

Transactions on “raw” healthcare receivables in the Italian market practice

by Patrizio Messina and Alessia Denaro, Orrick, Herrington & Sutcliffe

In the last years many structured finance transactions (either securitisation transactions or asset finance transactions) have been structured in relation to the so called healthcare receivables. The reasons are several. On one side, the providers of healthcare goods and services usually are not paid in time by the relevant healthcare authorities and therefore, in order to gain liquidity, usually assign their receivables toward the healthcare authorities. On the other side, due to the recent legislation that provides for very high interest rates on late payments, the debtors as well as banks and other investors have had the same and opposite interest on carrying out different kind of transactions.

In this brief article we will analyse, after a quick description of the Italian healthcare system, some of the different structures that have been used in relation to transactions concerning healthcare receivables and, in particular, we will focus on transactions concerning the so called “raw receivables”, which are lately increasing in the Italian market practice, by analysing the legal means through which it is possible to ascertain/recover such receivables.

The Italian healthcare system and healthcare receivables

Italy's national healthcare service (*servizio sanitario nazionale*, “nhs”) is regulated by legislative decree December 30, 1992, no. 502 (“decree 502/92”). The reform introduced by decree 502/92, as amended from time to time, provides for a three-tier system for the healthcare service, as outlined below:

State level

The central government provides a national legislation limited to very general features of the NHS and decides the funds to be allocated to the single regions according to specific criteria (density of population, etc.) for the NHS.

Regional level

The single regions have to adopt provisions regulating the specific features of the healthcare assistance. Each region has to approve the regional healthcare plan (*Piano Sanitario Regionale*) and has to provide the allocation to the Healthcare Authorities (as defined below) of the relevant quotas of state allocated funds (and of eventual additional regional funds).

“Local” level

Within the territory of each region different entities operate (AUSLs, AO, IRCCS, etc. hereinafter the “Healthcare Authorities”); the Healthcare Authorities provide the healthcare services to the citizens (either directly or through accredited private structures) and use the funds allocated by the regions to pay their providers of goods/services.

Basically the so-called healthcare receivables (the

“Healthcare Receivables”) are the receivables claimed by the Healthcare Providers and by the other providers (jointly, the “Providers”) for the healthcare services or goods or other kind of services or goods provided to the Healthcare Authorities.

For reasons that are better specified below, the Healthcare Authorities usually pay the relevant Providers with a certain delay (which could change from region to region).

Reasons for lack of liquidity within the system: market practice solutions

Usually, when healthcare funds are allocated, in the national provisional budget, the central government underestimates the amount of healthcare expenditure. Since the central government does not provide regions with enough funds, regions are not able to provide enough funds to Healthcare Authorities, and payments to the Providers are delayed. Since the Providers need liquidity, they usually assign their receivables toward the Healthcare Authorities.

To deal with all the above issues, Italian market practice has been developing an alternative system of financing through securitisation and asset finance transactions of Healthcare Receivables¹.

Different kinds of transactions

Basically a distinction could be made in order to try to differentiate the kinds of securitisation transactions that have been carried on lately in Italy

in relation to Healthcare Receivables: (i) transactions with a delegation of payment/delegation of debt which provide for a full participation of the relevant region; (ii) transactions without a delegation of payment/delegation of debt in which the relevant region plays a certain role; (iii) transactions concerning Healthcare Receivables which are object of judicial proceedings activated by the relevant Providers in order to recover their receivables.

Transaction providing a delegation of payment

Within the context of “public” transactions, i.e. transaction in which the relevant region has agreed to play an “active” role and the relevant notes are listed, rated and publicly offered on the market, the region can decide to pay through the mechanism of the delegation agreement².

Usually, before the delegation of payment, two previous steps, which are not fixed by any provision of law, are taken (i) a certification procedure and (ii) a settlement agreement. After the certification process and after entering into a settlement agreement, the Healthcare Authorities issue a delegation of payment asking the region they belong to, for an undertaking to pay. By means of the acceptance of such delegation (thus transforming a mere delegation of payment into a delegation of debt), the region becomes a new debtor (jointly or severally with the Healthcare Authorities, as the case may be) of the Providers. In this way, the Providers (or the purchaser of their claims, as the case may be) will have direct recourse on the region that, as a matter of fact, has more assets that could be attached in an enforcement procedure in case of default to pay.

Recently, when using a structure with delegation of payment/delegation of debt the issue of the “indebtedness” of the regions has been raised. There is the risk, in fact, that the transactions provide for the regional direct intervention with the delegation of debt mechanism, could be considered as new “indebtedness” for the relevant regions and, subsequently, be a violation of article 119 of the Italian Constitution, according to which regions, provinces and municipalities can use “indebtedness” instruments only to fund “investment expenses” (a definition of “indebtedness” and “investment expenses” has been provided by law December 24, 2003, no. 350). Should the latter use indebtedness instruments to fund different expenses, the main consequence should be a violation of article 119 of Italian Constitution, and the invalidity (the Italian nullità) of the agreements of the relevant securitisation transaction (as expressly provided for by law December 27, 2002, no. 289)³.

Transactions without a delegation of payment but with regional “authorisation”

There have been transactions on Healthcare Receivables which have not been structured by means of a delegation of payment but where the relevant region provides for an “authorisation” to the transaction. In this case the Provider/purchaser of the claim shall have recourse only against the Healthcare Authority and not directly against the region.

An example could be the approval of specific resolutions issued by regions setting forth some criteria and/or establishing some procedures for the Healthcare Authorities to issue the above mentioned certifications, the settlements agreements to be entered into by Healthcare Authorities and Providers and undertaking to reimburse to Healthcare Authorities part of the certified and settled receivables (or the relevant financial charges).

The purpose achieved in this case was that the Providers have been facilitated in finding national and international market players that, thanks to the regional “authorisation” of the transaction, could have an higher degree of certitude in relation to the Healthcare Receivables they were interested in purchasing.

Transactions concerning healthcare receivables which are object of judicial proceedings

As mentioned above, a Provider (or an assignee of its Healthcare Receivables) could commence a judicial proceeding to obtain the payment of its claims. A certain number of transactions have been structured by means of the purchase of “raw receivables” (i.e. such receivables in relation to which a judicial proceeding had been commenced and was pending), which, however, had a certain degree of judicial ascertainment. In particular, the relevant judicial proceedings were in an advanced phase, even if not yet concluded.

Because of the development of transactions concerning raw receivables, we deemed useful to analyse the Italian legal means which may be used in order to ascertain/recover healthcare receivables.

The judicial ascertainment/recovery of receivables in Italian legal system

Whenever a debtor (like an Healthcare Authority) does not fulfil its payment obligations, a creditor (like a Provider) may commence legal proceedings before the competent courts and jurisdictions to recover its claims. As a general matter, the creditor will have to start a legal action for the ascertainment

of its substantive rights, in order to obtain an enforcement title i.e. a title empowering to levy execution. The judicial proceedings provided for by the Italian Civil Procedure Code are (i) the ordinary proceeding and (ii) the injunction proceeding. As a general matter, a creditor may always go through an ordinary proceeding to recover a payment, whenever there are not the conditions to commence other judicial procedures to accelerate or facilitate the collection process or whenever for strategic reasons the party prefers not to go through a summary proceeding.

The ordinary civil proceeding

The ordinary civil proceeding may last few years, and ends up with a judgment of the Court (“*sentenza di primo grado*”), which is immediately enforceable. Such judgment can be appealed before a Court of second instance (*Corte d’Appello*) and, the judgment issued by a *Corte d’Appello* may be appealed before the Italian Supreme Court (*Corte di Cassazione*).

A first instance decision is provisionally executive and it entitles the creditor to commence an enforcement proceeding. The only way for the debtor to suspend the provisional execution of the first instance decision is to propose an appeal but if no suspension has been given by the second instance judge, then the creditor may continue regularly its enforcement proceeding to recover its claim against the debtor.

Provisional conviction measures

Within a first degree ordinary proceeding, and before the proceeding is over with a judgment of first instance, it is possible to ask the judge for the issuance of provisional conviction measures (*provvedimenti anticipatori di condanna*), which could assure a higher degree of certitude.

These measures are special remedies given to the creditors, by means the competent judge is enabled, upon demand of the interested party, to anticipate and satisfy the creditor’s claim prior to a judgement being rendered on the merit and becoming conclusive and final⁴. The main features of these measures are the following:

- They are titre exécutoire (*titolo esecutivo*), i.e. an enforcement proceeding may be commenced upon issuance of such measures for the amounts thereof;
- They may be modified and revoked by the same judge who issued them at any time;
- In case of termination of the ordinary proceeding for waiver of the parties or for inactivity of the parties, such measures maintain their effectiveness.

The injunction proceeding

In order to allow the creditor to collect its credit

within a relatively short period of time, the Italian legislator has set out a proceeding which last less than an ordinary proceeding: the injunction proceeding. In particular, instead of carrying on an ordinary lawsuit, if the debtor does not pay the sums due, the creditor can request the judge to grant an order of payment through a petition of injunction. The judge, after examining the petition and the exhibits, if it considers the demand well grounded, within 30 days from the request of the creditor, will order an injunction of payment against the debtor. The provision setting the time within which the judge should issue the order is not mandatory, therefore it often happens – above all in courts with a high number of lawsuits – that it takes more time (up to 50/60 days).

The injunction orders the execution of the payment within 40-days from the serving of a certified copy of the petition and of the relevant order of the judge to the debtor.

Starting from the day in which the Court’s injunction has been formally served to the debtor, we may have different scenarios:

- The debtor makes opposition by way of a summons which is called “*atto di citazione in opposizione*” within a 40 day time-limit before the judge that has granted the injunction. An ordinary civil proceeding commences, with the structure above mentioned. If the opposition by the debtor is not grounded on written evidence, the creditor can request the judge to grant the provisional execution of the injunction order so that it will be able to commence an enforcement proceeding.
- The debtor does not propose any opposition within the time given. In this case, upon the request of the creditor, the Court’s injunction will be furnished of seals, within an approximate 10/15 day period, containing declarations of enforceability.

According to Italian Law as interpreted by case law⁵, after the furnishing of the above mentioned seals, the debtor loses its right to file an opposition to the Court’s Injunction, except for the cases provided for by article 650 of the Italian Civil Procedure Code as explained hereinafter, and therefore the Court’s Injunction becomes a definitive judgement (*giudicato*) and a *titolo esecutivo* (empowering to levy execution) (the “*Definitive Court’s Injunction*”)⁶.

Moreover, further to a Definitive Court’s Injunction (when even the time limit to file a late opposition provided by article 605 of Italian civil procedure Code, having elapsed), the rights concerned in such a judgement by the court are



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Contacts:

www.orrick.com/practices/italian_finance

Patrizio Messina – Head of the Group (pmessina@orrick.com)

Raul Ricozzi (rricozzi@orrick.com) • Dorothy de Rubeis (dderubeis@orrick.com)

Alessia Denaro (adenaro@orrick.com) • Gianrico Giannesi (ggiannesi@orrick.com)

Alessia Frisina (afrisina@orrick.com) • Giuseppe Pizzuto (gpizzuto@orrick.com)

Ludovica Cipolla (lqipolla@orrick.com) • Maria Giovanna Pisani (mgpisani@orrick.com)

Via del Consolato 6 – 00186 Rome • Tel. +39 06 4521 3900 • Fax +39 06 6819 2393

Via Visconti di Modrone 12 – 20122 Milan • Tel. +39 02 4541 3800 • Fax +39 02 4541 3801

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actually ascertained, with no possibility to challenge the same ascertained rights by means of a regular opposition trial.

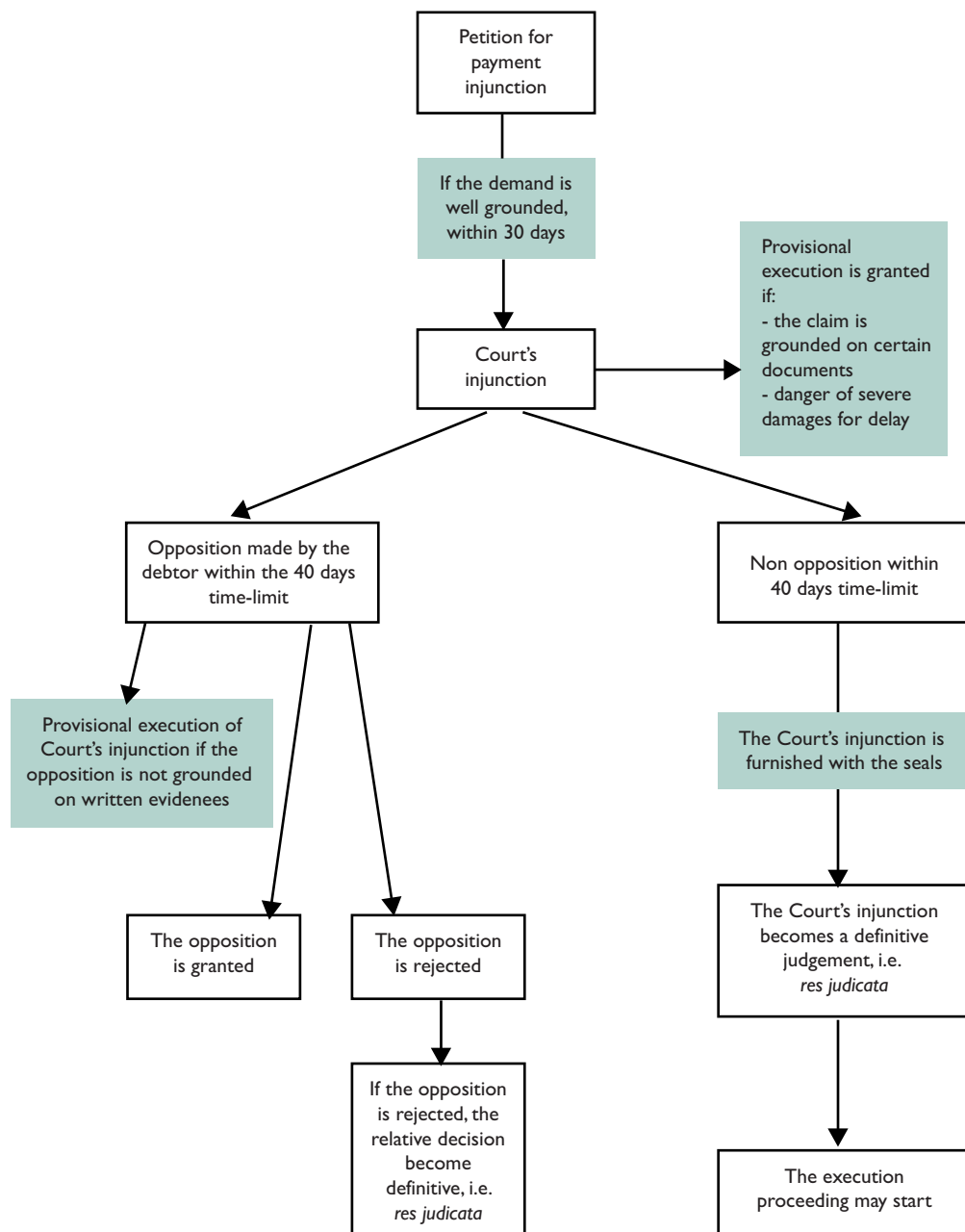
The enforcement proceeding towards healthcare authorities

After obtaining a definitive judicial decision (by means of an ordinary proceeding or an injunction proceeding), the creditor shall serve such definitive judicial decision i.e. a title empowering to levy execution to the debtor. As regards general government (*pubblica amministrazione*), after the serving of the title empowering to levy execution,

there must be a period of 120 days before starting the execution proceeding (or its preliminary phase).

As a preliminary issue, it is to be pointed out that, according to some law provisions⁷, certain assets i.e. funds allocated for payment obligations, owned by the regions and Healthcare Authorities, may not be subject to attachment proceedings, because, for the sake of public interest, they deemed to be essential for the activity, respectively, of regions and Healthcare Authorities. The specific funds which may not be attached are listed in a decree of the Ministry of Home Affairs, but such provision should be compared with the specific

Figure 1: The injunction procedure



legislation of each region. Obviously, the essential services that are carried out directly by the regions are different from the essential services carried out by the Healthcare Authorities. In both cases, the exclusion of certain assets from the attachment procedure, applies only if the competent organ (of, respectively, the region and the Healthcare Authority) by way of a quarterly resolution, expressly allocates certain funds for the essential payment obligations.

It is possible to summarise the execution proceeding as follows:

- A preliminary phase of the execution proceeding consist of the serving of (after the elapsing of 120 days as above stated) an *atto di precetto* to the debtor – a formal act by which the creditor asks the debtor to pay.
- Critically, the execution proceeding carried out to recover receivables due by the Healthcare Authorities, is the so called “third party execution”, (the third party being a debtor of the debtor or the holder of things or funds owned by the debtor), and it concerns (a) the funds owned by or due to the Healthcare Authority and usually deposited in a bank account (b) the treasurer of the Healthcare Authority (as third party), which is the bank that usually holds the account of the Healthcare Authority to which the funds owned by or due to the Healthcare Authority are credited⁸.
- If the debtor still does not pay after the attachment or the attachment in extension, after the third party, i.e. the treasurer, has confirmed its duty to pay and that the account of the debtor is credited with sufficient funds, the creditor or the creditors (in the case of intervention there will be more than one creditor), can ask the court for granting the funds attached. If there is more than one creditor, and the funds attached are not enough for the satisfaction of all the creditors, the court will grant a formal order (*ordinanza di assegnazione*) by which the funds will be granted proportionally i.e. pro rata to each creditor’s claim.

Objection to enforcement and objection to particular acts of enforcement

The debtor (*rectius*: the person who is qualified as such by the creditor) may start a proceeding in order to raise objections (*giudizio di opposizione*) against the creditor’s right to enforcement (*opposizione all’esecuzione*); or against a specific act of enforcement i.e. by contesting the formal flaws of a specific act of enforcement (*opposizione agli atti esecutivi*).

Should an objection to enforcement be filed, an ordinary proceeding will start. The court competent for the execution proceeding can suspend the execution proceeding upon request of the debtor (or the other legitimate parties) and provided that serious reasons occur, with or without requesting the deposit of a caution. Should the court grant a suspension, the execution proceeding will start again after the ordinary proceeding for the objection is concluded.

Conclusion

A financial transaction regarding raw receivables is highly influenced by the characteristics of such receivables, which do not have a high degree of certitude and in relation to which a judicial proceeding had been commenced and is still pending.

Despite of the risks concerning the judicial proceedings, Italian market players are still very interested on carrying on securitisation transaction on this kind of asset, principally because Legislative Decree no. 231/02 provides for very high interest rates on late payments (equal to the interest rate applied by ECB plus 7%).

On the other side, the structuring of a securitisation transaction should take into consideration the many different issues which raw receivables imply, due to the fact that the exact amount of receivables can not be determined until the end of the judicial proceedings.

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Notes:

¹ As for the rating approach that has been followed by the rating agencies, FitchRatings has recently issued two reports in relation to the rating to assign to transactions on Healthcare Receivables: (i) Italy Special Report dated 25 October 2005 concerning “*Italy’s Healthcare System: A Burden on Regional Finances*”; and (ii) Italy Criteria Report dated November 7, 2005 concerning “*Italian Public Healthcare Receivables Portfolios – Market Overview and Methodology of Analysis*”. In particular, in the report mentioned under (ii) above, the rating approach is different between deals that benefit from a direct payment obligation of the region and deals that do not benefit from the direct payment obligation of the region. Independently of the kind of transaction, for the rating approach of Standard & Poor’s, please see “*Rating Approach To Italian Health Care*

Entities' Renegotiated Commercial Obligations", published on May 15, 2006.

² Under Italian law (Articles 1268 et seq. of the Italian Civil Code), when the subject who is ordered to pay accepts such delegation and undertakes to pay, such subject is deemed to become the actual debtor of the beneficiary of the relevant payment (severally or jointly with the subject who has given the order to pay).

³ In this respect, a Circular issued by the Ministry of Economics stated that the transactions entered into between the Italian provinces and municipalities and the Providers shall be qualified as "indebtedness". However, such Circular has a vague content and it doesn't referred to regions. Afterwards, according to several recently published press articles (mainly appeared on the Italian Newspaper "Il Sole 24 Ore"), the issue of "indebtedness" has been directly referred to those transactions which provide for the regional direct intervention with the delegation of debt mechanism. However, such position, up to now, seems to have been rejected by Eurostat.

According to an Eurostat spokesman, securitisations of healthcare receivables providing for a delegation of payment/delegation of debt mechanism should not be considered as "new" indebtedness for the general government (*pubblica amministrazione*), since (i) they concern commercial debts not to be considered as indebtedness according to Maastricht treaty; (ii) independently of the regional participation to the transaction with the delegation of payment/delegation of debt, for the general government the only element that changes following to the securitisation transaction is the creditor (which usually becomes the special purpose vehicle assignee of the relevant Healthcare Receivables). Of course there could be the risk that Eurostat will introduce new regulations which could lead to a completely new qualification of such receivables as "indebtedness", with the above described consequences.

On the matter, the Italian Court of Audit (*Corte dei Conti*), which is the entity controlling the accountancy of the central government, stated that the delegation of payment/delegation of debt mechanism shall be used by regions only to pay the debts arising from the time gap that may occur between the insurgence of the debt and the moment in which the regions received from the central government the funds to be allocated among the Healthcare Authorities. Should the delegation of debt mechanism be used like an instrument to cover debts due to a bad

management of the Healthcare Authorities, whose operating expenses are higher than the ones estimated, it shall be considered as new "indebtedness" In this respect, please see the "Report on the balance sheet for the 2005-year period", published by the Court of Audit on the July 28, 2006, Volume I, Chapter I, pages no. 44-45

⁴ In particular: (i) with the enforcement order for uncontested claims (*ordinanza per il pagamento di somme non contestate*), provided for by article 186-bis of the Italian civil procedure code, is a measure modelled on that which had been already provided for since 1973 in labour legislation. The judge may, upon application of a party and until the summing up has been made, order the payment of the claims uncontested by the parties. This provision, besides, provides that such order is deemed a "titolo esecutivo" and maintains its effectiveness in the case of expiry of proceedings; (ii) the injunction order (*ordinanza di ingiunzione di pagamento*), provided for by article 186-ter of the Italian civil procedure code, is a measure that is strictly based on the model of injunction procedure and inserted in the ordinary proceedings. Said rule provides that the judge, upon request of the parties and in any instance of the ordinary proceedings, shall issue an injunction or delivery order. It is already provided that if the party against which the injunction is pronounced is in default, the order must be notified within 60 days under penalty of ineffectiveness of the injunction and must contain the explicit notice that, if the party does not appear before the judge within 20 days from the service, the order will be enforced.

⁵ Recently, Italian Supreme Court March 26, 2004, no. 6085.

⁶ Pursuant to article 650 of the Italian Civil Procedure Code, the debtor is allowed to oppose the Court's injunction after the time limit of 40 days ("Late Opposition") (*opposizione tardiva*) only to the extent that he can give evidence of the fact that he was not informed about the Court Injunction as consequence of one of the following: (i) the irregularity of the serving; (ii) fortuitous event; (iii) *force majeure*. In any case, the debtor cannot oppose the Court's injunction after 10 days by the commencement of the execution proceeding. The execution proceeding could be deemed to start with the attachment or with the filing of the petition for intervention. However, Italian law is not clear, and there is no case law on the matter of the possibility of considering the filing of the petition for

intervention as a first act of execution.

⁷ Article 11 of the Law Decree January 18, 1993, no. 8, as converted by Law March 19, 1993, no. 68.

⁸ Instead of starting an autonomous execution proceeding, it could be more convenient, in order to speed up the procedure to recover the receivables, to intervene in procedures already started by other creditors. There is no limit as to how many interventions it is possible to carry out. Basically, if one intervention is not successful, it could be possible to intervene in as many execution proceedings as possible, in order to recover the Healthcare Receivables.

Authors:

Patrizio Messina Partner
Email: pmessina@orrick.com

Alessia Denaro Associate
Email: adenaro@orrick.com

Orrick, Herrington & Sutcliffe
Via Del Consolato 6
00186 Rome, Italy
Tel: +39 06 4521 3900
Fax: +39 06 6819 2393
Website: www.orrick.com