Essays

Build to Suit Real Estate Transactions Facing Legal Issues in Italy

Ciro Di Palma*

Abstract

The paper examines certain salient legal issues relating to 'build-to-suit' real estate transactions, whereby a professional developer purchases a plot of land from a seller and, contextually, agrees to lease the asset to be developed on said plot to one or more tenants. Although the agreements are interrelated per se (BTS transactions squarely fall within the definition of 'operazione economica') a set of conditions precedent or subsequent is the most effective contractual tool to ensure that (a) each agreement is finalized and/or terminates (as the case may be) along with the others, and (b) the risk borne by the developer is minimized (namely, prejudicial due diligence findings, failed or delayed issuance of building permits and failure to find a satisfactory lease arrangement). Some conditions, however, must be structured in compliance with specific Italian legal provisions. The approach suggested in this paper also aims to reduce the steps and documents needed to complete the transaction: the purchaser-developer should be able to immediately bind the seller of the plot and, upon signing, proceed with due diligence, the application for building permits and the negotiation of the lease. The final sections illustrate some of the peculiarities of the lease agreements in BTS transactions and suggests contractual arrangements to prevent the developer-lessor from incurring liabilities that are usually borne by contractors.

I. The Transaction

This paper outlines the main features of the real estate transaction internationally known as '*build-to-suit*' ('BTS') and examines certain salient legal issues stemming from the practice of such arrangements in Italy. The foremost aim of the paper is to ensure that none of the contractual arrangements sought by the parties conflicts with mandatory Italian legal provisions and that the transaction gives rise to no liability beyond those taken into account and accepted by the parties. While the analysis is performed from the purchaser-developer angle, the paper also investigates how, in certain cases, it is possible to accommodate the converging or conflicting needs of other parties.

A BTS transaction is an arrangement among, at least: (a) the owner-seller of an area eligible for development or re-development (green-field or brown-field); (b) a purchaser-developer, generally an enterprise engaged in the development of

* LL.M. (U.C. Berkeley), Ph.D. (Bocconi), Lawyer – Partner at Molinari Studio Legale.

real estate premises for logistic or industrial use;[1] and (c) a prospective tenant seeking a turnkey real estate asset with customized features.[2] If the developer does not carry out the construction works directly (as in the case of mere financial investors, such as real estate funds) one or more contractors will be involved - typically a general contractor which, in turn, handles the relationship with a group of sub-contractors. Contractors are, usually, involved later in the transaction when the other three parties have agreed upon all the commercial and other conditions by means of binding contracts.[3]

The scope of the transaction encompasses: (a) the sale of a plot of land by the owner to the developer, (b) the development of new premises on such plot of land (mostly logistic or industrial real estate assets) by the developer, in its capacity as new owner of the land, and (c) the lease of the newly developed premises to the tenant. In most cases, the prospective tenant sets out some construction and development requirements and may even instruct the developer to purchase a specific buildable area. In other cases (so called speculative BTS transactions), the developer has already found a plot of land that is eligible for development and agrees with the tenant (its customer) upon the specification of the construction.[4]

Build-to-suit schemes were first introduced at the beginning of the second half of the 20th century in the United States,[5] and spread into Europe over the last three decades. They have proved to be particularly successful in the last few years due to the rapid growth of the demand for logistic platforms, as a result of the booming e-commerce market. The lack of buildable areas (especially greenfield plots) and the increase in construction-related costs (including those connected with building permits procedures, which in Italy can be rather uncertain and time-consuming and often require the assistance of several consultants) significantly contributed to the trend by prompting developers to focus on those investments

[1] The paper focuses on issues and technicalities that are common in logistic and industrial developments. However, BTS schemes are used also in other sectors, such as commercial-retail, offices etc. See, among others, G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' 29(3) *Probate and Property*, 32-41 (2015); G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' 33 *GP Solo*, 62 (2016).

[2] Normally tenants in BTS transactions require specialized buildings that are not readily available on the market. For instance, Amazon requires its landlords to design and build facilities in accordance with an 'extremely specific set of specifications designed for maximum efficiency and Amazon's particular business needs'. See G.P. Bernhardt and J.E. Goodrich, 'Build to Suit Leases' n 1 above, 33.

[3] See further details in G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32-41; Ead, 'Build-to-Suit Leases' n 1 above, 62; L.M. Kelly, 'Build-to-Suit Leases: Pre-Construction and Construction Issues' 32 *Practical Real Estate Lawyer*, 29-52 (January 2016).

[4] The latter scheme is more feasible when the characteristics of the plot (location, surrounding infrastructures such as roadways etc.) are likely to meet the demand of potential tenants, thereby giving the developer reason to expect the asset to be promptly leased out. In certain cases, the developer starts the development and only at a later stage makes an agreement with the potential tenant upon the customization and finalization of the semi-built premises.

[5] See M.W.J. Thompson, 'Challenges of construction in emerging economies' 3 *Journal of Corporate Real Estate*, 250 (2000).

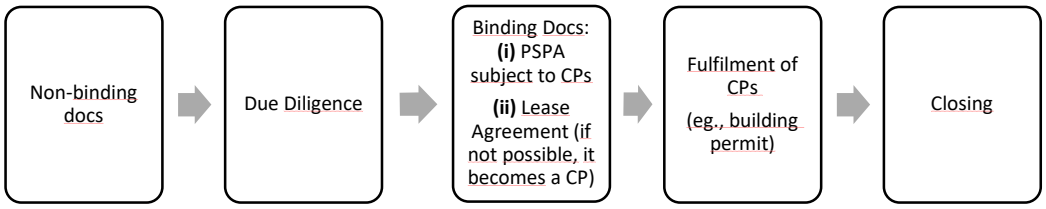
generating immediate and certain returns from the leases thus minimizing the risk of holding portfolio assets that are not income-producing immediately upon completion of the construction.

II. Main Steps and Contractual Documents of a BTS Transaction

The main steps in a BTS transaction might not materially differ from the common practice in business acquisitions, whether equity or asset deals: the process starts with the execution of non-binding documents (first step) and continues with a due diligence exercise performed by the developer (second step).[6] If none of the due diligence findings prevent the developer from moving forward,[7] the parties sign contractually binding documents (third step) and, upon fulfillment of the conditions set out therein, such as the issuance of building permits and, subject to the remarks below, execution of a lease agreement (fourth step), eventually reaching the closing of the transaction (fifth and final step).

[6] In some cases the tenant may perform preliminary due diligence, which will be confirmed by the developer (confirmatory due diligence). See L.M. Kelly, n 3 above, 34. For instance, in cases where the tenant has done its own site search (see G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33). In this scenario the developer will conceivably ask the tenant to give certain representations and warranties in the lease agreement. Moreover, in all cases where the purchaser is going to request a loan, the financing bank will double check the due diligence performed by purchaser's advisers. Finally, in a case where the parties wish to cover the risks connected with breach of seller's reps and warranties by means of title insurance and/or a warranty & indemnity insurance, the insurer will also double check the due diligence performed by the purchaser.

[7] The scope of the due diligence in a build-to-suit transaction can vary on a case-by-case basis. Normally, for the sake of efficiency, the developer tends to limit the due diligence to the areas that actually need to be covered. The due diligence exercise should be driven by the final intended destination of the plot, as planned by the developer. The aspects that are normally investigated are the identity, capacity and good standing of the seller; the title of the seller on the plot, the absence of encumbrances (and whether the purchase price suffices to pay off all liens, if any), the town planning framework/building permits, including possible issues with infrastructures and utilities and, last but not least, the environmental issues. See for further inputs R. Kymn Harp, 'Give Them Their Due: Due Diligence in Commercial Real Estate Transactions' 25 *Probate & Property*, 40-49 (2011). For more details on zoning due diligence see also D.B. Kolev and M.K. Collins, 'The Importance of the Due Diligence' 84 *New York State Bar Association Journal*, 22-29 (March/April2021); A.N. Jacobson, 'A Narrative Real Estate Acquisitions Due Diligence Checklist' 17 *Practical Real Estate Lawyer*, 7-18 (November 2001). As for environmental due diligence, in many cases the purchaser starts with a document-based legal review, which looks into (I) all documents and correspondence concerning environmental issues received during a relevant timeframe, including those received from and sent to authorities, (ii) all documentation relating to any environmental impact assessment, audit or any other similar report conducted during a relevant time frame, and (iii) all details of any criminal convictions or any environment-related charges during the relevant timeframe. Thereafter, the purchaser performs an on-site analysis, which can include several phases. For some general information on environmental due diligence (also in M&A transactions) see G.E. Wall, 'Permits and Acquisitions Environmental Due Diligence' 36-37 *Annual Institute on Mineral Law*, 43-68 (albeit focused on purchase of oil and gas producing premises); D. Williams, 'Due Diligence Investigations and Environmental Audits' 3 *Juta's Business Law*, 43 (1995); J. Civins and M. Mendoza, *Transactional Environmental Due Diligence: What Diligence is Due*, 20 *Natural Resources & Environment*, 22-26 (Winter 2006).



BTSs, therefore, are business transactions (*operazioni economiche*)[8] that require the execution of several contractual documents including, at least, a preliminary sale and purchase agreement (PSPA), a lease agreement and, in most cases, one or more construction agreements. Notably, each of the agreements reflects a contractual framework expressly regulated under Italian law.[9]

Although the process typically begins with the exchange of non-binding documents, such as letters of intent, memoranda of understanding or term-sheets, this section focuses on the binding contracts entered into at the second and third steps. At signing (a) the owner and the developer enter into a preliminary sale and purchase agreement of the plot of land, respectively as promissory seller and promissory purchaser, and (b) the developer and the tenant enter into a lease agreement in respect of the premises to be built on the plot of land.[10] It should be noted that, at times, the developer may not be ready to execute the lease agreement at signing (for instance, because it is still searching for a suitable tenant or is still entangled in lease negotiations): in such cases, as explained below, the parties envisage the execution of a lease agreement as a condition precedent ('CP') to closing.

In the preliminary sale and purchase agreement, the owner-promissory seller undertakes to sell a plot of land to the developer-promissory purchaser, who undertakes to purchase.[11] Normally the obligation of the purchaser to close the

[8] References to the category of 'economic transaction' are recurrent in the Italian literature. See E. Gabrielli, 'Il contratto e l'operazione economica' *Rivista di diritto civile*, 91 (2003); G. Gitti, 'La 'tenuta' del tipo contrattuale e il giudizio di compatibilità' *Rivista di diritto civile*, 491 (2008); G.B. Ferri, 'Operazioni negoziali «complesse» e la causa come funzione economico-individuale del negozio giuridico' *Diritto e giurisprudenza*, 318 (2008); E. Gabrielli, '*Contratto e operazione economica*' *Digesto delle discipline privatistiche* (Torino: UTET, 2011), 243 ; Id, 'Autonomia privata, collegamento negoziale e struttura formale dell'operazione economica' *Giustizia civile*, 445 (2020).

[9] The expression '*contratto tipico*' (typical contract) is used by the Italian authorities to refer to a contractual scheme which is expressly named and regulated by the legislature, as opposed to '*contratto atipico*' (atypical contract), *ie*, an agreement whose scheme is not expressly regulated by law, even though such a scheme is sometimes widespread in practice.

[10] The agreement with the contractors (most likely the general contractor) might be entered into at signing or at a later stage of the transaction, unless there is a specific need to bind a specific general contractor. For instance, the seller of the plot of land might happen to be a contractor and might wish to sell the plot upon the condition that the purchaser chooses to engage the seller as contractor in respect of the development (or part thereof).

[11] The preliminary agreement is expressly contemplated in a few provisions of the Italian Civil Code. Among others, Art 1350 sets out that the preliminary agreement is void if not executed in the same form mandated for the relevant final agreement. A real estate preliminary sale and purchase agreement might or might not be executed in a notarial form and recorded with the

transaction by means of the execution of the final deed of transfer and payment of the purchase price is subject to several conditions precedent[12] or, less frequently, terminates upon the occurrence of certain conditions subsequent.[13] Customary conditions are those related to the issuance of the building permits needed to complete the development of the plot but, as further detailed below, the list of conditions may be longer and include the successful outcome of the due diligence and/or the execution of a lease agreement in terms deemed satisfactory by the lessor. According to best practice, the conditions precedent or subsequent are coupled with the parties' undertakings within the period between signing and closing. Among others, the promissory purchaser undertakes to prepare the documentation (including projects) and carry out all the filings with the authorities in connection with the needed building permits and promissory seller undertakes to grant any authorization or proxy in this respect. The conditions enable the purchaser to minimize the risk of failed or delayed issuance of the building permits, of the due diligence revealing material issues or of the developed asset not being readily leased out. It is worth mentioning that, while the conditions are ordinarily set out in the sole interest of the purchaser, the seller may take advantage of them too. In fact, while the owner-seller bears the risk of unfulfilled conditions (*eg*, failed or delayed issuance of the building permit, material issues arising from the due diligence, failed execution of a satisfactory lease agreement), the seller may benefit from a higher purchase price where the buyer is willing to pay a premium in return for the reassurance granted by the conditions precedent (especially regarding the plot's eligibility for development).

Lease agreements in BTS transactions are complex and differ from basic leases in that the leased asset does not exist at the time of signing[14] and will be in

Land Registry. Pursuant to Art 2645-*bis* of the Civil Code if the parties record a preliminary real estate sale and purchase agreement in the Land Registry either of them will be able to enforce the agreement toward third parties. A duly recorded agreement, therefore, will prevail over a sale agreement of the same asset entered with another purchaser and recorded afterwards. The effects of the recording last for 1 year after expiration of the term provided for execution of the final transfer deed or in any case after 3 years from the recording. Pursuant to Art 2657 only agreements executed in a notarized form can be recorded in the Land Registry. For a thorough analysis of the issues related to the recording of agreements in the Land Registry under Italian law see F. Gazzoni, in E. Gabrielli and F. Gazzoni, *Trattato della trascrizione,* 1, I, (Torino: UTET, 2012).

[12] In BTS transactions the conditions are set out for the interest of one party only (the developer-purchaser) who can therefore waive the conditions and proceed with closing. The case falls into the doctrine known as 'unilateral condition'. For a thorough analysis see P. Maggi, *Condizione unilaterale* (Napoli: Edizioni scientifiche italiane, 2008).

[13] The difference is not significant since the preliminary purchase agreement does not transfer the title to the purchaser: even where conditions subsequent apply, therefore, the title does not need to shift back to the seller.

[14] Art 1348 of the Civil Code sets out the general principle that enables contracting parties to contemplate by prior agreement what they intend to do in relation to property that does not yet exist, without prejudice to specific prohibitions under applicable law. In addition to this general provision that should apply to all agreements, Art 1472 (included in the section concerning sale and purchase agreements) sets forth that in the sale and purchase agreements of future goods

place only upon completion of the construction works. Moreover, the lease might be subject to several conditions precedent or subsequent,[15] namely issuance of the needed building permits and positive outcome of the due diligence (in case the lease is executed while the due diligence is still ongoing).[16]

It may be argued that also the conditions that characterize lease agreements in BTS transactions are set out in the interest of the lessor, since they are meant to minimize the risks he may incur in the transaction. However, tenants too can take advantage of the same peculiarities: they will have the chance to request a customization of the asset under development that may be unfeasible in the case of a fully developed asset. Moreover, a longer period between signing of the lease and delivery of the built premises may be beneficial for those tenants handling the relocation of their premises (eg, termination notices set out in the previous lease).

As pointed out above, the agreement(s) with the contractor(s) are part of the transaction but not necessarily entered into at signing. In certain cases, however, either party may be interested in having a binding construction agreement already in place at signing. For instance, the developer may wish to bind a specific contractor or the seller may be available to sell the plot only upon the condition that the same seller (or an affiliated company) is appointed as contractor. In such cases the parties enter into the construction agreements simultaneously with, or before, the preliminary sale and purchase agreement.

III. Whether the Agreements Entered Within a Build-To-Suit Transaction Fall into the Doctrine of 'Linked Agreements' (*Contratti Collegati*)

Having outlined the transaction process and the relevant contractual documents, this section considers whether they fall into the category known in Italian legal doctrine as 'linked contracts' (*contratti collegati*)[17] and, if so, whether and to

the title shifts to the purchaser as soon as the good comes to existence.

[15] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 34.

[16] As more fully explained in para 3 and n 33 below, even if the agreements are linked, according to Italian case law the condition precedent or subsequent contemplated therein may not necessarily interact to the other agreement(s) if the parties did not expressly include such condition in all the agreements. Therefore, it is worth replicating the same conditions contemplated in the PSPA and vice versa. Moreover, in most cases the lease agreement mirrors the conditions precedent/subsequent contemplated in the PSPA (see n 51 below).

[17] The Italian literature on 'linked contracts' is almost endless and an exhaustive list of references cannot be included here. Among various contributions see: M. Giorgianni, 'Negozi giuridici collegati' *Rivista Italiana per le Scienze Giuridiche,* 327 (1937); F. Di Sabato, 'Unità e pluralità di negozi (contributo alla dottrina del collegamento negoziale)' *Rivista diritto civile*, I, 412 (1959); C. Di Nanni, 'Collegamento negoziale e funzione complessa' *Rivista diritto commerciale*, 279 (1977);G. Ferrando, 'I contratti collegati' *Nuova giurisprudenza civile commentata*, 1986, II, 256 ;E. Zucconi Galli Fonseca, 'Collegamento negoziale e efficacia della clausola compromissoria: il leasing e altre storie' *Rivista trimestrale diritto e procedura civile*, 827, 1085 (2000); V. Barba, 'La connessione tra i negozi e il collegamento negoziale' *Rivista trimestrale diritto e procedura civile*, 1167 (2008); R. Costi, 'I patti parasociali e il collegamento negoziale' *Giurisprudenza commerciale*, 200 (2004);

what extent this impacts on the transaction and/or on the relevant agreements.

In some cases, parties carry out a business transaction by means of several agreements: from a purely formal standpoint, each agreement has its own subject and scope and is governed by the legal provisions of the relevant contractual framework.[18] However, an holistic analysis of each of the agreements collectively, which takes into consideration the transaction as a whole, must show that they are linked to each other: therefore, all the agreements in question necessarily come into existence and cease to exist together. In other words, if, for any reason, anyone of the agreements terminates or expires, every other agreement also terminates or

A. D'Adda, 'Collegamento negoziale e inadempimento del venditore nei contratti di credito al consumo' *Europa e diritto privato*, 725 (2011); E. Zucconi Galli Fonseca, 'La clausola compromissoria nei contratti fra parti diverse' *Rivista trimestrale diritto e procedura civile*, 826 and 1169 (2019); E. Gabrielli, 'Autonomia privata' n 4 above, 445. Prominent scholars (R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 4th ed, 2016, 80) have disputed the feasibility of the category, claiming that the 'linked agreements' are actually pieces of the same contractual arrangement. This interpretation unlocks easier solutions, for instance in identifying the competent court in case of disputes concerning all the linked agreements. Sacco and De Nova also deem that this conclusion is not undermined where not all parties enter into all agreements or where only certain of the linked agreements require notarial form. The existence of group of agreements defined as 'interdependent' or interrelated' is also well known in jurisdictions other than Italy. In France the concept of interdependent contracts has always been retrieved from Art 1186 of the French Civil Code (see, among others, Cour de Cassation, Mixed Chamber, 17 May 2013, no 11-22768; Cour de Cassation, Commercial Chamber, 12 July 2017 nos 15-277703 and 15-23552) and, by virtue of the Ordinance dated 10 February 2016 for the reform of contract law, has been codified, so that para 2 of the current Art 1186 sets forth that 'Where the performance of several contracts is necessary for the putting into effect of one and the same transaction and one of them disappears, those contracts whose performance is rendered impossible by this disappearance lapse, as do those for which the performance of the contract which has disappeared was a decisive condition of the consent of one of its parties'. On this topic see also M. Mekki, 'France-The French Reform of Contract Law: The Art of Redoing Without Undoing' 10 *Journal of Civil Law Studies* (2017); V. Jentsch, 'Contractual Performance, Breach of Contract and Contractual Obligations in Times of Crisis: On the Need for Unification and Codification' 29 *European Review of Private Law*, 880 (2021). For a wider perspective on European Law, see also G. Orga-Dumitru, 'Reception of Contract Group Theory in European Contract Law' 2 *International Investment Law Journal*, Societatea de Stiinte Juridice si Administrative (Society of Juridical and Administrative Sciences), 46-68 (February 2022). Interrelated agreements are relevant in common law systems too. The topic is mentioned in some remote case law, such as *Measures Bros Ltd* v *Measures*, 1910, 2 Ch. 248 (11 May 1910) where the appointment of a director was deemed not interdependent to a non-competition arrangement. Albeit an exhaustive overview is not possible, see: US Court of Appeals, Seventh Circuit: *Davis Companies* v *Emerald Casino f/k/a HP, Inc., et al.,* 6 GLR 57 (2002) - where the existence of interdependent agreements was crucial to decide whether a party must be joined as a necessary party to a litigation; In South Wales see *Meetfresh Franchising Pty Ltd* v *Ivanman Pty Ltd*, 2020, NSWCA 27 (26 February 2020) (Macfarlan JA), where the court held that a license agreement and a franchise agreement were interdependent and, consequently, the appellant was precluded from recovering amounts due under the license agreement when it did not fulfil obligations under the franchise agreement.

[18] A. Cataudella, *I contratti. Parte generale* (Torino: UTET, 2014), 221; R. Sacco and G. De Nova, n 17 above, 79; Corte di Cassazione 3 May 2017 no 10722, 26 *Guida al diritto*, 82 (2017); Corte di Cassazione 22 September 2016 no 18585, *Giustizia Civile Massimario*, 2016; Corte di Cassazione 18 July 2003 no 11240, *Giurisprudenza italiana*, 738 (2004); Corte di Cassazione 8 February 2012 no 1875, available at www.dejure.it; Corte di Cassazione 22 March 2013 no 7255, available at www.dejure.it; Corte di Cassazione 10 October 2014 no 21417, *Diritto e Giustizia*, 13 (2014).

expires (*simul stabunt simul cadent*).[19] This means that the validity and legal effects of each agreement influences and depends upon the validity and effects of the other agreement(s), as they're all are entered into by the parties to pursue the same final scope,[20] regardless of whether each agreement is entered into by a separate document[21] or whether all the persons involved are parties to all agreements.[22]

There is no academic consensus on the minimum requirements for linked contracts: some[23] put more attention on the objective link and argue that the fact that all agreements are entered into to pursue the same final scope suffices to establish a connection; others[24] postulate that, to ascertain an actual connection among the contracts, there must be an intention on the part of the parties to that effect. Italian courts seem to take into account both the objective, functional connection between contracts as well as the intention of the parties.[25] Italian scholars note that, in some cases, the agreements can be linked through the scope of the whole transaction, even if parties do not include any specific provision in that respect in the agreement ('necessary connection').[26] This happens for instance when parties enter into a guarantee to secure fulfilment of the obligation arising

[19] C.M. Bianca, *Diritto civile*, *3. Il contratto* (Milano: Giuffrè, 4th ed, 2000), 481. Corte di Cassazione 12 December 1980 no 1007 *Giurisprudenza italiana*, I, 1, 1537 (1981); Corte di Cassazione 10 October 2014 no 21417, n 10 above, 13; Corte di Cassazione 26 March 2010 no 7305,19 *Guida al diritto*, 38 (2010); Corte di Cassazione 25 July 1984 no 4350, *Rivista notariato*, 162 (1985). Some scholars would rather use the sentence '*utile per inutile non vitiatur*', meaning that, once one of the connected agreements is deemed void, the others are useless. See, among others, V. Barba, n 17 above, 1169;

[20] F. Gazzoni, *Manuale di diritto privato* (Napoli: Edizioni scientifiche italiane, 17th ed, 2015), 826. C.M. Bianca, n 19 above, 482; P. Gallo, *Trattato del contratto*, I, *La formazione* (Torino: UTET, 2010), 180.

[21] In the opinion of C.M. Bianca (n 19 above, 482, fn 120) the case does not fall into the category of the contractual connection.

[22] Corte di Cassazione 19 July 2012 no 12454, available at www.dejure.it; Corte di Cassazione 12 October 2012 no 17405, available at in www.dejure.it; Corte di Cassazione 25 September 2014 no 20294, available at www.dejure.it; C.M. Bianca, *Diritto civile*, *3. Il contratto*, note 11 above, 483.P. Gallo, n 20 above, 188; R. Sacco and G. De Nova, n 17 above, 79.

[23] C.M. Bianca, n 19 above, 482;

[24] M. Giorgianni, note 17 above, 327;

[25] Corte di Cassazione 23 March 2022 no 9475, *Guida al diritto*, 20 (2022); Corte di Cassazione 5 March 2019 no 6323, 17 *Guida al diritto* 53 (2019); Corte di Cassazione no 20634, 2018 *Giustizia Civile Massimario* (2018); Corte di Cassazione 31 October 2014 no 23177, 10 *Guida al diritto*, 59 (2015); Corte di Cassazione 17 May 2010 no 11974, *Giustizia Civile Massimario*, 5, 761 (2010); Corte di Cassazione-Sezioni Unite 14 June 2007 no 13894, 34 *Guida al diritto*, 52 (2007); Corte di Cassazione 21 July 2004 no 13580, *Giustizia Civile*, I, 685 (2005); Corte di Cassazione 8 July 2004 no 12567, *Giustizia Civile Massimario*, 7-8 (2004); Corte di Cassazione, 23 June no 9970, *Giustizia Civile Massimario*, 6 (2003); Tribunale di Firenze 30 March 2022 no 905, available at www.dejure.it; Tribunale di Pavia 3 February 2022, no 137, available at www.dejure.it; Tribunale di Pisa 20 February 2020 no 207, available at www.dejure.it; Tribunale di Roma 15 June 2011 no 12996, available at www.dejure.it; Tribunale di Bari 22 October 2009 no 3152, available at www.giurisprudenzabarese.it (2009); Corte d'Appello di Venezia 27 January 2020 no 230, available at www.dejure.it; Corte d'Appello di Napoli, 16 April 2018 no 1686, available at www.dejure.it.

[26] V. Barba, n 17 above, 791; Corte di Cassazione 28 June 2001 no 8844, *Giurisprudenza italiana*, 1618 (2002).

from another agreement, entered between the same parties.[27] In other cases, the link depends on the parties' agreement in this respect ('voluntary connection') and, accordingly, the agreements would not be linked but for the parties' decision to make each agreement (or any of them) dependent upon the other.[28] For instance, the owner of a business located in a building might sell the going concern without the building or vice versa.[29] The two sale and purchase agreements are not necessarily connected. The parties, however, can choose to establish a connection between the two sales, so that neither can be perfected without the other. Where the link between the agreements is the result of the parties' choosing, the interpreter should focus on the parties' intentions (even when not all the parties have entered into all of the agreements)[30] resulting from the contractual provisions (not elsewhere).[31] Needless to say that the analysis is easier when the agreement is sophisticated enough to include specific clauses that show the parties' intention of tying one agreement to another. For instance, in some cases, the parties expressly exclude the right to terminate one of the agreements unless the other agreement(s) is/are also terminated.[32]

According to scholars, the link between the agreements can be mutual or unilateral. The latter occurs when only one of the agreements is dependent upon the other(s).[33] This happens when the parties enter into a guarantee to secure fulfilment of the obligations arising from another agreement:[34] indeed, termination

[27] P. Gallo, n 20 above, 181. Further examples can be easily found: the agreement between a contractor and a sub-contractor is necessarily dependent upon the agreement between the contractor and the principal, regardless of whether the parties expressly acknowledged it in the contract. Likewise, the mandate agreement between the principal and the agent this required to enable the latter to enter into a sale and purchase agreement on behalf of the principal.

[28] F. Gazzoni, *Manuale* n 20 above, 827. The scope of the transaction should be shared by all parties involved and not by only some of them. See, among others, Corte di Cassazione 4 September 1996 no 8070; Corte di Cassazione 6 February 2013 no 2839; Tribunale di Perugia, 12 June 2020, all available at www.dejure.it;

[29] Corte di Cassazione 10 October 2014 no 21417, *Giustizia Civile Massimario* (2014).

[30] Corte di Cassazione 16 September 2004 no 18655, *Giustizia Civile*, I, 1251 (2005); Corte di Cassazione 28 July 2004 no 14244, *Giurisprudenza italiana*, 1825 (2005).

[31] M. Giorgianni, n 17 above, 327; F. Gazzoni, *Manuale* n 20 above, 827. However for C.M. Bianca, n 19 above, 483 a subjective intention of the parties is not needed and the link can originate from the objective connection between the agreements. For another example see also R. Costi, n 17 above, 200, who investigates the connection between the articles of association (*patti sociali*) and the shareholders agreements (*patti parasociali*). Further examples can be found in the business transactions known as financial leasing, swap, catering, leveraged buyout etc. See V. Barba, n 17 above, 791. For a more thorough analysis of the financial leasing as group of connected agreements see E. Zucconi Galli Fonseca, 'Collegamento negoziale' n 17 above, 827.

[32] F. Gazzoni, *Manuale* n 20 above, 828. Corte di Cassazione 27 February 1976 no 638, *Rivista del notariato*, 957 (1977).

[33] F. Gazzoni, *Manuale* n 20 above, 827. R. Sacco and G. De Nova, n 17 above, 81; Corte di Cassazione, 4 March 2010 no 5195, 14 *Guida al diritto*, 61 (2010); Cassazione 8 October 2008 no 24792, *Giustizia Civile Massimario*, 1449 (2008); Corte di Cassazione 5 June 2007 no 13164, *Il civilista*, 5, 95 (2008).

[34] C.M. Bianca, n 19 above, 483.

of the guarantee does not give rise to termination of the secured agreement. Vice versa, termination of the secured agreement should trigger the termination of the guarantee. Another aspect highlighted in the academic literature is that the link can influence the effect of the interrelated agreements (at the moment they are entered into) or the expiration/termination thereof (in a time frame that follows execution).[35]

Thanks to the doctrine of the linked agreements the courts have been able to bring about solutions that reflect the actual scope of the parties and that would have been unachievable if each contract had been considered on a standalone basis. One of the conclusions drawn by the courts is that, if one of the agreements is terminated for any reason, the others are also deemed to have terminated automatically.[36] Similarly, where a party is in material breach of agreement Alfa, another party can refuse to fulfil its obligations under the connected agreement Beta, provided that Beta is linked to Alfa, pursuant to Art 1460 of the Civil Code.[37] Scholars also argue that agreement Beta might be terminated under Art 1464 of the Civil Code if the main obligations contemplated in agreement Alfa (connected with Beta) become impossible.[38] In the case of linked agreements, the condition precedent or subsequent contemplated therein may be referred also to the other agreement(s), even though the parties did not expressly include such condition.[39] Moreover, the avoidance (either *annullabilità* or *nullità*) of one of the linked agreement

[35] ibid; Corte di Cassazione 16 May 2003 no 7640, *Giustizia Civile Massimario*, 5 (2003).

[36] Tribunale di Treviso, 24 January 2019, available atwww.dejure.it; whereby the parties voluntarily agreed upon the termination of a supply agreement and the courts deemed that also the loan, entered into only for the purposes of the supply, was to be considered automatically terminated; similarly Tribunale di Brescia, 17 February 2018, available atwww.dejure.it, where in a case of the purchase of real estate and connected assumption of the mortgage debt by the purchaser the court deemed that since the purchase had been terminated the assumption of the mortgage should be terminated too. But in Tribunale di Milano, 2 December 2014 no. 14378, available atwww.dejure.it the court stated otherwise and deemed that the loan connected to the purchase would continue following the termination of the purchase.

[37] Corte di Cassazione 28 June 2019 no 17148, *Giustizia Civile massimario* (2019) (relating to the termination of a construction agreement due to the breach in a connected sale and purchase of shares); Corte di Cassazione 11 March 1981 no 1389, *Giurisprudenza italiana*, I, 1, 378 (1982); Corte di Cassazione 19 December 2003 no 19556 *Foro italiano*, I, 718 (2004); Corte di Cassazione 10 July 2008 no 1884, available at www.dejure.it; C.M. Bianca, n 19 above, 484.

[38] F. Gazzoni, *Manuale* n 20 above, 828. C.M. Bianca, n 19 above, 484; Corte di Cassazione 23 May 2012 no 8101, *Giustizia Civile Massimario*, 5, 654 (2012). But see also A. Cataudella, n 18 above, 225, for a different opinion that denies an impact on linked contract in case the link is voluntarily established by the parties.

[39] Corte di Cassazione 3 February no 1333, *Foro italiano*, I, 3085 (1993); R. Sacco and G. De Nova, n 17 above, 80; Tribunale di Savona, 17 November 2020, available at www.dejure.it where the court ordered cancellation of an insurance policy and return to the insured of the premium due to the fact that the policy was entered exclusively in connection with a loan, which did not go through; Tribunale di Crotone, 6 May 2020 no 390, available at www.dejure.it, whereby the court allowed the defendant (purchaser of a car and borrower in the relevant loan, provided by the same company) to raise the same objection used for the sale and purchase agreement also for the loan.

should give rise to the avoidance of the others.[40] Last but not least, Art 1363 requires that the interpretation of the contract as a whole will apply not only in respect of one agreement but in respect of all the connected agreements.[41]

Let us return to the initial issue - ie, whether the agreements that are part of a BTS transaction qualify as 'connected contracts' under the above discussed doctrine.

It is undisputable that there is a link between (at least) the PSPA and the lease agreement, regardless of whether the parties expressly acknowledged such connection by means of express provisions. In many cases the lease agreement and the construction contract can also be seen as two related transactions. This link is clear if we look at the transaction from the standpoint of the developer, who enters into the sale and purchase agreement on the basis of an expectation to lease the developed land while entering into the lease agreement on the assumption of completing the acquisition of the plot.[42] Undoubtedly, the developer would not sign the sale and purchase agreement without an arrangement on the lease of the premises and, vice versa, would not enter into the lease agreement without a seller's commitment to sell the developable area. However, the connection is not as obvious for the other parties nor it is meant to protect their interest. The owner-seller only wishes to sell its land and receive the purchase price, all while not even aware of the lease agreement. Likewise, the tenant expects delivery of the built premises and might not be aware of the fact that, at signing, the developer has not acquired title over the plot yet. While the connection is rather obvious if we look at the actual scope of the overall transaction for the developer, the other parties might be unaware of it without proper express provisions in the contractual documentation. There is, therefore, a possible information asymmetry between the developer, on the one hand, and the seller and the tenant, on the other hand, with substantial consequences in terms of contractual liability: for instance, the tenant may deem the developer liable for breach of the lease even if the latter's inability to perform is due to a breach by the seller (causing, in turn, the developer's inability to complete the purchase). In such cases, the developer could raise the

[40] V. Barba, n 17 above, 791; F. Gazzoni, *Manuale* n 20 above, 828.P. Gallo, *n* 20 above, 188. Corte di Cassazione 6 July 2015 no 13888, *Giustizia Civile Massimario*, 2015; Tribunale di Palermo, 7 July 2022 no 3012, available atwww.dejure.it, whereby a loan agreement was entered into for the sole purpose of handling a bank account with a negative balance, which was the result of a void bank account agreement. Therefore, the Tribunal deemed also the loan null and void. Corte d'Appello di Napoli, 22 July 2022 no 3452, available at www.dejure.it; Corte d'Appello di Milano, 8 January 2020 no 40, available at www.dejure.it; Corte d'Appello di Napoli, 10 May 2019 no 2564, available at www.dejure.it; Corte d'Appello di Trento, 5 March 2009 no 46, available at www.dejure.it.

[41] R. Sacco and G. De Nova, n 17 above, 80. The Italian legislature has recognized the doctrine of linked agreements since, in the consumer contracts regulations, the abusive nature of certain provisions must be evaluated taking into consideration all of the clauses of the agreement and of any connected agreements.

[42] As mentioned by C.J. Circo, 'Construction Law Apologetics, in Symposium: Construction Law in the Legal Academy' 75 *Arkansas Law Review*, 343 (2002), typically developers/project owners for the operation of their business enter into a 'network of bilateral agreement' that creates a 'complex web or interdependent contracts'.

contractual link between the sale and purchase agreement and the lease agreement as a defense against the tenant's claim[43] - however, the burden of proof would be on the developer to demonstrate that the tenant was aware of the causal connection between the lease and the purchase. It is, therefore, important to consider how information asymmetry can be corrected, ensure that the developer is exempted from liability and does not have to bear the burden of proof concerning the other parties' awareness of the contractual connection. Italian case law clarifies that, especially in cases where not all the persons involved are parties to all the connected agreements and where the connection is only in the interest of certain parties, it is necessary that the party who has an interest in the connection includes clauses in the agreements that expressly confirm the existence of the connection, so that all the other parties can acknowledge and accept that all the agreements are entered into to pursue the same final scope.[44] Both the preliminary sale and purchase agreement and the lease agreement should clearly state that the undertaking to purchase, as well as the obligation to lease, are linked to each other and that, accordingly, the developer will be released from its undertaking to close the purchase in case the lease agreement is not executed. Similarly, the lease agreement should clearly set out that the obligation to lease the developed premises is dependent upon the completion of the purchase. In other words, in light of the fact that the contractual connection may not be entirely clear for some of the parties, it is advisable that the information gap be filled by means of express provisions to be included in both the PSPA and the lease agreement. The same would apply to the construction agreement, in case it is entered into before closing. There are different types of contractual provisions to that end and we might wonder which is the most effective. Both the sale and purchase and the lease agreement might be conditional upon the execution of the other: neither would be binding unless and until the other is executed. Should the condition not occur, none of the parties (including, of course, the developer) would be liable for breach.[45] The condition can protect the interest of the developer and also represent a fair arrangement for the other parties: the occurrence or non-occurrence of the condition is, in fact, beyond the control of the developer, who cannot arbitrarily walk away from the transaction. Another relevant provision is the termination right (*recesso*), whereby the developer can terminate either agreement where the other is not executed by a certain date. In such cases, the agreements would be binding and effective as soon as they are

[43] Corte di Cassazione 10 September 2015 no 17899, *Giustizia Civile Massimario* (2015), clarifies that the contractual connection can be ascertained by the judge (regardless of the claims and the defenses of the parties) and can be also raised as a defense by the defendant.

[44] Corte di Cassazione 24 March 2014 no 6879,27 *Guida al diritto*, 78 (2014); Corte di Cassazione 6 February 2013 no 2839,15 *Guida al diritto*, 43 (2013); Corte di Cassazione 16 February 2007 no 3645, *Obbligazioni e contratti*, 7, 648 (2007); Tribunale di Trani, 15 September 2022 no 1318, available at www.dejure.it; Corte d'Appello di Milano, 8 June 2017 no. 2545, available at www.dejure.it.

[45] But notably this should not undermine the duty of good faith of all the parties before the satisfaction of the conditions, pursuant to Art 1358 of the Civil Code. See also para 4.3 below.

executed. A termination right at-will would, however, expose the other parties to the discretionary decision of the developer, whose position would be similar to the holder of an option right. In the case of termination rights that are subject to a justified cause, the other parties would not be exposed to arbitrary decisions of the developer but there would be a risk of a dispute as to whether the termination right is sufficiently justified. In light of the above, it can be argued that, while a termination right at-will is the best option for the developer, the condition is a more fair option and acceptable for the other parties. It is worth mentioning that the conditions (either precedent or subsequent) would operate regardless of whether the agreements are connected.[46] This should exempt the interpreter from investigating the connection. The inclusion of clear conditions in the agreement facilitates the contract's interpretation: the interpreter does not need to investigate the actual scope of the agreements to understand whether they are connected to each other or not. The Italian High Court has clarified that conditions can be included to ensure that – *(a)* the effectiveness or the termination of the agreements is subject to a circumstance that would otherwise be irrelevant (or beyond the contractual arrangement), or *(b)* the contractual arrangement reflects the actual and final scope pursued by the parties.[47] The latter scenario occurs when the developer uses the condition to compel the other parties to acknowledge the actual scope of the transaction from his perspective and, therefore, avoid any disputes (along with the relevant burden of proof)[48] as to whether the other parties were aware of the link between the agreements.

IV. Customary Conditions Precedent or Subsequent: Satisfactory Completion of Due Diligence; the Issuance of the Permits Needed to Build the Premises; and Confirmation that the Impact Fees Due to the Municipality Do Not Exceed a Given Threshold

Real estate developments entail risks and costs that can be assessed only at an advanced stage of the process, and in many cases this will be only once the due diligence analysis has been completed, the authorities have issued the building permit and have determined the impact fees (or at least have notified a preliminary

[46] The conditions are accessory to the main contractual arrangement (they may be or may not be part of it) and need to be expressly included in the agreement. If a condition precedent or a condition subsequent has not been satisfied, this does not give rise to any liability for breach of the agreement, without prejudice to the duty of good faith while the conditions are pending. Among others, see Corte di Cassazione 18 March 2002 no 3942, *Contratti*, 443 (2003); Corte di Cassazione 4 September no 9388, 1999 and Corte di Cassazione 13 December 1979 no 6505, both available at www.dejure.it. Moreover, while a condition precedent is pending the agreement does not have any legal effect (see P. Gallo, n 20 above, 181).

[47] Corte di Cassazione 3 February no 1333 n 39 above.

[48] According to Corte d'Appello di Milano 8 June 2017 no 2545 n 39 above, the link between the agreements must be certain.

positive opinion thereon) and the tenant has signed a binding and final lease agreement.

Due diligence findings, the issuance of the building permits and the amount of the related impact fees, as well as the negotiation and execution of a satisfactory lease agreement are inherent hazards that can be minimized[49] by means of a set of conditions precedent or, less frequently, conditions subsequent[50] in the PSPA[51] so that the developer is obliged to close, or can walk away from the transaction, as the case may be, only upon the occurrence of certain circumstances.[52]

Notably the conditions are drafted so as not to affect the effectiveness of the entire preliminary purchase agreement but only the obligation to proceed with the closing of the transaction. Accordingly, the other contractual provisions (interim management, confidentiality, etc) are immediately binding between the parties upon signing of the PSPA.[53]

The issuance of a building permit (or similar administrative measures) can be easily governed by means of a condition precedent or subsequent.[54] The condition

[49] It is generally accepted that the conditions precedent or subsequent are a contractual tool to manage the risks connected to the agreement. Among others, see A.C. Nazzaro, 'La condizione nel contratto tra 'atto' e 'attività', in F. Alcaro ed, *La condizione nel contratto* (Padova: CEDAM, 2008), 376.

[50] The choice between a condition as precedent or subsequent is not a substantial matter when the condition is included in a preliminary purchase agreement, since the execution of the agreement does not cause title to transfer from the seller to purchaser. In both cases the agreement does not transfer the title to the purchaser. The choice becomes more relevant when the condition is part of a final transfer agreement since, in the case of a condition subsequent, the execution of the agreement would entail transfer of the title to the purchaser and subsequent termination would require another transfer of the title back to the purchaser. See, among others, Corte di Cassazione 4 November 1994 no 9062, available atwww.dejure.it. On the other hand, a final sale and purchase agreement subject to a condition precedent would not cause any shift in the title to the purchaser unless and until the condition occurs. See Corte di Cassazione 20 January 1983 no 573, and Corte di Cassazione 11 July 1981 no 4507, both available atwww.dejure.it.

[51] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32 and 37. The authors of this work also point out that all the provisions of the construction contract that allow delayed completion of the works should mirror the clauses of the lease agreement, so that the landlord does not incur any liabilities that depend upon the contractor or are otherwise beyond his control (*eg*, force majeure). See also L.M. Kelly, n 3 above, 38.

[52] It is generally accepted that while (most of) the due diligence findings can be handled through representations, warranties and indemnities in the agreements, the risks concerning the signing of a lease agreement and the issuance of building permits can only be minimized through conditions precedent to closing.

[53] See also para 3 of Art 1354 of the Civil Code, which refers to cases where an illegal or impossible condition has been stipulated in respect of single clauses or arrangements and not in relation to the entire contract. E. Giacobbe, *La condizione*, in N. Lipari and P. Rescigno eds, *Diritto civile*, III, *Obbligazioni*, II, *Il contratto in generale* (Milano: Giuffrè, 2009), 427.

[54] The prevailing case law confirms that parties can make the effectiveness or the termination of the preliminary sale and purchase agreement subject to the execution of a town planning agreement, the issuance of a building permit or the completion of similar administrative procedures. Among others, see Corte di Cassazione 30 October 1992 no 11816, available at www.dejure.it, Corte di Cassazione 2 October 2014 no 20854, available at www.dejure.it, Corte di Cassazione 18 April 2018 no 9550, *Guida al diritto*, 69 (2018), Corte di Cassazione 16 June 2008 no 1781, 50 *Guida al diritto*, 109 (2008). See also Corte di Cassazione 20 December 1980 no 5757 and 5 June 2008

can also capture the amount of the impact fees,[55] ie the parties expressly agree that the condition is not deemed to have been satisfied if the amount of the impact fee exceeds a given threshold. In other cases, the purchaser does not want to withdraw from the transaction where the impact fees are higher than expected and, therefore, would rather negotiate a price adjustment mechanism that kicks in if there is an increase in the administrative fees connected with the development.

While the issuance of building permits or other authorizations does not give rise to specific concerns in terms of enforceability of the relevant condition, the other customary conditions, such as outcome of the due diligence and the execution of a satisfactory lease agreement demand additional remarks in respect of their compliance with, and enforceability under, Italian law.

1. Whether the Closing of a BTS Transaction Can Be Conditional on the Satisfactory Outcome of Due Diligence

It is not uncommon to include a provision in the PSPA stipulating that the obligation of the purchaser to close the transaction is conditional upon the satisfactory outcome of due diligence. Developers often also include it in the lease agreement.[56] Such provisions are normally set out as conditions precedent or subsequent and it should be considered whether this conflicts with mandatory provisions of Italian law.

A first issue is whether the condition is compliant with Art 1353 of the Civil Code, which sets out that an agreement (or the termination thereof, in the case of a condition subsequent) can be subject to the occurrence of uncertain *and future* event(s). Indeed, the due diligence process is meant to analyze circumstances and issues already in place at signing, albeit unknown to the purchaser: in those cases, the developer appoints its advisors to perform an analysis of the position and to uncover any issues that already exist at signing, even though the parties (or at least the party in the interests of whom the condition has been inserted) are unaware of them.[57]

Certain sources of authority[58] stick to the wording of Art 1353 and confirm

no 14938, available atwww.dejure.it.

[55] This is the case unless the amount of the impact fee can be quantified at signing, for instance when there is already a town planning agreement in place and there are no uncertainties concerning the amount of the impact fees due by the developer in connection with the project.

[56] See n 52 above.

[57] A rather similar example occurs when parties agree upon the sale and purchase of a piece of land subject to the condition that the land is (*and will not be*) included in the parceling plan of the Municipality. Indeed, the plan is already in place but the parties would rather reach an agreement and assess at a later stage whether the land is included in the plan or not. See M.C. Bianca, n 19 above, 544.

[58] Corte di Cassazione 29 September 2007 no 20591, *Nuova Giurisprudenza Civile Commentata*, I, 450 (2008), which however refers to a circumstance that was known to the relevant contractual party (a bank, which was supposed to know whether part of a mortgage loan had been repaid). See also Corte di Cassazione 2 April 2009 no 7994, and Corte di Cassazione 22 November 1974

that a condition can only be validly established if the event set out therein is future and uncertain. The underlying rationale for this interpretation is that an event that has already happened when the parties sign the agreement cannot be uncertain and, therefore, the parties have no legitimate interests in justifying the condition.[59]

Others[60] argue that, even in cases where the circumstances set out in the condition are already in place, they can be interpreted (or otherwise treated) as conditions to the agreement as long as the relevant circumstance was not known by the contractual party/parties (ie, if it comes to the knowledge of a relevant party only at a later stage, such as upon conclusion of the due diligence). The parties indeed might be interested in entering into a binding agreement and, thereafter, performing an assessment of the circumstances that are already existing. In such cases, regardless of the classification as a condition, the provision can be subject to the norms arising under 1353 et seq of the Civil Code.

In BTS transactions the interpretation of the agreement should lead to the second solution, as it is well known that certain due diligence findings require a deep and time-consuming level of analysis that is normally beyond the capability and knowledge of the purchaser (who, in fact, chooses to appoint specialized advisors to perform the necessary investigations). The interests of the purchaser, who wants to bind the seller to sell before appointing the advisors in charge of the due diligence and before incurring any relevant costs, seems to deserve protection by means of a binding agreement subject to conditions. Moreover, irrespective of the legal doctrine one may be inclined to support, lawyers should be wise enough to draft the conditions concerning outcome of the due diligence so as to resist all objections concerning the fact that the event set out therein is already in place and could have been ascertained before signing. For instance, an ideal contractual clause should include an acknowledgment that the due diligence will investigate circumstances that are not known to the buyer, that the knowledge of such circumstances is not readily available and requires substantial time for work and analysis. Moreover, the text of the clause might wisely refer not to current circumstances that have already occurred but rather to the delivery, by the

no 3783, both available at www.dejure.it. E. Calice, 'Condizione dell'estinzione del mutuo ed obbligo di cancellazione dell'ipoteca iscritta' *Nuova Giurisprudenza Civile Commentata*, 10450 (2008). Among the authors, see P. Rescigno, 'Condizione' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), VIII, 787.

[59] P. Gallo, n 20 above, 1188.

[60] R. Sacco and G. De Nova, n 17 above, 1081, who refers to all cases where the condition has already occurred but its happening has been ignored by the parties, when the event has already happened but is not known by the parties and those circumstances when the event has already happened but is not known by one of the parties (presumably the party in whose interest the condition is included in the agreement); P. Gallo, n 20 above, 1189; A. Cataudella, n 18 above, 117; C. M. Bianca, n 19 above, 544. Notably the project 'European Code of Contracts' (available at https://tinyurl.com/ys65twvn (last visited 30 September 2024)) clarifies in Art 55 that the parties can include in the agreement a condition referring to a past or present event provided that the parties ignore whether such event has happened. For the case law see Corte di Cassazione 10 April 2017 no 9186 and Corte di Cassazione 10 January 1991 no 187, both available at www.dejure.it.

appointed advisors to the purchaser, of due diligence reports that do not outline substantial issues (ie, a future event).

A further concern stems from Art 1355 of the Civil Code, which states that any agreement is null and void where it assigns a right or imposes an obligation subject to a condition (precedent)[61] and the occurrence of that condition depends on the discretion of the seller or the debtor. The provision is meant to prevent the parties from binding themselves to a fictitiously binding agreement where one of them is bound but the other is not and who can unilaterally opt for the effectiveness or termination thereof (*ie*, 'I will sell if I wish' or 'I will pay if I wish' etc).[62] It can be argued that the condition also falls within the category contemplated by Art 1355 of the Civil Code on the basis that the obligation to close the transaction depends solely on the positive opinion of the purchaser on the outcome of the due diligence (*ie*, 'I will purchase if I am satisfied with the due diligence report'). The purchaser is in the position to unilaterally decide whether the outcome of the due diligence is 'satisfactory' or 'positive'. This should suffice to prevent lawyers from drafting or accepting generic clauses that do not refer to the ascertainment of specific circumstances within the scope of the due diligence. It is, therefore, advisable for lawyers to identify the scope of the due diligence and the issues on which the investor expects to receive a clear green light from its advisors.[63] For instance, the relevant clause might envisage a due diligence report confirming at least that – *(a)* the soil has not revealed pollutants exceeding the acceptable thresholds provided under applicable law,[64] *(b)* the area is not encumbered with

[61] See C.M. Bianca, n 19 above, 550, who points out that the provision of the Civil Code exclusively refers to conditions precedent and not subsequent. For A. Cataudella, n 18 above, 150 a condition subsequent which gives one party the discretionary right to walk away from the agreement should be interpreted as a withdrawal right. A similar opinion is expressed by P. Gallo, n 20 above, 1185. For some references to this in the case law see Corte di Cassazione 20 November 2019 no 30143, available at www.dejure.it, where the Supreme Court confirms that the condition is merely discretionary where the occurrence or non-occurrence of the event is not connected with any interest of the relevant party other than the decision whether to proceed or not with the arrangement. Same position results from Cassazione 30 September 2008 no 24235, *Guida al diritto*, 47, 76 (2008).

[62] C.M. Bianca, n 19 above, 550, specifies that in such cases the parties should enter into an option agreement to better reflect the real intention of the parties. Prof. Bianca further explains that the interpreter should look into the clauses to understand whether the intention of the parties was to set up an option arrangement or one of the parties intended to create a unilateral way out from the agreement, which is the case contemplated by Art 1355 of the Civil Code. A. Cataudella, n 18 above, 149.

[63] See also L. Renna, *Compravendita di partecipazioni sociali* (Bologna: Zanichelli, 2015), 82, who seems to agree upon the opportunity to identify specific issues that will be addressed by the due diligence.

[64] According to D. Williams, 'Due Diligence Investigations and Environmental Audits' 3*Juta's Business Law*, 43 (1995), as regards the environmental issues the condition precedent should be fulfilled when the relevant report confirms that 'the property complies with all conditions, limitations, obligations, prohibitions and requirements contained in any environmental legislation and that there are no facts or circumstances apparent to such auditor which may lead to any breach of any environmental legislation or to any liability (both civil and criminal) arising from activities which

easements or other liens that would prevent or have an adverse impact on the development project, *(c)* the town planning framework of the area does not prevent development of the area in line with the project of the purchaser, etc. This specific drafting should prevent the seller from objecting that the occurrence of the condition entirely relied upon the discretionary judgment of the purchaser. Moreover, this should also enable the party who wants to avail itself of the condition to reject all objections concerning the genericity of the event contemplated by the condition.[65]

The delineated approach ensures that the outcome of due diligence can be included in the agreement as a condition precedent, so that in case of any 'red flag' issues the purchaser can step away from the transaction. This also suggests that purchasers replace the sequence seen in para 2, above, with a more effective one whereby the parties enter directly into a binding contractual document, typically a PSPA, which includes a full set of conditions precedent, including the outcome of the due diligence. Once the due diligence is completed and the other conditions are fulfilled (eg, building permit and lease agreement) the parties can proceed to closing and enter into a final sale and purchase agreement (see the scheme discussed in para 4.2 below).

2. Can the Closing of a BTS Transaction Be Conditional on the Execution of a Satisfactory Lease Agreement?

A further, rather frequent condition to closing in BTS transactions is the execution of a lease agreement between the promissory purchaser and a third party prospective tenant, which, at this stage, may still be unidentified:

> 'I will close the purchase upon the condition that I find a suitable tenant of the premises and with whom to agree upon a lease including satisfactory

cause pollution or which have other detrimental effects on the environment'. A different approach is envisaged by E.F. Braunreiter, 'Getting to Clean: Post-Closing Remediation' 10(1) *Probate and Property*, 38-43 (1996), where the author refers to a scenario where the seller undertakes to carry out remediation works post-closing and accordingly is entitled to access rights (whether through an easement or personal right) as long as the remediation works are ongoing.

[65] It is generally accepted that the event contemplated in the condition should be not only future, uncertain (pursuant to Art 1353 of the Civil Code), possible, non-illegal (pursuant to Art 1354of the Civil Code) but also sufficiently determined. Among others, Corte di Cassazione 9 February 1995 no 1453 (available at www.dejure.it) confirms that the event contemplated in the condition precedent or subsequent should be determined and specific. In addition, an *obiter dictum* in Tribunale di Brescia, 21 April 2021, *Contratti*, 180 (2022), deems that a generic reference to the 'completion of the sale process' (without any further details of the asset on sale, a deadline, etc) does not suffice to allow the relevant contracting party (a realtor) to walk away from an agreement with an architect and refuse to pay the last instalment of its remuneration. The issue of generic conditions is often connected with a unilateral condition since the relevant party might speculate on the genericity of the condition in order to arbitrarily decide that the condition in the agreement has been satisfied or to enable it to walk away from the bargain due to the alleged non-occurrence of the (generic) condition. See also the comment on the decision by G. Corradi, 'Brevi note in materia di condizione meramente potestativa' *Contratti*, 186 (2022).

terms and conditions'.

In principle, the execution of an agreement between one of the contractual parties and a third party does not amount to a 'mere discretionary condition' under Art 1355 of the Civil Code, provided that the event therein contemplated (eg, execution of an agreement, including the lease agreement between the developer and tenant) does not depend upon the unilateral discretion of the purchaser. In the above example, the purchaser has a substantial interest in the execution of the lease agreement[66] and execution depends not only on the conduct of the purchaser-lessor but also on the conduct of the other party (the prospective tenant).[67]

Nonetheless, it can be argued that if the condition includes a generic reference to the lease agreement having to be deemed 'satisfactory' by the purchaser (or similar expressions), the purchaser could easily exploit it to walk away from the transaction: the purchaser could arbitrarily treat a lease agreement that is consistent with market practice as being unsatisfactory and this would suffice to enable it to withdraw from the deal. The parties may obviate this concern by drafting conditions that clearly identify the main terms and conditions of the lease agreement, including, for instance, the rent per square meter, the minimum term, the termination rights, etc.

In the case of an ongoing negotiation at the time of signing, the parties can refer to such negotiation. Ideally, the condition will refer to a non-binding proposal for a term sheet that the purchaser already executed with the potential lessee. The proposed draft should also enable the purchaser to easily reject any objection concerning their good faith while the condition was pending. If the basic conditions of the lease agreement are clearly identified in the PSPA, the purchaser will be able to show that the negotiation led to terms and conditions that were worse than those contemplated in the condition.[68] Furthermore, where the terms and conditions

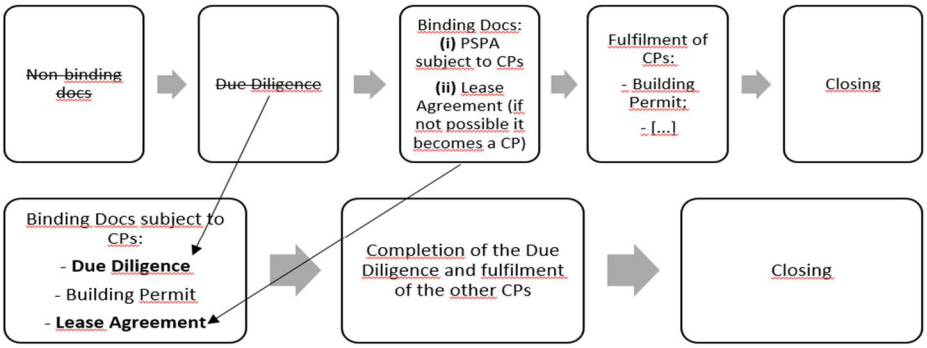
[66] Indeed, it is generally understood that a condition precedent or subsequent may depend on the will of a contracting party provided that it is linked to objective or subjective criteria that have an impact on such will. In other words, the relevant party should have an interest that goes beyond the mere convenience of extinction of the contractual obligation. A. Cataudella, n 18 above, 150 effectively argues that, unlike in cases contemplated in Art 1355, the non-occurrence of the condition is not without costs for the interested party. Likewise, C.M. Bianca, n 19 above, 550, clarifies that the relevant party interested in the condition, reserves the right to decide on the occurrence of the event set out as a condition and not directly on the effect of the agreement. See also Corte di Cassazione 26 May 2022 no 17158, available at www.dejure.it; Corte di Cassazione 20 November 2019 no 30143, Corte di Cassazione 26 August 2014 no 18239, Corte di Cassazione 21 May 2007 no 11774 and Corte di Cassazione 20 June 2000 no 8390, all available at www.dejure.it.

[67] The conditions are classified as, *inter alia* – (i) accidental, ie, depending on events or third party acts, (ii) potestative, ie, depending on the conduct of one of the contracting parties, or (iii) mixed, where the occurrence of the condition depends on a combination of (i) and (ii). When the fulfilment of the condition depends not only upon the intention of the party but also upon additional circumstances (in the example in question, the conduct of the prospective tenant) the condition is considered 'mixed'. See P. Gallo, n 20 above, 1182.

[68] It must be noted that a condition is deemed to have occurred when, on the basis of a practical assessment, the event that actually occurred is consistent with the event set out in the agreement. See C.M. Bianca, n 19 above, 557.

of a 'satisfactory' lease agreement are not clearly identified, the conduct of the purchaser might be judged in light of the good faith principle under Art 1359 (but on this aspect, see the para below).

The above considerations - enabling the developer to address the risks connected to the transaction by means of properly drafted conditions concerning the due diligence and the achievement of a satisfactory lease agreement - suggest that the purchaser is replacing the sequence seen in para 2 with a more effective one. This entails the parties entering directly into a binding contractual document, typically a PSPA, comprising a full set of conditions precedent, including the outcome of the due diligence and the execution of a lease agreement in terms acceptable to the lessor. Once the due diligence is completed, the lease is executed and the other conditions are fulfilled (eg, building permits) the parties can proceed to closing and enter into a final sale and purchase agreement.



The new sequence reduces the number of steps from five to three, as well as the necessary contractual documents, and enables the purchaser to immediately bind the seller and proceed with the filing of the application for a building permit immediately thereafter, while it is performing the due diligence. This reshaped sequence can be recommended especially in cases where due diligence is expected to be rather standard and there are no issues to be verified on a preliminary basis.

3. Conduct of the parties while the conditions are pending

The solutions proposed above must be coordinated with the principle under Art 1358 of the Civil Code, whereby, as long as the condition is pending, each contracting party[69] behaves in good faith to protect the other party's interest in the agreement. The rule is a corollary of the wider good faith principle in contract law under Arts 1175 and 1375 of the Civil Code,[70] which covers the period starting

[69] The Civil Code proviso applies to any party that assumes an obligation or assigns a right subject to the condition precedent or any party that acquires a right subject to condition subsequent; the rule is widely held to express a general principle that applies to all contracting parties where the agreement is subject to condition(s).

[70] Corte di Cassazione 13 July 1984 no 4118, available at www.dejure.it; Corte di Cassazione

from the execution of the agreement and ends whenever the condition occurs (or does not occur, in the case of conditions subsequent).[71] The conduct of each party should be consistent with the general duty of care in contractual relationships, requiring each party to protect, within reason, the counterparty's expectation for the condition to occur: the relevant party, therefore, should not perform (or omit to perform) activities that undermine or prevent the occurrence of the condition.[72] The principle is broad enough to cover both acts and omissions, whether attributable to willful misconduct or negligence, as long as there is –

(a) a causal relationship between such acts or omissions and the non-occurrence of the condition, and

(b) provided that they affect the interest of the other contractual party in the agreement.[73]

The underlying rationale is that any such act or omission would alter the parties' understanding of the risks connected with the condition.

It is worth noting how the good faith principle does not give rise to an obligation to procure the fulfilment of the condition and, accordingly, any non-compliance with it does not give rise to any liability for breach of the contract.[74]

As a consequence of the good faith principle (Art 1359 of the Civil Code), if a party prevents – whether wilfully or not[75]– the occurrence of the condition, then it is deemed to have occurred (or not occurred, in the case of a condition subsequent). Moreover, the rule is intended to prevent a party from behaving unfairly with the aim of altering the risks that have been agreed upon in the condition.[76] Furthermore, this provision may not apply to certain conditions whose occurrence depends upon the decision of one party (eg, 'I will hire you if I open

10 March 1992 no 2875, available at www.dejure.it; Corte di Cassazione 2 June 1992 no 6676, *Giustizia Civile Massimario*, 6 (1992); Corte di Cassazione 3 April 1996 no 3084 *Giustizia Civile*, I, 2259 (1996); Corte di Cassazione 27 February 1998 no 2168, *Contratti*, 553 (1998); Corte di Cassazione 22 March 2001 no 4110, available at www.dejure.it; Corte di Cassazione 18 March 2022 no 3942, *Contratti* 443 (2003); Corte di Cassazione 12 February 2013 no 3207, available at www.dejure.it; Corte di Cassazione 19 June 2014 no 14006, 36 *Guida al diritto*, 56 (2014); Corte di Cassazione 22 August 2022 no 25085, *Giustizia Civile Massimario*, 2022, Corte di Cassazione 2 July 2002 no 9568, *Rivista Notariato*, 483 (2003); Cassazione 28 December 2020 no 29641, available at www.dejure.it, Cassazione 2 January 2014 no 12, available at www.dejure.it. C.M. Bianca, n 19 above, 553. For a wider analysis of the good faith principle in Italian contract law see A. Albanese, 'Buona fede contratto legge' *Europa e diritto privato*, 31 (2021). For specific references to the general principle of good faith in the case law see, among others, Tribunale di Catania, 24 April 2020 no 1421, available at www.dejure.it.

[71] P. Gallo, n 20 above, 1197.

[72] ibid 1198.

[73] ibid 1205.

[74] C.M. Bianca, n 19 above, 554. Where a party fails to comply with the good faith principle while the conditions are pending the other cannot claim for damages including the loss of profit that would have arisen from the transaction.

[75] Among others, A. Cataudella, n 18 above, 146 as well as R. Sacco and G. De Nova, n 17 above, 1090, deem that the provision applies regardless of the negligence.

[76] R. Sacco and G. De Nova, n 17 above, 1091.

an office in town', or 'I will sell my apartment if I decide to move out', etc).[77] If the parties expressly envisaged that the occurrence of the condition depended on the choice of one of them, then it is fair that the relevant party is free to choose the occurrence of the event. However, after an analysis of the relevant case law it must be noted that the principle still applies when (i) the agreement expressly includes parties' undertaking in connection with the occurrence of the conditions (eg, a party undertakes to request a loan from a bank, to file an application with the Municipality for a building permit, etc)[78] and (ii) when the nature of the condition fairly implies a party's duty to cooperate in order to ensure the occurrence of the condition.[79] Hence, if the obligation to close is conditional upon the issuance of the building permit, it is implied that the parties intended to manage the risks connected with the failed or delayed issuance of the building permit and not the risks connected with the failed or delayed filing of the application with the Municipality. Likewise, in cases where the parties agree that the closing of the transaction will be subject to positive due diligence, it is implied that due diligence needs to be performed (the relevant party has no option but to procure performance of the diligence). Similarly, where the closing is subject to the execution of a lease agreement, it is implied that the purchaser needs to look for a potential tenant and/or negotiate the terms of the lease in good faith (and perhaps allow the other party to cooperate in the search).

V. The Ambiguous Role of the Developer: Lessor or Contractor?

As outlined above, the lease agreement between the developer and the tenant is entered into at an early stage in the process, in many cases when the former has

[77] Corte di Cassazione 27 February 1980 no 1379, available at www.dejure.it; Corte di Cassazione 6 March 1996 no 5343, available at www.dejure.it; P. Gallo, n 20 above, 1206; A. Cataudella, n 18 above, 145 e P. Rescigno, 'Condizione' n 58 above, 796.

[78] But in this case the non-compliance would amount to breach of the agreement. See Corte di Cassazione 18 November 1996 no 10074; Corte di Cassazione 22 April 2003 no 6423, *Contratti* 1096 (2003); Corte di Cassazione 28 July 2004 no 14198, *Giustizia Civile*, 2559 (2004); Corte di Cassazione 24 November 2010 no 23824, Corte di Cassazione 14 December 2012 no 23014, Cassazione 11 September 2018 no 22046, all available at www.dejure.it; Corte di Cassazione 11 September 2018 no 22046, *Foro italiano*, 1, I, 258 (2019); Tribunale Milano 19 February 2019 no 1567, available in www.dejure.it; Tribunale di Modena 7 June 2019 no 900, available at www.dejure.it; Cassazione 28 August 2020 no 18031, *Guida al diritto* 43, 48 (2020); Corte d'Appello di Torino 7 December 2020 no 1209, available at www.dejure.it; Corte di Cassazione 31 May 2022 no 17571, *Guida al diritto*, 31-32 (2022).

[79] Corte di Cassazione 22 April 2003 no 6423, *Giustizia Civile*, I, 2793 (2004); Corte di Cassazione 19 August 2004 no 19000, *Giustizia Civile*, I, 1247 (2005); Corte di Cassazione-Sezioni Unite 19 September 2005 no 18450 *Giurisprudenza italiana*, 6, 1141 (2006) Corte di Cassazione 10 August 2007 no 17647, *Giustizia Civile* 10, I, 2204 (2008); Corte di Cassazione 14 December 2012 no 23014, n 78 above; Corte di Cassazione 28 March 2014 no 7405, available at www.dejure.it; Corte di Cassazione 31 March 2014 no 7509, available at www.dejure.it; Corte d'Appello di Palermo16 June 2017 no 1157, available at www.dejure.it; Corte di Cassazione 28 December 2020 no 29641, available at www.dejure.it; Corte d'Appello di Milano 22 June 2021 no 1938, available at www.dejure.it; Corte d'Appello di Messina, 31 March 2022 no 208, available at www.dejure.it.

not yet acquired full title over the plot (although a party to a preliminary purchase agreement) and the development of the premises that are supposed to be leased has not begun. Unlike standard leases, here the leased asset does not exist at the time of the signing and will be in place only after significant construction works. For this reason, part of the agreement includes an array of contractual provisions dedicated to the activities to be performed before delivery of the leased premises, which are not found in plain 'vanilla' leases, such as the:

- lessor's obligations and deadlines concerning the completion of the development (landlords are normally responsible for the design and construction, with the exception of certain late-stage fittings that are carried out by the tenant),[80]

- tenant's right of early access and inspection of the premises before delivery,

- customization details required by the tenant,[81]

- final inspection and delivery of the premises (including punch list, if any),[82] and

- last but not least, power of the tenant to request changes to the design initially agreed.[83]

Such provisions might lead interpreters of the agreement (including judicial courts) to treat it (also) as a construction contract instead and not (only) as a lease,

[80] L. M. Kelly, n 3 above, 43. The targeted completion date is essential to both the landlord and the tenant. The former will be entitled to the rents upon delivery of the completed building, while the latter will need to relocate by a certain date or face holdover rent. See G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32.

[81] No one wants to bear the cost of the design and specification if the deal is not completed; therefore, at the signing of the lease agreement, it is usually the case that the parties are not ready to include a comprehensive design in the agreement. Hence they normally attach a masterplan and a list of specifications to the agreement. See L. M. Kelly, n 3 above, 29-52. For G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32, construction terms are normally included in the body of the lease agreement. The authors also point out that the lessee's requirements 'can range from adding minor finish items to a full design and construction of a new building'. See also Id, 'Build-to-Suit Leases' n 1 above, 62.

[82] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 38-39. In some cases, tenants will have to carry out additional works after substantial completion of the premises by the landlord (shelfs, security systems etc). If such works cannot be performed before delivery the parties may agree upon a free rent period.

[83] Tenants are normally entitled to request change orders as long as they are feasible. However, if the change order gives rise to additional costs the tenant should bear them, normally by means of an increase in the rent that amortizes the rate over the term of the lease (given the fact that the landlord is normally liable for cost overruns). Moreover, where the change causes a delay in substantial completion, the landlord may consider adding wording to the agreement that states that, if a tenant change order delays the completion beyond the targeted completion date, the rent commencement date shall nonetheless be the date it would have been had the change order not been accepted. See G.P. Bernhardt and J. E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33, according to which, in the American experience, tenants are responsible for all repairs and maintenance and in return often ask the ability to freely alter or expand the building and to assign the lease. On the contrary, in Italy, maintenance is normally handled by the lessor, which charges the tenant back for the relevant costs. Moreover, normally the tenant can ask for a deviation from the original project only as long as the construction is ongoing but is not entitled to alter or modify the building once it is delivered, nor is it entitled to assign the lease without the landlord's consent. See also L.M. Kelly, n 3 above, 36.

so that the laws concerning construction agreements are also deemed to apply, including additional rights of the tenant (which may be considered as the principal), obligations and responsibilities of the lessor (which may run the risk of being considered as a contractor). It is worth considering, therefore, whether the ambiguities that lead the interpreter to include the laws governing construction agreements can be removed, so that lessors do not qualify also as contractors and are not exposed to a number of additional claims from, and responsibilities towards, the lessee.[84]

If taken individually, leases and constructions agreements do not have much in common. Leases provide for one party (the landlord) to deliver to the other party (the tenant) a specific asset and to allow the tenant to use it, in return for the payment of a specified rent for a period of time (Art 1571 of the Civil Code); on the other hand, in construction agreements, the contractor, undertakes to carry out the construction of a building or to provide services, using his own company and management, at his own risk, in return for the payment of a fee as consideration (Art 1665 of the Civil Code).[85] The purpose of each agreement is different: in the lease agreement, the tenant pays the rent to use the asset for a given term, while in the case of a construction agreement the principal pays the fee as consideration to the contractor in return for the completion of the works, regardless of the usage of the asset. However, the two contractual arrangements show more similarities when the asset to be leased is not yet developed,[86] since the lease includes technical details about the asset, a deadline for its completion and delivery, given that the rent could change based on variations to the construction as needed or agreed upon between the parties.[87] These aspects might lead the judge to classify the agreement as one of construction rather than lease, significantly impacting the lessor, *eg*:

- the power of the principal to request changes to the project;[88]

[84] Remarkably, American practitioners tend to classify the lease entered into as part of a build-to-suit transaction as a 'Synthetic Lease', ie, 'both a construction contract and a lease combined into one document'. See G.P. Bernhardt and J. E. Goodrich, 'Build-to-Suit Leases' n 1 above, 32-41; Ead, 'Build-to-Suit Leases' n 1 above,62. See also S.J. Adelkoff, 'Documenting a Synthetic Lease Transaction' 15(4) *Practical Real Estate Lawyer*, 9-24 (July 1999).

[85] G.B. Campobasso, *Diritto Commerciale*, 3, *Contratti titoli di credito procedure concorsuali* (Torino: UTET 2014), 37; G. Zuddas, in A. Luminoso ed, *Codice dell'appalto privato* (Milano: Giuffrè, 2016), 3; V.D. Cutugno, *La negoziazione degli appalti privati* (Milano: Giuffrè, 2018), 7; L.V. Moscarini, *Il contratto di appalto e le figure affini*, in V. Cuffaro ed, *I contratti di appalto privato* (Torino: UTET, 2011), 5.

[86] The legality of an agreement with a non-existent asset has not been debated in Italian law. The Civil Code includes express rules on the sale of a 'future asset' (an asset that has not yet come into existence at the signing of the agreement) but it is undisputed that other contractual arrangements, such as leases, can also have a future asset as their object (and/or even an asset that is not yet the ownership of the lessor at the moment of signing).

[87] A. Luminoso, n 85 above, 61.

[88] The Civil Code includes three Articles dedicated to project modifications. Those agreed between the parties are set out in Art 1659 of the Civil Code. Changes that characterize the regulation of the construction agreements are those necessary (Art 1660) and those ordered by the principal (Art 1661). In the case of changes needed to comply with the applicable law or to address defects in the project, the contractor is obliged to proceed (and be remunerated for the additional work) - unless

- the right to request a review of the consideration;[89]

- the power of the principal to perform extensive checks on the construction works while they are still ongoing and to request the termination of the agreement where any non-compliance is not fixed within a reasonable period of time;[90]

- the warranties that the contractor is required to give pursuant to Art 1667, which are more extensive than those required from the lessor under Art 1578 of the Civil Code,[91] and those due to collapse, risk of collapse or material defects of real estate assets under Art 1669 of the Civil Code;[92] and,

- last but not least, the withdrawal right of the principal while construction is continuing, pursuant to Art 1671 of the Civil Code.[93]

Italian scholars and courts have made considerable efforts to investigate contractual arrangements that include elements belonging to different types of agreement; the analysis brought to the creation of the category of the 'mixed contract', whose main issue is determining which laws should apply to the agreement - in

the increase in costs is greater than 1/6, in which case he can withdraw from the agreement. Likewise, if the changes are material, the principal can also withdraw from the agreement. The principal can order modifications to the project unless the additional works do not exceed 1/6 of the overall works or otherwise entail substantial changes in the nature of the works or the workforce that needs to be deployed. See M. Gambini, '*L'esecuzione del contratto*', in V. Cuffaro ed, n 85 above, 215; V.D. Cutugno, n 70 above, 64.

[89] G.B. Campobasso, n 85 above, 38 and 44. Pursuant to Art 1664 either party can request a review of the consideration in the case of any variation that is higher than 10% of the cost of the raw material; M. Pennasilico, 'Il corrispettivo', in V. Cuffaro ed, *I contratti* n 85 above, 150.

[90] See Art 1662 of the Civil Code, in terms of which the principal also has the right to check the works before completion and, in instances of non-compliance, request that the contractor comply within a deadline and, where any non-compliances is not settled timely, the agreement is terminated and the principal has a right to compensation in damages. For further analysis, see E. Lucchini Guastalla, '*L'Appalto*', in G. Visentini ed, *Trattato della responsabilità contrattuale* II, *I singoli contratti*, 2009, 260, who points out that the regulation derogates *in peius* the general termination rules under Art 1453 of the Civil Code since the obligation is still being fulfilled. See also M. Gambini, 'L'esecuzione del contratto', in V. Cuffaro ed, n 85 above, 200;

[91] While Art 1578 provides that the tenant can request the termination of the lease or a reduction of the rent in case the leased premises show defects materially impacting the use of the asset, the contractor must warrant that the construction does not have any inconsistency nor defect (without any qualification in terms of materiality). E. Lucchini Guastalla, n 90 above, 266 points out that the warranty under Art 1667 of the Civil Code covers both defects and any lack of quality. Hence it is wider than the seller's warranty under the Civil Code. Furthermore, the contractor is responsible for the collapse of, risk of collapse of, or any material defects in the building for 10 years after completion of the works. See G.B. Campobasso, n 85 above, 42 and 43.

[92] Art 1669 of the Civil Code introduces a warranty given by the contractor to the principal and to its successors and assignees in the case of the construction of real estate assets when the asset collapses, there is a risk or collapse due to the ground or due to a defect in the construction or there is a material defect. See E. Lucchini Guastalla, n 90 above, 274; G. Chiappetta, 'La responsabilità per rovina o gravi difetti di immobili', in G. Visentini ed, n 90 above, 285.

[93] Pursuant to Art 1671 of the Civil Code, the principal is entitled to unilaterally terminate the contract – at will - while the construction is undergoing, also without cause, provided that the principal makes the contractor whole and indemnifies him against expenses incurred and loss of profit. See E. Battelli, '*La disciplina del recesso*', in V. Cuffaro ed, n 85 above, 245; F.M. Bandiera, in A. Luminoso ed, *Codice dell'appalto privato* (Milano: Giuffrè, 2016), 764; G.B. Campobasso, n 85 above, 46.

our case, whether the contract should be subject to the laws of the lease agreement, the laws of the construction agreements or both.[94] The prevailing consensus is that in each case the main contractual type should prevail over the others.[95] In other words, the applicable legal provisions should be identified on the basis of the contractual scheme whose element are prevailing (so called prevalence or absorption theory).[96] Accordingly, in our example, the question should be whether the elements of the lease or those belonging to the construction are prevailing. In particular,

[94] The European Court of Justice took a position that seems substantially in line with the Italian authorities. In the judgment issued in the case C-213/13, EU:C:2014:2067 (available at https://tinyurl.com/2xun8ace (last visited 30 September 2024)), the issue was whether 'a contracabovet [between the Municipality of Bari and the Italian construction company 'Pizzarotti'] containing an undertaking to let buildings which have not yet been constructed constitutes a public works contract despite having elements characteristic of a lease, and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50'. In the relevant judgment the ECG pointed out that 'where a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is necessary to refer to the main object of that contract in order to determine its legal classification and the EU rules applicable (see, to that effect, the judgments in *Auroux and Others*, C-220/05, EU:C:2007:31, para 37; *Commission* v *Italy*, C-412/04, EU:C:2008:102, para 47; and Commission v Germany, EU:C:2009:664, para 57)'. In the case at stake the ECG deemed that 'the main object of the contract is the creation of that complex, which the subsequent letting of the complex necessarily presupposes' and added that 'execution of the planned work corresponds to the requirements specified by the contracting authority' since 'that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design'. The opposing argument that the amount of the rents was by far higher than the value of the works to be carried out by 'Pizzarotti' was not considered conclusive by the Court: 'it is true that, as the referring court notes, the draft 'undertaking to let' also includes certain elements characteristic of a lease. Before this Court, emphasis has been placed on the fact that the financial consideration to be paid by the authorities corresponds, under Art 5 of that draft, to an 'annual rent' of EUR 3.5 million, to be paid over the 18 years of the contractual term. According to the information provided by Pizzarotti and the Italian Government, this overall consideration, amounting to EUR 63 million, is far lower than the total estimated cost of the work, which is almost EUR 330 million'. On the same case, see also I.L. Nocera, 'Un contratto di locazione di un'opera futura può essere qualificato come appalto di lavori' *Diritto Giustizia*, 19 May 2014, including comment to the conclusions of the Advocate General; D. Galli, 'La locazione di cosa futura e l'intangibilità del giudicato nazionale nel diritto europeo, il commento' *Giornale di Diritto Amministrativo*, 1, 53 (2015), and G. Vitale, 'Brevi note sulla giurisprudenza della Corte di giustizia dell'Unione europea tra qualificazione del rapporto contrattuale interno e incidenza sul giudicato nazionale' Federalismi.it, who expresses a different position, whereby the arrangement between the Municipality and Pizzarotti should have been subject to the law of the lease agreements.

[95] In many cases the courts have investigated agreements including elements belonging to the sale and elements belonging to the construction agreements. See, among others, Corte di Cassazione 30 June 1982 no 3944, *Giurisprudenza italiana*, I, 1, 178 (1984); Corte di Cassazione 20 April 2006 no 9320, *Contratti*, 21 (2006); Corte di Cassazione 24 July 2008 no 20391, *Giurisprudenza italiana*, 588 (2009); Corte di Cassazione 20 November 2012 no 20301, available at www.dejure.it. The literature on the topic cannot be exhaustively reported here. A clear summary can be found in E. del Prato, 'Contratti misti: variazioni sul tema' *Rivista diritto civile*, 1, 87 (2012).

[96] This does not exclude that other elements of the arrangement might be subject to the law provisions of the relevant contractual scheme to the extent they are not conflicting with the prevailing one. Corte di Cassazione 20 August 2020 no 17450, available at www.dejure.it; Corte di Cassazione-Sezioni Unite, 12 May 2008 no 11656, available www.dejure.it; Corte di Cassazione 17 October 2019 no 26485, available at www.dejure.it.

according to the judicial authority,[97] the interpreter should focus on the actual scope pursued by the parties and wonder whether – considering the actual scope pursued by the parties through the agreement – the works, ie, the design and building of the asset are prevailing over the lease of the premises or are just an ancillary element instrumental to the main scope of the contract, which is the lease of tailored premises to the tenant against a rent.

In a BTS transaction, the ultimate purpose of the arrangement is to deliver to the tenant a ready-to-use real estate asset in return for the payment of a long-term rent, after the expiry of which (or earlier, in the case of an early termination) the lessor receives back full possession of the asset, which can be allocated to other tenants, etc.[98] Hence the 'prevalence criterion', *prima facie*, suggests that, in lease agreements entered into in the context of BTS transactions, the 'lease component' prevails. However, one should not exclude disputes where the tenant-claimant tries to avail himself of certain rights attributed under Italian law to the principals *vis-à-vis* contractors. Lawyers can prevent such disputes by clarifying that the lessee will not proceed with the construction with its own organization and that the project, designs, etc are the property of the lessor and do not depend on the tenant, since the ultimate purpose of the arrangement is to enable the latter to use the asset for its activity in return for the payment of the rent and that in light of the preceding, all provisions of law governing construction agreements are not applicable and, to the extent necessary, expressly excluded by the parties. In particular, in respect of the warranties, the developer should adopt a 'non-warranty' position, clarifying that – no contractor's warranties apply to the agreement and that all such warranties are expressly excluded and waived by the tenant; therefore, among others when the tenant occupies the property, it is deemed to have agreed that the landlord has satisfactorily fulfilled all its pre-delivery obligations, with the exclusion of any warranty-related claim in connection with the works.[99]

[97] Corte di Cassazione 7 April 1998 no 3563, *Giustizia Civile Massimario*, 747 (1998), whereby the Supreme Court deemed that a lease agreement including undertakings on the part of the lessor to carry out substantial works is still subject to the lease law, since all the undertakings are means to enable the enjoyment of the leased premises and are therefore included in lessor's obligations under Art 1575 of the Civil Code.

[98] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 33 point out that tenants prefer to have long term leases, 'often 10 to 20 years or longer' and that 'the more specialized is the project, the more important it is to the landlord that the lease term be long enough to fully amortize the landlord's investment in the property'. In Italy pursuant to Art 27 of Law no 392/1978, commercial lease agreements must have a minimum term of 6 years (9 years in case of hotel premises); moreover, pursuant Art 79 of the Lease Law (Law no 392/1978) – as amended by Law Decree no 133/2014 (converted into Law no. 164/2014), for lease agreements where rent exceeds 250,000 Euro per year there is no minimum term and the only main limitation is that the lease cannot last longer than 30 years, pursuant to Art 1573 of the Civil Code.

[99] G.P. Bernhardt and J.E. Goodrich, 'Build-to-Suit Leases' n 1 above, 40, 63.