

Newsletter

A landmark decision of the Italian Supreme Court of Cassation on the valid transferability of Italian buildings

Introduction

On 22 March 2019, the Italian Supreme Court of Cassation (the “**Court**”) issued the decision no. 8230 which addresses the validity at law of the transfer of a building not fully compliant with the relevant building permits.

From a commercial standpoint this is a landmark decision which confirms the validity of the transfer even if the building is materially non-compliant with the building permit, so long as a building permit has actually been issued and such building permit has been mentioned in the deed of transfer.

This will significantly simplify due diligence activities (at least where the scope of the due diligence is limited to the validity of the transfer) and will allow greater reliance on the validity of transfer agreements.

Background

Italian law provides that the agreements by which ownership of a building is transferred shall indicate the number of the relevant building permit (or alternatively, that the building has been built before 1967). If the building permit is not mentioned, the agreement is null and void.

The rule is based on two separate rationales, *i.e.*, the need to protect the purchasers, by ensuring that non-compliant buildings cannot be transferred and the indirect enforcement of building codes which arises from the due diligence activities of sellers, purchasers and public notaries whenever a building is transferred.

Such a rule has obvious costs, inter alia in terms of increased complexity of real estate due diligence and transactions, uncertainty as to the validity of transfer deeds and non-transferability of non-compliant buildings.

The case law and market operators have repeatedly tried to address such issues through interpretation of the rule, inter alia by supporting:

- a “*formalistic*” interpretation of the rule (which in its most extreme position would imply that the transfer agreement is valid even if the building permit mentioned does not exist or refers to a different building); and
- a “*materiality threshold*” criterium, identifying cases of “major” non-compliance (which could cause the non-validity of the transfer agreement) and “minor” non-compliance (which couldn’t).

A significant percentage of the case law has, however, applied a “*substantive*” interpretation, by holding that even if the transfer agreement mentions a building permit, this is not sufficient to ensure the validity of the agreement, as a *de facto* check of actual compliance of the building is necessary. Part of the case law has also applied a relatively low materiality threshold to identify the cases of non-compliance which could affect the validity of the transfer agreement.

The decision of the Court

The decision of the Court seeks a reasonable “middle path” between the “formalistic” and the “substantive” interpretation. More in detail, the decision states that the transfer agreement is valid whenever the same mentions a building permit which exists and refers to the building. In such a case, the transfer agreement is valid even if the building is not fully compliant with the building permit that has been mentioned in the agreement, and even when the non-compliance is material (so-called “*variazioni essenziali*”).

The main rationale for the decision is a strong need to ensure the certainty of transfers. The non-compliance with building permits can be sanctioned otherwise, through the application of administrative law (which may cause the application of significant fines, the denial of authorizations or the expropriation or demolition of the non-compliant building) and in extreme cases also of criminal law. The purchaser, for its part, will seek protection through contractual mechanisms (indemnities or termination rights) under civil law.

Implications and practical effects

The decision has been taken by the Supreme Court of Cassation in joint session (i.e. with the participation of judges from multiple sections of the Court). Such joint session decisions are reserved to situations where there is significant uncertainty in the case law and an authoritative and unequivocal decision is necessary to ensure consistency. While such decisions do not have formal “*stare decisis*” value, they provide an essential interpretative criterium and are usually followed by subsequent decisions.

This is an important and appropriate decision, which will provide in future useful certainty and comfort to real estate purchasers and investors.

The main implications are:

- simplification of the “transferability” checks on buildings. This is important, because contestations on transferability often cause delays and discussions between the parties;
- transferability of buildings whenever there is an initial building permit. This is important because under the previous interpretation of the law uncertainty as to the valid transferability of buildings had a substantial “lock-up” effect on certain properties;
- greater certainty as to the validity of transfer agreements;
- greater freedom for the parties to agree on the content and effects of the transfer agreement and on the protections for the purchaser concerning compliance with building permits (as the previous interpretation entailed an implicit “warranty” by the seller as to the substantial compliance of the building with building permits).

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