

Alert | Real Estate



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Italian Supreme Court Requalifies Business Lease Into Property Lease

Shopping center owners should consider a recent Supreme Court ruling – a worrying precedent in the long-running debate over risk of requalification of business leases into property leases.

In a decision published 17 February 2020, the Italian Supreme Court requalified a business lease relating to a retail unit within a shopping center into a property lease. At the time of execution of the business lease, the complex of assets forming the going concern (in this specific case: the use of the real estate unit, certain movable assets, and certain know-how) had not yet been “organized” by the lessor for the exercise of the prospective business activity; in fact, according to the court, such “organization” was implemented by the lessee after execution of the lease.

Such decision contradicts established case law and the contractual practice in force in Italian shopping centers where business leases are consistently used to regulate the relationships with individual lessees; such contractual practice is determined – *inter alia* – by the need to allow the temporary transfer (for the duration of the business lease) of the benefit of the shopping center trading license to the individual lessees/operators of the individual units, so as to enable them to legally perform the business activity therein. The temporary transfer of such benefit would not be achievable through the execution of a property lease.

The decision also appears to lack any consideration for the inner workings of shopping centers, a concern in itself.

While the decision is a single precedent that may be contradicted by future rulings, it is fair to predict that – following such a decision – litigation between shopping centers owners and lessees over the qualification of business leases is more likely.

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