STUDIO LEGALE BEMBO

WARRANTIES AND GUARANTEES in Italian Law

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1. PERSONAL GUARANTEES

Personal guarantee ("garanzia,/ fidejussione")
This kind of guarantee is often required by banks, from company directors, their spouses, their parents, to warrant with an additional personal obligation or giving in warranty beings so to assure loans to the beneficiary or third subjects.

In the **fidejussione** the guarantor assumes the same responsibility for payment of the debt as the debtor himself, and can be sued by the creditor as well as, or instead of, the debtor.
To allow the direct action without the attempt of the execution against the real debtor a special clause of renounce shall be signed according art. 1944 c.c.

In Italy there are no differences between commercial or civil matters. The consumer code may be relevant to have valid clauses.

Requirements
The will to be guarantor of the accomplishment of an obligation of a third subject should be expressed, and normally we use the words "I grant the payment" and the guarantor shall sign the document.

To get a valid warrant the amount or the quantity of the subject has to be written as it is not admitted a warrant without limitation of value.

The principal debtor has not to be informed, but the guarantor has the right to oppose the same exceptions of the principal debtor. If the principal obligation is void also the warrant.

2.MORTGAGES ON MOVABLE PROPERTY "Pegno"

Pledge on movable property .
The debtor may secure some of his movable beings to the creditor.

The way to set a pegno is alternatively

- with the physical transfer of possession of the pledged asset to the secured creditor or to a third party
- with the delivery of a document pledge("pegno"), which provides the pledgee the right to have use of the good, to be preferred in case of sell or to apply for the sell of the assets upon default of the debtor and it is subject to the authorization of the Courts where it is written that the creditor is the only with the right to use the good.

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The pledge agreement can be a deed, enacted by a notary public or a registered agreement as it needs the certainty of the date and the trustable description of the good.

3.MORTGAGES OF LAND

Mortgage of land ("ipoteca")
The most important form of security on immovable property is the mortgage, which provides the mortgagee the right to have a notary public appointed to sell the property sold upon default of the debtor, and to use the proceeds of the sale to repay the outstanding secured debt.
The creation of a mortgage requires notarized documents to be filed with the land registry and attracts stamp duty of 1 per cent of the secured amount in addition to various fees.

Order of registration decides priority of mortgages. So check before accepting security what prior mortgages are registered. Land register is open to public inspection

4.CHARGING ORDERS

Pignoramento
Creditor who has a judgment can apply to court to register a charge against debtor's properties movable or lands. It is the execution by Court of judgments ruled by the execution rules of the civil procedure code (after art.474 cpc).

A charging order does not require any consent as it is directed by the Court. Any priority in the distribution of the amount received by the court after the sell of the properties should be defended during the proceeding.

Any application of execution against debtor's registered properties should be protected by registering a notice at the respective good Registry (land registry, car registry etc etc.).
Charging orders have priority according to date of registration of notice also in reference with pledges or mortgages.
The debtor is notified of the interim charging order as soon as this has been made by the court. He can then raise objections to the order being made final.

Prior pledgee/ mortgage holders must be notified of the application for the charging order to allow them to participate in the distribution of the amount recovered by the sell.

Charging orders can also be made against personal property deposited by third subjects or rights towards third parties e.g. bank accounts, life assurance policies and company shares. The bank / life company / company itself must be notified of the application for the order and participate at the hearing to make the declaration of the relationship they have with the debtor and declare the amounts/ obligation they have. In several cases it is enough a written declaration.
In case of acknowledgement by the court, the third parity has to pay directly the proceeding creditor.

Sequestro
A creditor who is able to give evidences of the attempt of a debtor to sell all his properties and to avoid all warrants to pay his debts can apply the Court – before any judgment – giving also evidence of his rights and his credits - for precautionary seizure of the goods of its debtor

("sequestro conservativo"). This seizure will not create any priority: it is just a way to stop any purchase.
When the case is finished and a judgment recognizes the credits of the creditor he can proceed with the execution and the judiciary sell of the goods seizured. During this proceeding other creditors may participate and ask to be paid. The date of the insertion in the procedure is important to determine if the creditor can be paid together with the first creditor of if he can ask just the remaining amount after the payment of the proceeding creditor.

5. RETENTION OF TITLE

The retention of title in commercial business has been facilitated.
It is enough to write this clause in the invoice and to agree this right to the vendor.

The problem is just practical. There is no way to act the recall of the good object of a retention title if the good is not marked or easily recognized.

The solution is to act like in the former way: put a label on the good and register the label in a special register.

6.RETENTION OF TITLE IN REGISTERED MOVABLE GOODS LIKE CARS, SHIPS AND AIRCRAFT

All the being registered can be the object of retention title only of it is registered in the register of this goods. The same happens in case of pledge. If there is no registration in their register any deed is not known by third parties and there will be no evidence of the priority of the registration.

7.CEASE OF A 1/5 OF THE SALARY

It is common for employed people to cease part of his credit / salary to the creditor.
The limit is the 1/5 of his salary, but it can happens to have more than once cession. The limit is that the employer should keep a salary amount not less the amount set by law as the minimal.

To act the cession it enough the declaration of cession – like any credit cession – and the declaration of the employer about the amount of the salary and that he undertakes to pay directly the creditor until the limit of the amount ceased.

8. ASSIGNMENT OF CHOSES IN ACTION

Factoring is a common situation in which businesses raise finance by assigning book debts to banks.
Notice must be given to the customer of the business, generally on each invoice raised by the business: this states that the debt created by the invoice has been assigned to the bank.
The customer must then make payment to the bank direct.

9. MORTGAGES BY COMPANIES

Company mortgages or debentures must be registered by the company in its records. They must also be registered with the Registrar of Companies within 15 days of creation.

Failure to register in the term normally means the mortgage is not opposable and recognizable.

IMPACT OF INSOLVANCY LEGISLATION:

Security when approaching insolvency.

Creditor should not assume that the debtor can give a valid security over his assets if he is approaching insolvency.

In case of bankruptcy the debtor lose any power to represent himself or the bankrupted company. Only the commissioner appointed by the law can make payments or give warrants or a valid security over his assets.

Article 67 of the Bankruptcy Law (L. 267/42) Act provides that following acts cannot be valid and should be revoked by the bankruptcy when made by the debtor or the guarantor within a year before the declaration of bankruptcy, safe the evidence the insolvency where not knew:

- all economical act which value overpasses for more than ¼ the value of the obligation of the bankrupted
- all acts made to extinguish debts different by a normal payment
- pledges and mortgages

In case the commissioner named by the court is able to give the evidence that the other part knew the situation of insolvency of the debtor, all the following acts will be revoked:

- payments
- economical acts
- act able to grant a priority in payment in own favor or in favor of third people.

Before the real bankruptcy proceeding in Italy we have a proceeding according which the debtor make an acknowledgement of his debts and makes a proposal for a payment granting the satisfaction of some different percentage in case of a privileged credit or not.
If the proposal is accepted by creditors and recognized by the court the proceeding of liquidation may start.

Since the deposit of the application or of the proposal no execution can be made against the debtor beings.

Conclusions & suggestions:

Effective forms of guarantee:
Cession of credits, pledge, mortgage on movable properties, on movable registered properties, retention title, Mortgage on land
Simple forms of guarantees: fidejussione like an unconditional and irrevocable bank guarantee.

Other forms guarantee:
Pignoramenti, Sequestro preventivo

Judicial cantonment:
The debtor wants to avoid seizure on his goods or wants to withdraw the seizure.
Or, pending the appeal, the debtor wants to pay provisionally.
The funds are then “cantoned” on the Court account to stop the interest course.

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If one trying to avoid an executive seizure or an execution of an enforceable order, then the cantonment is a conditional payment. The funds have left the assets of the debtor. In case of a bankruptcy later on, the money shall go to the creditor, and not to the mass of creditors.

Amicable cantonment:
The parties shall designate a third party that will safeguard the funds. They have to clarify whether the conservatory act is a conditional payment or not.
The lawyer could serve as a third party. Sometimes funds are deposited on accounts in the name of two lawyers jointly.
This solution may be risky and a specific mandate should be signed among the parties to assure the payment when asked.

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These notes are a brief introduction to a complex and wide subject. They should not be used as the basis for giving legal advice. Whilst they are believed to be correct, neither the author can accept responsibility for any accidental errors.

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