

Colocation Agreements: The Nature and Legal Classification of a New Contractual Model from an Italian Law Perspective

Abstract

This article examines the legal nature of colocation agreements under Italian law. It treats colocation not as a single contractual type, but as a family of transactions ranging from standardised services to the exclusive, long-term use of highly specific infrastructure. While services generally predominate in retail colocation, wholesale and hyperscale transactions combine more complex real estate, development and infrastructure-service elements. The article focuses on restrictions affecting transfers and financing of data-centre assets and on the limits of purely contractual protection against third-party purchasers. For structured transactions, it proposes a multi-layered contractual architecture combining a lease of real property that, subject to specified requirements, binds subsequent purchasers, with a separate infrastructure services agreement. Its broader aim is to enhance legal certainty and foster investment in a sector of strategic importance to Italy and the European Union.

Keywords: Colocation agreements; data centres; commercial leases; infrastructure services; Italian law¹.

1. Data centres: a new strategic asset for our economy

Data centres are essential infrastructure for the digital economy. The growth of cloud computing and, more recently, the development of artificial-intelligence systems have caused a rapid increase in demand for computing capacity, energy and cooling, thereby establishing data centres as a strategically important real estate asset class. There are currently approximately 3,500 data centres in Europe, and forecasts suggest that this number could double over the coming years.²

Public debate focuses primarily on land use and energy demand. These issues understandably attract attention and concern, not least because they are often accompanied by reflections - at times apocalyptic in tone - on the development of artificial intelligence and the risk that it may evolve beyond human control.

Without disregarding or trivialising these legitimate concerns, we should not lose sight of the essential point. In the highly competitive international arena of the coming years, competition between States will unfold not only on the traditional terrain of military deterrence and economic rivalry, but also - and, we believe, predominantly - in the field of artificial intelligence: a new “immaterial” resource, which, whether we like it or not, is destined to have a profound effect on our economies and our lives.³

¹ This paper is an adapted English-language version of an article originally written in Italian and reflects the perspective of a jurist examining the subject through the lens of the Italian legal system.

² AGRATI AND MARRAZZO, *Data center: la disciplina multilivello tra semplificazione e sostenibilità*, *LexItalia*, 4 August 2026, <https://lexitalia.it/a/>. All links cited in this article were checked as at 16 August 2026.

³ Computing capacity and artificial intelligence are not resources in themselves, but rather by virtue of what they make possible. It is precisely the progressive expansion of those possibilities that gives them increasing strategic importance. The most immediate applications are already apparent, both in the military sphere - consider intelligence analysis for identifying military targets - and in the economic sphere, for example through predictive models applied to the exploration and exploitation of natural resources. It would, however, be unduly restrictive to confine our attention to

At the present stage of technological development, data centres constitute the indispensable physical infrastructure for developing powerful and autonomous computing capabilities. The question, therefore, is not whether they should be developed, but where and how this should occur. To refrain from building adequate infrastructure would be to accept increasing technological irrelevance and dependence on technologies, interests and priorities determined elsewhere.⁴

Italy, moreover, is by no means without strengths in this competition, which must necessarily also assume a European dimension.

From this perspective, understanding these new real estate “objects” - and the distinctive regulatory and contractual implications that accompany them - is one of the tasks facing a lawyer who wishes to place their expertise at the service of the country’s development. This requires resisting the uncritical adoption of foreign contractual models without adequate reflection on their proper legal classification. We are not driven by the taxonomist’s pedantry. Rather, following De Nova’s teaching,⁵ we proceed from the awareness that misreading contractual instruments developed within legal systems that may differ profoundly from our own can produce unexpected consequences and, in some cases, prove fatal to the economic interests pursued by the contracting parties.

This article focuses in particular on a model that developed in Anglo-American contractual practice, for understandable reasons connected with the earlier spread of data centres in those markets: the **colocation agreement**. In essence, this is an agreement under which one party - which we shall call the operator, and which has developed or otherwise manages a data centre - makes all or part of its space available to a user so that the latter may install its own IT and digital equipment there.⁶

these uses. Ever greater computing capabilities, combined with increasingly sophisticated artificial-intelligence systems, may become one of the means by which humankind approaches some of the most profound scientific and philosophical questions, perhaps ultimately attaining an understanding of the very nature of life and consciousness. Whoever first gains access to knowledge of that order would possess a form of power scarcely comparable with those generated by earlier technological revolutions.

From this perspective, the recent episode involving Claude Fable 5 is not without significance. The model, unveiled by Anthropic in June 2026, was made available to the public subject to particularly stringent safeguards in certain scientifically sensitive areas: for some requests relating to biology, cybersecurity and programming, the system automatically prevents the use of Fable 5 and switches to an earlier, less capable model. Significantly, the episode became intertwined with action by the United States Government, which subjected Fable 5 and Mythos 5 to temporary export restrictions on national-security grounds, subsequently lifted. Whatever the specific reasons underlying those measures, the episode provides a very concrete indication of the growing perception of frontier-model capabilities as strategic assets, access to which may itself become an object of geopolitical control.

⁴ Against this background, it is unsurprising that the rapid development of data centres is attracting increasing attention from the perspectives of national security and the protection of strategic autonomy, requiring consideration of the possible application of the Italian *golden power* regime. Where the relevant conditions are met, the legislation already encompasses assets and relationships connected with the processing, storage, access to and control of strategically important data and information, as well as certain digital technologies, including cloud computing and artificial intelligence. These matters may plainly intersect with the operation and ownership of data-centre infrastructure (see Decree-Law (Italy) 15 March 2012, no. 21, and Prime Ministerial Decree (Italy) 18 December 2020, no. 179). We nevertheless believe that the transaction under consideration should be given a more specific statutory definition as soon as possible, so as to exclude potential avenues for circumventing national interests.

⁵ G. DE NOVA, *Il contratto alieno* (Turin, 2008).

⁶ Commission Delegated Regulation (EU) 2024/1364 (Article 2(5)) defines a colocation data-centre operator - rendered in Italian as the operator of a “*centro dati in coudicazione*” - as “a physical or legal person who manages and

The operator does not, however, merely grant the use of physical space, as might occur in relation to an ordinary logistics property. It also provides infrastructure and technology services that are essential to the operation of the hosted equipment, foremost among them electricity, connectivity and cooling capacity.⁷ The customer normally retains ownership and logical control of its equipment.⁸

2. Colocation agreements: identifying the economic transaction

Having outlined the essential features of the contractual model found in commercial practice, we shall now describe several important variations. These give rise to differences that are far from marginal in terms of both the applicable rules and, above all, the agreement's classification under private law.⁹

sells space, security, network access, power and cooling capacity in the entire colocation data centre to one or more customers who install and manage their own network or networks, servers and storage equipment and services". The Regulation contributes to the **establishment of a common European data-centre rating scheme**, implementing Directive (EU) 2023/1791 on energy efficiency. It also distinguishes between several types of data centre and operator, and assumes that in colocation data centres part of the technological infrastructure belongs to customers rather than necessarily to the operator. It is therefore a source of EU law that expressly recognises the colocation data centre as a distinct operating model, although it does not regulate its private-law or contractual nature, which remains a matter for the Member States.

The progressive spread of these contractual models in Europe will in any event have to engage with the EU regulatory framework, although its impact varies considerably according to the characteristics of the operator and the relationship. Without seeking to exhaust the subject, we refer in particular to Regulation (EU) 2022/2554 on digital operational resilience for the financial sector (**DORA**), Article 30 of which imposes mandatory minimum contractual content on two levels, depending on whether or not the services support critical or important functions. This includes a description of the services and of the locations at which they are provided and data are processed; service levels with quantitative objectives; rights of access, inspection and audit; duties to cooperate with supervisory authorities; conditions governing subcontracting; and exit strategies incorporating a mandatory transition period. That colocation falls within its scope does not appear seriously open to doubt: Annex III to Implementing Regulation (EU) 2024/2956 includes, among the types of ICT services, the provision of infrastructure and hosting services, including utilities such as power and heat management. A distinct framework, largely independent of the customer's status, is established by Directive (EU) 2022/2555 (**NIS 2**). The Directive does not prescribe standard contractual provisions, but its supply-chain security obligations and time limits for reporting significant incidents inevitably translate into contractual terms.

⁷ Cooling is one of the principal infrastructure components of a data centre, since the heat continuously generated by IT equipment must be dissipated. In traditional architectures, this function is often performed, at least in part, by chilled-water circuits and evaporative systems, which may consume significant water resources. Solutions already exist, however, that rely primarily on air or air-cooled chillers and require very little water.

⁸ This is the feature that distinguishes colocation from cloud or managed services, in which the operator also controls, to a greater or lesser extent, the IT resources and applications available to the customer.

⁹ The study of contractual practice in this field presents a significant difficulty. Colocation agreements, especially in wholesale and hyperscale transactions, are normally subject to stringent confidentiality obligations. This is understandable in light of both the economic importance of the relationships and the sensitivity of the technical and infrastructure information involved. As a result, few complete agreements are publicly available, and comparative analysis must rely upon inevitably fragmentary sources.

In addition to various public sources, this article has therefore drawn upon the EDGAR (Electronic Data Gathering, Analysis, and Retrieval) database of the **U.S. Securities and Exchange Commission (SEC)**, available through the SEC's Full Text Search service (<https://www.sec.gov/edgar/search/>). EDGAR is the system through which companies subject to United States federal securities law file the required documents with the SEC; exhibits to those filings may include relevant contracts (material agreements). The system allows full-text searches of electronic filings and their exhibits and is a particularly valuable resource for lawyers engaged in the comparative analysis of contract law. It should nevertheless be borne in mind that SEC rules permit, subject to specified conditions, the omission or redaction

In **retail colocation**, the customer uses one or more open racks or enclosed cabinets, or a physically separated or protected area (a cage), within premises shared with other users. Its location may be changed, access is subject to the operator's procedures, and the arrangement's economic utility lies primarily in continuity of service. The space allocated to the customer may itself be subject to change: under some agreements, the operator reserves the right to require the customer's equipment to be moved to another area within the same facility, generally subject to specified requirements concerning notice, the technical equivalence of the new location and continuity of service. In configurations of this kind, the space is therefore primarily instrumental and fungible and lacks full autonomy as a real estate unit.

In **wholesale colocation**, by contrast, the customer has the use of a room or data hall, an autonomous or semi-autonomous operating module, or otherwise a significant part of the data centre. The area is specified, power is reserved, and the customer may incur substantial fit-out costs. The exclusivity of use, the degree of physical control and the customer's dependence on the particular asset all increase accordingly. From this perspective, **hyperscale** may be regarded as an evolution - or even an extreme form - of the wholesale model: a single user takes up a very large share of capacity or an entire facility or campus. The data centre may then be designed to the customer's technical specifications and delivered on a build-to-suit or powered-shell basis.¹⁰ In these cases, the operator provides certain utilities and services, while others are installed or managed directly by the customer. Here too, the technological investment depends upon continued control of the property and of the infrastructure that makes it usable.

It is therefore prudent to say that the expression **colocation agreement** does not denote a single contractual scheme, but rather a family of transactions situated along a continuum.¹¹ At one end lies a standardised service in which the space is merely a physical support; at the other lies the exclusive, long-term availability of a specific asset, accompanied by development obligations and infrastructure services. The user's bargaining power also differs profoundly. In retail arrangements, customers normally have limited ability to influence the structure of the service prepared by the operator and, at least as regards its essential elements, adhere to a substantially predetermined contractual and operational model. In hyperscale projects, by contrast, the investment may amount to several hundred million euros. In view of the transaction's economic scale and the customer's strategic importance to the operator, the customer enjoys considerably

of immaterial information whose disclosure could cause competitive harm to the company. Agreements obtained in this way may therefore themselves contain omissions or redactions.

An initial selection of recent references might include, among others: TeraWulf Inc., Form 8-K, 13 August 2025; Cipher Mining Inc., Form 8-K, 24 September 2025; and Applied Digital Corp., Form 10-Q for the period ended 30 November 2025.

¹⁰ In a build-to-suit transaction, the infrastructure is designed and constructed to meet the customer's specific requirements. Under a powered-shell arrangement, by contrast, the operator essentially provides the building shell, already equipped with the principal infrastructure - particularly power availability and connectivity - while leaving a significant portion of the internal fit-out to the customer.

¹¹ The foregoing account does not, in fact, exhaust the possible types of data centre. These also include **enterprise data centres**, owned and operated directly by the end user, and **edge data centres**, which are generally smaller and located close to urban centres or the places where data are used. The distinction between wholesale and hyperscale also requires clarification: *hyperscale* refers primarily to the scale and characteristics of the infrastructure and the associated demand for capacity. Hyperscalers are now among the most sought-after customers in the wholesale market, but they may instead develop and operate their own data centres; similarly, wholesale services may also be supplied to large enterprise users that do not qualify as hyperscalers. Technological and market developments are likely to produce further distinctions and classifications. For present purposes, however, there is no need to pursue each of them, as it is sufficient to identify the categories of greatest contractual significance.

greater bargaining power and may exert a substantial influence over the infrastructure's technical characteristics, the service levels and the very structure of the contractual relationship.

Whatever the model, the contractual architecture typically contains a number of core areas to which the parties devote particular attention. As one moves from retail towards wholesale and hyperscale models, the operator's obligations tend to become more detailed, the customer's rights more extensive and the remedies for breach more complex.

The first area governs the **provision of space**. The agreement identifies the site, regulates access by personnel and governs the operator's continuing access for security and maintenance purposes. More sophisticated models must also distinguish between areas reserved to the customer, common areas and areas over which the operator retains exclusive control. In wholesale and hyperscale projects, where the operator is also required to construct the data centre, this part of the agreement is preceded by specific and sophisticated development, delivery and acceptance obligations: the operator - which is therefore also the developer - constructs or adapts the building in accordance with agreed technical specifications. The agreement regulates milestones, delay, testing, remedies and the requirements for achieving *ready for service*, the point at which the facility has been completed, commissioned and made available in practice for the provision of services to the customer.¹²

The second area concerns the **infrastructure capacity reserved to the customer**. The economic value of the relationship depends not only on the floor area occupied, but also on the technical characteristics of the space and, above all, on the capacity that the infrastructure can provide: available electrical power, cooling capacity, systems redundancy, connectivity and the overall characteristics of the technological architecture. Parameters such as critical IT load (the electrical power used to supply critical IT equipment), the infrastructure capacity reserved to the customer, levels of systems redundancy and energy efficiency are therefore of particular importance.¹³ The charges often reflect the infrastructure capacity reserved and actually used by the customer far more than the number of square metres occupied.

A third contractual area concerns **operational services**: the continuing services through which the infrastructure capacity described above is made usable in practice throughout the relationship. These include the supply of power, cooling, connectivity, security, access control, maintenance, monitoring, operational continuity and incident management. Service Level Agreements (SLAs), namely the contractual provisions defining the service levels that the operator undertakes to provide, are particularly significant in relation to these obligations. Availability, or uptime, is especially important and is frequently expressed as an extremely high percentage. It is not uncommon, for example, for an operator to commit to availability of 99.99%, commonly described in market practice as "four nines", subject to specified exclusions and scheduled maintenance windows. The agreement also regulates response and restoration

¹² In the market practice we have examined, *ready for service* normally presupposes completion of the fit-out of critical infrastructure, receipt of the required permits and commissioning, namely the pre-operational tests designed to verify that the facility is fully operational and capable of delivering the agreed service levels.

¹³ The infrastructure's energy efficiency is also particularly important. It is normally measured by the power usage effectiveness (PUE) ratio, which compares the data centre's total energy consumption with the energy actually supplied to its IT equipment. The closer this ratio is to one, the more efficient the facility. The measure is important not only environmentally but also in strictly economic and industrial terms, since it determines what proportion of the available power is actually devoted to computing capacity and what proportion is instead consumed by auxiliary systems such as cooling.

times and the remedies arising from any failure to meet the agreed standards, including service credits (reductions in or credits against the charges payable by the customer), contractual penalties, cure periods and, in the most serious cases, termination or step-in rights. The latter permit the customer, or another contractually designated person, to intervene temporarily in the management or performance of specified activities in order to ensure continuity of service.

Two further areas complete the picture. Although distinct, they are closely connected, particularly in relation to the data centre's financeability.

The first concerns the **ownership and protection of the customer's equipment**. The IT equipment installed in the data centre remains the customer's property, or is otherwise held by it under separate arrangements, and the agreement must ensure that such equipment is clearly identified and segregated from the operator's assets. The customer therefore has an interest in ensuring that its title is recognised not only by the operator,¹⁴ but also, where necessary, by the operator's creditors, and in preserving its right to access and remove the equipment when the agreement ends.¹⁵

A separate issue concerns the **ownership, transferability and financeability of the data centre**. From the operator's perspective, the property and its infrastructure are assets that must be capable of being financed, used as security, transferred or included in broader investment transactions. Set against this requirement is the customer's need - increasingly acute as one moves towards wholesale and hyperscale models - to prevent a transfer of title, enforcement of security by lenders, enforcement proceedings or the operator's insolvency from interrupting access to and use of infrastructure that cannot readily be replaced. This gives rise to provisions designed to reconcile the asset's free transferability and financeability with the continuity of the customer's contractual relationship and recognition of its rights by subsequent owners and lenders. We shall return to this delicate issue below.

3. Legal classification

The presence of several economic dimensions within a single agreement and, in particular, the tension between real estate features and technology services have already emerged in the common-law jurisdictions in which these contractual models first developed. In particular, the terminology used to identify the legal basis upon which the customer uses space within a data centre frequently oscillates between the concepts

¹⁴ For ease of exposition, we assume that the data-centre operator also owns the property. In practice, corporate structures may be considerably more complex, both for regulatory reasons and to achieve asset segregation. They may require, in essence, the creation of a PropCo (the property company that owns the property) separate from the OpCo (the operating company that actually operates the data centre and bears the business risk). Although highly interesting from both legal and operational perspectives, the subject is far too extensive to be addressed in a footnote and accordingly requires a degree of simplification in the description given in the text.

¹⁵ In Italian contractual practice, the landlord's statutory preferential claim ("*privilegio*") under Article 2764 of the ICC is likely to become a frequent subject of specific negotiation, especially in larger transactions. The tenant is likely to request a waiver of that priority - to the extent that such a waiver is considered legally permissible - proceeding prudently on the assumption that the rules governing leases may apply to the transaction, although, as we shall see, this classification is far from settled. The tenant's interest in retaining unrestricted control of the assets used in its business will tend to conflict with the interest of the landlord and its lenders in preserving a legally recognised priority right.

of a *licence* and a *lease*. This is not merely a terminological distinction, since it reflects different legal configurations of the customer's relationship with the real estate asset.¹⁶

The question of how to classify arrangements combining the availability of physical infrastructure with the provision of technology services has, in fact, already arisen under Italian law in connection with hosting and housing agreements. In hosting, the provider makes its own hardware and IT resources available to the customer - typically processing capacity, memory and storage space - to host the customer's data, applications or websites, without the customer necessarily having the use of any particular physical equipment. In housing, by contrast, the equipment remains the customer's property, or is otherwise under its control, and is physically installed in the provider's premises and infrastructure; depending on the arrangement, the provider supplies space, electricity, connectivity, cooling, security and other ancillary services.

It is precisely this combination, in housing arrangements, of access to physical space and a range of additional services that has raised classification issues similar to those now arising in relation to colocation agreements. Depending on the particular structure of the relationship and the relative weight of its different components, the transaction has been classified as, or analogised to, a contract of deposit, a lease or a services agreement, possibly including ancillary obligations of a different nature.¹⁷ In our view, this approach remains entirely valid for retail colocation, but only partially captures the reality of wholesale and, especially, hyperscale models. In such cases, it is more persuasive to recognise a **mixed contractual nature**, comprising, depending on the precise subject matter, elements of a **lease** ("*locazione*"), a **works contract** ("*appalto*") for the construction of the property and its systems, a **service contract** ("*appalto di servizi*") or a **supply contract** ("*somministrazione*").

The **lease** component is found in the provisions under which the operator makes a specified "space" available for the exclusive installation of the customer's technological infrastructure, for a defined period and in return for a specified consideration. Factors supporting classification as a lease include the stable

¹⁶ **Lease** and **licence** are categories of the common-law tradition and do not correspond perfectly to the concepts of Italian private law. In general terms, a lease grants the tenant exclusive possession of specified premises for a defined period, creating a legally recognised interest in the property. A licence, by contrast, essentially confers a personal right to use or access the premises for specified purposes, without generally creating an independent interest in the property or a right of exclusive possession. Under English law, the distinction traditionally turns on the substance of the relationship and, in particular, on whether exclusive possession exists, irrespective of the nomenclature adopted by the parties: see *Street v Mountford* [1985] AC 809.

The same terminological variation is found in data-centre contracts. In the Master License and Service Agreement between CoreSite and Box, Inc., filed with the SEC, the customer's right to the space is expressly characterised as a licence, and the agreement states that the arrangement is a "space license and service agreement and does not constitute a lease, sublease or easement", while nevertheless recognising forms of exclusivity in relation to specifically allocated spaces such as cabinets or cages. By contrast, under the Lease and Master Services Agreement between i/o Data Centers and CrystalTech Web Hosting Inc., also available through EDGAR, the customer is granted the exclusive right to use and occupy a specified Customer Area, expressly leased to it together with the related data-centre services. The comparison is significant because it shows that economically very similar arrangements may be structured in common-law jurisdictions by granting the customer either a merely personal right to use the space or an exclusive right of enjoyment characterised as a lease. For that very reason, the use of such expressions in contractual documents cannot automatically be transposed into the categories of Italian law. The relationship must instead be classified independently in light of its particular structure and the obligations actually undertaken by the parties.

¹⁷ D'AMBROSIO, *Fornitura di spazio digitale: hosting e cloud computing*, in GABRIELLI (ed.), *Commentario del codice civile. Dei singoli contratti - Leggi collegate* (Turin, 2020); SAMMARCO, *Diritto digitale* (Milan, 2024).

identification of a portion of the data centre, the exclusive or near-exclusive nature of its availability, the long term of the arrangement, the customer's power to control access and the separate economic valuation of the space. The asset made available to the customer may be limited to a single rack, or may progressively take the form of an actual part of the property, identified or identifiable in the cadastral records. In the latter case, the arrangement will display the characteristics of a lease of real property, with the important consequences considered below.

The development component may be classified as a **works contract** where the operator, organising the necessary resources and acting at its own risk, undertakes to construct or enhance the data centre. The construction or expansion of the data centre, achievement of ready-for-service status and performance of the tests unmistakably possess the characteristics of a works contract. Finally, the continuing supply of power and technology services may reasonably fall within the contractual types of a **service contract** or a **supply contract**.¹⁸

None of these elements, however, necessarily appears to predominate in the most significant projects when the relationship is viewed as a whole. This confirms the mixed contractual nature of the model under consideration.¹⁹ It does not, however, preclude the components of the overall transaction from being isolated and regulated separately where doing so advances the parties' interests and provides greater certainty as to the rules governing their relationship.

4. Transfer of the property: what protection for the user?

Having classified the colocation agreement in these terms, we shall devote the following pages to a particular group of contractual provisions commonly included to protect the customer in wholesale and, especially, hyperscale agreements, and consider the consequences that follow from the classification proposed above.

We refer in particular to provisions governing **events affecting the transfer of the asset**. Through such provisions, the customer essentially seeks protection against the risk that the property may fall, so to speak, into the "wrong hands", without preventing its transfer altogether or compromising its financeability. The rationale for these provisions is multifaceted and reflects the distinctive strategic importance that we have attributed to data centres as an asset class from the outset of this article.

In infrastructure of this kind, a change in ownership of the property or control of the operator does more than merely substitute the owner of an asset. It may transfer to a different party the material and operational

¹⁸ On the contested classification of an agreement for the supply of electricity as a supply contract or a service contract, see CITARELLA, *Il contratto di somministrazione del servizio di energia elettrica*, *Giur. it.*, 2012, p. 320 ff. On the supply of IT services, see SAMMARCO, *Diritto digitale*, cited above.

¹⁹ Relevant, though not conclusive, in this regard is the judgment of the Court of Justice of 2 July 2020 (Case C-215/19, *Veronsaajien oikeudenvaltayksikkö*). For VAT purposes, the Court held that data-centre hosting services consisting in the provision of equipment cabinets, electricity and ancillary services do not constitute the letting of immovable property where the customer has no right to occupy part of the property as if it were its owner and does not have exclusive control over it. The decision most probably concerned agreements classifiable as retail under the scheme set out above and therefore cannot properly be extended beyond that context. It nevertheless confirms the importance of the factual and contractual indicators identified in the text for the model's proper classification. Also of interest is Ruling no. 36/2022 of the Italian Revenue Agency, Central Directorate for Large Taxpayers and International Matters.

control of infrastructure upon which the security, confidentiality and continuity of the customer's business depend. The identity and nature of the new party, its financial strength and its experience in operating data centres are therefore matters of considerable importance.

The operator is thus generally required, at a minimum, to give the customer advance notice of any proposed transfer of the asset and any impending change of control of the operator. Depending on the customer's economic and bargaining significance, the agreement may also expressly prohibit transfers to specified **prohibited parties**. This category will typically include foreign governments and entities under their control, competitors of the customer,²⁰ and persons that fail to meet prescribed thresholds of financial standing or lack the professional expertise required to operate the infrastructure.

Breach of these prohibitions may trigger particularly stringent remedies, ranging from termination of the agreement to contractual penalties or other financial remedies, and even an automatic reduction of the charges payable by the customer for the entire remaining term. Economically, a provision of the latter kind may operate as a lethal poison pill, substantially reducing the value of the asset to a potential purchaser and discouraging transactions undertaken without the customer's involvement or consent.

These mechanisms, which are often highly elaborate, may of course assume different forms, be supported by external guarantees or direct agreements with lenders and successors in title, and extend to rights of first offer in favour of the customer.²¹

Subject to these limitations, the asset nevertheless retains considerable scope for transfer and financing. The purpose is not, therefore, to render it unavailable or inalienable, but rather to establish a controlled process of transfer compatible with the operator's financing needs while also preserving the strategic interests of the wholesale or hyperscale customer.

If these provisions are as significant to the transaction as we have seen, their actual effectiveness under Italian law must nevertheless be examined. In particular, it is necessary to consider whether mechanisms that are essentially contractual and *in personam* can withstand events affecting title to, or the financing of, the data centre.

Provisions that prohibit a transfer of the property, or make it subject to the customer's consent, must contend with two distinct sets of issues.

The first arises under Article 1379 of the Civil Code (Italy) ("**ICC**"), according to which a contractual **prohibition on alienation** is valid only if it is limited to a reasonable period and serves an appreciable interest of one of the parties; moreover, it has effect only between the parties. The provision is not confined to absolute prohibitions on alienation. The case law has extended it to provisions which, although not formally framed as prohibitions on transfer, impose equally substantial limitations upon the right of

²⁰ In such cases, the possible implications under competition law should always be considered at the drafting stage.

²¹ A right of first offer, or ROFO, is essentially a right to be consulted before the owner offers the asset on the market or to third parties. It is therefore not a right of first refusal in the strict sense, although its precise structure may vary considerably from one transaction to another and, in some cases, the contractual provisions may bring its effects significantly closer to those of a right of first refusal.

ownership.²² Elaborate contractual mechanisms and particularly broad definitions of the persons to whom the asset may not be transferred could therefore fall within the scope of Article 1379, regardless of the contracting parties' original intentions.

Article 1379 does not, however, automatically invalidate all contractual prohibitions on alienation, but only those which, as noted above, do not serve an appreciable interest of one of the parties or are not limited to a reasonable period. Both requirements may therefore be relevant to the validity of a particular provision. When drafting the agreement, it will consequently be appropriate to set out with particular care the interests justifying the restriction; to limit its objective, subjective and temporal scope as far as possible; and expressly to regulate the effects that invalidity of the individual provision would have upon the remainder of the agreement, including in light of Article 1419 of the ICC.²³

Once this first obstacle has been overcome, a second and different problem arises. In principle, provisions governing transfers of the asset bind the operator that agreed to them but do not, merely by virtue of that fact, confer upon the customer a right enforceable against a third-party purchaser. Contractual penalties, obligations requiring the operator to procure the transferee's accession to the agreement, eligibility requirements for the new owner and other disincentives may significantly strengthen the customer's contractual protection. They do not, however, eliminate the risk that, following a transfer made in breach of those provisions, the customer will be left to pursue an operator that no longer owns the infrastructure through which the service was to be provided.²⁴

Moreover, even if one were, by straining the analysis considerably, to classify the colocation agreement in its entirety as a lease of real property, on the basis that the property-use component predominates over the other obligations comprised in the relationship, the contractual remedies protecting the restrictions on transfer - and, in particular, contractual penalties or rights to a reduction in charges - would hardly, for that reason alone, be enforceable against the new owner-landlord. Such obligations appear to fall outside the essential content of the lease relationship whose continuity vis-a-vis the purchaser is ensured, where the applicable requirements are met, by Article 1599 of the ICC.

It is precisely at this point that the legal classification of the colocation agreement ceases to be a purely classificatory exercise and assumes concrete practical significance. Certainty and stability in the relationship are interests shared by both parties. For the user, they are essential to ensure uninterrupted access to and use of infrastructure in which substantial investments may have been made and upon which

²² See Italian Supreme Court, First Civil Division, judgment of 11 April 1990, no. 3082; Italian Supreme Court, Second Civil Division, judgment of 17 November 1999, no. 12769.

²³ Under that provision, partial nullity of a contract or the nullity of individual clauses entails nullity of the entire contract where it appears that the parties would not have entered into it without the part of its content affected by the nullity.

²⁴ The acquisition of a data centre is not, moreover, a transaction that can ordinarily be completed without the purchaser having conducted extensive due diligence on the colocation agreement constituting its principal source of revenue. The purchaser will therefore be fully aware of the transfer restrictions contractually undertaken by the operator. If it nevertheless proceeds with the acquisition without the customer's consent and knowingly and intentionally participates in the breach of those obligations, the third party may - subject to satisfying an evidential burden that is certainly not insignificant - incur liability in damages under Article 2043 of the ICC. In our view, however, this would not affect the validity of the transfer made without the customer's consent or in breach of any right of first offer. For an analogous case, see Italian Supreme Court, Second Civil Division, judgment of 7 October 2016, no. 20251.

an essential part of its business may depend. For the provider, the strength and predictability of customer relationships directly affect the value of the asset and, particularly in larger transactions, its financeability and the position of its lenders.

Uncertainty as to the classification of the relationship and, consequently, as to the durability and third-party effectiveness of the contractual mechanisms adopted by the parties therefore risks weakening not only the user's position but also the transaction's economic and financial structure. This is particularly important for infrastructure characterised by very high initial investment, long duration, significant specialisation and increasing strategic importance, for which legal certainty is a material component of the investment's sustainability and therefore of its financeability.²⁵

If the development of this infrastructure in Italy is to be encouraged, lawyers too must identify instruments capable of ensuring an appropriate degree of stability and predictability in the parties' relationships. They must propose solutions which, without forcing the categories of Italian law, bring these new transactions within a sufficiently certain legal framework.

5. A proposal for a multi-layered contractual architecture

Against this background, we propose a possible practical solution which, in our view, is capable of strengthening customer protection while also providing greater certainty as to the relationship's legal classification, at least in the more structured wholesale transactions and, above all, in hyperscale projects.

In essence, the proposed solution is to structure the transaction on two distinct contractual levels.

The first would consist of a **lease of real property** concerning a precisely identified portion of the data centre - including, where appropriate, by reference to the cadastral records - with separately determined rent. If the data centre has yet to be developed, the lease may concern the spaces to be constructed, provided that they are sufficiently identified in the project documentation.²⁶

²⁵ Italy has already had a partially analogous experience in the development of investment in renewable energy. The need to ensure the stability, duration and third-party effectiveness of rights relating to sites intended for renewable-energy facilities gradually became a central consideration for the financeability of those transactions, requiring contractual structures adapted to the distinctive features of Italian law. One may think, for example, of the debate surrounding the use of a superficies right ("*diritto di superficie*") rather than a lease, which arose from the particular features of that form of investment.

²⁶ It should also be recalled that, in the case of leases of property for non-residential use with an annual rent exceeding EUR 250,000, Article 79(3) of Law (Italy) no. 392/1978 permits the parties to agree contractual terms and conditions derogating from the provisions of that Law. The economic scale of the wholesale and, even more so, hyperscale transactions considered in this article makes it likely that, where the relationship is structured or recharacterised as a lease, it will frequently fall within the scope of that provision. Consequently, although the mandatory provisions of Law (Italy) no. 392/1978 must be considered when analysing the transaction, their practical importance is substantially reduced because the parties may contractually disapply their effects through appropriate drafting. For the purposes of this article, it is therefore unnecessary to examine in detail the possible interaction of each provision of the commercial-leasing regime, it being understood that the ability to derogate from that regime presupposes satisfaction of the requirements laid down by Article 79(3) and express contractual regulation.

The second level would consist of a **separate infrastructure services agreement** governing the power made available, cooling, connectivity, security, maintenance, operational continuity and the applicable service levels.

This structure does not presuppose a different classification of the overall economic transaction, which retains the composite nature described above. Rather, it seeks to separate the transaction's different functions at contractual level, subjecting each to the legal rules most consistent with its economic substance.

For the customer, the principal benefit would be the ability to rely, as regards the real estate component of the relationship, upon an established body of rules that expressly governs the enforceability of a lease following transfers of the property. Under Article 1599 of the ICC, a lease bearing a date certain prior to the transfer is enforceable against a third-party purchaser. Where it concerns real property and has a term exceeding nine years, enforceability beyond the first nine-year period requires registration. In a wholesale or hyperscale transaction, where the term can reasonably be expected to exceed that threshold, the lease should therefore be executed in a form suitable for registration and subsequently registered in the Italian Land Registers, subject to the general maximum term of 30 years laid down by Article 1573 of the ICC. Where the relevant conditions are met, the protection also applies upon a forced sale of the property, pursuant to Article 2923 of the ICC.

The proposed structure is not, of course, a panacea. Registration of the lease protects the customer's right to use the property, but does not in itself ensure the continuity of the services that make the space economically usable as a data centre. A third-party purchaser may be required to comply with a lease that is enforceable against it, but this does not automatically cause it to assume the separate services agreement. That agreement will continue to operate according to the rules applicable to it and will, in principle, remain unenforceable against the third party, without prejudice to any further contractual instruments adopted to protect the customer. This contractual separation will need to be mitigated through appropriately designed contractual linkages allowing, for example, the customer to replace the operator in the event of its breach of the services agreement or insolvency.²⁷ In a data centre, use of the space is only one of the conditions necessary to utilise the infrastructure: physical availability of the property would be of very limited value without continuity in the supply of power, cooling, connectivity and other essential services. Separating the two contractual levels does not therefore eliminate the risks arising from events affecting the operator, but it does at least distinguish and circumscribe them. The real estate component is protected by the rules governing the third-party effectiveness of leases, while continuity of the infrastructure component must be secured through specific contractual mechanisms.

²⁷ The proposed structure has the further advantage of providing greater certainty as to the overall legal framework in the event of the operator's insolvency, because the rules governing each component of the relationship may be applied separately. If the landlord enters judicial liquidation, Article 185 of the Crisis and Insolvency Code (Italy) provides that commencement of the procedure does not terminate the lease and that the insolvency administrator succeeds to it. Services may be treated differently: in the absence of a special rule, Article 172 on executory contracts or Article 186 on works contracts may apply. In any event, the customer must carefully assess whether it is desirable to keep the lease in force without the services agreement.

6. Conclusions

The colocation agreement does not appear to possess a single, definitive legal nature. Rather, it is an economic category within which the provision of space, infrastructure development and services may carry different weight depending on the particular structure of the transaction.

In retail colocation, the availability of individual racks, cabinets or cages, the greater fungibility of the space and the operator's more extensive control over the infrastructure normally make the service paradigm predominant. In wholesale and, especially, hyperscale arrangements, by contrast, exclusivity of use, the specificity of the site, the fit-out, the scale of the investment and the duration of the relationship may give the real estate component an autonomous and substantial function, even if it does not necessarily predominate over the other contractual obligations.

It is precisely this composite nature that may make the relationship's legal classification uncertain and, above all, render the consequences of events affecting the asset, the operator or the agreement itself less predictable.

Hence the proposal for a multi-layered structure: on the one hand, a real estate title enforceable against third parties and designed to secure the long-term use of the space; on the other, a separate infrastructure services agreement governing the technical and operational services that make the space usable in practice as a data centre.

The strength of the solution will, of course, depend not on the number of contractual documents, but on the consistency between their legal form and the transaction's economic substance, and on the precision with which their interrelationship is regulated.

From this perspective, the lawyer's task is neither to force new infrastructure into a traditional legal category nor to create new categories where existing ones are sufficient. It is, rather, to combine the instruments already offered by the legal system, assigning to each the economic and legal function that it is best equipped to perform.