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## Credit Supports for Italian Specialty Products: The Case of Prosciutto and Long-Aged Cheese

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# CREDIT SUPPORTS FOR ITALIAN SPECIALTY PRODUCTS: THE CASE OF PROSCIUTTO AND LONG-AGED CHEESE

*Jorge L. Esquirol\**

## ABSTRACT

Credit is key to business development. Access to credit and low-cost credit may mean the difference between profits and losses, sustainability and bankruptcy. These are the types of comparative advantages that national legal rules can either enable or curtail. Italian law has traditionally been quite restrictive of using non-registered assets—such as business equipment and inventory—as collateral for loans and financing. Certain premier Made in Italy products, however, benefit from special legislation that allows their stocks, warehoused during the aging process, to serve as loan guarantees. Prosciutto, cheeses, and more recently wine and spirits are part of that list. These differential laws direct a subsidy of sorts to these products. This essay will examine the Italian model of secured transactions law and consider its effects in promoting specific products, industries, and creditors.

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## I. INTRODUCTION

Secured lending laws are fundamental to a capitalist economy. They shape the supply and type of credit and allocate resources between voluntary and involuntary creditors. In individual transactions, these rules enable the transfer of assets to creditors as payment guarantees. Such guarantees may consist of real estate, personal property, and rights to payment. Both continental European and Anglo-American legal traditions permit their use, subject to differing degrees and norms. Both traditions also differentiate among types of asset guarantees: real versus personal property in the common law, immovables versus movables in civilian law, and rights to payment varyingly defined in each. Movables are further subdivided into either publicly registered or non-registered property. Examples of the non-registered kind are inventory and materials, which is the focus here.

This essay presents a general overview of the Italian legal regime on non-registered movables guarantees. It focuses, in particular, on the special legislation for inventories of origin-denominated prosciutto and long-aged cheeses. Prosciutto is cured ham that is salted and aged anywhere from nine months to three years or more. The traditional process is original to Italy and goes back thousands of years. The most famed prosciuttos are from Parma and Modena in the Emilia-Romagna region and San Daniele in the Friuli Venezia Giulia region. In turn, the long-aged cheeses specifically regulated by a special pledges law are Parmigiano Reggiano, Grana Padano, Pecorino Romano, Montasio, and Provolone Valpadana. Long-aging usually means at least six months and up to three or more years. The curing processes for both prosciuttos and cheeses require special conditions, such as temperature and humidity controls and various types of traditional techniques.

The special pledges legislation differentially benefits these industries in targeted ways. The advantages provided are limited to origin-denominated labels. That is, the assets that may serve as collateral are inventories of certified products. Only producers meeting specific production requirements may make use of the law's special provisions. Such sectoral, debtor-specific, and activity-conditioned secured lending provides a subsidy of sorts to the enterprises involved. In general, secured borrowing operates, at least in theory, to expand the sources of credit and to reduce interest costs. Its differential and targeted enablement, as provided by these special pledges, amounts to—in effect—a tool of industrial policy. It enables lower cost credit for specific industries and producers.<sup>1</sup>

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<sup>1</sup> As this essay was being prepared for publication, the Italian authorities passed special legislation in March 2020—responding to the COVID-19 crisis—to extend the prosciutto and cheese secured lending

This is certainly a defensible way to promote certain sectors of the national economy. Policy makers may want to direct additional investment to these industries. And this way of proceeding does not violate international trade law. That is the case because such legislated benefits do not fit the international treaty definition of “subsidies.” They do not confer a direct governmental benefit, the threshold requirement for legal scrutiny. Rather, it is through the operationalization of private law rules—and commercial law in this case—that private parties themselves are systematically driven to benefit favored products. In this and other ways, the Italian model of secured lending—at least until recently—is quite distinct from its U.S. counterpart and contemporary trends. It effectively provides for differential secured lending opportunities, depending on the type of debtor, type of creditor, use of funds, and—in the cases emphasized here—specialty products. Some of the advantages and disadvantages of this model are discussed below.

## II. BACKGROUND

There has been considerable international attention in recent years to liberalizing secured lending laws and asset-based guarantees. More liberal laws herald new sources of financing in developing countries and a stimulus for developed economies in crisis. All of the major international financial institutions support this formula: to wit, expanding the range of assets authorized as collateral, simplifying legal formalities in functional terms, and streamlining judicial enforcement or self-help remedies for creditors. This recipe is widely accepted as the key to lower-cost financing and unlocking the equity otherwise frozen in personal property holdings and rights to payment.

Article 9 of the Uniform Commercial Code in the United States, in force in all its constituent states, has in this respect become a global model. That is the case for several reasons. First, it covers an open-ended range of assets that may serve as collateral, regardless of conceptual distinctions like property and contract. It thus adopts a *substantive approach* to collateral. Second, all legal devices for creating non-real property guarantees—whether or not outwardly labeled a security agreement, conditional sales contract, chattel mortgage or other—are subsumed under a singular legal entitlement, called a “security interest.” It accordingly adopts a *functional approach* to

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regime to all origin-denominated products, including wine and spirits and olive oil industries. Decreto-legge, 17 marzo 2020, n.18 converted to Legge 24 aprile 2020, G.U. Apr. 29, 2020, n.110 (Decreto Cura Italia), implementing regulations by Ministero delle politiche agricole alimentari e forestali, Decreto 23 luglio 2020, G.U. Aug. 29, 2020, n.215 (It.). The new special pledges identically track the prosciutto and cheese regime. This demonstrates the continuing relevance in Italy of the approach to industrial policy discussed here.

the question of legal form. Third, the relationship between competing rights is relatively straightforward. The first filing, or first perfected, secured creditor has priority over all later secured creditors and lienholders.<sup>2</sup> Claims from unsecured creditors like unpaid employees, tort judgment holders, and trade suppliers are all subordinate. It has a decisively *pro first-voluntary-creditor* orientation. Finally, creditors do not need to involve public officials to repossess defaulted-upon collateral. They can collect assets directly from the debtor, liquidate it in a private or public sale, and satisfy existing debts all without state involvement, as long as the debtor does not subsequently bring suit under a limited set of protections. As a result, it is a significantly *privatized form of dispute resolution*.

Italy has a very different trajectory in this field. The Italian approach to personal property guarantees is much more variegated. The pledge of personal property *with transfer of possession to creditors* (possessory guarantees) has long been in existence since the first Civil Code upon the unification of Italy in 1865.<sup>3</sup> However, this legal form is of marginal interest to business owners who must make physical use of their business assets, process their raw materials, and sell their inventory. Still, it is not the case that secured lending on personal property *without* transfer of possession (non-possessory guarantees) to creditors is completely unknown. Rather, it is only available more discriminately to certain creditors, debtors, and types of activity.

Cars, ships and airplanes have always been covered by mortgage provisions in the civil code.<sup>4</sup> These assets are normally registered and, thus, are quite comparable to real property mortgages.<sup>5</sup> They need not be physically transferred to the creditor. Individual contracts for the financing of authorized types of personal property may also legally provide for non-possessory guarantees. For example, in the unique case of production equipment, the seller extending credit may include a retention-of-title clause, until the debt is paid off.<sup>6</sup> Additionally, banks are specifically eligible for a “special privilege” over business assets securing business loans. Banking legislation enables these consensual “privileges” conveyed by debtor on non-

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<sup>2</sup> There are some exceptions. For example, as against lienholders, a priority-claiming creditor must have both filed a financing statement and entered into a security agreement, or its equivalent, before the effective date of the lien. U.C.C. § 9-317. Also, creditors that lend to enable the purchase of goods or software, and that comply with certain additional requirements, may take priority over an earlier filing or perfected secured creditor. U.C.C. § 9-324.

<sup>3</sup> Codice civile [C.c.] arts. 1879–90 (1942) (It.).

<sup>4</sup> Codice civile [C.c.] art. 2810 (1942) (It.).

<sup>5</sup> Regio decreto 15 marzo 1927, n.436 (It.).

<sup>6</sup> Codice civile [C.c.] arts. 1524 and 2762 (1942) (It.); *see also* Legge 28 novembre 1965, n.1329, G.U. Dec. 14, 1965, n.311 (It.) (Sabatini Law).

registered movables in debtor's possession.<sup>7</sup> No less, collateral consisting of securities deposited at the Italian Central Bank, or other financial intermediaries, may be pledged without physical transfer.<sup>8</sup> Indeed, "financial collateral" is subject to a European Union directive since 2002.<sup>9</sup> It eliminates all formal requirements for effectiveness, except written evidence of the encumbrance.<sup>10</sup>

Most importantly, for our purposes, national legislation supports some of the prize jewels of the Made in Italy catalogue of products.<sup>11</sup> Certified brands of hams and cheeses have their own secured lending laws.<sup>12</sup> These specialty products can serve as collateral while remaining in producers' facilities undergoing the quality-defining aging process. These laws notably apply only to products identified by certified marks of origin. As such, these credit enhancement devices discriminate by product type. And they specifically support origin-certified products.

The discussion below foregrounds some of the main objectives of secured transactions law. It highlights the policy choices embodied in different legal regimes. And it considers the choices made by Italian legislators in specifically supporting geographically significant products. In this area of the law, in particular, non-uniformity with hegemonic global models is widely characterized by commentators as backward or inefficient. Indeed, minimal collateral identification requirements, a functional approach to legal form, unlimited assets capable of serving as collateral, the law's undifferentiated availability to all legal persons, and creditor self-help

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<sup>7</sup> Testo Unico Bancario, Decreto Legislativo 1 settembre 1993, n.385, [1993 TUB], art. 43, 44, 46 (It.).

<sup>8</sup> Testo Unico della Finanza, Decreto Legislativo n.58, 1998 and subsequent amendments, arts. 83-octies, 87 (It.) (requiring registration on intermediaries' books and annotations in case of withdrawal of tangible securities).

<sup>9</sup> "Financial collateral" is defined as cash, financial instruments, and credit claims. European Union Directive 2002/47/EC, Art. 2, amended by EU Directive 2009/44/EC. The parties subject to the Directives are limited to institutional creditors and non-natural person business entities.

<sup>10</sup> The EU Directive defers to national law on the formation and perfection of security interests on financial instruments. Evidence in writing in Italy, on most centrally held financial instruments, would require control and/or annotation in the financial intermediaries' books. Decreto Legislativo 21 maggio 2004, n.170 (implementing EU Directive 2002/47/EC and Decreto Legislativo 24 marzo 2011, n.43 (implementing European Union Directive 2009/44/EC). See generally Valentina Canalini, *La Nuova Disciplina dei Contratti di Garanzia Finanziaria: Commento alle Modifiche Introdotte dal D.Lgs. 24 marzo 2011, n.48*, 35 LE NUOVE LEGGI CIVILI COMMENTATE 443 (2012).

<sup>11</sup> Legge 24 luglio 1985, n.401, G.U. Aug. 9, 1985, n.187 (It.); Legge 27 marzo 2001, n.122, G.U. Apr. 17, 2001, n.89 (It.).

<sup>12</sup> L. n. 401/1985 (It.); L. n.122/2001 (It.).

remedies or streamlined enforcement are the dominant “modern” norms.<sup>13</sup> However, a more tailored and discriminating regime of collateral guarantees may well be justified. It may more disaggregatedly reflect the merits of particular policy objectives that differentially support certain industries and activities.

Rather than an inexorable march to one singular credit guarantee device, in Italy different legal instruments have evolved. Such distinct legal forms have developed over time to allow debtors to remain in possession of collateral, to benefit certain industries and products, and to protect involuntary creditors. Instead of blanket enabling legislation that grants the first-to-file (or perfect) creditor practically all priority rights over all others, a system of targeted guarantees reflects more differentiated policy objectives. Certainly, everyone (or almost everyone) values clarity and efficiency. However, there is no reason why clarity and efficiency cannot be pursued while at the same time allowing for various different asset-backed guarantees and a priority regime that incorporates competing public policies. The Italian scheme certainly has its demerits. It is, however, an example of a differentiated approach to asset preferences upon insolvency, as an instrument of economic policy and distributional objectives.

This hybrid regime has recently taken a new turn. Italy has not been immune from pressures for greater liberalization of its secured lending. In 2016, it acted by passing a new general secured transactions law. The legislation’s scope approximates the range of UCC Article 9—but not completely. All business assets may in the near future serve as collateral, enforceable against third parties without physical transfer to the creditor. In place of physical transfer, the law provides for a new public registry at the national tax office. Any type of creditor, whether bank or other financier, will be able to take advantage of the law’s provisions. However, the range of permissible debtors is still limited. It is restricted to registered business entities. And the loan must be employed for business purposes. The new law is still subject to implementing regulations. Thus, as of this writing, many specifics still remain unknown.

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13 For an insightful discussion on the aesthetics of UCC Article 9, and references to “modernity,” see Heather Hughes, *Aesthetics of Commercial Law – Domestic and International Implications*, 67 La. L. Rev. 689, 745–48 (2007).

### III. SECURED TRANSACTIONS LAWS IN ITALY

The Italian scheme of personal property guarantees consists of a patchwork of legal devices.<sup>14</sup> Some of its earliest objectives, in historical times, consisted of the alleviation of poverty. In the late fifteenth century, government-run pawn shops with no or limited interest charges emerged to supply credit to the needy. The only other option in existence at the time was usurious money lenders. These transactions involved the transfer of some valuable, and even not so valuable, item to the lending authority.

Advancing forward to the 1865 and 1942 Italian Civil Codes, the relevant provisions on pledges draw distinctly on classical Roman Law notions.<sup>15</sup> They require the dispossession of the debtor's collateral for a valid pledge, enforceable against all others. This requirement is actually a distortion of the Roman legal scheme.<sup>16</sup> Nonetheless, to this day, the civil code pledge contains an inescapable requirement of physical transfer of the collateral to the creditor or its agent.

Over time, a number of legal devices has been enacted to expand asset-based guarantees. The Code itself makes room for these special laws.<sup>17</sup> They authorize, for example, "rotating" liens over some assets like rights to payment; retention-of-title over business machinery sold on credit and held by debtor; special contractual privileges for some creditors—namely banks—over business assets in debtor's possession; and expedited enforcement by creditors in some circumstances. These facilities are not all contained in any one single legislation and do not universally apply to all creditors, debtors, and potential collateral. Rather, these legal devices are distributed in customized ways across a range of laws and potential credit operations. Below is a quick historical survey of the most prominent personal property security devices.

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<sup>14</sup> Cf. Anna Veneziano, *Italian Secured Transactions Law: The Need for Reform*, in SECURED TRANSACTIONS LAW REFORM: PRINCIPLES, POLICIES AND PRACTICE 358–59 (Louise Gullifer & Orkun Akseli eds., 2016) (describing the system as "haphazard" and "obsolete").

<sup>15</sup> ALDO SCHIAVONE, DIRITTO PRIVATO ROMANO UN PROFILO STORICO 314–19 (2d ed. 2010).

<sup>16</sup> Willem J. Zwolve, *A Labyrinth of Creditors: A Short Introduction to the History of Security Interests in Goods*, in SECURITY RIGHTS IN MOVABLE PROPERTY IN EUROPEAN PRIVATE LAW 42 (Eva-Maria Kieninger ed., 2004) ("A Roman 'pledge' might well have amounted to a non-possessory security interest.").

<sup>17</sup> Codice civile [C.c.] art. 2795 (1942) (It.).



### A. *Monte di Pietà*

Using personal property as loan guarantees has a long history in Italy. It dates back to the creation of pawn shops for the poor in the second half of the fifteenth century.<sup>18</sup> More graciously termed *Monte di pietà* in Italian or “bank of compassion” (loosely translated), it provided a last resort for those in need with at least some material possession to offer as collateral. Franciscan and Dominican religious orders heavily promoted them, attempting to drive out usurious money lenders in central and northern Italy.<sup>19</sup> The clerics were presumably heeding the biblical call against usury and interest-bearing lending.<sup>20</sup>

The first institution of this kind was established in the town of Perugia in 1462.<sup>21</sup> It was not founded by the religious orders. They merely urged the secular authorities to act.<sup>22</sup> By resolution of the town council, it was created and began operations the following year. The poor were allowed to borrow based on whatever personal items they could deposit at these compassion banks. A modest amount of interest, generally reputed at four to six percent, came to be allowed with the intervening justification of covering administrative costs.<sup>23</sup> These collateral guarantees required that the items delivered would remain in the hands of the creditors until the loan was paid off. This same Perugia model was replicated throughout central and northern Italy.<sup>24</sup>

### B. *The Civil Code Pledge*

The Roman law institution of the pledge was the model for modern codifications. In Italy, the *pegno* appears in the 1865 code<sup>25</sup> and then in substantially similar form in the 1942 code.<sup>26</sup> When the loan is greater than

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<sup>18</sup> SERAFINO GATTI, IL CREDITO SU PEGNO 21–23 (2002).

<sup>19</sup> *Id.* at 23–29.

<sup>20</sup> Commentators have noted that this had the effect, intended or not, of depriving Jewish money lenders of one of their few licit occupations at the time. *See, e.g.*, Maria Giuseppina Muzzarelli, *Monti di Pietà e Banche Ebraici Nella Predicazione Osservante: Il Caso di Bernardino da Feltre*, STUDI FRANCESCANI: TRIMESTRALE DI VITA CULTURALE E RELIGIOSA, July–Dec. 2013 at 327–42.

<sup>21</sup> *Id.* at 29–30.

<sup>22</sup> *Id.* at 26.

<sup>23</sup> *Id.* at 32; *see also* Maurizio Pipitone, *Monte di Credito Su Pegno*, in DIGESTO DELLE DISCIPLINE PRIVATISTICHE, SEZIONE COMMERCIALE 74 n.3 (1994).

<sup>24</sup> Muzzarelli, *supra* note 20, at 31.

<sup>25</sup> Codice civile [C.c.] arts. 1878–90 (1865) (It.).

<sup>26</sup> Codice civile [C.c.] arts. 2786–2807 (1942) (It.).

500 lire, raised to 5000 lire in 1942,<sup>27</sup> it requires a notarized act or private written contract of date certain, which must include the loan amount and description of the collateral.<sup>28</sup> There must be a transfer of collateral to the creditor. Enforcement requires judicial action, although by 1942 in an expedited procedure. Foreclosure may occur through public auction or transfer of property rights to creditor upon estimate by court-appointed expert, with any excess value going to debtor.

### 1. Dispossession of Debtor

The *pegno* is not unlike its common law counterpart, the pledge. There are some differences from Article 9 of the UCC. Yet, the *pegno* is not so different from that kind of UCC security interest that requires transfer of possession to the creditor, or its agents, for perfection and priority.<sup>29</sup> The *pegno*, however, requires a writing when the debt is above a minimal amount. Therefore, transfer of possession to creditor and an oral security agreement, sufficient for an enforceable priority interest under Article 9, would not be enough in Italy.

Moreover, the consensual agreement that creates this legal right is understood as a “real” contract, in the sense of a property rights-conveyance act. The 1942 Civil Code declares in the first sentence of the relevant provision that the pledge is constituted by transfer of possession to the creditor.<sup>30</sup> Physical conveyance (*traditio*) to purchaser or creditor, as definitional of “real” contracts, is essential to its formation. This requirement is thus understood not simply as a mode of perfection or declarative effect of the validity of the underlying transaction. Rather, the conveyance is a necessary aspect of the creation of the property right.

Some scholars and courts, however, have drawn a distinction between the pledge and the underlying contract that creates it.<sup>31</sup> Under this interpretation, the contract is valid as between the parties without transfer of possession to creditor. However, the creditor does not obtain rights against third parties unless there is physical dispossession of debtor. This view is not universally agreed among commentators. Still, Italian courts have interpreted

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<sup>27</sup> The official conversion rate of the lira to the euro on January 1, 1999 was £ 1,936.27: 1 €. Press Release, European Central Bank, Determination of the Euro Conversion Rates (Dec. 31, 1998), [https://www.ecb.europa.eu/press/pr/date/1998/html/pr981231\\_2.en.html](https://www.ecb.europa.eu/press/pr/date/1998/html/pr981231_2.en.html).

<sup>28</sup> Codice civile [C.c.] art. 1880 (1865) (It.); Codice Civile [C.c.] art. 2787 (1942) (It.).

<sup>29</sup> Codice Civile [C.c.] art. 2786 (1942) (It.).

<sup>30</sup> *Id.*

<sup>31</sup> See generally Enrico Gabrielli, *Pegno Digesto 4*, in XIII DIGESTO DELLE DISCIPLINE PRIVATISTICHE: SEZIONE CIVILE 329 (6th ed., UTET Torino, 1995).

conveyance not as an essential element of the formation of the contract but as a condition for its enforceability against third parties.<sup>32</sup> Over time, the emphasis has shifted from the requirement of conveyance-to-creditor to one of dispossession-of-debtor. Whether transferred to the creditor or a third-party agent or even joint possession by creditor and debtor, all become possible options.<sup>33</sup> This shift ultimately opens the door to reasoning about functionally equivalent means to achieve the same underlying ends.

Commentators widely note the basic function of dispossession as providing public notice to third parties. Dispossession informs third parties of the interest of others; namely, the possessor in most cases, the creditor. Subsequent transfer of title to a third party, acting in good faith, then becomes harder to prove, and the creditor's possession or previous possession becomes the basis for a creditor's superior rights against others that may subsequently claim it. Substitutes for the dispossession of debtor—like public registration—must, however, await the later special legislation, described in more detail below.

In any case, the classic *pegno* is still not very useful to encumber assets in regular business use, raw materials in production, or inventory for sale. Indeed, it was not until the late twentieth century that Italian law started to authorize some non-registered personal property as collateral without transfer of possession. The first forays into this area were the special legislation for the regulated origin-denominated prosciutto industry and later the cheese industry. That legislation dates back to 1985 for prosciutto and 2001 for cheeses. These will be discussed in section IV. Other legal devices, however, that merit attention are discussed immediately below.

## 2. All assets of the debtor

The 1942 Civil Code additionally provides for pledges of a “universality of personality.”<sup>34</sup> This has been interpreted, not without dispute, as extending to “all rights of the business.” The business or *azienda* is defined within the code as “the complex of assets organized by the business-owner for the operation of the enterprise.”<sup>35</sup> As such, potentially all non-real-property

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<sup>32</sup> ENRICO GABRIELLI, *IL PEGNO “ANOMALO”* 90 (CEDAM–Casa Editrice Dott. Antonio Milani ed., 1990).

<sup>33</sup> Co-custody, however, would not apply in the case where the debtor retains control without cooperation of creditor (such as the collateral remaining in place with debtor) or where the co-custody is not evident to third parties. See LUCA CAPUTO & MATTIA CAPUTO, *I PEGNI: DAL MODELLO TRADIZIONALE AL NUOVO PEGNO MOBILIARE NON POSSESSORIO* 65–66 (Dott. A. Giuffrè Editore, S.p.A. Milano ed., 2017).

<sup>34</sup> Codice civile [C.c.] art. 2784 (1942) (It.).

<sup>35</sup> Codice civile [C.c.] art. 2555 (1942) (It.).

assets may be granted in pledge in one fell swoop. This could bring in all non-registered assets, such as equipment and inventory, into a single security agreement with a general description.

However, the requirement of physical transfer to the creditor has not been relaxed in this circumstance. The creditor must still take possession. As such, the creditor or its agent would have to, in effect, take over the operation of the business.<sup>36</sup> This is the only imaginable way this option would ever have any concrete application.

### 3. Bank Advances

The Civil Code also contains a special provision on “bank advances”—which is a separately regulated form of financing in the code. Banks may take fungible assets as guarantees for these types of loans. They can consist of cash, securities, and inventory. These are known in legal scholarship as irregular pledges. They still require transfer of possession to the bank, just as in the regular civil code pledge. However, the transfer is deemed a conveyance of full property rights to the bank. Rather than a partial property right or “security interest,” the bank henceforth becomes the new owner. It has, nonetheless, an obligation to return excess amounts of equity to the debtor in the case of default and satisfaction from the proceeds of the transferred assets.

Beyond a formal technicality, this has some consequences in terms of enforcement.<sup>37</sup> Banks are not required to seek judicial intervention to authorize a foreclosure sale or subsequent transfer of full property rights to them (after default). The bank already has full property rights. It can thus act as an accounting matter to satisfy itself for the outstanding loan amount and then return any excess to debtor. Again, the unwavering requirement of transfer of collateral—applicable to a sale as well—to the purchaser/creditor causes the same difficulties attendant the regular pledge.

#### C. Contractual Clauses

Other possibilities to create non-registered personal property guarantees consist of purely private-party contractual arrangements. There are several different forms that can achieve a similar result. One type is a reservation of title clause. This withholds the transfer of ownership of the asset to debtor until the purchase-money debt is completely paid off. Additionally,

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<sup>36</sup> CAPUTO & CAPUTO, *supra* note 33, at 32–35.

<sup>37</sup> *Id.* at 41–42.

contractual clauses may be drafted to transfer a property interest to creditors upon default. Significant attention has been devoted to these arrangements by legal scholars and courts. Below is a summary of the most relevant ones.

In terms of reservation of title, or conditional sales contracts, this mode is contemplated by the Civil Code. Article 1524 specifically refers to reservation of title in the case of sales of machinery.<sup>38</sup> Such clauses are valid against third party purchasers of the machine, if the reservation of title has been publicly filed. The Code requires filing with the clerk of court in the jurisdiction where the asset is located. The creditor's superior rights are only effective if the asset remains within the filing jurisdiction at the time of attempted enforcement.

This mode of creating an asset-based guarantee has not been particularly controversial. It is limited however to machinery, to purchase-money financing, and to machinery that is not moved to another jurisdiction. The Code singularly refers to this one type of asset. A reservation of title only works from the perspective of the seller of the asset, and not a separate creditor who wants to take a property interest in existing machinery or machinery purchased from someone else or with some other creditor's funds. At a minimum, the creditor would have to engage in the legal fiction of first purchasing the machinery and reselling it to debtor, in order to reserve transfer of title.

Clauses regarding transfer of title to creditor upon default are much more controversial. It has been extensively debated in the legal scholarship and decided upon by the courts. This would be the case in which the debtor retains possession but agrees to a transfer of ownership upon the default on a debt. This is a particularly thorny issue in Italian law. The Italian Civil Code expressly prohibits contractual clauses of this nature, known as the *divieto di patto commissorio*.<sup>39</sup> Courts strike down these clauses when they are litigated.<sup>40</sup> They also strike down clauses that are perceived as functional equivalents of these contingent ownership rights.<sup>41</sup> Thus, numerous contractual arrangements have been invalidated on this basis. The rationale adopted is that the Civil Code prohibition is a measure for the protection of debtors, preservation of parity among creditors, and/or against public

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<sup>38</sup> Codice civile [C.c.] art. 1524 (1942) (It.).

<sup>39</sup> Codice civile [C.c.] arts. 1963 and 2744 (1942) (It.).

<sup>40</sup> Cass., sez. III, 3 giugno 1983, n.3800, Foro it. I 1984, I, 3, 212 (It.); Cass., sez. I, 6 dicembre 1983, n.7271, Giur. it. I 1984, I, 1, 1698 (It.).

<sup>41</sup> See, e.g., Massimo di Paolo, *Patto Commissorio*, in 13 DIGESTO DELLE DISCIPLINE PRIVATISTICHE: SEZIONE CIVILE 309 (1995).

policy.<sup>42</sup> The property transferred upon default may be of a significantly higher value than the underlying debt.

Of course, there is an easy way around this. The value of the asset, used as collateral, may be stipulated in advance. Or, a means to assess the value may be included in the contract, by designating a mode of derivation or third-party assessment. The excess value over and above the debt owed may be agreed will be returned to the debtor. These contractual clauses, or pacts, are all together valid. Commentators and courts have agreed. They are not a *patto commissorio*. Rather, they are catalogued as a *patto Marciano*.<sup>43</sup> However, private parties have reportedly hesitated due to their similarity with *commissorio* clauses and have thus avoided them.<sup>44</sup> Regardless, invalidation of these clauses may be avoided by careful drafting.

Another substantive question concerns the ability to create a floating lien contractually. In these cases, the collateral must still be held by the creditor. Provision may be made nonetheless to substitute some items for others. This may easily be the case when the creditor is holding tangible accounts receivable, negotiable instruments, or securities. This form is known in Italian legal debates as a rotating pledge or *pegno rotativo*.<sup>45</sup> The question arises whether the substitute assets trigger a new priority date, or if the substitution dates back to the first transaction. This issue is particularly relevant in the context of insolvency proceedings. The bankruptcy trustee may overturn transactions within a certain time prior to insolvency. Earlier perfected transactions would be exempt from the trustee's avoidance powers. Generally, the Italian courts have approved the *pegno rotativo*, assigning it the original perfection date.

In sum, contracting for a personal property guarantee is subject to various pitfalls. Financial assets held by creditors have been effectively turned into floating liens. However, physical assets needed for production may not be pledged, with effects valid against third parties, without dispossession of debtor. Thus, this contractual route has been of only partial utility.

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<sup>42</sup> *Id.*

<sup>43</sup> See generally Nicola Cipriani, *Appunti sul patto marciano nella L. 30 giugno 2016, N.119*, 5 LE NUOVE LEGGI CIVILI COMMENTATE 995 (2017) (It.).

<sup>44</sup> Nicola Cipriani, *Il patto marciano tra garanzia del credito ed esecuzione forzata*, GIURISPRUDENZA ITALIANA, [GIUR. IT.], July 2017, at 1727 (It.).

<sup>45</sup> Described as a "*pegno anomalo*" by the leading commentator on the question. See GABRIELLI, *supra* note 32, at 181.

*D. Special “Contractual” Privilege for Banks*

In support of the banking sector, legislation was enacted in 1993 to allow for personal property guarantees without the transfer of collateral to creditor.<sup>46</sup> This law explicitly focuses on non-registered movables. Registered property—like cars and boats—are specifically excluded. The latter are already covered by chattel mortgage laws, which do not require the physical dispossession of the debtor. However, the 1993 law is limited. It contains a number of restrictions. It circumscribes the range of lenders to banks.<sup>47</sup> It applies mostly to medium and long-term loans, and short-term loans for agricultural and fishing enterprises. It extends only to borrowers that are businesses, or any agricultural and fishing enterprise.<sup>48</sup> And, it limits potential collateral to assets used in the course of business.<sup>49</sup> Then, only the following assets may be encumbered: present and future fixtures, works and instruments; raw materials, livestock and inventory; and purchase-money financed goods.<sup>50</sup> Additionally, the credit amount guaranteed must be specified in the required documentation.<sup>51</sup>

In 1999, the list of permissible collateral was expanded to include present and future accounts receivable.<sup>52</sup> A notable feature of the law is that contractual privileges may extend over whole categories of assets.<sup>53</sup> So-called floating liens—which attach to existing and future items—may be obtained over equipment and accounts receivable. But, the same does not extend to inventory.<sup>54</sup> As such, a debtor’s after-acquired inventory is not includable under a contractual privilege. In 2013, this legislation was again

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<sup>46</sup> TUB art. 46 (It.).

<sup>47</sup> Anna Veneziano, *supra* note 14.

<sup>48</sup> TUB art. 43, 44, 46 (It.).

<sup>49</sup> *Id.* art. 46, ¶ 1.

<sup>50</sup> *Id.* (“*a*) impianti e opere esistenti e futuri, concessioni e beni strumentali; *b*) materie prime, prodotti in corso di lavorazione, scorte, prodotti finiti, frutti, bestiame e merci; *c*) beni comunque acquistati con il finanziamento concesso; *d*) crediti, anche futuri, derivanti dalla vendita dei beni indicati nelle lettere precedenti.”).

<sup>51</sup> *Id.* art. 46, ¶ 2 (Other requirements include a writing, description of collateral, names of debtor and creditor (bank or securities underwriter, subsequent to amendment allowing for latter), amount of credit and conditions, and amount of privilege).

<sup>52</sup> Modified by Decreto Legislativo 4 agosto 1999, n.342, art. 8, ¶ 1, G.U. Oct. 4, 1999, n.233 (It.).

<sup>53</sup> Commentators question whether the requirement of a very specific description of collateral conflicts with the possibility of accurately describing future collateral, presumably available in other sections. See Laura Costantino, *L’esperienza Giuridica Italiana Relativa alla Creazione di Nuove Figure di Garanzie Mobiliari Non Possessorie sui Beni dell’impresa Agricola*, in *LE GARANZIE MOBILIARI NEL SISTEMA AGRO-INDUSTRIALE* 104 (2005).

<sup>54</sup> *Id.* at 103–04.

amended: this time to expand the scope of eligible creditors.<sup>55</sup> Amended again in 2016, “qualified investors” in corporate securities—backed by asset guarantees contemplated in the 1993 legislation—may also create contractual privileges.<sup>56</sup>

The overall legislation contemplates public registration.<sup>57</sup> In fact, a double filing must be effectuated in the jurisdiction of the business location and of debtor’s residence. This is a condition for obtaining priority over third party claims over the collateral.<sup>58</sup> This is different than U.S. security interests, which are valid against third parties, even if not perfected or filed. Under the UCC, filing and perfection serve instead to prevail over *certain* third parties, such as earlier-in-time unperfected secured creditors; later filing or perfected secured creditors; and lien creditors arising post-filing of a valid security agreement.<sup>59</sup>

Remarkably, this special privilege in Italian legislation turns the traditional categories of contractual pledges and statutory liens inside out. It creates, in effect, a “contractual lien.”<sup>60</sup> The legal category of “privileges” in Italian law—whether special or general—are analogous to the legal status of statutory liens in U.S. law. They are not normally contractual devices. Rather, they are almost uniformly legislative mandates of priority for certain classes of creditors on specific types of transactions. They are not consensually negotiated for by private parties; rather, just the opposite. They are statutorily ordained for the benefit of certain classes of creditors and certain activities. The “privilege” is thus similar to a statutory lien in the Anglo-American tradition. They both arise as a matter of law. Some examples of privileges in Italy accrue to unpaid salaried employees, unpaid trade suppliers, and a host of specific types of creditors such as funeral parlors, hoteliers, and a list much too long to reproduce here. In these cases, following the defined statutory procedures, a lien simply ripens into an enforceable property claim on assets following non-payment.

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<sup>55</sup> Amended by article 12, paragraph 6, letter a), Decreto Legge 23 dicembre 2013, n.145, G.U. Dec. 23, 2013 n.300 (It.) (converted with modifications by Legge 21 febbraio 2014, n.9, G.U. Feb. 21, 2014, n.43 (It.)).

<sup>56</sup> Qualified investors are defined by reference to article 100 of Decreto Legge 24 febbraio 1998, n.58 (3), G.U, Mar. 26, 1998 n.52 (It.).

<sup>57</sup> See Codice civile [C.c.] art. 1524 (1942) (It.). Registration is with the clerk of court in the relevant jurisdiction. Other formal requirements include a notarized or private written instrument, description of the collateral, amount of the loan.

<sup>58</sup> TUB art. 46 (It.).

<sup>59</sup> U.C.C. §§ 9-317, 9-322.

<sup>60</sup> There are precedents in Italian legislation. See, e.g., Legge 5 luglio 1928, n.1760, Art. 9, G.U. Aug. 10, 1928, n.186 (It.).



In the regime under consideration, the legal vehicle for a consensual privilege is the re-engineering of a statutory lien. The traditional legal device of “special privileges” is transformed into a consensual, non-possessory pledge. It is not the quintessential statutory lien arising upon non-payment by operation of law. That would be the situation, for example, in the case of a contractor’s lien or a mechanic’s lien in the U.S. Rather, it is a statutory lien that is redefined, by inserting contractual requirements, as part of a voluntary transaction. This statutory lien is thus created through the voluntary contracting of the parties.

Of course, this mixing of the forms of statutory liens and pledges is not completely alien to a U.S. perspective. Article 9, as a feature of its history, governs “agricultural liens” in tandem with “security interests.” It is not the same thing, though, as the Italian transformation of statutory liens into consensual security interests. The formation of agricultural liens is still governed in the U.S. by independent statutory provisions following the traditional logic of statutory liens, not the UCC or the consensus of the parties. Still, many of the characteristics and effects of agricultural liens in Article 9 track security interests.

In the end, the distinction between a contractual lien and a consensual pledge may seem merely formal. That is, it may seem formally different but substantively the same. However, conceptualizing this transaction as a lien, instead of a security interest, has some quite different effects. First, as already noted, the perspective is one of recognizing a privilege or benefit to a particular class of creditors. In this case, only established banks can take advantage of the privilege. It is also limited in terms of the range of debtors and guarantors that may engage in this type of financing.

But, most importantly, casting it as a privilege also bears on the relative priority of competing claims. The law has certain features within it that bring it more in line with a property right than a statutory privilege. For example, creditors have specific rights over proceeds upon the transfer of the encumbered asset and rights over proceeds of proceeds. Nonetheless, the law of priorities is rather complex in Italy and, in practice, subject to significant discretion in bankruptcy contexts. Categorizing one of the main modes of creating consensual asset guarantees as liens, or privileges, rather than pledges or chattel mortgages affects its standing. Furthermore, the registries for these bank privileges are the local courthouses where the debtors are located. There is no central registry created.

In short, the legislative framework of specified contractual privileges versus general security interests is quite a different approach. It consists of a tailored credit guarantee for the benefit of a particular industry and registered business in pursuit of their business activities. It is not the expansive widely

enabling legislation in which any creditor may lock in any debtor's assets and obtain priority over all later creditors.

*E. The New 2016 Law*

A paradigmatic shift is the new secured transactions law enacted in 2016.<sup>61</sup> It more closely tracks the logic of Article 9 of the UCC. Commentators have noted the general influence of European Union guidelines and independent legal harmonization proposals, like Unidroit Principles.<sup>62</sup> The law also comes in the midst of troubles at Italian banks. The overall legislation, of which it is part, is meant to improve the position of banks in light of their high-risk exposure to bad debts. However, the new legislation is exceedingly concise. It contains ten sections and consists of only a few pages. The law makes reference to more detailed implementing regulation to be issued by the Ministry of Trade in consultation with the Ministry of Justice. The deadline for these rules was set a month after the law's effective date. That would have been October 2016. As of this writing, the implementing regulations have not been issued. Therefore, many important aspects remain to be seen.

Its underlying model is the civil code pledge. In fact, the new legal form is termed "pledge without dispossession," or *pegno senza spossessamento* alternatively *pegno non possessorio*. It simply appears to do away with the requirement of dispossession by substituting it with a registration requirement. The final provision of the law approvingly cross-references the civil code sections on the pledge as supplemental norms, to the extent they do not conflict. In the place of dispossession, the law mandates public registration at the *Agenzia delle Entrate*, the government agency equivalent to the Internal Revenue Service in the US. The order of conflicting claims to the same collateral is to be decided according to the chronological order of filing.

This law is indeed much broader than earlier Italian legislation. It covers any creditor, not just banks. However, the debtors are limited to *registered* businesses. The collateral must be business assets. And the loan must be for business purposes. The maximum amount that the guarantee covers must also be stated. The scope of collateral covered is similar to the bank privilege

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<sup>61</sup> Decreto Legge 3 maggio 2016, n.59, G.U. Mar. 3, 2016, n.102, converted into law by Legge 30 giugno 2016, n.119, G.U. July 7, 2017, n.153 (It.).

<sup>62</sup> See generally Pier Giovanni Traversa, *A Proposito del Pegno con Spossessamento nelle "Secured Transactions,"* 52 RIV. DIR. CIV. 215 (2006). But see Giuseppe Tucci, *Is the UCC Dead, or Alive and Well? International Perspectives: The Adequacy and Efficiency of American Commercial Law,* 29 LOY. L.A. L. REV. 1137, 1137–42 (1996) (praising the UCC).

legislation described above. It is limited to business assets. However, it authorizes a pledge over rotating assets. This would be comparable to the floating lien, sanctioned in the UCC.

Under Italian law, so-called rotating liens were first recognized in the special legislation on prosciutto, discussed below. Outside of that limited arena, the only other possibility was to include them within traditional pledges, in which the collateral was in the possession of creditor. The validity of these contractual clauses was upheld by the Italian Court of Cassation in 1998 in the context of the bank advance.<sup>63</sup> As noted earlier, they are primarily a way to substitute securities or negotiable instruments in the hands of a secured creditor with another such asset of equal value. This serves the expediency of being able to redeem or trade the pledged security while replacing it with another. Enforceability against third parties requires a writing of stated date, the amount guaranteed, and a description of the collateral.<sup>64</sup> The new law extends the scope of rotating liens beyond these cases.

Additionally, more than just a twist on the classic pledge adapted to require filing and no dispossession, the new legislation also includes a broader range of collateral. Titled securities and tangible negotiable instruments have been a regular part of civil code law. Their material form makes them, in fact, the more common form of pledged collateral. The new legislation, however, also includes intangible rights, such as accounts receivable. This was a type of asset not easily accommodated under the civil code. There is some confusion as to whether registered immaterial assets, like copyrights and other intellectual property, are covered. The law excludes registered assets. But, it is not clear whether or not the registered assets excluded are only material assets, like cars and boats, or immaterial ones as well like intellectual property rights.

Additionally, the law contains another UCC-like aspect. It contains a notable exception to the first to file rule. It recognizes what, in US law, is a purchase-money security interest. Creditors advancing funds for the direct purchase of specific items may defeat earlier filing secured creditors with a competing interest. This competing interest would likely arise from the operation of an after-acquired property clause in the security agreement. Such clauses include, as collateral, assets of a similar type subsequently purchased by the debtor. In the US, some collateral is presumed to include after-acquired like-products because of their rotating nature, such as inventory and accounts receivable. These are constantly turning over, and thus any new

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<sup>63</sup> Cass., sez. 1, 26 febbraio 1998, n.5264 (It.).

<sup>64</sup> Chiara Abatangelo, *La Clausola di Rotatività del Pegno: Requisiti di Efficacia e Profili di Responsabilità*, 8 LA RESP. CIV. 663 (2011).

items are automatically covered. In any case, a “purchase-money creditor” can also take priority, under the new Italian legislation, by notifying the earlier creditor of its purchase money credit.

Finally, the new law provides for expedited enforcement. It does not completely create a self-help remedy like the UCC, in which creditors can repossess without any judicial intervention. Rather, upon default, creditors notify the debtor who has fifteen days to hand over the collateral. If they do not, the creditor must seek judicial assistance, which is an *ex parte* procedure initiated simply on the word of the creditor. A public official assists in the repossession. The debtor subsequently has three months to file a claim for wrongful repossession, if warranted. This is actually just one of the four enforcement methods provided by the law. The second statutory option covers the case of credits and accounts receivable as collateral. They may be collected by creditors immediately upon declaring default. The two other methods require contractual provisions permissibly pre-negotiated in the security agreement. These may enable the creditor to either lease the collateral or keep the collateral in satisfaction of the debt.

#### IV. SPECIAL LAWS FOR PROSCIUTTO AND CHEESES

This brings us to the main focus of this essay. The existing security devices, discussed above, proved insufficient for the prosciutto and long-aged cheese industries. As a result, special laws were enacted in 1985 and 2001, respectively.<sup>65</sup> These laws drew on the model of the civil code pledge, with the exception of its requirement of transfer of the collateral to the creditor. They nonetheless specifically refer to the pledge and cite the relevant code provisions as supplementary norms. In general, qualifying producers may pledge prosciutto hams and long-aged cheeses, undergoing the aging process, without transfer of possession to a creditor.<sup>66</sup> To become effective, the sides of ham must be branded with an iron or indelible ink. A special mark on cheese products is not required under the implementing regulations. For both ham and cheese, however, a notation in a privately maintained register is necessary. It is in this way that creditors are able to

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<sup>65</sup> L. n. 401/1985 (It.); L. n. 122/2001 (It.).

<sup>66</sup> A February 14, 2017 report cites a 30 million euro loan by Friulovest Banca to the Consortium of San Daniele DOP prosciutto, for the purchase of raw material. See Vincenzo Romano, *Pegno: Quando L'oggetto della Garanzia Reale Sono le...Cosce di Prosciutto Crudo!*, SCR NEWS (Feb. 14, 2017), <https://www.studioconsulenzaromano.net/fisco-e-leggi/293068/pegno-quando-loggetto-della-garanzia-reale-sono-le-cosce-di-prosciutto-crudo.html>. In the cheese industry, a report of March 24, 2017 states that these guarantees are being used to back minibonds by small and medium business to institutional investors. *Formaggi DOP: Si Diffonde Il Pegno Rotativo*, QUALIVITA (Mar. 24, 2017), <https://www.qualivita.it/en/news/formaggi-dop-si-diffonde-il-pegno-rotativo/>.

obtain enforceable guarantees against third parties, such as subsequent purchasers and the bankruptcy trustee.

The legislative bill on prosciutto, first presented in 1983, explained the reasons for its introduction.<sup>67</sup> The prosciutto industry already represented a significant sector of the Italian economy in terms of exports and was expected to grow further. Approximately 300 businesses at the time were involved.<sup>68</sup> And they could not make effective use of existing secured-lending laws. The quality standards and origin designation rules that they operate under require that the prosciutto remain under the care of qualified producers. The product must be subjected to special methods, climate control, and geographic conditions. Transfer of possession to creditors or third parties is not a viable option. The closest then existing legal vehicle in 1985 was the “bank advance” discussed above.<sup>69</sup> That legislation grants banks easier enforcement rights. However, it still requires the transfer of possession to the creditor. And it is limited to banks. In terms of other alternatives, the contractual privilege, discussed above, was not available until 1993 and then only applies to bank creditors. The prosciutto sector was thus disadvantaged by limited credit options and presumably high-interest rates. Yet, sufficient capital was routinely needed to purchase raw material, i.e., the uncured hams, which must remain in production for a minimum of nine to twelve months.

The 1985 law established the special prosciutto regime.<sup>70</sup> It has been implemented by separate ministerial decrees for three of the ten or so origin-denominated prosciutto consortiums.<sup>71</sup> Specific regulations were enacted in 1985 for prosciutto di Parma and prosciutto San Daniele.<sup>72</sup> A third decree

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<sup>67</sup> Proposta di Legge 22 settembre 1983, n.525 (It.).

<sup>68</sup> *Id.*

<sup>69</sup> Attilio Guarneri, *Il Pegno si Adatta ai Prosciutti* [The Pledge is Suitable for Hams], *IL CORRIERE GIURIDICO* 903, 904 (1985).

<sup>70</sup> L. n. 401/1985 (It.).

<sup>71</sup> There are now approximately ten origin-denominated brands that could make use of the law, all but the last two listed here are organized in consortia: CONSORZIO SAN DANIELE, <https://www.proscittosandaniele.it/il-consorzio/>; CONSORZIO PARMA, <https://www.prosciuttodiparma.com/il-consorzio/>; CONSORZIO MODENA, <https://www.consorzioprosciuttomodena.it/>; CONSORZIO CUNEO, <http://www.prosciuttocrudodicuneo.it/it/home/>; CONSORZIO NORCIA, <http://prosciuttodinorcia.com/consorzio/>; CONSORZIO CARPEGNA, <https://consorzioprosciuttodicarpegna.it/>; CONSORZIO PROSCIUTTO VENETO - BERICO EUGANEO DOP, <http://www.prosciuttoveneto.it/it/consorzio/#>; CONSORZIO PROSCIUTTO TOSCANO DOP, <http://www.prosciuttotoscano.com/>; VALLE D’AOSTA JAMBON DE BOSSES DOP, <http://www.debosses.it/homepage.asp?l=1>; SAURIS, <https://www.wolfsauris.com/>.

<sup>72</sup> Decreto Ministeriale 30 ottobre 1985, G.U. Nov. 19, 1985, n.272 (It.); Decreto Ministeriale 30 novembre 1985, G.U. Dec. 5, 1985, n.286 (It.).

was passed in 2006 for prosciutto di Modena.<sup>73</sup> They all require the branding of the side of the ham with either an iron or indelible ink stamp. The specific format of the branding is approved by the ministry on a proposal by the relevant origin control entity.<sup>74</sup> Additionally, the brand must contain a set of letters that identifies the creditor. It must also contain a number with the chronological order of encumbrances of specific hams, allowing for multiple secured creditors.

The law on cheeses was passed in 2001.<sup>75</sup> It contains a few particulars relevant to the cheese industry, but it mostly references the 1985 prosciutto law. This special law for the cheese industry became effective in 2017 through one implementing decree.<sup>76</sup> It applies only to long-aged cheeses. The minimum aging period regulated is 90 days for Pecorino Romano, 120 days for Montasio and Provolone Valpadana, nine months for Grana Padano, and twelve months for Parmigiano Reggiano.<sup>77</sup> A stamp on the cheese itself is not required. Rather, they are recorded in a private registry by reference to identifying lot numbers.<sup>78</sup>

In essence, these are *sui generis* legal devices applicable solely to specified industries, producing certified products, warehoused during the aging process, and located in their producers' facilities.<sup>79</sup> Throughout the term of the encumbrance, creditors have the right to inspect the product for quality and to ensure it is processed in conformity with appropriate norms.<sup>80</sup> Debtors may not transfer possession of the encumbered hams and cheeses without first repaying the underlying debt. If they attempt to do so, creditors have an action for assignment of the product to them. The implementing

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<sup>73</sup> Decreto Ministeriale 16 novembre 2006, G.U. Nov. 24, 2006, n.274 (It.).

<sup>74</sup> Producers are almost uniformly organized into geographic area consortia. The consortia set production and quality standards and are delegated authority to patrol the use of origin designations. Codice civile [C.c.] arts. 2602 et seq. (1942) (It.).

<sup>75</sup> Legge 27 marzo 2001, n.122, G.U. Apr. 17, 2001, n.89 (It.).

<sup>76</sup> Decreto Ministeriale 26 luglio 2016, G.U. Aug. 12, 2016, n.188 (It.).

<sup>77</sup> D.M. 26 luglio 2016, Attachment (It.).

<sup>78</sup> *Id.*

<sup>79</sup> E-mail from Consorzio di Prosciutto di Parma, to author (Feb. 10, 2020, 4:10 am) (on file with author). In email requests for information to the prosciutto consortia, the Consorzio di Prosciutto di Parma reported that it believes its producer members make use of the special pledge, but they do not have specific statistics. The Consorzio di Prosciutto San Daniele reported detailed information for 2015-2019. For 2019, 28,850,000 euros in credit were guaranteed by this form of pledge. The Consorzio di Prosciutto di Modena did not respond. The Consorzio del Crudo di Cuneo informed us that its members did not use this form of credit guarantee. Understandably, in the latter case, there is no individual ministerial decree implementing the special pledges law in favor of this consortium or any of the others. The cheese consortium of Pecorino Romano reported increasing popularity of these special pledges among its producers, even changing the production cycle by allowing them to age cheeses longer (and obtain higher value added) and better time their supply to market (allowing better responses to a slow or static market). Emails on file with author.

<sup>80</sup> L. n. 401/1985, art. 2 (It.).

regulations contemplate that the collateral may be pledged to more than one creditor at the same time.<sup>81</sup>

These are not exactly floating liens. That is, they do not extend to the whole undifferentiated category of “inventory.” They do not include the proceeds of sales nor do they automatically attach to new inventory.<sup>82</sup> They allow the parties, however, to include a rotating lien clause in their security agreements and to track individual lots and substitute inventory.<sup>83</sup> The encumbrance extends to items listed on a ledger to be maintained by debtor and audited annually by several possible, designated parties.<sup>84</sup> In addition, as already noted, the encumbered hams (but not cheeses) must be individually marked with an ink stamp or iron-brand, designated by government ministry in consultation with the relevant geographical-origin trade association. The creditor may give permission to sell some items as well as to add items of like collateral. The creditor’s new collateral does not create a new pledge. Rather, it dates back to the original pledge date. Once the underlying debt is repaid, the stamp or brand must be effaced and noted in the books.

Notably, these laws do not restrict eligible creditors by type.<sup>85</sup> Secured creditors are not limited to banks or any other category. Additionally, the permissible purpose of the loans is not limited to business activities. The loan may be used for any objective. The major limitation, however, is the type of collateral allowed. It is circumscribed to certain types of hams and cheeses. Specifically, these products must be certified as to their origin.<sup>86</sup> That is, they must be hams and cheeses with a specifically designated origin by one of the authorized systems of control.<sup>87</sup> Additionally, the hams must be produced by qualified operators, as defined by the relevant laws.<sup>88</sup> And, in the case of

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<sup>81</sup> D.M. 30 ottobre 1985 (It.); D.M. 30 novembre 1985 (It.).

<sup>82</sup> Cf. Anna Veneziano, *Pegno Rotativo*, in XIX NUOVI CONTRATTI NELLA PRASSI CIVILE E COMMERCIALE 140–41 (UTET 2003) (discussing prior scholarly and judicial opinions making way for contractual clauses establishing rotating liens, i.e., the substitution of new collateral for existing collateral of the same value).

<sup>83</sup> Decreto Ministeriale 26 luglio 2016, n.188, G.U. Aug. 12, 2016 art. 1, ¶ 2 (It.).

<sup>84</sup> D.M. n.188 art. 3, ¶ 3/2016 (It.) (For San Daniele prosciutto, by the Chancellory of Prefecture of the town of San Daniele or a notary; for Parma prosciutto, by the creditor; for Modena prosciutto, by a notary).

<sup>85</sup> See Costantino, *supra* note 53, at 109.

<sup>86</sup> L. n. 401/1985 (It.).

<sup>87</sup> For example, the origin name “Prosciutto di Parma” has been protected at the Italian national level since 1970. Legge 4 luglio 1970, n.506, in G.U. July 17, 1970, n.179 (It.). Since 1992, European Union regulations on PDO (protected denomination of origin) and PGI (protected geographical indicator) marks apply. Council Regulation 2081/92, 1992 O.J. (L 208) 1. See J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GI's?*, 14 FIU L. REV. 571 (2021).

<sup>88</sup> L. n. 401/1985 (It.).

cheeses, they must consist of *long-aged* varieties.<sup>89</sup> They must be produced in compliance with the relevant regulations for such type of production.<sup>90</sup>

The principal feature highlighted here is the targeted nature of these secured-lending laws. Considering the fact that secured lending is not liberally available, the enabling features of these laws provide an edge to beneficiary products and their producers. As already noted, the previously existing credit laws—when this special legislation was passed in 1985 and 2001 respectively—did not serve these producers' particular needs and interests. Bank advances, as noted, require dispossession of the collateral. Contractual privileges, enacted in 1993, are limited to creditor banks and qualifying investors. Those loans must also be employed for a business purpose. The special legislation for hams and cheeses contains none of these restrictions. Thus, producers are able to draw on investors and partners that wish to structure their participation in the form of credit. And with this legal device, they may structure their commitment as secured credit, guaranteed by the high-value inventory in debtor's possession. Or, producers may simply draw on the equity locked up in inventory to use for other purposes, whether business or personal.

More importantly, from the perspective of Made-in-Italy labeling, the laws are limited to origin-certified hams and cheeses. Not all producers of hams and cheeses may take advantage of its provisions.<sup>91</sup> The benefits are not broadly available to all. As such, this particular legislation may be seen as an element in the legal construction of Italian branding. Along with other regulations—such as labeling rules, production norms, tax regimes, and other background rules—it structures how these enterprises are financed and operated. In this particular case, special secured-lending laws provide an advantage, consisting of credit supports for these specialty products.<sup>92</sup> In this way, interest costs are presumably lowered, and investment is incentivized in their direction. Additionally, it further promotes the production and maintenance of origin certification and quality norms. It inserts an additional party—creditors—with rights to inspect for quality and compliance with certified production norms.

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<sup>89</sup> L. n. 122/2001 (It.).

<sup>90</sup> *Id.*

<sup>91</sup> A report in 1999 estimates that the production of ham in Italy with a denomination of origin represents more than 50 percent of the ham produced. European Monetary Union and Regional Policy, *The Denominations of Origin (DOP) and Protected Geographical Indication (IGP) in the European Union: Considerations on the Regional or Autonomous Policies on Quality* (Aug. 29–Sept. 1, 2000).

<sup>92</sup> *Cf.* Legisl. ital. II Sept. 22, 1983, n.525 (It.). The legislative bill specifically states that the special law does not constitute a privilege for qualified producers. Rather, it places them on equal footing with producers not following the special quality and origin regulations.



Tracing this legally created benefit to specific industries may raise doubts about Italy's international treaty obligations. The World Trade Organization, of which most nations including Italy are members,<sup>93</sup> features a mandatory treaty as to permissible government assistance or subsidies.<sup>94</sup> Its objective is to discipline the types of subsidies that governments may provide. Specifically, the treaty seeks to curtail the use of government resources that would function to outcompete similar foreign products in international markets. A government subsidy, under the WTO Treaty, could consist of (1) a direct transfer of funds or provision of loan guarantees, (2) government revenue otherwise due that is foregone or not collected, (3) government provision of goods or services other than general infrastructure, and (4) government purchase of goods.<sup>95</sup> Such types of subsidies are considered unfair-trade practices, unless they fall under a listed exception. Additionally, the European Union regulates state assistance to business entities that may distort competition in the common market.<sup>96</sup> Analogous to WTO rules, illegal subsidies require a benefit, or exemption of liability, from the state; "selectivity" as to specific industries or producers; and effects on competition within the common market.<sup>97</sup> The latter requirement is broadly defined as any potential commercialization of benefitted products in the common market, with no requirement of actual, negative, competitive effects.

The benefit provided to origin-denominated prosciutto and cheese under the special pledge laws, however, are not of the type prohibited by international treaties. Both the WTO and the European Union define a subsidy as a government contribution or exemption from liability. These secured-lending benefits would thus not qualify under that definition. Rather, they are effectuated through the re-arrangement of private-law rules. They intervene in the background, legal constitution of the credit market rather than through an ostensible "disruption" of that market. These are not government-subsidized rates of interest or loan guarantees. They are not special tax deductions for interest expenses. Nor are they in any way state equity participation in these businesses. Rather, by constituting a differentiated credit market—through the use of tailored secured-credit

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<sup>93</sup> The European Community, at the time, was also a Contracting Party.

<sup>94</sup> Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

<sup>95</sup> *Id.*

<sup>96</sup> Consolidated Version of the Treaty on the Functioning of the European Union arts. 107–19, Dec. 1, 2009, 2016 O.J. (C 202) 1.

<sup>97</sup> *Id.*

laws—private parties themselves would set, or not, preferential interest rates or increased credit to specific industries and producers.

## V. CONCLUSION

Secured-lending laws are, no less, one of the constitutive elements of economic activity. Among the means of production, the supply of capital is most basic. The legal rules that structure its sources define the very contours of a given political economy. As such, the Italian example demonstrates a variation, characterized among other things by its credit policy. It enables differentiated credit markets. In affording certain industries and products expanded access to secured credit, it indirectly favors them with expanded credit options. In the case of prosciutto and cheese, the overall Made-in-Italy branding—required by these laws—is thereby promoted. Products bearing the label of specific Italian regions and origin are benefited by the special regime conceded to them. Additionally, the production requirements for eligibility to such certification are reinforced.

Granted, the patchwork of legal devices present in Italian legislation may at first blush appear anachronistic. It does not follow the substantive and functional approach of UCC Article 9 and similarly modeled legislation in other countries. However, it deploys the rules that construct the credit supply as another instrument of industrial policy. This use of state law does not contravene the many international strictures currently imposed on the national government's policy space. Rather, it directs benefits to certain industries not by intervention in the market but rather by the rules that constitute the market.

The very new 2016 law has the potential to erase these differentials. Whenever actually implemented, it purports to institute a more liberal and horizontal approach to secured lending. The framework of the law is still limited to lending for business purposes, a restriction not present in ham and cheese laws. And it is not clear what additional, if any, restrictions may appear in the forthcoming, implementing regulations. However, for the most part, the 2016 law will potentially undo the special advantages until now available only to certain producers. After its implementation, all ham and cheese producers—no matter the place of origin or quality procedures—may equally pledge their on-site production. This does not mean that the new law does not advance certain interests over others. It just advances different ones. After all, it was promulgated in the midst of a financial crisis and under a law intended to save *the banks*.