Survey on:

Claw-back of security in insolvency

Questionnaire – ITALY

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1. Introductory questions

1.1 *Please briefly describe the main type of security in your jurisdiction (per type of asset; per perfection technique; per type of secured obligation).*

The following security interests are available under Italian law. Focus is made on security created voluntarily by the grantor. Security interests originating out of provisions of law by reason of the nature of the secured claim will not be dealt with in this Questionnaire.

(a) *In rem* security interests (*garanzie reali*)

In rem security interests (i.e. securities in relation to real estate, movable assets or other assets or rights of the relevant debtor) available under Italian law are: mortgage (*ipoteca*), pledge (*pegno*) and special privilege (*privilegio speciale*).

(i) Mortgage (ipoteca)

(A) Notion

A mortgage may be granted over immovable property and certain classes of registered movable property (namely, ships, aircraft and motor vehicles) and gives the secured creditor a right to foreclose on the specific property made liable to secure its identified claim, even against a third party transferee, and a preference in being paid from the proceeds of such a foreclosure. A mortgage is indivisible and extends in its entirety over all mortgaged assets, over each of them and over any part of them. A mortgage extends to interest accrued in the two years preceding the attachment (*pignoramento*) and in the then current year, notwithstanding any agreement to the contrary, provided that the relevant rate is indicated in the registration. The mortgage also extends to interest accrued in the period following the year when the attachment is lodged and ending on the date of the sale, but such interest must be calculated at the legally prescribed rate.

Multiple mortgages have, as a rule, different rankings, depending on the date of registration.

A mortgage may be created: (i) by operation of law, (ii) by virtue of a judicial decision or (iii) at the instance of the mortgagor by a mortgage instrument. This analysis focuses only on the last indicated form. A mortgage may also be given by a third party mortgagor (*terzo datore di ipoteca*) over its immovable property in favour of a debtor for the benefit of the latter's creditor. A mortgage may also be granted on assets which the mortgagor does not currently own. In this case, the mortgage can be validly perfected only upon acquisition of the asset by the mortgagor. A mortgage may also be granted on future assets, but it can validly be perfected only upon the

asset coming into existence.

(B) Instrument granting a mortgage

A mortgage may be granted by either a unilateral deed or bilateral agreement, by means of a public deed or a written document with signature certified as true by a notary public (*scrittura privata autenticata*). If these formalities are not followed, the mortgage cannot be registered and therefore is not validly created. The instrument granting a mortgage must specifically indicate the immovable property involved and the sum of money (i.e. the amount of the relevant debtor's liability *vis-à-vis* the secured creditors) to secure which the property is mortgaged. A mortgage may also be granted by an instrument executed outside of Italy. If this is the case, such instrument must be notarised and legalised (or apostilled, as the case may be) in order for registration to occur and must be deposited with an Italian notary. In the event that the mortgage deed is executed abroad, in order to be registered it must comply with all the requirements provided for by Italian law.

(C) Perfection of mortgages

The mortgage is perfected and enforceable against third parties once it is registered in the Land Registry Office (*Conservatoria dei Registri Immobiliari*) of the place where the property is situated.

After execution, the notary in charge deposits the deed at the registration tax office. Thereafter, the notary files the mortgage deed at the competent Land Registry Office.

In cases of late registration, there might be a risk that a third party registers a transfer agreement or a mortgage before the secured creditor's registration, in which case the person who has filed first will prevail over the secured creditor, notwithstanding that the mortgage deed bears an earlier date. No grace period is available and the first to file shall have priority.

(ii) Pledge

(A) Notion

A pledge may be granted, by the debtor or by a third party, over a variety of assets, including the relevant debtor's/third party movable property, shares in an Italian joint stock company (*società per azioni* – "**S.p.A.**"), quotas in Italian limited liability companies (*società a responsabilità limitata* – "**S.r.l.**"), other securities, receivables, positive balance of bank accounts, patents, trademarks and other intellectual property rights. This analysis will focus on the most common types of pledges in financial transactions: i.e. pledge over shares of an S.p.A. (the "**Share Pledge**"), pledge over quotas of an S.r.l. (the "**Quota Pledge**") and the pledge over receivables or the positive balance of bank accounts (the "**Receivables Pledge**").

A pledge grants to a secured creditor:

(I) priority of payment as against unsecured creditors;

(II) the right to foreclose the pledged asset, which is binding on third-party purchasers;

(III) the right to satisfy its claims from the proceeds of sale of the pledged asset; and

(IV) certain expedited measures in the forced sale of the pledged asset.

A pledge is indivisible[1] and, accordingly, secures the relevant claim for as long as it has not been completely satisfied, even if the debt or obligation secured is itself divisible. Priority of payment will also include interest for the year current at the date of attachment (*pignoramento*), or, in the absence of attachment, at the date of service of the notice of intention to start enforcement proceedings (*precetto*), as well as all interest (at the legal interest rate) accrued up to the date of sale of the pledged asset.

(B) Granting a pledge – The pledge agreement

A pledge agreement must be in writing and must bear a date certain at law[2] and contain a sufficient description of the secured claim and of the subject-matter of the pledge.

(C) Granting a pledge – Share Pledge

There are two different methods of perfecting a Share Pledge:

- after the execution of the pledge agreement, the secured creditor, or a third party on its behalf, must request a director of the S.p.A. whose shares have been pledged to make an entry on the share certificate and in the register of members of the company (*libro soci*) indicating: (i) the statement that the shares have been pledged in favour of the secured creditor; and (b) the details of the secured creditor; or, alternatively

- the pledgor must endorse by way of security (*girata in garanzia*) the share certificate in favour of the secured creditor (the endorsement must contain all details described above). Afterwards, the granting of the pledge must be entered in the register of members (*libro soci*). The signature of the pledgor on the endorsement must be certified true by a notary public, a stockbroker or by a duly authorised officer of a bank, who must also certify the identity and capacity of the pledgor.

Specific rules apply to pledges over de-materialised shares. In this case, certain of the formalities described above are replaced by an entry in the appropriate registers kept by the common depositary.

In addition, if the shares are listed, there may be further notification requirements.

(D) Granting a pledge – Quota Pledge

Under Italian law, an S.r.l. cannot issue shares representing a holding interest in its corporate capital. A pledge over an S.r.l. capital is therefore created as a "quota" pledge, i.e. a pledge over the rights of a quotaholder corresponding to its quota interest in the company's capital.

A Quota Pledge is granted by a notarised written document. The document is then filed at the competent Register of Enterprises (*Registro delle Imprese)* by the notary involved. Once such filing is completed, the S.r.l. whose quotas are the subject of the pledge may enter the pledge in the quotaholders' ledger (*libro soci*), if the company keeps such ledger.

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[1] In other words, even if the pledged assets are divisible (for example, 100 shares), the pledge will be considered as a single and indivisible unit over all and each of the shares. As a consequence, notwithstanding there is a partial reimbursement of the relevant loan, the 100 pledged shares will continue to secure the outstanding portion of the loan and, subject to certain exceptions, will not be reduced.

[2] I.e., in practice, the date in which such acceptance or notification has been made must be certified by a notary public or other public official so authorised or otherwise made certain by any other adequate means so as to be enforceable against third parties.

(E) Granting a pledge – Account Pledge

The pledge created over amounts standing from time to time to the credit of bank accounts would be considered as a pledge over the relevant claims that the debtor has towards the relevant account bank for payment of the net balance of such account.

As a pledge over receivables, an account pledge will be perfected in the same manner as an assignment of the same receivables. Accordingly, the pledge will be effective *vis-à-vis* the account bank when it accepts the granting of the pledge or when it has been notified to the bank. Both the acceptance and the notification need to bear a certified true date (*data certa*) (see footnote 2) for Italian law purposes to make the pledge enforceable *vis-à-vis* third parties.

The abovementioned formalities must be carried out each time money is credited or debited to the account. In practice, this is only done on a periodical basis, or when the balance is in excess of a given threshold.

Should the pledged accounts be opened with the secured creditor acting at the same time as depositary bank, such secured creditor, in cases of the debtor's default, may directly set off its claims against the money deposited in the pledged account without need of a notice each time the balance of such accounts changes.

(iii) Assignment of receivables

(A) Notion and perfection

An assignment of receivables by way of security is similar to a pledge over the same collateral, except that it generates the transfer of ownership to the assignee of the receivable over which the security is granted, although such transfer is characterised by a security purpose. The assignment of receivables by way of security will be effective as between the parties (i.e. the assignor and the secured creditor) immediately upon the execution of the relevant agreement, but it will be effective *vis-à-vis* the assigned debtor when the debtor accepts it or when such assignment is notified to the debtor. Both the acceptance and the notification need to bear a certified true date (*data certa*).

As a principle, the secured creditor may cash in the assigned claim to satisfy its credit upon such receivable becoming due and payable, i.e. either prior or upon default by the assignor, and must return any surplus to the assignor.

Certain additional perfection requirements apply to assignments by way of security of rentals (i.e. receivables arising under rent/lease agreements) and to assignment of receivables *vis-à-vis* public bodies.

An assignment of receivables by way of security can also be taken over future receivables, provided that at the time of the assignment either the contractual relationship from which such future receivables will arise has already been entered into, or it may in any event be identified. However, the assignment of future receivables will confer priority rights *vis-à-vis* third party when: (I) the future receivables actually come into existence; and (II) a *data certa* notice of assignment is served on each relevant debtor (or alternatively, a *data certa* acknowledgment by the relevant debtor is obtained) every time that a new receivable comes into existence.

(iv) Security Financial Collateral Arrangements

There is another legal regime, common to pledges and assignments by way of security, applicable to the so-called financial collateral arrangements ("**FCA**") as defined in Legislative Decree No. 170/2004, enacting Directive No. 2002/47/CE. An

FCA is a contract granting a pledge or providing an assignment by way of security over collateral such as cash, securities and receivables for the purposes of securing financial obligations.

In particular, an FCA must be evidenced in writing[3]. Perfection of an FCA must also be evidenced in writing. Evidence must include the date of perfection and the collateral which is granted as security. Nevertheless, registration of the security in the appropriate accounts held with the relevant intermediary will suffice for the above purpose. Priority takes place upon such formalities being completed.

A secured creditor may use the assets secured pursuant to an FCA even prior to the occurrence of an event of default if so agreed in the instrument whereby the FCA is granted, but in the latter case, the secured creditor must replace an equivalent collateral to the one he has disposed of prior to the lapse of the secured obligation. Similarly, the parties may agree that the financial collateral be replaced by the pledgor up to the original value of the collateral or that new financial collateral is added to the security if there is a change in the value of the secured obligation or of the collateral. In such cases, (I) the replacement collateral must not constitute new collateral and the relevant granting date remains that of creation of the original FCA, within the limit of the value of the replaced collateral; and (II) the additional collateral must be treated as being granted contextually to the secured obligation for the purposes of the bankruptcy claw-back action (see below, paragraph 1.4).

There is, however, some doubt as to the formalities required for perfecting an accounts pledge under Decree No. 170. Depending on whether or not the traditional qualification of such pledge as a receivables pledge would prevail or not, there would still be the need to have the notification or acceptance procedure implemented. If, on the contrary, such pledge would be construed as a pledge over that amount of money from time to time standing to the credit of the account, then the only formality required would be a written agreement evidencing the granting of the pledge and an annotation of the pledge in the accounting books of the depositary bank.

(v) Special Privilege

(A) Notion

The special privilege described in this section[4] is a lien available to secure claims under medium or long-term (over 18 months) loans granted to entrepreneurs by banks authorised to carry on banking business in Italy. It is governed by Article 46 of Legislative Decree No. 58 of 1 September 1993 (the "**1993 Banking Act**").

This type of security has certain similarities with the floating charge and is essentially a defensive security conferring on the entity taking the security preferential status as against the generality of unsecured creditors of the grantor in the event of the grantor's bankruptcy.

Based on the approach which is followed in identifying the legal nature of a special privilege[5], such special lien would (or, alternatively, would not) prevail over a pledge subsequently granted over the same assets.

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[3] Which expression includes any electronic means and any durable data storage system in accordance with applicable law.

[4] Special privileges may arise by operation of law to secure claims by reason of their nature.

[5] I.e. whether its nature is similar to that of a mortgage or of a pledge.

It should be noted that the grantor is not generally restricted from dealing with the assets subject to the privilege, which may include circulating assets of the business, prior to bankruptcy. If a sale occurs, the lien should attach to the proceeds of any sale.

A special lien may be created over the following classes of property:

(I) present or future plant and machinery, concessions and fixed assets;

(II) raw materials, work-in-progress, stock, finished goods, produce, livestock and merchandise;

(III) goods purchased in any manner with the proceeds of the relevant financing; and

(IV) present or future receivables arising from sales of the assets or goods listed in (I) to (III) above.

A special lien, however, may not be taken over a movable property over which a mortgage may be taken (such as, for example, ships, aircrafts or motor vehicles). In addition, only movable assets (and, in the limited circumstances referred to above, receivables) may be subject of a special lien. Trademarks and other intellectual property rights may not be covered by this type of security.

(B) Granting a special privilege

A special lien must be granted by a written document (describing, inter alia, the assets over which the lien is granted, the details of the secured bank, of the debtor and of any third party grantor of the special privilege and the amount and terms of the secured loan) and will be effective *vis-à-vis* third parties only once the special privilege is registered in a special register kept in the clerk's office of the court of the place in which the borrower's registered office is located; and, as the case may be, of the place in which the third party granting the special privilege has its registered office.

(b) Guarantees

There are two forms of guarantee under Italian law:

(i) joint and several guarantees (*fideiussione*), which is expressly regulated by the Italian Civil Code; and

(ii) first demand "autonomous" guarantees (*garanzia autonoma a prima richiesta*).

A *fideiussione* is an undertaking by a guarantor to pay a debt if the debtor fails to do so. Such guarantees are usually given on a joint and several basis by the guarantor and the debtor, allowing the creditor to choose whether to pursue its claim against either the guarantor or the debtor or both (unless the parties have agreed on the *beneficio della preventiva escussione*, i.e. a clause whereby the guaranteed creditor undertakes to claim payment from the principal obligor first). When future claims are guaranteed, the *fideiussione* must indicate a cap for the guarantee.

A first demand "autonomous" guarantee differs from a *fideiussione* in that it is an independent undertaking and therefore the guarantor is obliged to pay under the guarantee as a principal obligor and on demand from the beneficiary, regardless of any defence of the primary debtor.

1.2 *Please briefly describe whether your jurisdiction provides for a procedure of protection against creditors (usually initiated by a debtor at a time when the debtor is yet not insolvent) and if so what*

are its basic assumptions.

Pursuant to Article 182-*bis* of Royal Decree No. 267 of 16 March 1942 (the "*Legge fallimentare*", hereafter the "**Italian Bankruptcy Law**"), the debtor can request from the competent Court, filing also the relevant documentation necessary to be admitted to the composition with creditors (see Paragraph 1.3 below) (including, inter alia, a report on the patrimonial, economic and financial situation of the debtor and a list of creditors and their claims and the relevant security, if any) the confirmation (*omologazione*) of a restructuring agreement executed with creditors representing at least 60% of its debt (the "**Restructuring Agreement**"). For this purpose, the debtor must also file a report by an expert on the suitability of the Restructuring Agreement, with particular reference to its capability to ensure the regular payment of the creditors which have not executed the said Restructuring Agreement within the deadlines specified in Article 182-*bis*. The Restructuring Agreement is effective upon its filing with the relevant Register of Enterprises, and the creditors, and any other interested party, can oppose the Restructuring Agreement within thirty days of the said filing.

From the date of filing in the competent Register of Enterprises, and for the following 60 days, the creditors whose claims *vis-à-vis* the debtor are prior to such date cannot start or continue enforcement or precautionary measures against the debtor's assets or to obtain pre-emption rights over the debtor's assets.

However, the debtor may request the relevant judge to order that the creditors refrain from starting or continuing enforcement or precautionary measures or from obtaining pre-emption rights over the debtor's assets even prior to the Restructuring Agreement effective date stated above, by filing with the court the documents mentioned above (including a report on the economic and financial situation of the debtor and a list of creditors and their claims, a list of the security and guarantees over the debtor's assets) along with a report prepared by an expert having certain characteristics provided for by the Italian Bankruptcy Law, declaring that the proposed Restructuring Agreement is capable of fulfilling the debtor's obligations against the creditors which have not taken or have refused to take part to the Restructuring Agreement. After having examined the above documents, the judge may decide to forbid the creditors to start or continue enforcement or precautionary measures against the debtor's assets or to obtain pre-emption rights over the debtor's assets. Creditors may challenge such decision.

Similarly, the filing of an application for the admission to the procedure of composition with creditors (*concordato preventivo: see paragraph 1.3 below*) bans any enforcement or precautionary action on the assets of the debtor until the moment when the *concordato* is approved (*omologato*) by a decree of the court.

1.3 *Please briefly describe the types of insolvency proceedings contemplated by your legislation (liquidatory proceedings; reorganisation or recovery proceedings).*

Two types of insolvency liquidation procedures exist in Italy. The 'general' procedure, which is applicable to entrepreneurs, whether individual or structured as a partnership or company, is the *fallimento* (bankruptcy). It is regulated in the Italian Bankruptcy Law. The second procedure (*liquidazione coatta amministrativa*) applies to particular cases, such as those of banks and insurance companies. Provisions on the *liquidazione coatta amministrativa* are found on the Italian Bankruptcy Law, as well as on particular legislation setting forth specific provisions for certain businesses, such as, for example, the 1993 Banking Act.

Depending on the cause of the insolvency and on the legal structure of the enterprise, other procedures are applicable as alternatives to bankruptcy, which may not necessarily lead to the liquidation of the company but rather to the recovery of the insolvent company[6].

6 A third kind of insolvency proceeding has been introduced in Italy by Legislative Decree No. 26 dated 30 January, 1979 (the so named "**Prodi Law**"), subsequently replaced by Legislative Decree No. 270 dated 8 July, 1999. Eligible companies for the application of the above mentioned legislation are those companies exceeding certain thresholds on employees and debts.

One of these procedures, which envisages a situation possibly less serious than in bankruptcy (a "crisis"), is the composition with creditors (*concordato preventivo*). The *concordato preventivo* may include: a restructuring of the debts and the satisfaction of the debts in any manner; the transfer of the business to a third party; the division of the debts into classes and the different treatment of the classes of the creditors. The insolvent entrepreneur does not lose the management of the business, but is under the supervision of the judicial commissioner (who is appointed by the court).

The composition with creditors, once approved by the court upon the application of the debtor, is approved by a majority vote of the creditors entitled to vote. The proceeding of the composition with creditors will end with a decree issued by the competent court. If the court or the creditors reject the offer, the entrepreneur is automatically declared bankrupt by the court.

A very recent law passed in August 2012[7] enhances the recovery purpose of the *concordato*, introducing new provisions aimed at ensuring the continuation of the business concerned. Some of these new provisions include the possibility to take new financings and to grant new security in respect to such financings.

Other recovery proceedings provided under Italian law are restructuring plans provided for in Article 67, paragraph 3) letter (d), of the Italian Bankruptcy Law (the "**Restructuring Plan**") and the Restructuring Agreement (analysed above).

A Restructuring Plan is a document prepared by an entrepreneur in financial distress and has the following characteristics: (i) it is suitable to allow the restructuring of the indebtedness of the company and to guarantee the rebalance (*riequilibrio*) of its financial situation, and (ii) the reasonableness of the plan must be confirmed by a fairness opinion regarding the plan provided by an independent expert. There is no court approval process in respect of a Restructuring Plan, nor, as a rule, are its contents included into an agreement between the debtor and its creditors (although this frequently occurs in practice).

1.4 *Please briefly describe the types of claw-back actions available in your jurisdiction.*

Under Italian law, in the context of a bankruptcy procedure (reference is made to *fallimento*, *liquidazione coatta amministrativa* and *amministrazione straordinaria*), the receiver is given powers to "restore" the economic and financial substance of the bankruptcy estate to its pre-insolvency state by setting aside transactions and/or claw-back payments. The relevant provisions are contained in Articles 64-70 of the Italian Bankruptcy Law.

(a) Limiting our analysis to the subject matter of this survey (claw-back of security), these powers are limited to certain transactions/agreements entered into:

(i) in the six-month, one year or, with respect to gratuitous acts, two year period, as the case may be, prior to the declaration of bankruptcy (the "**Suspect Period**"). In broad terms, when a transaction or matter occurs on a date prior to the Suspect Period, that transaction or matter is deemed to be "consolidated", i.e. cannot be clawed back (save for (b) below). The Suspect Period is counted backwards from the date of perfection of the security interest concerned; or

(ii) in the cases set forth in Article 2901 of the Italian Civil Code, in the five years following the date of the deed or agreement;

(iii) in any case, pursuant to article 69-*bis* of the Italian Bankruptcy Law, no claw-back action pursuant to articles 64-70 may be brought after five years from the completion of the transaction or three years after the adjudication in bankruptcy (or equivalent

[7] Reference is made to the Law-Decree No. 83 of 22 June 2012, which has been converted into law with certain amendments. As at today, 6 August 202, there is no evidence of the promulgation and publication in the Official Gazette of the Republic of Italy of such conversion law.

event in cases of *liquidazione coatta amministrativa* or *amministrazione straordinaria*).

(b) In particular, and, again, concentrating only on the topic of this survey, the receiver may seek to revoke, *inter alia*:

(i) gratuitous acts (including the granting of security[8]). The Suspect Period is, as mentioned above, two years prior to the adjudication in bankruptcy.

(ii) security granted for pre-existing debt not yet due and payable. The Suspect Period is equal to one year preceding the declaration of bankruptcy;

(iii) security granted for pre-existing due and payable debt. The Suspect Period is equal to six months preceding the declaration of bankruptcy,

unless, in both cases, the non-insolvent party evidences that, at the time of the relevant transaction, he was not aware of the insolvency of the bankrupt party;

(iv) any security granted to secure debts (also of third parties) simultaneously with the origination of the secured obligations (i.e. security granted for genuine new money), unless the receiver evidences that at the time of the relevant transaction the non-insolvent party was aware of the insolvency of the bankrupt party. The Suspect Period is equal to six months preceding the declaration of bankruptcy.

Please address, in particular, any of the following questions:

(c) *Is claw-back automatic or does it require a positive assessment of the existence of the relevant conditions by the court or the receiver?*

As a rule, the receiver must assert and prove the existence of the conditions upon which the claw-back can be exercised (e.g., the time when the transaction was completed, the gratuity of the transaction, or the fact that the secured obligation pre-existed the granting of security). Similarly, the absence of any such conditions, or the different nature or time of the transaction having regard to that asserted by the receiver, must be asserted and proved by the other party. The condition relating to the knowledge (or absence of knowledge) of the insolvency of the grantor of security is subject to the specific regime described in paragraph (b) above.

(d) *Does your legislation make a difference between transactions (including the granting of security) with consideration and without consideration?*

Pursuant to Article 64 of the Italian Bankruptcy law, transactions (including the granting of security) entered into without consideration may be deemed ineffective *vis-à-vis* the insolvency estate, if they have been entered into by the insolvent debtor within the two years preceding the adjudication in bankruptcy. Traditionally, security or guarantees granted by a party to secure or guarantee third party debt are not considered without consideration if they are granted simultaneously with the origination of the secured obligations. If the security or guarantee is granted at a later stage, then it may be considered "gratuitous" (i.e. without consideration) if no economically relevant consideration is obtained by either the debtor or the third party grantor of security and (in case of security granted to secure the debtor's own debt) when the secured obligation is not matured.

(e) *Does your legislation make any difference, in case of security in general, between security taken concurrently with the granting of the secured debt and security taken in a different period of time?*

[8] See paragraph 1.4(d) below.

Yes, please see paragraphs (b)(ii), (iii) and h(iv) and paragraph (d) above.

(f) *Are there special provisions for intra-group transactions and transactions between related parties?*

There are no such specific provisions in relation to claw-back under the Italian Bankruptcy Law. However, the fact that security is granted to secure liabilities of a company member of the same group of the grantor may be relevant, according to court precedents and scholars' opinion, to exclude the gratuity of such granting.

Special provisions on "group" claw-back are contained in Article 91 of the aforementioned Legislative Decree No. 270 dated 8 July, 1999 (see footnote 6), whereby, in case of an *amministrazione straordinaria*, the extraordinary commissioner and the receiver of the insolvent company may lodge a claw-back action for intra-group transactions entered into in the five years or three years period preceding the declaration of insolvency of the relevant company, depending on the nature of the transaction.

2. Specific questions

2.1 *Is claw-back subject to specific rules with respect to any type of security available in your jurisdiction? If so, please describe any such rules*.

A special 10 days claw-back period applies to mortgages securing the so-called *fondiario* loans: such special mortgages are hardened after 10 days of their registration. In the very essence, *Fondiario* loans are mortgage loans over real property (*mutui fondiari*) granted by banks authorised to carry on banking activities in Italy, whose duration exceeds 18 months and which are secured by first ranking mortgages over properties. To qualify as a *fondiario* loan, the loan amount shall not exceed 80% of the value of the property.

Security granted under an FCA is subject to the regime described in Paragraph 1.1(a)(iv) above.

Some doubts have been expressed as to the applicability to personal guarantees (see Paragraph 1.1(b) above) of the provisions on claw-back of security described in this paper.

2.2 *Are there any total or partial exemptions from claw-back, depending on (for example):*

(a) *The type of security;*

(b) *The type of transaction secured (including its legal form);*

(c) *The type of (wider) transaction within which the financing is granted and the relevant security is taken (e.g. financings granted in the context of certain reorganisation proceedings);*

(d) *The nature of the grantor of security;*

(e) *The nature of the beneficiary of security;*

(f) *Other.*

Pursuant to Article 67.3 of the Bankruptcy Act, certain transactions (including the granting of security) would not be subject to claw-back, including, *inter alia*, the following:

(a) acts, payments, guarantees and securities over the debtor's assets, to the extent made or granted in the framework of a Restructuring Plan (please see above);

(b) acts, payments, guarantees and security made or granted in the framework of a Restructuring Agreement (please see above) or in the framework of a composition with creditors (*concordato preventivo*).

2.3 *How does your legal system address the claw-back of quasi-security transactions (e.g. a sale of a*

property in return of a price payable in instalments may hide a financing transaction secured by the property; which legal regime applies in this case: that of the claw-back of security, or that of the termination of pending (sale and purchase) agreements?

A court may look through the formal nature of a transaction and claw it back based on the provisions applicable on the basis of its real nature. The analysis must be conducted on a case-by-case basis.

For example, an agreement (*mandato all'incasso*) whereby a debtor authorises its creditor to collect cash amounts due to that debtor by third persons and to offset its claim to be paid the amounts so collected by the creditor against the debtor's liabilities towards the creditor, has been clawed-back as if it was a security arrangement[9].

2.4 *What are the legal consequences of the claw back for the parties involved? For example:*

(a) *Is an agreement, deed or transaction subject to "claw back' invalid or just ineffective between the debtor and the party to the agreement?*

The claw back makes the relevant transaction ineffective *vis-à-vis* the insolvency estate; the assets concerned (or their equivalent value) are recovered to the insolvency estate and must be returned, when possible, to the receiver. Security shall be treated, as against the (other) creditors of the debtor or, as the case may be, grantor, as never been granted and, if applicable, the beneficiary shall be treated, within the context of the insolvency proceedings, as an unsecured creditor.

(b) *To which extent claw-back can affect the successful exercise or enforcement of security rights as may have occurred prior to the adjudication in bankruptcy (e.g. claims cashed by the secured lender under a security assignment of receivables prior to the adjudication in bankruptcy)? Is there any difference between the case of "self-enforcing" security (e.g. the cashing of claims referred to above) and a court-driven enforcement (e.g. the enforcement of a mortgage)?*

With particular reference to the assignment by way of security, authoritative scholars and case law hold that the assignee (subject to the fulfilment of all perfection requirements prior to the date of the adjudication in bankruptcy), and subject to claw-back of the assignment itself, does not suffer any adverse effect as a consequence of the bankruptcy of the assignor.

This opinion has been sustained on the grounds that the transfer of claims by way of security produces its effect against third parties immediately upon the accomplishment of the actions set forth above (i.e. the serving of a notice by a court bailiff to the assigned debtor or the acceptance of the transfer by it with *data certa*), and therefore, upon such assignment (i.e. the accomplishment of the above action), the assigned claims will no longer be considered as assets of the bankrupt estate and, instead, will pass on to the assignee, who acquires the sole ownership of such claims.

As a consequence, there will be no need for an assessment of the claims through their proving in bankruptcy as a condition for the secured lender continuing to cash the assigned claims pursuant to the relevant contractual provisions, as they have been validly removed from and are no longer part of the assets and liabilities of the bankrupt estate. Accordingly, the assignee will be immediately, also after the assignor's adjudication in bankruptcy, in a position to fully benefit from the performance of the assigned debtor's obligations and to apply the relevant proceeds to the entire repayment of its claims, including interest at the full contractual rate, provided that the assignor will still be obliged to pay to the bankruptcy

[9] If, on the contrary, a similar arrangement is entered into at the time when the (secured) obligation is due and payable, then its nature has been found to be more that of an "abnormal" means of payment rather than that of providing security to the creditor. The relevant claw-back regime provides for a 1 year Suspect Period, with the burden of proof of the absence of knowledge of the insolvency of the grantor being shifted on the other party.

receiver any surplus amounts. However, as mentioned above, this may be different with respect to "future claims".

On the other hand, when payment results from the enforcement of other security rights (such as a mortgage, or a pledge), it would still be subject to claw-back according to the provisions governing payment claw-back[10].

The transfer of the property of an asset over which security has been granted within the context of an enforcement procedure (i.e. through the intervention of a court) is not, in principle, subject to claw-back).

2.5 *What are the rights of the parties involved once the claw back had been enforced (as a result of operation of law or court ruling)?*

As a general rule, pursuant to Article 70 of the Italian Bankruptcy Law, the party (other than the bankrupt) to an agreement which has been clawed back who, as a consequence, has given back to the receiver what it had received from the bankrupt, has the right to join the bankruptcy procedure as a creditor of the bankrupt.

2.6 *What is the claw-back regime for security granted by third parties/in respect of third party indebtedness? Please analyse from the perspective of either the insolvency of the debtor and of the insolvency of the third party grantor of security. Does the possibility for the third party grantor to act in recourse against the insolvent debtor make a difference?*

(a) *Bankruptcy of the third party grantor*

See paragraph 1.4(d) above.

(b) *Bankruptcy of the debtor – perspective of the third party grantor*

The right of the third party grantor of security to act in recourse against the debtor up to the secured claim or, if lower, the amount recovered by the secured creditor does not imply any right of the receiver in the insolvency of the debtor to claw-back security granted by the third party grantor, who is extraneous to the insolvency procedure.

2.7 *What is the "claw-back" regime for security which has been agreed (i.e. the relevant security agreement has been executed) but not yet perfected at the time of the adjudication in bankruptcy of the debtor/grantor?*

If the relevant perfection formalities of a security are not validly carried out, the agreement providing for the security is only valid *vis-à-vis* the parties thereto and it is not enforceable *vis-à-vis* third parties, including the receiver of a bankruptcy procedure[11] and the creditors of the parties. Accordingly, there will be no need for the receiver to lodge a proper claw-back action against the other party, as he will merely need to assert that the transaction is ineffective and, therefore, that no security right will secure the other party creditor's claim.

[10] Assuming, for the sake of brevity, that enforcement of security will only occur once the secured obligation has become due and payable, payments (of due and payable obligations) can be clawed back if they occurred in the six-month Suspect Period and if the receiver proves that the creditor was aware of the insolvency of the debtor at the time of the payment.

[11] See article 45 of the Italian Bankrupcty Law: "Any formality as is necessary to make a transaction enforceable *vis-à-vis* third persons shall have no effect against the creditors if completed after the date of adjudication in bankrupcty."