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Italian Supreme Court, 13 november 2024, no. 29369 – bankruptcy revocatory action: a revocatory action against a company in a bankruptcy proceedings - as a constitutive action aimed at modifying *ex post facto* a pre-existing legal situation - cannot be brought for the purpose of recovering an alienated asset and the sellers's creditors remain protected by the general asset security, which is to be enforced in accordance with the rules of the bankruptcy law.

ADMINISTRATIVE LAW

Council of State, Sec. VI, 26 November 2024, no. 9477 - The administrative measure, preceded by exhaustive acts of investigation, may be considered adequately motivated *per relationem* even by mere reference to those acts.

Council of State, Sec. V, 19 November 2024, no. 9255 - Based on the combined provisions of Articles 41, section 14, 108, section 9, and 110, section 1, of the new Public Contracts Code (Legislative Decree no. 36 of 2023), it can be affirmed that the bid of the economic operator that applies the discount also to labour costs must be subject to an anomaly check.

Constitutional Court, 7 October 2024, Order no. 161 - The Constitutional Court referred three questions to the Court of Justice of the European Union concerning the applicability of Directive 2006/123/EC (the so-called Bolkestein Directive) to concessions for small hydroelectric derivations.

BANKING AND FINANCIAL LAW

Italian Supreme Court, 8 November 2024, no. 28791 – evidence in disputes concerning bank account relationships: in disputes involving bank account relationships, the determination of debits and credits can be carried out using additional means of evidence capable of providing clear and complete indications that justify the balance accrued at the beginning of the period for which the account statements have been submitted.

The Italian Supreme Court, in its Order no. 28791, published on 8 November 2024, ruled on the subject of evidence that may be produced in disputes concerning a bank account relationship.

The Supreme Court first of all recalled that «*the statement of account (...) is not the only means of evidence through which to reconstruct the movements of the relationship: it allows, in fact, to have an appropriate confirmation of the identity and consistency of the individual transactions carried out but, in the absence of any regulatory index authorising a different conclusion, it cannot be excluded that the judge may ascertain the progress of the account by using other representative instruments of the movements that have taken place*».

To this the Court follows that «***in the face of the failure to produce all the statements of account, the first instance judge must make use of the evidence (also atypical) offered in court by the parties, such as the accounts referring to the individual transactions and to the contracts relating to the same (where ascertained on the basis of evidence consistent with the legal regime pertaining thereto) as well as, pursuant to Articles 2709 and 2710 of the Italian Civil Code, the results of the accounting records***».

The Supreme Court adds that «***The evidence of the account documents, in fact, may well be deduced even apart from the production in court of all the monthly account statements, i.e. through the results of the means of cognition taken ex officio and suitable to supplement the evidence offered,***

such as the technical accounting advice ordered by the judge on the documentary evidence produced».

In fact, the Supreme Court further observes that «*the particular effectiveness of statements of account, to the tacit acceptance of which art. 1832 of the Italian Civil Code is linked the preclusion of any dispute as to the conformity of the individual entries with the compulsory relationships from which the debits and credits derive (...)* ***does not allow one to consider that they constitute the only means that the bank can use to demonstrate the transactions carried out on the current account, since there are no limitations in this regard***».

In this connection, the Court finally notes that the proof of the transactions carried out on the current account may be inferred «***from the movement sheets or from other acts or documents capable of certifying the performance of the transactions from which they derive, as well as the title, nature and amount of the transactions, in addition, of course, to the entry in the account of the relevant items***».

COMPANY LAW

Italian Supreme Court, 20 November 2024, no 29963 – obligation of non-executive directors of banking companies to act on an informed basis: the obligation imposed by Article 2381, last paragraph, of the Italian Civil Code to act on an informed basis is particularly significant for directors of companies engaged in banking activities, since, in such cases, not only do they have a contractual liability towards the company, but they also have a public liability towards the supervisory authority.

The Italian Supreme Court, with its decision no. 29963, published on 20th November 2024, ruled on the issue of the obligation of directors without delegated powers of banking companies to act in an informed manner.

The Supreme Court first reiterated the principle that «*the obligation imposed by Art. 2381, last paragraph, of the Italian Civil Code on the directors of companies to "act in an informed manner", even when they are not holders of delegated powers, is embodied, on the one hand, in the duty to take action, exercising all the powers connected with the office, to prevent or eliminate or mitigate critical corporate situations of which they are, or should be aware, and, on the other hand, in the duty to inform themselves, so that both the choice to act and the choice not to act are based on the knowledge of the corporate situation that they can obtain by exercising all the powers of cognitive initiative connected to the office, with the diligence required by the nature of the office and their specific competences*».

In applying these principles to the case in question, the Italian Supreme Court stated that «[t]*he obligations are particularly incisive for the directors of companies engaged in banking activities, since, in such cases,* ***not only do they have contractual liability towards the company's shareholders, but they also have public liability towards the supervisory authority****.*
Moreover, the duty to act in an informed manner on the part of the non-executive directors of banking companies should not be referred, in its concrete operation, to the reports of the managing directors, since the former must also possess and express constant and adequate knowledge of the banking business and, since they are co-participants in the management strategy decisions taken by the entire board, they are obliged to contribute to ensuring effective risk management in all areas of the bank and to act in such a way as to be able to effectively monitor the choices made by the executive bodies not only with a view to assessing the reports of the managing directors, but also for the purpose of exercising the powers, pertaining to the board of directors, of directive or avocation concerning transactions falling within the scope of the delegation of powers».

Therefore, the Italian Supreme Court found that «[a]*lthough they may or may not be executive directors, all directors, who are appointed on the basis of their specific expertise also in the interest of savers, must perform the duties entrusted to them by law with particular diligence and, therefore****, even in the presence of any delegated bodies there is the duty of the individual directors to assess the adequacy of the organisational and accounting structure, as well as the general performance of the company's management, and the obligation, in the event of knowledge or awareness of irregularities committed in the provision of investment services, to take all appropriate steps to ensure that the company complies with diligent, correct and transparent conduct***».

In light of the foregoing, the Italian Supreme Court clarified that «***the non-executive director of a company is jointly and severally liable for the breach committed when failing to intervene in order to prevent its commission or mitigate its harmful consequences***».

On the basis of the above principles, the Italian Supreme Court concluded that: «[w]*ithin the current regulatory framework****, non-executive directors are liable, therefore, for failing to prevent "prejudicial facts" of which they have positively acquired knowledge (also as a result of information received pursuant to Article 2381, paragraph 3 of the Italian Civil Code), or of which they must acquire knowledge, on their own initiative, pursuant to the obligation set forth in Article 2381 of the Italian Civil Code, whereby it is necessary that the mere power to "request the delegated bodies that information relating to the management of the company be provided to the board" be triggered, so as to be transformed into a positive obligation of conduct, by elements such as to put the directors on notice in accordance with the "diligence required by the nature of the office and their specific competences"***».

BANKRUPTCY LAW

Italian Supreme Court, 13 november 2024, no. 29369 – bankruptcy revocatory action: a revocatory action against a company in a bankruptcy proceedings - as a constitutive action aimed at modifying *ex post facto* a pre-existing legal situation - cannot be brought for the purpose of recovering an alienated asset and the sellers's creditors remain protected by the general asset security, which is to be enforced in accordance with the rules of the bankruptcy law.

The Italian Supreme Court, in its decision no. 29369, issued on 13th November 2024, ruled on the admissibility of a revocatory action brought against a company that had entered into compulsory liquidation proceedings during the judgement.

Firstly, the Supreme Court carried out an historical reconstruction concerning the admissibility of a revocatory action against a company in a bankruptcy proceedings. In particular, the Supreme Court mentioned the ruling of the United Sections of the Italian Supreme Court (Cass. Civ. SS.UU, 23rd November 2018, no. 30416), which established the following principle: «***the judgment granting the revocatory action**, whether ordinary or bankruptcy, beyond the differences existing between the two actions and in consideration of the subjective element of common ascertainment by the judge, **has a constitutive nature as it modifies 'ex post' a pre-existing legal situation**, depriving acts that had already taken full effect and determining the restitution of the assets or sums subject to revocation to the function of general asset guarantee and to the satisfaction of the creditors of one of the parties to the deed of arrangement*» and, as a consequence, «*a revocatory action must be considered inadmissible, whether ordinary or bankruptcy, brought against a company in a bankruptcy proceedings, since it is a constitutive action that modifies ex post facto a pre-existing legal situation and because it operates the principle of crystallisation of the liabilities at the date of the opening of the competition, in order to protect the mass of creditors*».

The Italian Supreme Court also referred to the principles expressed by a subsequent ruling, again by the United Sections of the Italian Supreme Court (Cass. Civ. SS.UU, 4 June 2020, no. 12476), which reaffirmed the constitutive nature of the revocatory action as well as the principle of the crystallisation of the bankruptcy estate at the date of the beginning of the bankruptcy proceedings and it affirmed that «*since the object of the revocatory action (whether ordinary or bankruptcy) is not the asset per se, but the reinstatement of the general asset security of creditors by subjecting the asset to execution, it follows that **the asset disposed of by the revocable act is taken into consideration**, **with respect to the interest of those creditors, only for its value*** (...) *with the specification that, **when the subjection of the asset to enforcement becomes impossible because the asset has been alienated to third parties by a***

deed opposable to creditors, the natural substitute is the reinstatement of those creditors for pecuniary equivalent *(see Cass. no. 18369-10). This is so true that the creditor's interest in bringing the revocatory action does not cease (and remains intact) even when the asset subject to the deed whose revocation is sought is no longer at the purchaser's disposal, having been sold by the latter to a third party by a deed transcribed prior to the registration of the writ in revocation*».

Starting from these assumptions, the Supreme Court stated that «***the bankruptcy of the third party purchaser****, declared after the act of alienation (i.e. after the act of fraud determining the lesion of the patrimonial guarantee but before the revocatory action is brought),* ***prevents only the exercise of the constitutive action, but not also the exercise of that restitutory action for equivalent value compared to the value of the asset removed from the patrimonial guarantee****. The bankruptcy of the third-party purchaser, who has been prevented from bringing the constitutive action,* ***renders the aforementioned action inadmissible because it is not permitted to affect the assets of the aforementioned company in bankruptcy by recovering the asset from the asset guarantee of the alienator's creditor*** *and because it is not permitted to take that asset from the bankruptcy estate crystallised at the time of the declaration of bankruptcy. But* (...) *the purchaser's bankruptcy prevents the asset from being recovered in order to exercise the enforcement action on it, not from being lodged in the liabilities of that company in bankruptcy for the corresponding countervalue*».

Consequently, the Italian Supreme Court has pointed out that «*a revocation action against a company in a bankruptcy proceedings may not be brought with the aim of recovering the alienated asset under its own exclusive patrimonial guarantee, since it is a constitutive action that modifies ex post facto a pre-existing legal situation; however,* ***the alienator's creditors*** *(and, on their behalf, the receiver of the company in bankruptcy where the alienator is bankrupt)* ***are maintained protected through the general asset guarantee by the rules of concurrent proceedings, as they may lodge themselves as debtors in the bankruptcy proceedings of the purchaser for the value of the asset subject to the act of disposition that can in theory be revoked, leaving the delegated judge of that bankruptcy also to decide on the constitutive preliminary action***».

The Supreme Court therefore concluded that «***the successful prosecution of the revocatory action transcribed prior to the date of the purchaser's access to a bankruptcy proceedings does not entitle the non-bankrupt seller's creditor to start an execution proceedings on the purchased assets, since they have now become part of the bankruptcy assets****. Therefore, the restitutory obligation at which the request is aimed is always converted, whether the revocation action is brought against a company in bankruptcy or against an accipiens in bonis subsequently bankrupt in the course of the proceedings, into the debt corresponding to the value of the asset at the date of the revoked act. In the absence of the restitution of the asset in its material form, an asset that can no longer be withdrawn*

from the bankruptcy assets of the accipiens, the restitutory claim remains subject to the competition, the logical-legal antecedent of which is the existence of the requirements for the acceptance of the revocation action; ***the object of the lodgement is thus the countervalue that the seller's creditor must request to be admitted, in the assessment of the claims even if bankruptcy has been declared in the course of the revocatory action brought in the ordinary way***».

ADMINISTRATIVE LAW

Council of State, Sec. VI, 26 November 2024 no. 9477 - The administrative measure, preceded by exhaustive acts of investigation, may be considered adequately motivated *per relationem* even by mere reference to those acts.

The Council of State affirmed that "*the administrative measure, preceded by exhaustive acts of investigation, may be considered to be adequately motivated per relationem even by mere reference to such acts, inasmuch as in this way the issuing authority expresses the intention to make the results of the investigation conducted its own, placing them at the basis of the determination adopted*".

The reference to the investigative acts, contained in the IVASS sanctioning order appealed against, was deemed sufficient for the purposes of justifying the order since the reference, according to the Appellate Judge, "*evinces the legal reasons that support the decision, so as to allow not only the addressee to oppose them with the tools offered by the system, but also the administrative judge, where he is hearing the relative dispute, to review their grounds*".

Council of State, Sec. V, 19 November 2024 no. 9255 - Based on the combined provisions of Articles 41, section 14, 108, section 9, and 110, section 1, of the new Public Contracts Code (Legislative Decree no. 36 of 2023), it can be affirmed that the bid of the economic operator that applies the discount also to labour costs must be subject to an anomaly check.

The Court of Appeal ruled that "*even under the new public contracts code, as acknowledged by the first judge, a discount is allowed on the labour costs indicated by the contracting authority in the tender lex specialis, as already held, albeit incidentally, by this section, with reference to a case subject to the provisions of the previous code (Council of State, section V, 9 June 2023 no. 5665, according to which "Even in the new code, which in application of a precise delegation criterion under art. 1, second paragraph, letter t) of law no. 78 of 2022, provided "in any case that labour and safety costs should always be separated from the amounts subject to rebate", the economic operator was allowed to demonstrate that a rebate involving the cost of labour was the result of a more efficient company organisation, thus harmonising the delegation criterion with Article 41 of the Constitution")*".

It further stated that "*on the basis of the combined provisions of Articles 41(14), 108(9) and 110(1) of Legislative Decree no. No. 36 of 2023, it must therefore be held that, for the economic operator that applies the discount also to labour costs, the consequence is not exclusion from the tender, but the subjection of its offer to the anomaly check: at that time the economic operator will have the burden of demonstrating that the discount derives from a more efficient company organisation, beyond compliance with the minimum wages*" and *that* "*only by following this approach is also explained the obligation of the competitor to indicate its labour costs, under penalty of exclusion from the tender (Art. 108, paragraph 9 of Legislative Decree no. 36 of 2023), a provision that would obviously be superfluous if the labour costs were not rebatable, and the subsequent art. 110, paragraph 1, which includes the labour costs declared by the tenderer among the specific elements, in the presence of which the contracting station initiates the procedure for the verification of anomalies*".

Constitutional Court, 7 October 2024, Order No. 161 - The Constitutional Court referred three questions to the Court of Justice of the European Union concerning the applicability of Directive 2006/123/EC (the so-called Bolkestein Directive) to concessions for small hydroelectric derivations.

The Constitutional Court asked the Court of Justice to rule on the applicability of the Bolkestein Directive to the specific sector of small hydroelectric derivations and, to this end, submitted the following three questions to the Court of Justice:

«*(a) Is the Services Directive to be regarded as applying 'also to installations carrying out activities of mere electricity generation?*

(b) if such applicability is recognised, does the Services Directive preclude a Member State from using the difference between large and small installations as a criterion for distinguishing whether or not abstraction installations are capable of making a scarce hydroelectric resource?

(c) Finally, if the answer to the first and second questions is in the affirmative, does the Services Directive preclude a Member State from providing for an extension of the concession, justified by the need to allow the incentives obtained for the production of energy from renewable sources to be used in full, without prejudice to the 30-year limit which may be imposed from the outset on a concession for small hydroelectric derivation?»