



# ICLG

The International Comparative Legal Guide to:

## Corporate Recovery and Insolvency 2012

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A practical cross-border insight into corporate recovery and insolvency work

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## General Chapters:

1	<b>Insolvency Law and Contract: Policy and Practice in the US and UK</b> – Sarah Paterson & Elena Prattent, Slaughter and May	1
2	<b>Date Certain Requirements in Insolvency Scenarios: An Italian Peculiarity</b> – Filippo Chiaves, Hogan Lovells Studio Legale	5
3	<b>Schemes of Arrangement under the Companies Act 2006 for Foreign Companies</b> – Alicia Videon & Julian Turner, Olswang LLP	10

## Country Question and Answer Chapters:

4	<b>Australia</b>	Gilbert + Tobin: Dominic Emmett & Nicholas Edwards	16
5	<b>Austria</b>	Schoenherr: Dr. Wolfgang Höller & Mag. Dr. Barbara Steger	22
6	<b>Belgium</b>	Allen & Overy LLP: Koen Van den Broeck & Thales Mertens	28
7	<b>Bermuda</b>	Sedgwick Chudleigh: Alex Potts & Nick Miles	34
8	<b>Brazil</b>	Pinheiro Neto Advogados: Luiz Fernando Valente de Paiva & André Moraes Marques	42
9	<b>Bulgaria</b>	Advokatsko druzhestvo Andreev, Stoyanov & Tsekova in cooperation with Schoenherr: Anton Andreev	47
10	<b>Canada</b>	Dickinson Wright LLP: Lisa S. Corne & David P. Preger	53
11	<b>Cayman Islands</b>	Campbells: J. Ross McDonough & Guy Cowan	60
12	<b>China</b>	W&H Law Firm: Dr. Yin Zhengyou & Zhang Xueyun	66
13	<b>Cyprus</b>	Andreas Neocleous & Co LLC: Elias Neocleous & Maria Kyriacou	72
14	<b>Denmark</b>	Gorrissen Federspiel: John Sommer Schmidt	78
15	<b>Egypt</b>	El-Borai & Partners: Dr. Ahmed El Borai & Dr. Ramy El Borai	84
16	<b>England &amp; Wales</b>	Slaughter and May: Sarah Paterson & Thomas Vickers	90
17	<b>Finland</b>	Attorneys at law Borenius Ltd: Mika Salonen & Timo Seppälä	101
18	<b>France</b>	Allen & Overy LLP: Rod Cork & Marc Santoni	107
19	<b>Germany</b>	Hengeler Mueller: Dr. Ulrich Blech	116
20	<b>Hong Kong</b>	Gall: Randall Arthur	123
21	<b>Indonesia</b>	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry N. Kurniawan	129
22	<b>Ireland</b>	Arthur Cox: William Day & John Donald	134
23	<b>Italy</b>	Bonelli Erede Pappalardo: Vittorio Lupoli & Andrea De Tomas	142
24	<b>Japan</b>	Anderson Mori & Tomotsune: Tomoaki Ikenaga & Nobuyuki Maeyama	151
25	<b>Jersey</b>	Baker & Partners: David Wilson & Ed Shorroch	157
26	<b>Luxembourg</b>	Loyens & Loeff: Véronique Hoffeld & Laurent Lenert	161
27	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska, Attorneys at Law: Dragan Dameski & Ivan Gjorgjievski	167
28	<b>Mexico</b>	Rivera Gaxiola y Asociados, S.C.: Alonso Rivera Gaxiola & Abraham Gómez Velázquez	173
29	<b>Montenegro</b>	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Slaven Moravčević & Nikola Babić	180
30	<b>Netherlands</b>	De Brauw Blackstone Westbroek: Berto Winters & Rob van den Sigtenhorst	186
31	<b>Portugal</b>	Uría Menéndez – Proença de Carvalho: Pedro Ferreira Malaquias & David Sequeira Dinis	193
32	<b>Romania</b>	Pachiu & Associates: Florin Dobre & Alexandru Lefter	198
33	<b>Serbia</b>	Moravčević Vojnović Zdravković in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić	204
34	<b>Slovenia</b>	Filipov o.p. d.o.o. in co-operation with Schoenherr: Ana Filipov & Vid Kobe	210
35	<b>Spain</b>	Uría Menéndez: Alberto Núñez-Lagos Burguera & Ángel Alonso Hernández	216
36	<b>Sweden</b>	White & Case Advokat AB: Carl Hugo Parment & Michael Gentili	223
37	<b>Switzerland</b>	Lenz & Stachelin: Daniel Tunik & Tanja Luginbühl	228
38	<b>Turkey</b>	Pekin & Pekin: Gökben Erdem Dirican & Pınar Denктаş	235
39	<b>Ukraine</b>	Clifford Chance LLC: Olexiy Soshenko & Andrii Grebonkin	243
40	<b>USA</b>	Paul, Weiss, Rifkind, Wharton & Garrison LLP: Alan W. Kornberg & Elizabeth R. McColm	249

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# Date Certain Requirements in Insolvency Scenarios: An Italian Peculiarity

Hogan Lovells Studio Legale

Filippo Chiaves



‘Date certain’ (Italian and Latin: *data certa*) is a peculiarity of the Italian legal system which typically emerges in a number of areas of law among which, principally, insolvency scenarios. In common language the concept of ‘date’ is used to fulfil the primary requirement of establishing occurrences in time. From a strictly legal point of view, the date expresses the time when a fact occurred (*dies*, in Latin): said definition is relevant with respect to the document, covenant, act or transaction that are established and proven by means of the date.

The legal definition of date refers to the specification or mention, in a written instrument, of ‘the time (day, month, year) when it was made or executed’ (Black’s Law Dictionary, 1991, p. 274). The adjective ‘certain’ adds a further component to the time element. Date certain relates to ascribing certainty, i.e. full confidence, faith and reliance as to the exact and precise timing of a factual circumstance or document. In the end, it amounts to an issue of evidence.

Date certain is a highly disputed concept that has long been the object of debate among Italian scholars and discussion by courts. The subject matter is not fully settled today in that case-law has taken diverse views and has shown on-going interest in the topic even in recent times. Indeed, in February 2012 the Italian Supreme Court of Cassation was addressed to establish whether the assessment of date certain may be carried out by courts *ex officio* or if the issue is to be specifically raised by a plaintiff or defendant in order for it to be judged.

Authors and case law have shown particular interest in the topic of date certain in connection with insolvency law, with a specific focus on its developments in proof of debt in bankruptcy and claw back actions.

### Date Certain under the Italian Civil Code: “Parties” and “Third Parties” to a Document

Civily, the problem of date certainty typically relates to the evidentiary value of documents. As such, its main point of reference is to be found in the rules of evidence prescribed in the Italian Civil Code, and particularly those regulating private documents executed by individuals (as opposed to notarised deeds or instruments certified by public bodies to give them credit and authenticity).

Under section 2704 of the Italian Civil Code “The date of a private document without a certified signature, is not certain nor enforceable *vis-à-vis* third parties, if not starting from the day when the document is registered, or from the decease or physical impediment of its signor(s), or from the day when the contents thereof are reproduced in a notarial instrument, or from the day

when another equally certain fact is established that determines equivalent certainty as to the prior formation of the document”. The rule provides a list of instances legally attributing certainty to the date of a private document, such as notarisation, registration with public records, or indisputable facts such as death or permanent impairment. In all such cases the date is presumed to be certain and the presumption can be overturned only by questioning its truthfulness through a specific civil action (involving the public prosecutor and characterised by criminal connotations) known as *querela di falso*.

The general provision in the second part of the rule under section 2704 of the Italian Civil Code leaves the door open for case law to establish ‘other equivalent instances’ where the date can legally be considered certain. In this regard, the Supreme Court has held that the ‘other equivalent circumstances’ to establish date certain must be “material circumstances” that are “independent of the party invoking them to ground its claim” or that cannot in any case be “manipulated” by said party<sup>1</sup>. This has led to a variety of solutions established by courts in diverse cases brought to their attention.

Firstly, a dated private document subsequently reproduced in a notarial deed is considered to bear a date certain which coincides with the date of the notarial deed. Among the ‘other equivalent circumstances’ that have been found by courts to establish a date certain are, for instance: post office rubber stamps or seals (postmarks), as long as they are affixed on the letter paper and not only on the envelope (or on the stamps glued on the envelope)<sup>2</sup>; the seal affixed on corporate books by notaries or public officers in accounting review operations thereby certifying the company’s accounting books<sup>3</sup>; the stamp placed on any document received by a public body or agency (municipalities, government bodies, etc.) for archiving and registration purposes<sup>4</sup> and to record when the document was received; the “served on ...” record of service stamp affixed by bailiffs upon serving process (bailiffs are public officers in Italy); and the “filed on ...” stamp placed by the court clerk on briefs filed before a court<sup>5</sup>. Finally, courts have held that a contract’s date certain can be established from invoices (duly registered in certified books of accounting) containing express reference to that very same prior, non-registered contract lacking date certain.<sup>6</sup>

Conversely, courts have held that no date certain is established if a private document lacking date certain mentions another private document in turn lacking date certain<sup>7</sup>, nor reproducing a private document (such as the text of a contract) in a writ of summons duly served on the defendant, even if the writ bears the stamp of the bailiff who served process<sup>8</sup>.

The development of the digital revolution in the information age has led to debate on the probative value of electronic documents. The legal relevance of the date of formation of an electronic

document assumes compliance with the technical rules on time validation prescribed by statute (so-called Digital Governance Code, Legislative Decree no. 82/2005). As with affixing a postmark to stamp the date in ink on a paper document, e-document time validation consists in generating evidence of the existence of a digital document and of the date thereof. Lawful time validation methods are listed in Presidential Decree no. 37/2009 and currently include *inter alia* timestamps (a sequence of characters or encoded time information attached to digital data) issued by a certified authority, certified email (through a reputable email authentication system) and the Electronic Post Mark (defined by the Universal Postal Convention as amended in 2004 and implemented in Italy by Presidential Decree no. 18/2007).

By establishing that the date of a private document without a certified signature “is not certain nor enforceable *vis-à-vis* third parties”, the rule under section 2704 of the Italian Civil Code is believed to indirectly make a distinction between “parties” to the private document and “third parties” who are foreign to the document. The certainty or uncertainty of the document’s date and enforceability thereof relates to such third parties.

Among those who are believed by courts to be “parties” to a document are obviously those who executed the document (signatories), but also those signing for and on behalf of others<sup>9</sup> and including both representatives and represented parties<sup>10</sup>; also, the heirs of a deceased signatory<sup>11</sup>, as well as the assignees of a party who executed the document<sup>12</sup>.

Conversely, “third parties” to a document are persons bearing an independent interest which is incompatible with the interests of the parties to the document. For instance, courts have held the following to be “third parties” to a document: the company as opposed to its shareholder with respect to an assignment of shares of an unlimited liability partnership<sup>13</sup>; the assignee of a receivable as opposed to the creditor and the debtor with respect to the debt payment receipt<sup>14</sup>; and the revenue service as opposed to the contractual parties’ agreement on the payment of the contract registration duties<sup>15</sup>.

The distinction between “parties” to a private document (such as a contract) and “third parties” who are foreign to the document is particularly relevant in insolvency law issues in connection with the role and position of the insolvency receiver.

### Date Certain in the Context of Insolvency

The concept of date certain and the distinction between “parties” and “third parties” to a document is of relevance in the context of insolvency. Particular attention is drawn on the probative value of documents filed as evidence in bankruptcy proceedings and their date, considering that as a general rule of Italian insolvency law creditors’ claims must be supported by evidence of their dating prior to the declaration of insolvency. In this scenario, authors and courts have debated on the position of the court-appointed insolvency receiver who acts in the interest of all creditors of the insolvency estate. As such, the receiver is generally considered to be “third party” in the sense depicted above, i.e. bearing an independent interest as opposed to those of each creditor (and which may ultimately be in conflict with the interest of a single creditor). Indeed, the receiver is acting to pursue the equal treatment of creditors and to seek full recovery of the insolvent estate’s assets in order to liquidate them and distribute the proceeds among the creditors in proportion to their admitted claims. The general qualification of the insolvency receiver as “third party” is coherent with the rule under section 2704 of the Italian Civil Code discussed above, which is construed as implying that (i) whoever bears an independent interest is to be

considered as “third party”, and (ii) a document lacking date certain is not enforceable *vis-à-vis* third parties.

This implies that whenever a creditor files proof of debt in bankruptcy, proof must be given that the claim bears a date certain prior to the insolvency: in other words, the documents filed as evidence to ground the claim must bear a date certain<sup>16</sup>. The same principles apply if a creditor’s claim is not admitted, in which case the creditor may challenge the denial order but evidence in support thereof shall have to be characterised by date certain<sup>17</sup>. Equally, if property was sold by the insolvent party prior to the insolvency, the purchaser’s title will prevail as long as, prior to the insolvency, the property conveyance was duly registered in public records as such bearing a date certain<sup>18</sup>.

Another instance where the date certain requirement is of relevance with regards to receivables assigned by the insolvent party prior to insolvency. Since under Italian law an assignment of receivables is perfected if the debtor is duly notified of the assignment or accepts the assignment, courts have held that the assignment of receivables is ineffective *vis-à-vis* the insolvency estate if the notice of the assignment to the debtor or the latter’s acceptance thereof are lacking date certain prior to the insolvency.

Most typically, the date certain requirement applies to claw back actions<sup>19</sup>. Italian insolvency law provides that certain payments made and transactions carried out during the period prior to the declaration of insolvency (so-called “look back” period) may be invalidated (clawed back) by the insolvency receiver whenever the act amounts to a benefit for one creditor to the detriment of the others in violation of the equal treatment of the creditors principle.

Claw back actions are initiated by the insolvency receiver who is acting in the interest of all creditors of the insolvency. This context highlights the most significant outcome of the date certain doctrine: it is unanimously believed by Italian authors and case law that any documentary evidence filed by a creditor in defending against a claw back action must bear a date certain prior to the insolvency and documents lacking such requirement will be considered ineffective *vis-à-vis* the insolvency receiver.

### Acts Carried Out by the Bankrupt Party Before and After the Bankruptcy: Payments and Formal Requirements

The concept of date certain has a number of implications in connection with specific insolvency law provisions.

Under section 44 of the Italian Insolvency Act (Decree no. 267/1942 and subsequent amendments) any acts, payments made and transactions carried out by the insolvent party after being declared insolvent are invalid and ineffective irrespective of the whether they do or do not imply a violation of the equal treatment of creditors principle (*par condicio creditorum* in Latin). In all such cases, any evidence that a specific act, payment or transaction is to be traced back to a period prior to the insolvency will be a matter of meeting the date certain test.

Under section 45 of the Insolvency Act, transactions carried out prior to the insolvency may nevertheless be invalid if formally perfected thereafter. The law provides that certain transactions require the fulfilment of formalities to be perfected, such as notarisation or registration with public records (as with real property conveyance, share transfers, mortgages, leases exceeding 9 years of duration, and others). All such transactions are deemed ineffective *vis-à-vis* the insolvency estate if the transaction was executed before the insolvency but registered or in any event formalised thereafter, as they are believed to be lacking date certain prior to the insolvency.

Procedurally, the ascertainment of (lack of) date certain characterising such transactions is devoted to the insolvency court. As anticipated above, recently the Italian Supreme Court of Cassation was addressed to establish whether the assessment of date certain may be carried out by the court *ex officio* or if the issue is to be specifically raised by the insolvency receiver (as held by previous case law<sup>20</sup>) or by the creditor relying on the transaction - supported by documentary evidence - to ground its claims (as held by lower courts in the past<sup>21</sup>).

### Filing Proof of Debt in Bankruptcy: Is Documentary Evidence Self-evident?

Under section 52 of the Insolvency Act the declaration of insolvency triggers the right of each creditor to concur with the others to be equally satisfied in their claims, by ranking and proportionately. In this regard, creditors may file proof of debt in bankruptcy and their claims will be admitted (and ultimately liquidated) as long as they are established as undoubtedly dating before the declaration of insolvency. Proof of this is sought by filing documentary evidence bearing a date certain. This approach was confirmed by the Supreme Court: in construing section 52, courts have held that the rule is to be intended as implying that only creditors with claims prior to the insolvency are entitled to be satisfied by the liquidation<sup>22</sup>. In the court's view, the rule under section 2704 of the Italian Civil Code should be applied in determining the claim's antecedence to the insolvency. This decision confirms once again that the doctrine of date certain is highly significant in Italian insolvency contexts.

### Date Certain Issues in Claw Back Scenarios

As mentioned above, another insolvency law domain where date certain assumes a substantial role is claw back. Date certain can help defendants summoned in claw back actions to support their defence in a number of instances.

As anticipated, the insolvency receiver can claw back any payments made, securities granted or transactions stipulated by the insolvent party in the look-back period prior to the declaration of insolvency. By proving the date certain, the defendant could thus argue that the relevant payment or transaction dates back to before the look-back period (and therefore would not be subject to claw back). Similarly, the defendant could counter-argue that the payments at issue were made under a valid contract executed with the insolvent party prior to the insolvency (and this would assume that the contract bears a date certain prior to the insolvency).

This is particularly useful to avoid claw back actions under section 67(2) of the Insolvency Act. According to this rule, payments of due and enforceable debts not performed with money or other normal payment systems in the look-back period are clawed back unless the defendant can show that when paid it had no knowledge of the debtor's economic downturn and imminent insolvency. In all such cases, the claw back claim can be overturned if the defendant can prove that it was unaware of the debtor's distress and that the payments – irrespective of their peculiarity – were made under the terms and conditions of payment agreed in a valid contract bearing date certain and repeatedly performed under a long-standing business relationship.

Another example is offered by contracts for the assignment of receivables. If creditor A assigns to B his claim *vis-à-vis* debtor C and the debtor pays the debt and subsequently goes bankrupt, the insolvency receiver can claw back the payment against the original creditor A irrespective of the assignment of the receivable.

However, A can counter-argue that the receivable was transferred to B under an assignment contract bearing date certain prior to the insolvency.

The above shows the importance of date certain in the context of claw back.

### Comparing Different Legal Perspectives: Is Date Certain an Issue Outside of Italy?

The date certain test is certainly a peculiarity of the Italian legal system. One may wonder how relevant the issue is in other jurisdictions or if it is of any relevance at all.

The German legal system belongs to the same civil law family as the Italian one and the same legal roots tracing back to Roman law. Nineteenth Century German doctrines and scholars influenced the implementation of Italy's post-unification civil code that led to the enactment of the current Civil Code (including the rules on evidence) and of the Insolvency Act, both dating 1942. This notwithstanding, the German rules on insolvency do not seem to contemplate specific provisions on the certainty of the date of documents and, generally speaking, there is no need to prove date certain as prescribed by Italian law. The German rules appear to be less stringent in that proof that a payment or transaction occurred before insolvency may be given with any means, including by alleging factual elements and circumstances which may demonstrate anteriority to insolvency regardless of date certification by public authorities. This position is somewhat similar to the open clause encompassed in the second part of section 2704 of the Italian Civil Code allowing case law to establish 'other equivalent instances' where the date can legally be considered certain. However, the German approach is different in that a German insolvency receiver would not automatically question the date of a document solely because it was not certified and in principle the need to prove the certainty of the date of a contract is not viewed as a prerequisite to file evidence to support a claim.

The French legal system, which for a number of historical reasons appears to bear the most similarities to the Italian one, does not seem to contemplate a date certain concept. The existence, date and validity of claims/debts under French insolvency law are matters of proof. There are no specific rules concerning the date certain within the framework of insolvency proceedings. Creditors must file a declaration of claims/debts (*déclaration de créance*) with the creditors' representative within a specific time period (2 months for French creditors). The claims/debts are verified and paid in accordance with the rules applicable to the insolvency proceeding. The notarisation or the registration of an agreement attributes certainty as to the date of the covenant giving "*date certaine*" to the document and overturning the burden of proof for challenging the date of the claim/debt. Even if this element may strengthen the claimant's position, it is not essential, in that claims/debts which do not have "date certain" can also be accepted if they are clearly evidenced by any appropriate means (signed originals of contracts, court decisions referring thereto, official certificates, etc.). It is worth noting that under French insolvency law certain payments made by the insolvent company during the look back period (*période suspecte*) can be nullified, irrespective of whether the claim/debt bears a date certain or not. Therefore, the date certain does not appear to be a requirement in French claw back scenarios.

As to the common law perspective, generally the date certain is not considered an issue.

In U.K. administration or liquidation proceedings, likewise as in Italy, filing the proof of claim entails filling in a form and filing documents in support of the claim, and the liquidator may call for

further evidence thereof and the creditor may challenge the denial of admission of the claim. However, there appears to be no basic need to prove date certain anteriority to insolvency. Under English law a contract need not be dated in order to be valid (in the presence of an offer, an acceptance, consideration and the intention to create legal relations between the parties, and delivery in the event of deeds) and if an issue should arise on the date of the document, reference will be made to other elements connected to the formation thereof in order to establish timing. It is noteworthy to point out that also under Italian law, an undated contract would be deemed valid, but in an insolvency scenario attention would primarily be drawn to the certainty of the date of the transaction and its anteriority to insolvency. In sum, the U.K. perspective would not seem to consider date certain as an issue.

Similar conclusions may be drawn on the U.S. approach to the problem. No date certain requirement is contemplated in Title 11 of the U.S. Code (Bankruptcy Code), neither in Chapter 7 (liquidation), nor in Chapters 11 and 13 (reorganisation). As far as pre-petition claims for proof of debt in bankruptcy, there is a presumption of validity of the claim and supporting evidence thereof, and in principle debtors will hardly question the date or validity of the documents filed with the claim. If timing issues do arise as to a transaction underlying a claim, U.S. law contemplates the possibility of filing affidavits to confirm specific circumstances (an option which is unknown in Italian law). Date certain issues equally do not seem to arise in claw back scenarios such as with preference actions (which allow the bankruptcy trustee to void certain transfers of the debtor's property that benefit creditors where the transfers occurred within the 3-month reach-back period from the date of filing of the bankruptcy petition) or fraudulent conveyance (a cause of action in the event of conveyance of assets made with actual intent to hinder, delay or defraud creditors).

Based upon the foregoing, although certainly a peculiarity of the Italian legal system, apparently the date certain test is not felt as an issue in the above-mentioned jurisdictions.

### Practical Tips and Conclusions

As the saying goes, *onus probandi incumbit ei qui dicit*. The Romans were concerned about the duty to prove one's claim: much in the same perspective, the date certain requirement in Italian insolvency scenarios plays a significant role both with respect to claims and to claw back defences, where the burden of proof of anteriority to insolvency lies on the creditor.

In light of the above, non-Italian companies doing business with their Italian counterparts should take the necessary precautions to ensure that their transactions are encompassed into contracts, agreements and covenants bearing a certified date. Considering that non-Italian companies may have limited access to some of the means to ensure date certain as discussed above, date certification may easily be sought through notarialisation or, if not applicable, by postmarking the relevant document. These simple safeguards should be carefully taken into consideration by foreign companies in view of ensuring a stronger protection of their rights and interests in the event of their involvement in insolvency scenarios which are not uncommon in current times where global headwinds are relentlessly slowing down the economy.

### Endnotes

1. See Supreme Court, 1st Civil Div., decision no. 7964 of 1 April 2009, in *Guida al Diritto*, 2009, 20, at 88.
2. See Supreme Court, 1st Civil Div., decision no. 5561 of 19 March 2004, in *Giust. civ. Mass.*, 2004, at 3; Supreme Court, 1st Civil Div., decision no. 6943 of 25 July 1997, in *Giust. civ. Mass.*, 1997, at 1269; Supreme Court, 3rd Civil Div., decision no. 8692 of 24 August 1990, in *Giust. civ. Mass.*, 1990, file 8; Supreme Court, 3rd Civil Div., decision no. 18 of 5 January 1983, in *Giust. civ. Mass.*, 1983, file 1; Supreme Court, 1st Civil Div., decision no. 21814 of 11 October 2006, in *Giust. civ.*, 2007, at 92. In Italy post office seals (postmarks) are affixed on stamp duties to validate them (and avoid their reuse): courts have held that the date certain of a promissory note can be established from the post office seal affixed on the stamp duties of the note (Supreme Court, 1st Civil Div., decision no. 2347 of 10 March 1994, in *Fallimento*, 1994, at 817).
3. See Supreme Court, 1st Civil Div., decision no. 4738 of 31 August 1984, in *Giust. civ. Mass.*, 1984, 8; Court of Appeal of Milan, decision of 4 April 2001, in *Banca, borsa e titoli di credito*, 2002, II, at 693; Court of Appeal of Naples, decision of 30 December 1985, in *Fallimento*, 1986, at 1211; Court of Milan, decision of 1 December 1983, in *Banca borsa e titoli di credito*, 84, II, at 383, comment by Mazzoni; Supreme Court, 1st Civil Div., decision no. 748 of 4 February 1981, in *Giust. civ.*, 1981, I, at 1702.
4. See Supreme Court, 3rd Civil Div., decision no. 4577 of 03 September 1985, in *Giust. civ. Mass.*, 1985, 8-9.
5. See Court of Milan, decision of 7 April 1986, in *Banca borsa e titoli di credito*, 1987, II, at 486.
6. See Supreme Court, 1st Civil Div., decision no. 24320 of 22 November 2007.
7. See Supreme Court, Tax Div., decision no. 11129 of 7 May 2008.
8. See Supreme Court, 1st Civil Div., decision no. 24414 of 19 November 2009.
9. See Supreme Court decision no. 2382/1971.
10. See Supreme Court, 3rd Civil Div., decision no. 15861 of 15 December 2000; Supreme Court, 2nd Civil Div., decision no. 3705 of 31 May 1988; Supreme Court, 3rd Civil Div., decision no. 3911 of 12 June 1986.
11. See Supreme Court, 3rd Civil Div., decision no. 3911 of 12 June 1986.
12. See Supreme Court, 2nd Civil Div., decision no. 13926 of 22 September 2002; Supreme Court, 1st Civil Div., decision no. 96 of 8 January 1999; Supreme Court, 3rd Civil Div., decision no. 6192 of 28 June 1994; Supreme Court, 2nd Civil Div., decision no. 1601 of 15 February 1988.
13. See Supreme Court, 3rd Civil Div., decision no. 649 of 27 January 1984, in *Foro italiano*, 1984, I, at 1615.
14. See Supreme Court, Tax Div., decision no. 7636 of 31 March 2006.
15. See Supreme Court, Tax Div., decision no. 29451 of 17 December 2008.
16. See Supreme Court, Tax Div., decision no. 4320 of 26 March 2002; Supreme Court, 1st Civil Div., decision no. 6465 of 9 May 2001; Supreme Court, 1st Civil Div., decision no. 1370 of 8 February 2000; Court of Pescara, decision of 22 March 2007, in *PQM*, 07, 1, at 75; Court of Milan, decision of 17 November 2004, in *Corr. mer.*, 2005, at 381; Court of Milan, decision of 7 October 2004, in *G. Mil.*, 2004, at 78.
17. See Court of Rome, decision of 20 January 2000, in *Dir. e prat. soc.*, 2000, n.13, at 79; Supreme Court, 1st Civil Div., decision no. 18998 of 22 September 2004; Supreme Court,

1st Civil Div., decision no. 17543 of 19 November 2003, in *Dir. e prat. soc.*, 2004, 1. 19, at 93; Supreme Court, 1st Civil Div., decision no. 520 of 15 January 2003; Supreme Court, 1st Civil Div., decision no. 4729 of 28 May 1997; Supreme Court, 1st Civil Div., decision no. 4904 of 23 April 1992; Court of Appeal of Florence, decision no. 186 of 31 January 2006; Court of Milan, decision of 2 April 2005, in *Fallimento*, 2005, at 1197.

18. See Supreme Court, 2nd Civil Div., decision no. 23784 of 16 November 2007.
19. As confirmed by case law: see *inter alia* Supreme Court, 1st Civil Div., decision no. 1413 of 22 February 1996, in *Fallimento*, 1996, at 759; Court of Genoa, decision of 5 May 1995, in *Fallimento*, 1995, at 1067.
20. See Supreme Court, 1st Civil Div., decision no. 17691 of 2 September 2004.
21. See Court of Ascoli Piceno, decision of 21 December 1982, in *Dir. fall.*, 1983, II, at 851; Court of Rome, decision of 12 May 1999.
22. See Supreme Court, Joint Divisions, decision no. 8879 of 28 August 1990.

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