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Acquisition of Property, Portfolio and Infrastructure

### PURCHASING PROPERTY IN ITALY

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## I. PREAMBLE

*[Please kindly identify in brief lines the jurisdiction that you are preparing the report for and also briefly characterize the main legal framework for the transfer of property.*

*You may also indicate if there is a very particular element to take into account when addressing any acquisition of property in your jurisdiction.*

**Italy** is a civil law jurisdiction hence the distinction typical of English law between freehold and leasehold does not apply and the purchase of property in Italy entails that the property (both land and structures) is, in principle, fully, effectively and exclusively owned by the buyer.

## II. ACQUISITION OF PROPERTY IN ITALY

*Below you will find an introduction to the treatment of acquisition in our jurisdiction, following the pattern provided by the Real Estate Law Commission of the Union Internationale des Avocats, as driving considerations for this report.*

*For adequate comparison with other jurisdictions, we have kept and maintained the question format.*

### 1. Does your country accept direct acquisition of property by foreign-based individuals or corporations?

Yes, in principle there are no restrictions on foreign nationals or overseas companies buying property, subject only to the “condition of reciprocity” - pursuant to art. 16 of the Civil Code provisions on the law in general (Royal Decree n. 262 of March 16, 1942):

*“The foreigner is admitted to benefit of the civil rights granted to the (Italian) citizens on condition of reciprocity and except for the provisions laid down in special statutes. This provision is applicable also to foreign legal entities”*

The “condition of reciprocity” is satisfied for almost all countries of the world, with few exceptions. [http://www.esteri.it/mae/it/ministero/servizi/stranieri/elenco\\_paesi.html](http://www.esteri.it/mae/it/ministero/servizi/stranieri/elenco_paesi.html)<sup>1</sup>

The condition of reciprocity is deemed satisfied for the following foreign nationals who are granted equal rights to those granted to Italian citizens (“*parificazione*” cf. Legislative Decree of 25 July 1998 n. 286 - Consolidated Text of the provisions concerning the rules on immigration and rules on the conditions of the foreigner, and the implementing Regulation (Presidential Decree of August 31, 1999 n. 394):

- European Union nationals (both individuals and legal entities) as well as nationals of the European Economic Space (Iceland, Liechtenstein and Norway)
- Extra-EU nationals legally domiciled in Italy and holding a residence card (*carta di soggiorno*) or a residence permit (*permesso di soggiorno*) granted for employment reasons, independent work, for

<sup>1</sup> For example : with **Brazil** the condition of reciprocity for real property purchases is not fulfilled for the purchase of rural properties ; in **Iraq** in principle a foreign national is not permitted to purchase real property in his own name since the local constitution reserves real property ownership to Iraqi citizens only ; limited exceptions have however been introduced by the Iraqi laws on investments number 13 approved in October 2006 as amended in 2009 , which permits the purchase of plots of land by foreign individuals or entities for a maximum of 50 years renewable, as well as residential property at certain conditions; the existence of the condition of reciprocity as regards the territories of **Palestine** is under review; in **Myanmar** article 37 of the Constitution states that Private ownership rights of real property is reserved only to local citizens; citizens are not permitted to sell or otherwise transfer real property to foreign nationals “ Transfer of Immoveable Property Restriction Act” 1987; however the foreign investments law number 21 of November 2, 2012 as implemented by two decrees of January 31, 2013 does allow for leaseholds by foreigners. Limitations exist also for **Swiss** nationals: - the purchase of the houses in Switzerland by individuals resident abroad with reference to mono-family or pluri-family second homes, apartments as well as buildable land is subject to an authorisation according to the federal law of December 16, 1983 on the purchase of property by individuals resident abroad. The Canton of the territory is competent for the decision concerning the authorisation.

1) the condition of reciprocity has been verified for non-resident individuals limited to the purchase of the following:

a) second homes , for holidays and apartments with a net habitable surface not in excess of 200 m<sup>2</sup>;

b) plots of land pertaining to second homes and holiday houses ( mono family units : villas and buildings) with the surface not in excess of 1000 m<sup>2</sup>;

c) real property for exclusively commercial use

the exercise of an individual enterprise, for family reasons, for humanitarian reasons and for study reasons

- stateless individuals resident in Italy for at least three years
- refugees resident in Italy for at least three years

#### Foreign investments

Real property purchases represent one of the most common forms of foreign investments in Italy. According to a leading interpretation of the law, verification of the existence of the condition of reciprocity does not apply in respect of nationals of countries with which Italy has concluded bilateral investment treaties (BITs), in this case ratification and enforcement of the international bilateral treaty amounts to a special statute (“*lex specialis*”) that satisfies the general rule laid down by article 16 of the civil code preliminary rules mentioned above, hence the condition of reciprocity in respect of the matters covered by the treaty is deemed satisfied.

The list of countries with which Italy has concluded BITs is available on the web page of the Italian Ministry of foreign affairs

[http://www.esteri.it/mae/it/ministero/servizi/stranieri/elenco\\_paesi.html](http://www.esteri.it/mae/it/ministero/servizi/stranieri/elenco_paesi.html)

#### **Are there any specific requirement or restrictions for acquisition by foreigners? Is it usual to have foreigners directly acquire property or otherwise use a local vehicle?**

*[Please start with a clear yes/no/not always and develop after that. Please include reference to specific taxes imposed to nonresident owners and outline the main reasons why a foreigner would better acquire directly or otherwise set up a local SPV]*

Yes, it is quite usual to have foreigners acquire residential property directly as individuals; the alternatives of using a non-resident vehicle or a resident (Italian company) vehicle are considered in more sophisticated situations taking into account the tax aspects

Corporate vehicles are commonly used when purchasing commercial property

### **Taxation Aspects**

#### **Purchasing a residential property**

A) Purchasing property from one or more private individuals

The following transfer taxes apply to the purchase of residential real property:

transfer tax ( <i>imposta di registro</i> )	9%
mortgage tax ( <i>imposta ipotecaria</i> )	Euro 50
cadastral tax ( <i>imposta catastale</i> )	Euro 50

The transfer tax is levied on the revaluated “tax value” of the property , the so-called “cadastral value” (*valore catastale – prezzo-valore*) rather than on the actual market price paid, in case of transactions between private individuals as well as transactions where the seller is a company when the sale is not subject to VAT (i.e. not a builder ).

The *prezzo-valore* for the purpose of the transfer tax is the value resulting from the cadastral revenue multiplied by 126, regardless of the effective sale price

The minimum tax is 1000 Euro

If the “first home” tax reduction applies (so-called *agevolazione prima casa*):

transfer tax ( <i>imposta di registro</i> )	2%
mortgage tax ( <i>imposta ipotecaria</i> )	Euro 50
cadastral tax ( <i>imposta catastale</i> )	Euro 50

In this case, the cadastral value (*prezzo-valore*) of the property upon which the transfer tax is levied results from the cadastral revenue multiplied by 115.5, regardless of the effective sale price

The minimum tax is 1000 Euro

B) Purchasing from a builder (new property or restored property)  
 with few exceptions, the purchase from a builder is subject to VAT at the following rates

basic rate	VAT 10 %
if the <i>agevolazioni prima casa</i> applies	VAT 4%

Furthermore the following taxes are payable

transfer tax ( <i>imposta di registro</i> )	Euro 200
mortgage tax ( <i>imposta ipotecaria</i> )	Euro 200
cadastral tax ( <i>imposta catastale</i> )	Euro 200

### **Purchasing land**

A) transfer of agricultural land

transfer tax ( <i>imposta di registro</i> )	12%
mortgage tax ( <i>imposta ipotecaria</i> )	Euro 50
cadastral tax ( <i>imposta catastale</i> )	Euro 50

For the transfer of agricultural land, the transfer tax is levied on the price declared by the parties in the deed of purchase and sale

B) Transfer of non-agricultural plots of land

transfer tax ( <i>imposta di registro</i> )	9%
mortgage tax ( <i>imposta ipotecaria</i> )	Euro 50
cadastral tax ( <i>imposta catastale</i> )	Euro 50

In short, the *prezzo-valore* applies not only to all the sales where both parties are private individuals, but also to all sales from companies, enterprises or entities who are not subject to the VAT regime to purchasers who are private individuals

During the course of ownership and upon resale the following taxes will apply

### IMU

It is a property tax paid to the local government.

### Capital Gains Tax

On the sale of a property, the seller may be liable to pay capital gains tax. Capital gains tax is chargeable on the “gain” element of the sale proceeds. Liability to pay capital gains tax partly depends upon whether the property is commercial or residential and whether a relief applies (for example, capital gains tax is not payable where an individual disposes of a residential property that he has owned for more than 5 years)

### Inheritance Tax

Italian inheritance tax may be chargeable on the death of an owner of an Italian property as well as when a gift of the property is made during the owner’s lifetime. Tax rates are relatively low.

### Tax on rental income

Broadly, an individual or company will be liable to Italian tax on income generated by Italian property whether or not that individual or company is as Italian tax resident.

### **How does your legal system protect the acquirer? Registries? Title insurance?**

*[Please identify whether your legal system is based upon civil law or common law (or other) and then please identify how you address publicity and opposability of title vis-à-vis any third party acquirors]*

Following the notary's deed, the transfer of the property from the seller to the buyer is registered in the Real Property Registry

In the Italian system purchase transactions are effective vis-à-vis third parties only once a transaction has been recorded in the public land registry, strictly the word used is "transcription" in the real property registries (*trascrizione nei Registri Immobiliari*).

The real property publicity system is based on the rule of continuity of transcriptions, which means that title is based on a continued series of "transcriptions" going back in time in respect of the same property. According to the transcriptions system, the person who "transcribes" a real property purchase for first prevails over a second purchaser of the same property, regardless of the date of execution of the deed of purchase (what counts is the date of registration). For this reason the notary public in charge of the deed of transfer must proceed to the transcription in the shortest possible term to limit the risk that another transfer might take precedence over the purchaser's transfer.

A different registration is the so-called *voltura catastale*, which is a formality for tax purposes, the function of the "Catasto" is to identify the property with information and provide a value to be used for the calculation and payment of property taxes through the mechanism of the tax revenue (*rendita catastale*).

### **Purchasing from a builder**

A special statute (Legislative Decree June 20, 2005 n. 122) lays down rules in respect of purchases of a property to be built or restored by a builder for the sake of protecting the purchaser, in particular in the event that the builder goes bankrupt in the interim. In particular the statute:

- regulates the contents of the preliminary contract
- provides the duty for the vendor to issue a bank or insurance company guarantee for the reimbursement of any amounts paid or to be paid prior to the final notary's deed
- provides for the duty of the builder to deliver to the purchaser an insurance policy holding the purchaser harmless for at least 10 years against damages from the complete or partial collapse of the building or against serious building defects
- Prior to stipulation of the final notary's deed, the loan taken up by the builder to finance the restoration and the mortgage to secure the loan, must be cancelled from the portion being sold
- the notary public is prohibited from proceeding with the stipulation of the deed in the absence of the legal title confirming cancellation of the loan and of the mortgage unless the purchaser takes up the loan
- the purchaser has a right of first refusal should the property be sold at a court auction as a result of bankruptcy of the builder if the property is used as the purchaser's principal place of residence.

## **2. Can you please share what the usual process in acquiring a property would be in your jurisdiction?**

### **2.1 Due diligence**

*[Please indicate a distinctive element you would require to analyze in your jurisdiction depending on the type of asset: residential, retail or industrial]*

Typically, a lawyer instructed to represent a client in a real property purchase transaction will carry out and arrange, with the assistance of chartered technical consultants, a preliminary due diligence and survey to include the following:

- title of origin of the owner
- official maps
- transcriptions and inscriptions in favour of third parties such as loans secured by mortgages (*ipoteche*) recorded on the property, passive easements and other liens, charges and limitations in favour of third parties, attachments etc.
- compliance with local general planning rules and regulations (*regolarità urbanistica*), examination of building licences, concessions, authorisations and permits, existence of building

- amnesty licenses (*condono*) taking care of any past irregularities (*regolarità edilizia*)
- the situation as regards the Catasto (*regolarità catastale*)
  - limitations and liens including landscape limitations (*vincolo paesaggistico*)
  - right of first refusal (*diritto di prelazione*) in favour of certain individuals or entities laid down by contract or by statutes
  - whether the property is part of the historical, artistic or archaeological heritage (*beni di interesse storico, artistico, archeologico*)
  - in the case of publicly funded buildings (*ERP - edilizia residenziale pubblica*), the existence of certain requirements to be held by the purchaser or limitations as regards the price
  - enquiries on future public works planned (roads, autostrade, electroducts, aqueducts ...)
  - the energy performance certification (*APE - attestato di prestazione energetica*)
  - environmental search – historical information about previous uses of the land
  - information about disputes with neighbours, use of property etc.
  - the patrimonial regime of the vendors (if individuals)
  - the legal capacity of the vendor (if the owner or one of the owners is underage or incapacitated or if it is a legal entity)
  - the tax treatment of the transfer - whether the transfer is subject to registration tax or VAT, the existence of any tax facilities, etc.
  - physical examinations – a physical survey of the property should be arranged by the purchaser and carried out by a professional chartered surveyor, to examine the building, the structural aspects and the technological systems, so as to anticipate any potential defects or non-conformities as regards the building and the state of conservation of the property offered for sale and to include, but not limited to, the following:
    - access roads
    - visible active and passive easements (*servitù*)
    - compliance with planning rules and regulations (*regolarità urbanistica*), and with the building licences, concessions etc (*regolarità edilizia*)
    - compliance with the *Catasto* data and maps (*regolarità catastale*)
    - compliance of the technological systems – electrical , plumbing , heating – with safety rules
    - compliance with the rules prescribing special building methods, for example as regards anti-seismic rules;
    - verification of any planning liens in respect of plots of land (for example land which is subject to local implementing plans – *Piano Urbanistico Attuativo* – or subject to specific planning conventions (*convenzioni urbanistiche*);
    - utilities (electricity, gas, water)
    - other water sources
    - waste disposal
    - architectural barriers
    - elevator ...

## 2.2 Contract

*[Please indicate the usual mechanisms for parties to document a purchase agreement]*

The civil code requires that the purchase of real property can be only validly made in writing (written form *ad substantiam* i.e. in the absence of which the sale is null and void), and must be recorded in the real property public registries.

### Purchase offer

Estate agents generally insist with purchasers that they should formalise their offer in writing, to indicate the intention to purchase for a given price. Generally speaking purchase offers are made by using standard forms (a typical standard form is the one prepared by the chambers of commerce system) accompanied by a deposit.

A signed purchase offer lays down undertakings that are already binding for the purchaser but in the meantime the owner is free to consider other offers and there is no certainty that the deal will be concluded. In principle, we recommend conducting a proper survey and due diligence before signing a purchase offer, which contains legal obligations binding only for the offering party. A purchase offer signed for acceptance by the owner can automatically acquire the same legal effects of a preliminary contract, hence it is prudent to seek professional advice before signing. If at all possible, it is preferable to proceed by signing a preliminary contract directly (see below) rather than going through the step of the purchase offer.

#### Preliminary contract

A typical sale and purchase transaction is a two-stage process involving a “preliminary contract” between the buyer and the seller. Under Italian law, a preliminary contract (*contratto preliminare*, otherwise known as the *compromesso*) is a fully binding and enforceable legal contract which binds both parties to stipulate a final contract (notary public deed) within a certain future date, so it amounts to a point of no return, when both parties commit themselves to complete the transaction. Upon signing the preliminary contract an earnest (*caparra*) is paid in the hands of the owner.

A properly drafted preliminary contract must indicate all the main elements of the sale, such as the price, a detailed description of the property, its address, the real property registry data and the date of the final deed; it should contain all the specific reciprocal obligations that the parties undertake to perform prior to transfer of the property. Special rules apply in the event of the sale of a property in course of construction.

Recording the preliminary contract - To secure the maximum level of protection for the future purchaser we recommend recording (*trascrizione*) the preliminary contract in the land registry (*Registri Immobiliari*), especially in the event of substantial deposits, and/or of a prolonged period of time between signing of the preliminary contract and execution of the final deed, and if the vendor is a business person or enterprise that is potentially subject to the risk of bankruptcy. For recording the preliminary contract in the land registry, it must be signed before a notary public; recording in the land registry amounts to making a “booking” to purchase the property, the preliminary agreement is no longer simply a private agreement between purchaser and vendor, and it acquires force and effect vis-à-vis third parties with the effect that the owner will no longer be able to sell the property to a third-party nor to grant a mortgage on the property nor to record any liens or limitations or prejudicial tax on the property. Any creditors of the vendor will no longer be able to record a mortgage on the property promised for sale to the purchaser under a preliminary contract, nor proceed with any attachment. In other words from the date of registration of the preliminary contract in the land registry, the property is reserved for the future purchaser and any transcription or inscription in the land registry would have no effects vis-à-vis the party promising to purchase.

Furthermore recording the preliminary contract amounts to a further protection for the purchaser, in case of breach of contract by the seller: the purchaser’s rights (such as the purchaser’s credit rights in case of breach of contract to obtain the reimbursement of the deposit) amount to a so-called special privilege on the property, which are preferred to the other creditors of the owner - or if the vendor were to go bankrupt.

The taxes involved in recording the preliminary contract are as follows:

- |   |   |
|---|---|
| registration tax  | 0,50% on the earnest ( <i>caparra confirmatoria</i> )                 |
|   | 3% on any sums paid on account of the price ( <i>acconto prezzo</i> ) |
| - transcription tax   | 200,00 euro   |
| - transcription stamp duty ( <i>diritti fissi di trascrizione</i> ) | 35,00 euro  |

The registration tax paid in respect of the preliminary contract will be recovered at stipulation of the final deed.

Enforcement - If a party to a preliminary contract refuses without reason to proceed with the sale, the other party has the right to demand enforcement to the courts, this amounts to the so-called “enforcement in specific form” (*esecuzione in forma specifica*) under art. 2932 Civil Code resulting in the Tribunal issuing a judgement, which makes the preliminary contract final, hence ownership title passes from seller to purchaser and the price, must be paid.

The more detailed and accurately drafted the preliminary contract is, the higher will be the level of protection before the Courts that the parties will be able to obtain in case of breach of contract by the other party.

From July 1, 2010 following (entry into force of Decree Law May 31, 2010 n. 78) the “tradeability” / transferability (*commerciabilità*) of buildings is made conditional upon a representation (*attestazione*) by the vendor or through a specific report written by a chartered engineer or architect (*relazione tecnica*) attesting the conformity with the state of fact of the data and of the cadastral plans (*planimetrie catastali*) filed at the Catasto.

The so-called “*regolarità catastale*” should be checked upfront, prior to signing of the preliminary contract since it is a circumstance that will affect the possibility to proceed with the final deed.

For this reason, the preliminary contract should contain all the information which is necessary for the final deed:

- the cadastral identification
- reference to the cadastral plans
- the declaration of the party promising to sell attesting the conformity with the state of fact of the cadastral data and plans or in lieu of such representation, a report by a chartered technical professional
- compliance with building licences (*regolarità edilizia*); if the house has been built with a regular building permit or, if not, if the past irregularity has been taken care of by means of an amnesty licence (*condono*),
- the *agibilità* (see below)
- the energy performance certificate is required even at the stage of a preliminary contract ( D.L. June 4, 2013 n. 63) since it is required when the property is put on the market.

#### The final deed (*rogito*)

Transfer of ownership takes place by means of a deed executed before a notary public. In principle, the purchaser appoints the notary public.

Generally speaking the owner expects to receive full settlement of the price at the time of completion by means of the final notary’s deed. If this is not the case based on agreement between the parties, the owner will expect to be secured, with securities such as: - promissory notes for recording a legal mortgage (*ipoteca legale*), sale with reservation of title (*vendita con riserva di proprietà*) whereby in payment by instalments title is transferred upon payment of the final instalment.

The recent economic crisis has favoured the creation of new contracts in the Italian real property scenario such as the “**rent to buy**”, where in substance the parties agree that the price will be paid in instalments, a part of which is considered as amounting to the payment of a rent (*canone di locazione*).

Subsequent to execution of the deed, the notary public will register the deed at the tax office (*Agenzia delle Entrate*), pay the relevant transfer taxes on behalf of the purchaser and file a copy of the deed in the real property public registries (*Conservatoria dei Registri Immobiliari*); a third formality following execution of the deed is updating the records in the *Catasto - Agenzia del Territorio* (*voltura catastale*).

### 2.3 Transfer

*[Please indicate how transfer occurs in your jurisdiction, maybe simply by handover or keys or other symbolic way, by mere statement of the parties by contract, or through Notary. If there is a very local and distinctive way you would wish to highlight, please do so]*

Transfer of ownership occurs upon execution of the final notary’s deed of sale and purchase at which time “legal possession” is also transferred to the purchaser. However, it is possible for the parties to agree a different time for the transfer of possession:

- transfer prior to the notary’s deed of sale, which implies that the ownership title remains vested with the vendor who remains responsible for all the owner’s responsibilities pursuant to the law until the date of the deed of transfer;

- transfer after the execution of the notary's deed of sale, due to special requirements of the vendor, hence the deed of sale will include a clause agreeing the date by which the vendor shall have the duty to hand over possession, with the possibility for the parties of agreeing liquidated damages in the event of late delivery (*penale per il ritardo*).

### 3. Now, getting down to contracts, does your jurisdiction allow limitation of liability by the seller of a real estate property?

*[Please kindly outline what a seller must imperatively be liable for, such as clearance of title or hidden liabilities.*

*Please then tell us if in your country it is possible to exclude all liabilities from seller or not, or whether it is unclear. Case law and legal commentators are welcome in this section]*

The standard warranties in respect of the sale of real property are laid down in the Civil Code and specifically the warranties for defects (*vizi*, arts. 1490 through 1496, Civil Code) and the absence of rights of third parties (*evizione*, arts. 1483 through 1488, Civil Code), which apply to contracts of sale in general, as well as the specific provisions on the sale of real property as laid down by articles 1537 and following Civil Code (*vendita a corpo, vendita a misura, vendita cumulativa*).

Typically the deed of sale will contain a clause whereby the seller grants to the purchaser "all the warranties pursuant to the law", especially for the absence of rights of third parties (*evizione*) and for the freedom of the property sold hereunder from censuses, levels, fees, weights, constraints, encumbrances, mortgages and prejudicial transcriptions; if there are exceptions, they must be listed - for example a right of transit in favour of a third party.

**1. Under art. 1490 c.c., the seller has the duty to warrant that the property sold is immune from defects that render it unsuitable for its intended use or diminish its value in an appreciable manner.** The defect (*vizio*) may consist either of a material imperfection (*imperfezione materiale*) of the property which affects its suitability for the intended use or the lack of quality (*mananza di qualità*) which amounts to the lack of the requisites of functionality, utility and value (*funzionalità, utilità e pregio*) which the property should present.

With regard to the warranty for defects, the purchaser shall have the right to claim that the property presents hidden defects which were unknown to the purchaser at the time of the stipulation of the purchase and that the purchaser would have not been able to detect using the normal diligence (*ordinaria diligenza*). If the seller represents that there were no defects, the warranty covers easily recognisable defects (*facilmente riconoscibili* art. 1491 c.c.).

In the presence of such defects the Civil Code offers to the purchaser a double channel of protection: termination of the contract (*actio redhibitoria*) or a proportionate price reduction (*actio aestimatoria*), in addition to the duty of the seller to reimburse the buyer the damages suffered, unless the seller can prove that he ignored the defects of the property without fault, as well as the damages suffered by the property itself (cfr. art 1494 c.c.)

Furthermore termination can be demanded if the property does not have the qualities promised or those that are essential for the intended use (art. 1497 c.c.) so long as the defect of quality is above the limits of tolerability established by usages.

Termination of the contract has the effect that the seller has the duty to reimburse the price as well as the expenses and payments strictly connected with the sale whilst the purchaser has the duty to return the property.

Except if the seller has recognised the existence of the defect or has hidden it, the purchaser has the duty to notify the defects to the seller within eight days from discovery unless otherwise agreed between the parties or established by the law.

The action is time-barred after one year from delivery (art. 1495 c.c.).

**The parties can agree to exclude or limit the vendor's warranty for defects** (Cass.Civ., Sez. III, 3345/76), albeit within the limits of paragraph 2 of art. 1490 civil code if the vendor has not disclosed in bad faith the existence of defects of the property to the purchaser (this is the equivalent to excluding the liability for wilful misconduct or gross negligence - *dolo o colpa grave* - of the debtor cf. art. 1229 civil code).<sup>2</sup>

The intention of the parties to exclude or limit the warranty must result unequivocally, hence there shall be no exclusion for example in the presence of a declaration by the purchaser recognising that he has received the purchased property in conditions of normal efficiency, which refers to the situation which is apparent at the time of delivery (Cass.Civ. Sez. II, 12759/93)<sup>3</sup>.

Furthermore the warranty is excluded automatically if the purchaser was aware of the defects or the defects were easily recognizable (art. 1491 c.c.).

**2. The warranty against the lack of rights of third parties** (*garanzia per evizione*) refers to the legal condition of the property and not to its material condition: should the purchaser lose ownership of the property as a result of a court decision declaring that a third party rather than the vendor has the legal title on the property sold (art. 1485 c.c.).

If the right of third party is total (*evizione totale* i.e. relating to the real property as a whole) the seller has the duty to reimburse the damages the purchaser (art. 1483 c.c.) and also to pay the value of the fruits which the purchaser shall have to reimburse to the third party, in addition to the expenses sustained.

If the right of the third party is only partial (*evizione parziale* i.e. relating to a part only of the property), the purchaser is entitled to demand the payment of damages and the reduction of the price, unless the purchaser proves that he would not have given his consent to stipulating the purchase if he had known that he would not have become entitled to the ownership rights or other real rights in respect of such portion of the property and owned by a third-party, in which case the purchaser shall be entitled to demand termination of the contract (art. 1480 c.c.).

**The warranty against the lack of rights of third parties may be excluded** by agreement between vendor and purchaser: the parties may agree to increase or limit the effects of the warranty pursuant to art.1487 para 1 civil code (cf. Cass. Civ. Sez. II, 4711/85), and even agree that the vendor is not subject to any warranty at all. As regards possible limitations of the warranty, art.1487 para 2 civil code appears rather vague: however it is possible to exclude the vendor's duties concerning reimbursements all the payment of damages, except for the vendor's duty to reimburse to the purchaser the price paid (Cass. Civ. Sez. II, 393/93 ).

**3. There always are two situations which limit the exclusion of the warranty and that cannot be excluded by agreement between the parties:**

- any agreement excluding or limiting in advance the responsibility of the debtor for wilful misconduct or gross negligence is radically null and void art. 1229 civil code; whilst the exclusion of liability is permitted only in relation to a conduct amounting to a minor negligence (*colpa lieve*) of the vendor or in relation to agreements excluding the liability even in the presence of wilful misconduct or gross negligence, but subsequent to the point in time when the event has occurred.

- when the *evizione* is dependent on the fact of the vendor himself, in relation to which every clause to the contrary is considered null and void (art.1487 para 2, civil code) .

<sup>2</sup> E' discusso se a norma dell'art. 1229 cod. civ. il patto di esclusione sia nullo anche in caso di esonero da colpa grave del venditore: secondo alcuni (Mirabelli, Dei singoli contratti, in Comm.cod.civ., libro IV, Torino, 1991, p.115 e Rubino, La compravendita, in Trattato di dir.civ. e comm., dir. da Cicu e Messineo, vol.XXIII, Milano, 1971, p.864) sembrerebbe che la lettera dell'art. 1490, Il comma, cod.civ. abbia inteso porre una deroga rispetto all'art. 1229 cod.civ.. Il patto sarebbe dunque valido ed operante anche nel caso di colpa del venditore. Discussa è altresì la possibilità di stabilire diversi termini per la decorrenza della prescrizione: secondo Mirabelli, cit., p.114, l'inderogabilità delle norme attinenti alla prescrizione impedirebbe qualsiasi modificazione convenzionale, a giudizio invece di Franceschetti e De Cosmo, I singoli contratti, Napoli, 1998, p.81, nulla vieterebbe alle parti di aumentare (ma non di diminuire) la durata dei termini prescizionali.

<sup>3</sup> In particolare, se predisposta dal venditore, la clausola di esonero richiede la specifica approvazione per iscritto dal compratore ex art. 1341 cod.civ.: Luminoso, I contratti tipici ed atipici , in Tratt.dir.priv., a cura di Iudica-Zatti, Milano, 1995, p.150.

- Furthermore the restitution of the price can never be excluded: under art.1488, para 1, civil code lays down the obligation to reimburse the price and the expenses sustained even if the parties have expressly agreed to exclude such reimbursement: this rule amounts to a third and more essential limitation to the autonomy of the parties in excluding the warranty, based on the circumstance that restitution of the price does not amount to the payment of damages, but is a reaction to the so-called synallagmatic character of the agreement.

**4. Furthermore the seller has the duty to give certain warranties and representations as laid down by special statutes (rather than by the civil code), which cannot be renounced or derogated and are therefore essential for a valid and effective sale:**

- that the state of fact of the property is in conformity with the “cadastral” data and maps.
- details of the origin of the seller’s legal title (purchase deed; deed of donation / inheritance, etc.)
- with regards to the general planning situation (*situazione urbanistica*), pursuant to art. 40 of Law 28.2.1985 n. 47, and pursuant to arts. 3 and 76 of Presidential Decree 445/2000, the vendor shall represent:
  - (a) that the building in question commenced prior to September 1, 1967 or has been built pursuant to building licences or concessions or authorisations, the details of which are expressly mentioned
  - (b) that the property in question has not undergone building interventions or changes of destination that would have requested a licence or concession or authorisation , except for a list of building concessions or permits
  - (c) that the property sold is in compliance under general planning rules (*regolarità urbanistica dei beni venduti*)
- pursuant to Legislative Decree n. 192 of August 19, 2005 the purchaser must represent that he has received the information concerning the energy performance of the buildings and specifically the vendor is required to deliver to the purchaser the energy performance certification relating to the property sold and represent that the certification is still valid and the date of the notary’s deed of sale since no modifications of the planning instruments has occurred since.<sup>4</sup>

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<sup>4</sup> The following are typical standard warranties and representation clauses in a deed of sale:  
 “The seller in his capacity as the owner of the property sold herein as officially shown in the cadastral records hereby represents that their state of fact is in conformity with the data and with the cadastral maps.  
Origin  
 Legal title in the property sold hereunder has reached the vendor pursuant to .... Sale and purchase deed executed by and before notary public \_\_\_\_\_ on \_\_\_\_\_ rep. n. \_\_\_\_\_ racc. n. \_\_\_\_\_, registered at \_\_\_\_\_ on \_\_\_\_\_ at n. \_\_\_\_\_ series \_\_\_\_ / deed of donation / inheritance....  
Possession  
 the sale takes place with accessions, appliances, fixtures, adhesions, easements and rights and liabilities, actions, reasons and customs relating to property sold, in the state of fact in which the property finds itself and with the immediate transfer of the full and legal possession to the purchaser.  
Warranties  
 the seller hereby grants in favour of the purchaser all the warranties pursuant to the law , especially for the absence of rights of third parties (evizioni) and for the freedom of the property sold hereunder from censuses, levels, fees, weights, constraints, encumbrances, mortgages and prejudicial transcriptions, except for the following ...  
Planning Situation (Situazione Urbanistica)  
 Pursuant to art. 40 of law 28.2.1985 n.47, and pursuant to arts. 3 and 76 of presidential decree 445/2000, the vendor hereby represents that the building in question commenced prior to September 1, 1967 ;  
 furthermore the vendor hereby represents that the property in question has not undergone building interventions or changes of destination that would have requested a licence or concession or authorisation , except for the following:  
 - interventions for which the building concession n. .... Has been granted  
 - the denunciation of commencement of activities (D.I.A.) n. \_\_\_\_\_ Dated \_\_\_\_\_ for works of restoration and conservation improvement ...  
 - The certified signalling of commencement of activities (S.C.I.A.) n. \_\_\_\_\_ dated \_\_\_\_\_ for the building of ...  
 Therefore the vendor hereby warrants that the property sold hereunder is in compliance under planning legislation (*regolarità urbanistica dei beni venduti*).  
Energy Performance Certification  
 Pursuant to legislative decree n. 192 of August 19, 2005 the purchaser hereby represents that he has received the information concerning the energy performance of the buildings;  
 the vendor delivers to the purchaser the energy performance certification relating to the property sold hereunder prepared by ...  
 on ... the original of which is attached hereunder and marked exhibit ...  
 The vendor represents that the certification is still valid since as of today no modifications of the planning instruments has occurred.”



The purchaser should insist that the vendor delivers two kinds of certificates  
The *certificato di agibilità* and the *dichiarazioni di conformità degli impianti*

### **The *certificato di agibilità***

The certificate of fitness for use (*certificato di agibilità*) attests the safety conditions, hygiene, health and energy saving of the buildings and of the technological systems installed and is issued by the local authority (*Comune*). Since the certificate attests also the safety conditions of the building, the owner's engineer is required to file with the *Comune* the following

- certificate of static testing (*certificato di collaudo statico*)
- certificate of compliance with anti-seismic rules (*certificato di conformità alle norme antisismiche*) of the works carried out (if the building is located in an area subject to earthquake risk)
- declaration of conformity with the rules concerning accessibility and elimination of architectural barriers (*conformità alle norme in materia di accessibilità e di superamento delle barriere architettoniche*).

The function of the *certificato di agibilità* is only to certify the suitability of the building under the profiles of health, hygiene, safety and energy saving for use for residential, commercial, office or industrial purposes; it does not attest conformity of the building with the plans and projects approved by the local authority (i.e. its compliance with building permits (*regolarità edilizia*)). Hence the existence of the *certificato di agibilità* by the *Comune* does not guarantee the *regolarità urbanistica ed edilizia*.

For the "tradeability" / transferability (*commerciabilità*) of a building, it is not necessary for the *certificato di agibilità* to be issued and the latter is not necessary for the validity of the deed of transfer. However, we do underline that if a building is sold without the *certificato di agibilità*, the parties need to agree this point in order to prevent future disputes.

According to the consolidated jurisprudence of the Italian courts, in case of a sale of property for residential use without the *agibilità*, the purchaser has the right to demand termination of the contract if the vendor has undertaken even implicitly to take care of obtaining the *agibilità*, unless the owner proves that the *agibilità* can be easily obtained, in which case the Judge is likely to consider the lack of the *agibilità* as a breach of minor importance, in which case the purchaser would be entitled to damages, but not termination of the sale contract.

Furthermore the *agibilità* does not affect the legal "tradeability" of the building (the *agibilità* is not required by the law as a condition for a valid and effective sale), however being a pre-condition for the use of the building, it does affect in a considerable manner the economic tradeability of the property - unless the parties have expressly agreed to transfer ownership of the building without the *agibilità*, for example if the building is transferred without finishings, leaving to the purchaser to complete the restoration works; or a building in bad conditions of conservation which requires a radical renovation, such as an abandoned dwelling.

So the presence of the *agibilità* is an important element in the negotiations since it influences the following:

- the consent by the purchaser who might not be agreeable to purchase a building without the *agibilità*.
- the purchaser might be agreeable to purchase the building without the *agibilità*, on condition that this is taken into account in agreeing the price.

### **The declarations of conformity of the technological systems**

All the technological systems (including radio, television systems, electrical systems, health, plumbing, heating systems, systems for the use of gas, etc.) regardless of the destination of use of the building (whether for residence or office or commercial or industrial) and regardless of the date of building, must be built and installed according to the rules of the art and using materials equipped with safety mechanisms. Upon completion of installation, the enterprises in charge of installing the systems must deliver "declarations of conformity" of the systems installed (*dichiarazioni di conformità degli impianti*) (Ministerial Decree 37/2008).

The above applies to all systems installed after March 27, 2008, and this is a condition for the granting of the *certificato di agibilità*; whilst for technological systems installed prior to March 27, 2008 the owner is required to deliver a “declaration of response” (*dichiarazione di rispondenza*).

The declarations of conformity are not a condition of validity of the sale contract sale of buildings, however conformity of the systems and with the safety rules, although not affecting the legal “tradeability”, does however affect in a relevant manner the economic “tradeability”.

The vendor is required to warrant that the property does not present defects, hence he is required in particular to guarantee that the systems are in conformity with safety rules and will be held responsible for damages suffered by the purchaser due to a nonconformity with the safety rules of the systems installed in the property sold

Therefore we recommend insisting on delivery of the *agibilità* (which of course includes and requires the *conformità degli impianti*) since the lack of the above might put at risk the personal safety of the purchaser and of his family members and guests, it might be the cause of accidents involving personal injury, with consequential civil and possibly criminal liability for the purchaser, it might make it difficult to resell the property in the future, especially if the technological systems are not in conformity, it might create difficulties for the purchaser in obtaining loans from the banking system due to the difficulty to secure insurance coverage of the case of fire of buildings with systems that are not in conformity.

**4. Sometimes we are very fond of US and UK practice, what is the treatment of representations and warranties in your country? Are they valid? Are they pro forma only or actually useful and necessary in practice?**

*[Brief explanation: Generally, legal practice in all countries always include several statements from the seller as to its capacity, the state of condition of the asset, the occupancy, the environmental status, the compliance with public or imperative provisions.*

*The goal of these is generally to cause the seller to indemnify the purchaser from damages caused due to the inaccuracy of any such statements. We, practitioners use them on a very much “copycat” basis but depending on how you work and where you work these can be much more than rhetoric and really compromise the seller.*

*Please kindly let us know whether:*

It is usual in your country to include a set of representations and warranties

- (i) If so, what is their treatment
- (ii) To which extent this involves an extended liability for the seller or is pure rethoric]

The following are **standard warranties and representation clauses** in a deed of sale:

Cadastral Situation (*situazione catastale*)

“The seller in his capacity as the owner of the property sold herein as officially shown in the cadastral records, hereby represents that their state of fact is in conformity with the data and with the cadastral maps.

Origin

Legal title in the property sold hereunder has reached the vendor pursuant to .... Sale and purchase deed executed by and before notary public \_\_\_\_\_ on \_\_\_\_\_ rep. n. \_\_\_\_\_ racc. n. \_\_\_\_\_, registered at \_\_\_\_\_ on \_\_\_\_\_ at n. \_\_\_\_\_ series \_\_. / deed of donation / inheritance....

Possession

The sale takes place with accessions, appliances, fixtures, adhesions, easements and rights and liabilities, actions, reasons and customs relating to property sold, in the state of fact in which the property finds itself and with the immediate transfer of the full and legal possession to the purchaser.

Warranties

The seller hereby grants in favour of the purchaser all the warranties pursuant to the law , especially for the absence of rights of third parties (*evizioni*) and for the freedom of the property sold hereunder from censuses, levels, fees, weights, constraints, encumbrances, mortgages and prejudicial transcriptions, except for the following ...

#### Planning Situation (*Situazione Urbanistica*)

Pursuant to art. 40 of law 28.2.1985 n.47, and pursuant to arts. 3 and 76 of presidential decree 445/2000, the vendor hereby represents that the building in question commenced prior to September 1, 1967; furthermore the vendor hereby represents that the property in question has not undergone building interventions or changes of destination that would have requested a licence or concession or authorisation , except for the following:

- interventions for which the building concession n. .... Has been granted
- the denunciation of commencement of activities (D.I.A.) n. \_\_\_\_\_ Dated \_\_\_\_\_ for works of restoration and conservation improvement ...
- The certified signalling the commencement of activities (S.C.I.A.) n. \_\_\_\_\_ dated \_\_\_\_\_ for the building of ...

Therefore the vendor hereby warrants that the property sold hereunder is in compliance under planning legislation (*regolarità urbanistica dei beni venduti*).

#### Energy Performance Certification

Pursuant to Legislative Decree n. 192 of August 19, 2005 the purchaser hereby represents that he has received the information concerning the energy performance of the buildings; the vendor delivers to the purchaser the energy performance certification relating to the property sold hereunder prepared by ...

on ... the original of which is attached hereunder and marked exhibit ...

The vendor represents that the certification is still valid since as of today no modifications of the planning instruments has occurred.”

#### **Standard boilerplate clauses (*clausole di stile*)**

These clauses do not correspond to a true and effective intention of the parties and are incorporated customarily and almost automatically in real estate transaction contracts, such as the following: - “the sale is made in the state of fact and of law in which the property finds itself, with all active and passive easements”<sup>5</sup> . A clause of this kind does not say anything concerning the effective presence of an active or passive easement in favour or to the detriment of the sold property, and is limited to reminding the parties of the “real”, as opposed to the “obligatory”, nature of any easements in respect of the real property.

The consolidated jurisprudence of the courts commonly considers these clauses as not having any concrete effectiveness, hence the courts hold that the existence of a passive easement is enforceable against the purchaser of a property in so far as it results transcribed in the land registry or mentioned in the deed of sale in a specific and express manner, whilst an easement mentioned only in a boilerplate clause has no legal effect (Cass. Civ. Sez. II 757/99; Cass. Civ. Sez. II 8038/90). To the contrary a clause reflecting the undertaking by the purchaser to free the property sold from prejudicial inscriptions within a given deadline does not amount to a *clausola di stile*, but corresponds to a true and specific interest of the parties (Cass. Civ. Sez. II 5266/97).

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<sup>5</sup> "la vendita viene effettuata nello stato di fatto e di diritto in cui l'immobile si trova, con ogni servitù attiva e passiva".



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- harmonisation of the reports
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- All margins (top, bottom, left, right): 2.5 cm
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- Space between the lines: single
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FAMILY NAME First name of the author, year of the edition, title of the book, name of the editor

*Ex:* PERTEK Jacques, 1998, La reconnaissance des qualifications dans un espace européen des formations et des professions, Bruylant.

**Articles:** (indent of 0.5 cm, Times New Roman 11, bold underlined)

FAMILY NAME First name of the author, date of publication, page number, title of the article, name of the publication

*Ex:* DOWNEY Michael J., April 2004, p.47, Sending a Second Employee Back: Tantamount to Termination?

**Case law citations:** (indent of 0.5 cm, Times New Roman 11, bold underlined) Jurisdiction, date, papers of publication

*Ex:* Conseil d'Etat (3<sup>ème</sup> et 8<sup>ème</sup> sous-section), 30 juillet 2003, Gazette du Palais.

#### **4. Delivery of documents**

Your report must be sent in electronic format to your respective Main Theme Co-ordinator or Commission President, before the deadline set by them. In any event, an electronic copy must be sent to the UIA **by September 15, 2015.**

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