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Chapter 16

ITALY

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I INTRODUCTION

The current state of Italian project finance is the result of a trend initiated more than 20 years ago, when public resources started to become scarce and the construction or infrastructure needed private funds to be carried out.

First came the realisation of energy plants – especially the renewable sector with the CIP6 regulation, which started in 1992 – where project finance started to be used in Italy on the basis of the UK experience. Such project finance schemes were initially purely private and fostered by public subsidies in the sale of green energy to the state. In light of the success of such structures, the Italian state in the late 1990s passed a specific regulation to use project finance schemes to finance, build and operate public infrastructures in the context of European framework legislation on public works. The procedure, in brief, provided that private sponsors could submit autonomously to the authorities projects to finance, build and operate public infrastructure.

In the case of 'cold' infrastructure,[2] public grants are available to subsidise business plans; public subsidies, however, need to comply with Eurostat rules and need only cover a minority part of the investment. This procedure has passed through many legislative changes in the past decade and is now regulated under Article 153 et seq. of the Italian Act for Public Works, which provides a specific procedure for selecting sponsors in public PFI schemes. Such schemes are extensively utilised in a wide range of infrastructures in Italy, with particular focus on hospitals and roads. Purely private PFI schemes are still used in the energy sector, with a specific focus on renewable and photovoltaic projects. These schemes are financed by major Italian banks, and their development has been helped by the setting up of regional public agencies that direct and manage all the major

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2 Infrastructure not creating a positive cash flow sufficient to repay the investment.

public PFI schemes dealing with infrastructure, but also urban regeneration programmes that involve the disposal of public assets.

II THE YEAR IN REVIEW

The most important aspect of project finance and construction law in Italy has been the consolidation of the new procedure to select private projects and sponsors for public infrastructure projects and, in particular, the following:

a Article 153 et seq. of Legislative Decree No. 163 dated 12 April 2006,[3] Code of public contracts concerning works, services and supplies deriving from Directives 2004/17/CE ('the Public Works Code'), which has outlined new organic legislation regarding public works and services, including a detailed procedure for the selection of private sponsors in public PFI schemes.

b New detailed regulation of the technical and contractual aspects of public construction law, set out in Presidential Decree No. 207 dated 5 October 2010,[4] now amended by rules for the execution of the Public Works Code, whereby the detailed aspects of public works are outlined, during the design, construction and testing phases. This is the most detailed piece of law on the matter in Italy and even though it mainly applies to the public sector, relevant regulations are sometimes applied to private projects.

c New organic legislation about safety in construction sites set out by Legislative Decree No. 81 dated 9 April 2008,[5] and subsequently amended by Law concerning the protection of health and safety in work places.

d Incentive tariffs for photovoltaic projects, set out in Ministerial Decree No. 52804 dated 5 May 2011, 'Incentives for the production of electrical power generated by photovoltaic solar plants', which was recently renewed, and so will likely continue to boost this market for the next few years.

Currently, PFI schemes are used extensively by public administrations, especially in public roads and hospitals. Energy projects will also continue to have a significant role to play in the near future.

During 2011 and the first half of 2012, several financial stabilisation measures proposed by the government in order to promote, *inter alia*, the growth of the PFI sector have amended the relevant discipline. A brief description of the main amendments adopted in this regard is outlined below:

a Law Decree No. 70 dated 13 May 2011, amended and converted into law by Law No. 106 dated 12 July 2011 ('the Development Decree') has set out, *inter alia*, the following measures:

- extension of the range of financial subjects authorised to audit the economical-financial budgets to be filed by interested operators; and

3 Published in Official Gazette No. 100 dated 2 May 2006.

4 Published in Official Gazette No. 208 dated 10 December 2010.

5 Published in Official Gazette No. 101 dated 30 April 2008.

- possibility to activate projects not contemplated in the three-year programmed planning adopted by the single PA entities. The promoter of such kind of activities shall be granted with a pre-emption right to be exercised during the bidding proceedings, in the event that his proposal is valued by the PA as a project of public interest. In this specific case it shall be possible to adopt – alternatively – a concession structure or the financial leasing scheme provided in the Public Works Code.

b Law Decree No. 201 dated 6 December 2011 ('the Salva Italia Decree'), converted into law by Law No. 214 dated 22 December 2011, has, *inter alia*, shortened the proceedings applicable to the approval of works of strategic interests by the Interministerial Committee for Economic Planning ('CIPE') by indicating that the relevant assessment shall be made on the basis of the preliminary design and by granting a short term for the subsequent approval of the final design. Moreover, the general PFI scheme provided at Section 153 et seq. of the Public Works shall no longer be applicable to works of strategic interests, provided that a specific scheme has been set out by the Salva Italia Decree (and it being understood that the proceedings currently in progress shall in any case continue to be ruled by the precedent discipline). The procedures for the planning, approval and realisation of works of strategic interests have been further accelerated with the Law Decree No. 5 dated 9 February 2012 ('the Semplifica Italia Decree'), converted by Law No. 35 dated 4 April 2012, in particular, with respect to the participation of companies involved in the management of airport infrastructure.

c Law Decree No. 1 dated 24 January 2012 ('the Cresci Italia Decree' or 'the Liberalisation Decree'), amended and converted into law by Law No. 27 dated 24 March 2012 concerning urgent measures on competition, infrastructure, development and competitiveness, has set out with respect to PFI what follows:

- measures aimed at facilitating the use of the PFI scheme for the execution of recreational boating infrastructure, with the intention of promoting the tourism sector;
- the possibility of using the PFI scheme in the jail infrastructure sector by granting to the concessionaire, as price, a fixed tariff for the management of the infrastructure and relevant services – with the exception of custody – to be paid upon the use of the structure;
- amendments to the discipline regarding the emission of project bonds by SPVs; and
- introduction of the 'availability contract' now outlined in Article 160-ter of the Public Works Code among the PPP schemes contemplated in such law.

d Law Decree No. 83 dated 22 June 2012 ('the Development Decree 2012') published in the Ordinary Supplement No. 129 to the Official Gazzette No. 147 dated 26 June 2012, which has set out, *inter alia*, the following measures:

- a favourable tax regime in order to promote the emission and placement of project bonds;
- extension of the exemption from taxation contemplated as partial or total coverage of government grants for free to all infrastructure works based on

PPP schemes (the former legislation did not include the no-metropolitan railways and airport infrastructures);

- introduction of a further exemption of taxation for works that cannot receive government grants for free: in this case, the concessionaire and the SPV may receive a reimbursement of one-third of the new tax revenues generated by the works carried out;
- mandatory and preliminary *conferenza di servizi* (i.e., resolution adopted by all the competent public bodies interested in the authorization of the works) that shall resolve on the feasibility study regarding PFI projects. This resolution shall be binding for the execution of the following design and execution phases; and
- introduction of a proceeding that shall allow the president of the Council of Ministers to break possible deadlocks in case of energy projects where authorisation is under way.

Please note that Law Decree No. 83/2012 is in force from the date of its publication in the Official Gazette on a provisory basis only. In fact, according to Article 77 of the Italian Constitution, a law decree loses effectiveness *ex tunc* if the Parliament does not convert it into law within 60 days from its publication.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

BOOT, BOT and BOL structures may all be found in Italian practice. BOOT schemes are the most commonly used, in particular in the realisation of public infrastructures, but leasing schemes are not generally used in public PFI, even though leasing schemes are allowed under Article 160-bis of the Public Works Code.

ii Documentation

On the basis of the scope of the project and the necessity to plan the development of the same, the contractual package should be designed in order to structure the financing and the execution of the works and to recover the financial capital invested in the same, looking for diminishing the possible risks.

In general, the contractual framework should include at least these kind of documents:

a shareholder and sponsor documents;
b project documents; and
c finance documents.

Shareholder and sponsor documents

The shareholder and sponsor documents are included in the incorporation deeds of SPVs, shareholders' agreements and any other measure regarding the management of the SPV. According to Italian law, documents related to the incorporation of SPV or other corporate entities shall be executed as public deeds, before a notary, and shall be registered at the competent companies' registry.

Project documents

The project documents are aimed at ruling the development of the project and may contain, at least:

a an EPC contract by means of which a contractor procures the construction of facilities on a turnkey basis;

b an O&M agreement or other services agreement, which is usually executed between the SPV and the operator company entrusted with the management of the facilities;

c a concession deed between the SPV and the public entities which grants the right to use a public asset for a certain period of time;

d offtake agreements, which are usually executed with a third company that undertakes to purchase the products or services rendered by the SPV;

e supply agreements, aimed at providing the SPV with the supplies needed to produce the product or to render the services in order to comply which its business purposes.

Project documents shall be executed in accordance with rules under Article 1655 et seq. of the Civil Code, which encompasses the procurement of works and services. In the event that project documents should be executed with public entities as counterparties, they are subject to the provisions and limits applicable to the bidding and execution of public works, in particular, the Public Works Code and its regulations approved by Presidential Decree No. 207/2010.

Finance documents

The finance documents are executed between the sponsors or the SPV and the financial entities that complement the equity injection of the project. A project finance framework should also include at least the following:

a a preliminary term sheet, which sets out the key terms and conditions under which the lenders will inject the debt capital requested by the SPV and relevant promoters;

b senior loan agreement between the SPV and the lenders;

c intercreditor agreements among the lenders and the equity sponsors; and

d direct agreements executed between the lenders and the project counterparties, which govern the events in which the lenders shall be entitled to step into the project documents in case of default and regulates the behaviour of such counterparties in case of the SPV's default.

Delivery methods and standard forms

Provided that the model assumed in Italy for the execution of project finance projects is the 'concession' (DBFO), the project finance has been implemented in Italy with very few regulations to the activities that the public and private parties should undertake during the negotiation, drafting, and monitoring of PPP contracts; in fact, the applicable law has made very generic indications that obliged the parties involved to create its own contractual standards on the basis of each single project.

The design, construction and management contracts executed in the context of PPP projects are not usually drafted on the basis of international standards such as

FIDIC scheme or NEC; they are, however, drafted to balance the need to respect Italian legal principles applicable to construction contracts. Italian contractors are reluctant to use international standards and prefer tailor-made documents except in the case of major industrial plants. In the case of using international standards, such as FIDIC, extensive negotiations on particular conditions should be expected.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Generally, contractors will bear specific risks when entering into construction contracts or participating in project finance transactions. Typically, they will be required to bear any immediate costs if they are necessary to prevent interruption of the works or supply of services. According to the Civil Code, however, the following apply in relation to material price escalation and ground conditions (Article 1664):

a the contract price may be adjusted if there is at least a 10 per cent decrease or increase in the price of raw materials or personnel; and

b if there are unexpected groundwater problems under the construction site, the contractor is entitled to receive a proper indemnification in connection thereto.

This provision can be waived to entirely transfer this risk to the contractor and this is common practice when acting under lump-sum turnkey construction contracts, which are frequently used in project finance schemes. Administrative risk is generally borne by the principal (i.e., the project sponsor).

After delivery, contractors are liable for a period of two years for any latent defects, starting from the date on which the clients take delivery of the works, or for 10 years for structural or major defects.

ii Limitation of liability

According to general rules on the matter of liability (Article 1218 et seq. of the Civil Code), contractors are only liable for both actual loss and loss of profit if the damage is a direct consequence of their actions; consequential (indirect) damages will not be their liability. Despite the foregoing, Italian law allows the parties to exclude or agree upon a limitation on liability. This is not yet the standard practice but limitation of liability clauses are used more and more frequently in major contracts and PFI transactions. However, pursuant to Article 1229 of the Civil Code, the liability for damages cannot be contractually reduced or waived in the case of gross negligence or wilful misconduct, neither can liability for damages be excluded in case of a breach of public policy; any clauses setting out the reduction or exclusion of liability in such cases will be null and void.

Force majeure exclusions are available and enforceable under Italian law pursuant to Article 1218 of the Civil Code; in contracts, this is usually qualified as an event, act, fact or circumstance that:

a prevents the contractor from performing its obligations;

b is beyond the contract's direct or indirect control;

c cannot be avoided by taking all reasonable precautions necessary; or

d cannot be reasonably foreseen or prevented by a contractor, using the proper precautions.

The occurrence of an event of force majeure usually involves an extension of the term agreed for completion of the works at no extra cost. Generally, the duration of an event of force majeure for a period longer than that previously agreed between the parties may even entail termination of the construction contract.

iii Political risks

After the 2009–2010 financial crisis, the Italian government has had limited expenditure to reduce Italy's public debt, which, according to experts, poses serious concerns for the future. Italy welcomes foreign investment, but acquisitions in strategic sectors can be evaluated by the government and several industries are closely regulated. As a general rule, 100 per cent foreign ownership is recognised in most sectors except for the defence sector and there are also specific restrictions in the telecommunications sector on overseas investors. Moreover, in the banking sector, investments of over 5 per cent must be approved by the Central Bank.

The government encourages private sector investment by granting incentives (e.g., the incentives for the construction of photovoltaic plants) and promoting economically depressed regions, particularly in southern Italy. There are no obstacles to repatriation of profits, transfers, or payments and no foreign exchange controls; in general, there is no discrimination between benefits granted to foreign investors and those granted to local investors. The benefits are given in the form of investment grants, loans at reduced interest or a state guarantee for exporters. Occasionally, the benefit is granted in the form of a combination of an investment grant and low-interest loans, depending on the geographical location of the investment and the size of the investing company.

In general terms, as with all the developed western economies, political risk in Italy is minimal given the stability of its institutions. Although the state runs certain industrial and service activities, nationalisation and privatisation is not a current issue.

V SECURITY AND COLLATERAL

The main construction and development projects are generally channelled through SPVs. Indeed, SPVs are preferred both in real estate developments and PFI/PPI schemes as this structure allows the investors to ring-fence themselves from the project risk other than for the equity invested in the project. For this reason, SPVs are mostly structured as joint ventures.

That said, development and construction projects are generally financed with recourse to both equity and debt. In the most sophisticated transactions mezzanine finance is used. Also, bond issues can be used in PFI/PPI projects, but this is not common practice in the Italian market. In normal market conditions the debt-to-equity ratio would range between 80:20 and 70:30. Of course, funders financing the development projects usually require the provision of securities. In particular, the following main forms of security are provided:

a granting of mortgages over the real estate;

b granting of pledges over shares in the SPVs; and
c assignment, by way of security in favour of the lenders, of all the SPV's credits.

VI BONDS AND INSURANCE

The client does not commonly give security to cover its obligations uner a construction contract, except in the case of major works involving foreign actors. If the client is an SPV, the sponsors may be requested to provide corporate guarantees or comfort letters to secure the SPV's obligations. As far as the contractor's obligations are concerned, a performance bond is usually delivered in favour of the client in order to secure the timely and correct fulfilment of its obligations under the contract. The preferred form for the performance bond is a first demand-bank guarantee issued by a leading credit institution. Also, based on the fact that the payment of the price usually occurs on a milestone basis, retentions on each milestones may be executed by the client. Both the performance bond and the retentions are generally released in favour of the contractor once the works or supply of services have been satisfactorily completed. These forms of guarantee do not generally exceed 10 to 15 per cent of the construction value.

The contractor is usually required to execute and keep the following insurance policies in force until the completion of the project:

a construction all-risks, with an insured amount equal at least to the value of reconstruction of the works;
b damage cover for all its employees and/or possible non-employed staff;
c civil liability cover in relation to all vehicles owned and/or used, which are subject to compulsory insurance for an amount no lower than that required by relevant laws;
d all-risks insurance, covering the equipment owned and/or used and which will be used during the performance of the works or supply of the services, for at least the value of the equipment;
e coverage for latent defects referred to Article 1667 of the Civil Code, which lasts for two years starting from the certification of completion of the works (generally only for PFI transactions); and
f cover for the risks of total or partial collapse of the building due to a defect of the soil or of the construction, which lasts for 10 years starting from the certification of completion of the works, for at the least the value of reconstruction of the works (covering the responsibility of the contractor arising out of Article 1669 of the Civil Code).

The construction all-risk and the decennial insurance policy may also be entered into directly by the client with relevant costs reimbursed by the contractor.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

While the enforcement of pledge over pledge over shares or mortgage respects the mandatory rules provided by the Civil Code and by the Code of Civil Procedure, the

enforcement of purely contractual obligations – such as step-in clauses – will adhere to the contractual arrangements between the parties according in any case to the Civil Code, and will generally be subject to the express consent of the third parties involved in this kind of security such as banks, suppliers and/or the public administration when it acts as principal in a construction or concession contract.

i Pledges

The creditor can enforce the pledge of shares through a private enforcement procedure pursuant to Article 2797 of the Civil Code or through a court supervised procedure pursuant to Article 502 of the Code of Civil Procedure.

ii Private enforcement procedures

Prior to enforcing a pledge, notice must be served by the creditor to the debtor and to the pledgor. The notice shall include a request for payment and a warning stating that in absence of payment the pledged assets will be sold.

The debtor may file an objection with the court (within five days from the date of receipt of the notice, which may be increased up to a maximum of 150 days if the domicile of the debtor is outside Italy). If an objection is filed, the creditor's right to enforce the security is suspended until the dispute is resolved by the court. If there is no objection or where an objection is dismissed, the creditor is entitled to enforce the pledge.

Enforcement may be carried out (1) without the need for the secured creditor to obtain an enforceable title if the pledged asset has a current market price (i.e., listed shares) by an asset sale through an authorised intermediary according to Article 2797 of the Civil Code or by means of a public auction; (2) by requesting the court to proceed with the sale of the pledged asset, which is not usual in PFI transactions; or (3) by the creditor applying for the award of the pledged assets up to the amount necessary to satisfy the secured obligation, provided that the assets are appraised by an expert unless the pledged asset has a current market price. A creditor must always return any amount deriving from the enforcement that exceeds the secured obligation.

iii Court-supervised procedures

In order to enforce a pledge the creditor must first obtain an enforceable title in accordance with Article 402 of the Code of Civil Procedure, which may be obtained, *inter alia*, by starting ordinary legal proceedings at the outcome of which the court issues a decision acknowledging the secured creditor's claim. Alternatively, the creditor can start an injunction proceeding, requesting payment from the debtor. Provided the debtor does not object to the request, the secured creditors obtains an enforceable title a shorter period of time (some months) compared with ordinary legal proceedings (which may take two or three years).

The creditor must then serve a writ of enforcement, with the express indication that in the event of failure of the debtor to pay the requested amount the secured assets will be sold. Should the term not be respected by the debtor, the creditor requests their sale through the court, after which the court authorises the distribution of the proceeds

deriving from the sale to the secured creditor, with deduction of enforcement costs. This will take approximately one year.

iv Mortgages

The duration of a mortgage enforcement depends on the marketability of the property and also the timings adopted within the court district in which the mortgaged property is located. After the sale of the property, proceeds are distributed among all creditors intervened in the enforcement procedure. If there is a challenge by any creditor, the case will go to trial.

v Bankruptcy proceedings

According to Italian law, insolvency may give rise to a bankruptcy or winding-up order or to the opening of other proceedings according to which the assets of the debtor are managed and sold in order for them to be used for the payment of creditors.

Italian law contemplates two categories of pre-insolvency proceedings. One is an out-of-court settlement between debtors and creditor, which permits the debtor to continue operating upon handing over some assets to their creditors and in exchange for new payment conditions or waivers from such creditors. The other procedure is governed by the bankruptcy law[6] and implies that the debtor proposes a plan for restructuring the debts. The court shall approve the proposal or dismiss it, in which case the court formally declares the debtor bankrupt. Should an arrangement with creditors be obtained, the debtor keeps the control of its business and assets under the supervision of a receiver named by the court.

Bankruptcy law also contemplates a compulsory liquidation procedure applicable in the case of insolvency of companies that are not allowed to go bankrupt for public interest reasons (i.e., banks and major insurance companies).

Upon the declaration of bankruptcy, the debtor cannot pay individual creditors and must deliver assets subsequently acquired to the receiver. If necessary, the receiver may order measures to safeguard assets such as preventive seizures, clawback actions of detrimental transactions executed during the suspected period (up to two years before the declaration of bankruptcy) and other special procedures set out in the Code of Civil Procedure.

On the other hand, upon the declaration of bankruptcy, the creditors shall not be entitled to collect its credit nor to enforce its securities or promote seizures regarding the debtor individually, but only in the context of the bankruptcy proceedings. In fact, not only is every creditor entitled to request that the court declare its commercial operators bankrupt if they are insolvent but also, in the context of a bankruptcy proceeding, every creditor has the right to admit its claim. Preferential creditors have priority regarding the settlement of their claims in accordance with the relevant titles (liens, pledges, mortgages or legal privilege) as detailed by the applicable legislation.

Claims are verified and admitted at a special hearing held to assess whether the creditor's claim should be accepted and what preferential or priority claims are involved.

6 RD No. 267/1942.

vi Mortgage loans under Article 38 et seq. of the Banking Act[7]

This specific kind of mortgage (*credito fondiario*) is granted by banks by way of medium and long-term loans under predefined terms and conditions, and which loans are secured through first-decree mortgages that benefit from special legislation aimed at excluding and/or limiting the application of certain mandatory insolvency rules that are normally applied in the case of subsequent insolvency of the borrower.

Specific rules that apply to mortgages granted in the context of a *credito fondiario* are:

a individual enforcement procedures may start or continue even if an insolvency procedure is opened against the debtor;

b the bank has the right to receive the running income (net of procedure costs) from the seized property during the enforcement procedure; and

c the bank has the right to receive outstanding amounts for principal, interests, accessories and expenses directly from the adjudicated buyer of the *credito fondiario*.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

The protection of the environment and of human health is becoming more and more sensitive and sophisticated also in Italy. Accordingly, development projects need to meet the requirements of several legal instruments and requirements such as EIAs and the assessment of the effects of certain plans and programmes, the remediation of the contaminated soil and groundwater, and asbestos removal from existing buildings in order to reduce carbon dioxide emissions. In light of the above, Legislative Decree No. 152/2006 ('the Environmental Code') provides for the regulation of EIAs, which aim at preliminarily assessing the effects of the town-planning plans and programmes on the environment. Such assessments are required to evaluate the environmental sustainability of development projects. If a development project involves existing buildings, asbestos removal is regulated by specific legislation, recently amended by Legislative Decree No. 81/2008 as subsequently amended. With reference to the building phase, the LEED certification is often used and an energy efficiency certificate of the building is required in case of lease or purchase of the buildings. Furthermore, local legislation provides for possible additional building volumes in exchange for high energy efficiency of the new buildings. In case of a productive site, further environmental permits could be required depending on the operations that will be carried out at the site (IPPC, air emission permits, etc.).

Construction activity is subject to a building license, issued by the competent local administration board or committee. The matter is regulated by DPR dated 6 June 2001 No. 380.

Three main types of building authorisation exist:

a building permits;

7 Legislative Decree No. 385/1993.

b the certified declaration of commencement of works ('SCIA'), which has replaced the declaration of commencing works ('DIA') – following the enforcement of the Law Decree No. 70 dated 13 May 2011, amended and converted into law by Law No. 106 dated 12 July 2011– and shall not be applicable only in the event that the SCIA be interchangeable or alternative to the building permit; and

c the DIA, which is still in force and may be applicable in alternative to the SCIA if allowed by the applicable regional law (i.e., for example in case of non-substantial variations of works – still under progress – approved with a building permit).

According to the DPR No. 380/2001, all works whose execution requires a SCIA or DIA can be carried out by requesting the release of a building permit and obtaining the related title. The opposite is not true, however, since the release of a building permit cannot always be substituted by the filing of a simple SCIA or DIA (for example, the works for the new construction of a structure can be carried out by filing a SCIA or DIA only in specific cases). Regional laws may actually change such provisions by allowing the filing of a SCIA or DIA for every building work, even the most important ones.

A building permit is an administrative license issued by the competent local administration committee to allow the contractor must merely communicate to the local competent administration committee its intention to begin the construction works. If the administration committee fails to respond within 30 days from the request, this is an effective approval and the contractor can begin the construction works.

Other specific permits may be required depending on the specific destination of the asset object of the development, such as commercial, tourist or other. In the case of the realisation of public infrastructures, the permitting side is entirely in charge of the public side, of course.

ii Equator Principles

Only one major Italian bank has adopted the Equator Principles, in 2007.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPP transactions are consolidated schemes in Italy and are well regulated under the Public Works Code. Except for some specific major projects, PPP transactions in Italy do not focus on PFI or construction projects – for which BOT schemes are more often used – but rather on public services. There is a wide range of public services where the public authority ventures with private parties in order to create a corporate vehicle that becomes concessionaire of the public service involved. Private partners are mandatorily selected by means of public bidding procedures. PPP transactions are extremely frequent locally in transport, energy and water sector.

From a corporate governance standpoint, the relation between the private and the public partners are regulated by by-laws as well as by means of shareholder agreements, which need to meet certain principles set out by specific courts. The principle underlying such contracts is that while the public entity keeps a control over the strategy and the activity of the PPP vehicle, the private partner is in charge of the operation of the

company and of the provision of the services, in order to maintain profitability and a sound management of the PPP vehicle.

ii Public procurement

The Public Works Code is the basis of public procurement in Italy. As a rule, and in full accordance with the European legislation, the procurement of works, services or goods by the state and all other public bodies defined by the Code need to follow specific bidding procedures in procuring works, services or assets.

Only public contracts exceeding certain thresholds are subject to the above regulation. From 1 January 2012 in accordance with Commission Regulation (EU) No. 1251/2011, the value of the thresholds is the following:

a €130,000 for public supply and service contracts awarded by central government authorities (ministries, national public establishments);

b €200,000 for public supply and service contracts awarded by contracting authorities that are not central government authorities; covering certain products in the field of defence awarded by the central government authorities; concerning certain services expressly listed by the applicable regulation; and

c €5 million in the case of works contracts.

The thresholds are calculated by the Commission every two years.

The proceeding public body has full authority to verify the application and award a contract. Third parties are able to challenge the award of the proceeding authority by means of judicial claims through specific regional administration judicial authorities ('TARs'). TAR decisions can be appealed at the Supreme Administration Court sitting in Rome.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

According to Article 16 of the General Provisions of Law, foreign subjects are generally allowed to hold assets located in Italy, provided that an Italian subject has the same right in the country of the considered foreign (the reciprocity rule). The aforesaid provision also applies to foreign legal entities. Accordingly, a foreign legal entity will be able to carry out investment projects in Italy, including real estate development projects, provided this requirement is met. It is common practice that the foreign entities carrying out development projects in Italy, especially when participating in a project finance project, create an SPV, incorporated under Italian law, which is fully dedicated to the project. That being stated, foreign entities carrying out development projects in Italy are not subject to any specific restriction and additional permits or licences are not required.

i Removal of profits and investment

There are no specific constraints on foreign investments in Italy and the main point to take into consideration is the tax effects that a specific transaction has on foreign investors when transferring dividends or interest earned in Italy abroad, mainly withholding tax, which can also be applied in PFI transactions or real estate development schemes.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specific construction courts or tribunals operating in the private sector. Construction disputes are dealt by territorial courts in accordance with the provisions of the Code of Civil Procedure. As far as public works, services and procurement of goods are concerned, the proceeding authority may select to have recourse to the special arbitrational courts for this type of controversies set out by Article 240 of the Italian Public Works Code.

In construction disputed, parties commonly take precautionary measures and to start the relevant special proceedings before or pending ordinary proceedings, such as:

a Preliminary expertise (Sections 696 and 696-bis of the Code of Civil Procedure): a precautionary measure allowing the claimant to collect evidence before it files the writ of summons. This avoids the risk of that the evidence will be altered, which may jeopardise the future outcome of the proceedings.

b Action for the recovery of possession (Section 703, Code of Civil Procedure and Section 1168 of the Civil Code): a precautionary measure that can be started by a party who has been intentionally deprived of possession of an object or of a site.

c Denouncement of new work and feared damage (Sections 1171 and 1172 of the Civil Code and Sections 688 to 691 of the Code of Civil Procedure): a precautionary measure that can be claimed by the landlord or the possessor of the site to hinder the completion works of the construction of buildings because of the potential damage they could suffer.

ii Arbitration and ADR

Construction disputes can be settled by means of ADR in Italy. According to the Italian Civil Code and the Italian Code of Civil Procedure, several types of ADR can be used to settle disputes in general. In recent years the use of ADR has increased remarkably, due to the fact that international construction players prefer the speed of ADR Methods to the traditional court process in Italy.

There are several ADR methods commonly used:

a amicable settlements (Section 1965 of the Civil Code);

b judicial or extrajudicial conciliation (Sections 183, 320 and 322 of the Code of Civil Procedure);

c arbitration (Sections 806 et seq. of the Code of Civil Procedure); and

d mediation, by which the parties use a neutral, independent and impartial person who guides the parties to their own mutually satisfactory agreement, which is now mandatory in civil trials before the judicial claim is started before the competent court.

There are also non-adversarial forms of conciliation provided for by special laws for specific sectors, such as labour, agriculture and telecommunications. There are no specific non-adversarial forms to be used for construction disputes. The chambers of commerce in the main Italian cities offer arbitration services.

The most important arbitration organisation that can be involved in the settlement of construction disputes is the Chamber of National and International Arbitration of Milan.[8]

Italy is a signatory of several international treaties and conventions on arbitration, including the ICSID and the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards ('the New York Convention'). Italy ratified the New York Convention without making the reciprocity reservation (nor any commercial reservation); the New York Convention is in principle applicable to the enforcement of all international and foreign arbitration awards.

Italy, thus, recognises international arbitration contractual provisions as well as international and foreign arbitration awards that comply with the Convention and with the principles of Italian public policy. The enforcement of such awards is subject to a special procedure pursuant to Sections 839 and 840 of the Code of Civil Procedure. According to such articles a request for enforcement must be submitted to the president of the court of appeal of the place where the opposing party resides. If the opposing party is not resident in Italy, then the competent court of appeal will be that of Rome.

The party requesting the enforcement must lodge both the award and the arbitration clause. The president of the court of appeal, without hearing the parties, evaluates whether the award meets the formal requirements and grants the decree of enforcement unless the dispute is not arbitrable under Italian law or the award contains provisions that infringe Italian public policy.

Under Italian law, there are no special restrictions for the arbitrability of project finance or construction disputes. According to Section 840 of the Italian Code of Civil Procedure, the opposing party can challenge the decree of enforcement within 30 days and provides the grounds for the refusal of recognition and enforcement of foreign arbitral awards. Article 840 of the Code of Civil Procedure also explicitly provides that international conventions will prevail over domestic law. The judgment of the court of appeal can be challenged in the Supreme Court. Under Italian law, there are no provisions that entail automatic domestic arbitration for project finance or construction disputes.

XII OUTLOOK AND CONCLUSIONS

Italy, as a developed western country, has a developed sophisticated legislation like other western European countries. As far as PPP, public PFI and public procurement are concerned, Italy shares the same legislation of other European countries, so its legislation is able to host the most complex international investments.

Italy has also suffered the severe downturn in the economy from 2009. However, the fundamentals of the economy and the level of private savings are high and this is the basis for the future developments. In the next few years, considering the infrastructural gap in Italy, the state may be interested in selling distressed assets and in promoting PFI projects. As far as real estate development is concerned, social housing and tourist developments are an area of interest for the coming years.

8 www.camera-arbitrale.com.

Appendix 2

ABOUT THE AUTHORS

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Francesco Sanna is a partner of the Italian K&L Gates practice and heads the department of real estate, development and construction.

Mr Sanna mainly assists sponsors of project financing initiatives in the energy sector, as well as developers and investors in real estate, with particular focus on issues related to development and construction. He specialises in advising foreign and domestic clients in structuring and carrying out their development investments in Italy.

He obtained his law degree from the Catholic University of Milan in 1996. He was admitted to the Italian Bar in 2000. Mr Sanna speaks fluent English.

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Carolina Teresa Arroyo is an associate in the real estate practice group of Milan and works in the construction and development department. She is admitted to practise in both Italy and Peru. Before moving to Italy, she graduated from the Catholic University of Peru and worked for the National Institute for the Defence of Competition and Intellectual Property in Peru.

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