

*The Sponsorship Contract and New  
Contract Tools for Valorising Cultural Heritage*

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**Abstract**

Scope of the review is the predisposition of contractual tools for protecting and valorising cultural heritage, contributing to the development of the society. Cultural heritage has an economic value, because it becomes one of the most important conditions to attract activities, investments, inhabitants, and tourists. In Italy, public intervention aimed at the protection and valorisation of the national cultural heritage has proven to be inadequate due to cuts in public spending, as well as public administrations' organizational inefficiencies. In this context, based on the principle of horizontal subsidiarity, under Article 118 paragraph 4 of the Constitution, the involvement of private actors (individuals, businesses, Non-profit-organisation) has increased. Therefore, private sponsorship of cultural heritage, which may take several forms, plays an important role. However, models of public-private partnership (PPP), where the private sector takes on directly the management of the cultural heritage, are less common. They can be related only to the valorisation of the cultural heritage, into the limits set by Article 9 of the Constitution, whereas the protection and preservation of the heritage is reserved only for the public sector. The modifications of the Cultural Heritage's Code due to d.lgs. 62/2008, caused the almost complete re-writing of sponsorship contract. These variations, together with other recent laws (such as d.l. 91/2013) and legislation in other countries (especially Germany which has a best practice regulation), will be a good example to analyse the main subjects of sponsorship and its use in the context of heritage.

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## 1. Cultural Heritage as an element of a territory's attractiveness<sup>1</sup>

Cultural assets and heritage conservation can be promoted in the context of developing new direct, indirect, and induced business and employment growth, with significant impacts on economic, social, and environmental conditions. The artistic or ecological resource contributes to the beauty of the site or landscape. Indeed, cultural heritage sites have the same peculiarity: the beauty. It is a soft value that characterizes all these sites, which depends on relationships and then on ecological, economic and social processes.

Beauty has also an economic value, because it becomes one of the most important conditions in attracting activities, investments, inhabitants, and tourists. The beauty of a landscape or a site can be compromised by pollution or improper usage such as inappropriate "modernization". Cultural and environmental integrated conservation produces relevant economic and social benefits overall. For example, tourism represents an economic sector of increasing importance for many local, regional, and national economies. The success of tourism depends on a set of elements including transportation accessibility (infrastructure and network links), attractiveness due to natural and cultural resources (beaches, mountains, and monuments), and the supply of various amenities and services (cultural and social). It is characterized by a major positive multiplier effect on business activities, employment, investment, and development by drawing in revenues and resources from outside of the marketplace. Direct employment resulting from renewed cultural assets can be calculated to generate 1.5 overall new jobs for every 10,000 visitors, to which new jobs specifically in the tourism sector along with temporary construction and renovation jobs in the field of heritage investments must be added. Tourism helps increase property values, wealth, jobs, incomes, and a positive international balance of payments for the tourist destination and its surrounding region and nation. This is also its limitation, because of the negative impacts of tourism on the same resources (the natural and built environment) on which it is based. Each site has a specific "carrying capacity" that should not be overly utilized.

The risk of the tourist approach is the "spectacularisation" as an end in itself, and not as a process for valorisation of local physical, social, and cultural resources: the production of empty and ephemeral images, not rich of meanings experiences. Investing heritage conservation can be a major catalyst of economic development and regeneration, far beyond the simple appeal to cultural and/or physical attractiveness.

## 2. The role of the cultural sector in Italy and its financing in the current economic crisis

The cultural heritage sector is not only necessary for preserving history and culture of a territory, but creates real economic growth with many jobs and businesses. A recent report conducted by *Fondazione Symbola* and *Unioncamere* shows that cultural industry did not sink under the blows of the crisis, and it has become one of the pillars

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of Italian flying in exports. During the most difficult years for the Italian economy, exports have grown by 35% - from 30.7 billion in 2009 to 41.6 in 2013 - and today culture marks a surplus of foreign trade of 25.7 billion, second only to the mechanical supply chain and well above the metallurgical one.

According to this report, the Italian cultural industry generated last year \$ 80 billion of turnover, around 5.7% of GDP (including public and non-profit organizations). Moreover, it was able to mobilize - thanks to a multiplier effect of 1.67 (every euro produced by the culture activates 1.67 in other sectors) - 134 billion extra in other sectors (such as tourism, food industry), arriving at the threshold of 214 billion, in other words 15.3% of Italian GDP. To move this engine that inherits the best of our past and represents the hope for our future, it is a galaxy encompassed by 443.458 enterprises (-0.8% compared to 2011), 7.3% of Italian manufacturing base. Enterprises active in the creative industry (architecture and design), in culture (movies, music, books and printing), museums, entertainment and conferences. Culture employs 1.4 million people, 5.8% of the Italian occupation (6.2% including the public sector and non-profit).

At least 50 per cent of the world's heritage it is concentrated in Italy. This assumption, perhaps excessive, gives a measure of the phenomenon's significance. 60 per cent of Italian cultural Heritage are located in Southern Italy. Even if there is not yet a study which quantifies the value of the whole Italian cultural Heritage, the *Corte dei Conti* (Constitutional Institution with the role of safeguarding public finance and guaranteeing the respect of jurisdictional system) estimated that the Italian cultural Heritage is worth at least 234 billion euro. The southern region of Campania has the majority and the highest concentration of cultural heritage sites. For instance, Naples, on its own, can boast of a budget indicated at € 50 billion (due to the Treasure of *San Gennaro* which is credited to be the richest ever, more than the Crown of England and the treasure of the Czar of Russia). The yield of all this, however, is less than it could be. (The case of *Riace Bronzes* in *Calabria* is emblematic of this phenomenon).

Italy has, despite its treasures, fallen behind its European counterparts. Since the 2009 economic crisis a deep reduction for public expenses has taken place. This is especially true for the cultural heritage sector. In 2013, Italy merely allocated 87 million euro for cultural heritage protection and 1.5 billion for the whole cultural sector. This represents 0.19 of Italian public expense. In ten years the resources for culture have been reduced by 27 per cent. Italian citizens are also last in Europe in terms of cultural participation. Only 30 per cent of Italians visited a museum in 2013 (compared to 44 per cent Germans or 39 per cent French).

The international comparison reveals that the resources for the conservation and enhancement of monuments have become increasingly thin. Until 2009, in fact, Italy allocated 0.9% of GDP to the cultural sector, in 2010 that percentage fell to 0.6 in 2013. Among the EU countries, only Greece has acted in the same manner as Italy, while Estonia and Slovenia are on the top positions investing 1.9% of their GDP.

To improve the situation, the first taboo that must be broken is the appreciation of the assets that we have inherited and which surround us. Assigning a value does not mean to belittle or create the conditions for the sale (that is among other things impossible). It just means being aware of just how lucky Italy really is.

Some studies argue that the ability to extract value from a cultural asset in the United States is sixteen times higher than in Italy. Just this data suggests that there are many areas for improvement and how much income can be recovered and how much employment be offered.

Culture is even in times of crisis a good attractor of sponsorship: 159 million between 2012 and 2013 (+ 6.3%). A good performance, which could further improve. Private investment including foreign ones are welcomed. For this reason Italian legislators recently issued a decree “Bonus Art” with which the government has broken one of the “Italian taboos”: the public-private alliance. The tax relief provided by the decree is a tax credit of 65% on gift contracts.

### 3. Italian Legislation on Cultural Heritage

In Italy the preservation and valorization of cultural Heritage is stated in art. 9 of the Constitution which affirms that “the republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the nation”.

According to this Constitutional not modifiable provision, cultural heritage protection is reserved to the Republic and cannot be delegated to other entities, such as private investors. Despite this function, the enhancement of cultural heritage can be carried out by private individuals. This function is, however, as provided by art. 117, paragraph 3 of the Italian Constitution, under State / regional concurrent legislation. The involvement of private exploitation of cultural heritage, however, is permitted and indeed encouraged by many provisions of the Code of cultural Heritage (*d.lgs* 42/2004). In this context, in order to finance public measures of protection and promotion of cultural heritage, the legislator is trying to attract private funds.

Today, the most widespread form of attraction of private funds in the cultural sector is the sponsorship contract which is an atypical, onerous and bilateral contract; it is stipulated between two parties: sponsee and sponsor. A sponsorship contract of cultural heritage is a unique public-private partnership that is characterized by the association of the name, trademark, image or the product of a company with a cultural asset or event. This contractual tool is attracting growing interest both by the public administration and by enterprises. For public entities, this contract enables in an easy way the availability of resources, or of goods and services, which can be diverted to the pursuit of their institutional purposes (protection of cultural heritage). On the other hand, private investors can benefit from advantages obtained by the combination of the company or its products with the prestigious national cultural heritage site. For these reasons, sponsorship contracts - traditionally present in other socio-cultural sectors as sport and entertainment - is developing as an effective instrument for the conservation and enhancement of cultural heritage.

The Cultural Heritage Code (*d.lgs.* no. 42/2004) dedicates article 120 to cultural heritage sponsorship. This article is contained in Title II (Exploitation and enhancement), Chapter II (Principles of the valorization of cultural heritage) of the second part of the Code. The rule provides, in the first paragraph, a broad notion of cultural heritage sponsorship, which includes all contributions, including goods or services, provided for the design or implementation of initiatives in relation to the

protection or enhancement of cultural heritage meant to promoting the name, trademark, image, activities or products of the sponsor. The promotion of the above, pursuant to the second paragraph of that article, is through the association of the name, trademark, image, activities or products of the sponsor to the initiative of the contribution. The forms of promotion must be compatible with the character of artistic or historic, appearance and decorum of cultural property from the protection or enhancement and are established with the sponsorship contract. In the field of protection of cultural heritage, the purpose of its sponsorship becomes therefore the protection and enhancement of cultural heritage through the provision of private individuals, who find their remuneration in the association between their name, products or activities and the sponsored initiative.

With specific reference to the object of the contract, the obligation imposed on the sponsoring person is an obligation of means and not of results because it precludes any possibility for the sponsor to complain on the lack of image return.

Furthermore, the cause of all sponsorship contracts is to be identified in the sponsor's image promotion. This does not have to lead this type of contract to an advertising one, because by signing an advertising contract, parties want to improve the development and sales of the sponsored product. Otherwise sponsorship represents a real process of association between sponsee and sponsor; through sponsorship the sponsor's image will be promoted and indirectly also its products.

Because of the multiplicity of characteristics which substantiates sponsorship contract, the doctrine has tried to lead it to other typical contracts, in order to identify the applicable legislation. However, none of these attempts was successful, thereby affirming the conviction, confirmed by case law, that sponsorship contract is an atypical contract, with no similar contractual tools (*ex multis, Consiglio di Stato*, sect. VI, December 4, 2001, n. 6073; Cass. civ., sect. 1, 13 December 1999, no. 13931). This feature does not prevent the usability of this contract by public authorities, which can be free, as any individual, to stipulate every contract. Indeed, public entities can without any doubt conclude atypical contracts, as long as they are aimed at achieving worthy protection of interests.

### 3.1 Technical, pure and mixed sponsorship

The types of sponsorship contract that may be concluded by public entities are three and they have different disciplines.

#### 3.1.1 The technical sponsorship

This type of sponsorship consists in a form of partnership extended to the design and implementation of part or the whole intervention in the care and expense of the sponsor of the services required. In addition to works or services provided by the sponsor they may include, services and supplies, which are instrumental to the first (*eg.* installation and assembly of equipment and facilities, supply of furniture). With regard to legislation, technical sponsorship is subject to the application of artt. 26 and 27 of *d.lgs.* no. 163/2006 and for the choice of sponsor to art. 199-*bis* of the Code. In a nutshell, this type of sponsorship contracts:

- does not apply the law on public tendering;
- sponsor choice must be made by a notice published on the website of the administration. The notice must contain a description of the intervention to be carried out, including the minimum value and the time of implementation, with the request for tenders to increase the minimum amount of funding. In addition, the notice shall indicate the factors and criteria of evaluation of tenders and the award is made in favor of those who have proposed the best offer;
- the requirements for planners and executors of the contract are dictated by *d.lgs.* 163/2006;
- for all matters concerning the planning, direction and execution of the contract, the sponsor is subject to the control and the requirements issued by the contracting authority or other entity.

The sponsor may rely on third parties for the execution of the work, if the other companies are in possession of the same requirements listed on the notice.

### 3.1.2 The pure sponsorship

In this contract the sponsor is committed only to finance payment obligations. The standard reference for this type of contract is art. 199-*bis* of *d.lgs* no. 163/2006, but it is simplified. The choice of the sponsor must be made by a notice published on the website of the administration. According to the law, it is sufficient that the notice includes a description of the intervention to be carried out, including the minimum value and the time of implementation, with the request for tenders to increase the minimum amount of funding. The award is made in favor of the investor that offers the greatest funding.

### 3.1.3 The mixed sponsorship

Mixed sponsorship results from the combination of the first two. By signing this sponsorship type, the sponsor can provide directly the design, and then only fund the work provided. In this case it will be applied both the provision on technical and pure sponsorship.

In all cases of sponsorship below the amount of 40,000 EUR, public entities must operate only under the principles of legality, good performance and transparency of administrative action. This implies the possibility for the administration to identify the contractor in any form, provided in a transparent, fair and non-discriminatory way. In particular, such obligations may be considered to be adequately fulfilled if such sponsorships are published on the website of the administration and if it decides to negotiate directly with the first operator that expresses interest.

## 3.2 The choice of the sponsorship type

The administration has always an obligation to predetermine the type of contract in the notice. The decision to entrust a technical, pure or mixed sponsorship contract depends on the ability of the public to manage the tender process and the subsequent phases of execution of the contract, the level of definition of the design available and the type of intervention to be carried out:

- a pure sponsorship will be chosen, if a project is available for which the public entity merely needs a financial resource for implementing it.
- otherwise technical sponsorship will be preferred in the event that the administration intends to avoid procedural costs related to the management of procurement and the subsequent construction stages. Through this contract the administration avoids direct involvement in complex and challenging construction phases of the operations, and has only a supervisory role.
- mixed sponsorship may further be considered preferable if the administration has a feasibility study and needs sponsor funding for realizing it.

In order to prevent disputes in the implementation of the contract, it is important that the contracting authority provides in the public a description of the intervention as stated in art. 120 of *d.lgs.* no. 42/2004.

### 3.3 Use of advertising bills

If the sponsorship contract provides the affixing of signs or other means of advertising on buildings or areas protected as cultural heritage, the general rules laid down in art. 49, *d.lgs.* no. 42/2004 will apply. This article states that it is forbidden to place or affix billboards or other means of advertising on buildings or in areas protected as cultural property. Moreover it shall be forbidden to place hoardings or other means of advertisement along roads located within or near these properties.

In relation to these properties the superintendent may, after assessing compatibility with their artistic or historical nature, authorize or permit the use for advertising purposes of the coverings of the scaffoldings mounted for the execution of conservation or restoration work for a period of time that does not exceed the duration of the work. For this purpose, the tender contract for the aforesaid works must be attached to the application for the permit or assent.

## 4. Other contractual tools for the cultural heritage valorization

In addition to sponsorship contracts, there are other related contractual figures that can be used by the administration to create partnerships between public and private sectors.

- Patronage;
- partnerships with non-profit organization (third sector);
- adoption of a monument;
- project financing;
- Concession of advertising space.

### 4.1 Patronage

Sponsorship contracts are onerous and bilateral. These features differentiate this contract to donations or patronage. Compared to the sponsorship, such cases are distinguished by the fact that the investor has no equivalent in the expected benefit from the publicity of his role as a patron. It is outside the scheme of sponsorship, even if the funder benefits a return of the image due to the beneficiary behavior. Patronage, therefore, does not fall into the category of bilateral contracts but, depending on the concrete behavior of the case, can be divided in two different contractual

arrangements: the modal donation, *donation sub modo*; and the so-called “internal sponsoring”.

This distinction does not lead to different administrative and fiscal regime of the two cases. In both cases for the administration there is no duty of competitiveness to be observed in the choice of the patron and no special procedural formality is requested.

#### 4.2 Partnership with non-profit organizations

Cultural agreement of valorization between a private lender and the administration is similar to patronage, and concerns a broader program or project of public-private partnership, referring to the restoration of an asset or group of assets and articulated in cultural activities relating directly or indirectly related to the protection of cultural heritage. It is a complex figure related to cultural agreements stated in art. 112, *d.lgs.* no. 163/2006 (where the enhancement must be understood primarily as improving the protection, but also such as public use improvement of the asset).

Although these agreements are considerable complex and may contain the prediction of specific *facere* obligations for the administration, they are related to patronage and are, therefore, free from authorization. Hence, art. 199-*bis* of the Code of public contracts does not apply and the direct engagement after specific proposal and initiative of the patron it is possible.

#### 4.3 Monument adoption

Once clarified the distinction between the relations of sponsorship and donations, it is worth to define the “adoption of a monument”. Indeed, this expression does not match an autonomous legal institution, but it has a purely factual valence in the description of a phenomenon, which is likely to be attributed to both the sponsorship agreement, and patronage. The adoption of a monument is the provision of a private entity, in order to fully compensate one or more specific needs for protection and / or enhancement of cultural property, often for a specific period of time, so that the private individual assumes the care of the monument. The term “adoption of a monument” is interchangeably used in two cases.

In the first case as patronage because there is any intervention for the public entity. In the second case, it is a strong sponsorship that is qualified by the special intensity of the relationship with the cultural heritage site / object. In fact, while sponsorship relationship involves an association between the sponsor and a specific intervention for the protection or enhancement, adoption of the monument allows the private individual to directly link his / her name to the cultural property, creating a greater economic utility for the adopter.

#### 4.4. Project financing

In project financing, public administrations are taking advantage of funding sources for institutional activities, alternative and / or additional to those obtained through traditional channels, however, unlike in sponsorships, project financing in the economic relationship is more complex, since the promoter / financier, not only deals with the implementation, but also the management of the public and the cash flow



gets the return on invested capital, according to the typical pattern of granting construction (completion of the restoration work) and management (public service provided by the well in the case of cultural heritage, public service opening to public use and enhancement of the well restored).

In project financing private investors play an active role. The basic framework is artt. 153 *et seq.* of the Code of public contracts, which include various forms of procedure, for realizing project financing. Since project financing are bilateral operation, unsolicited proposals can never lead to the signing of contracts for direct procurement.

#### 4.5 Concession contracts for advertising space

A very common case is that the administration funds conservation work of cultural property by affixing posters or other means of advertising on scaffolding installed for the execution of the work. In such cases, it is necessary to determine whether the relationship can be traced back in the scheme of the sponsorship agreement, or if it gives rise to a different contract for the sale of advertising space. It's not worth to differentiate these two categories because both fall under the legislation pursuant artt. 26, 27 and 119-*bis*, *d.lgs.* 163/2006.

#### 5. German legislation on cultural heritage

Art and culture as provided by the German Constitution are a responsibility of each *Land* and of the State. The federal government takes over with around 1.2 billion euros approximately thirteen percent of total spending on art and culture. The State is competent for cultural institutions and projects of national importance for maintaining German cultural heritage in a good state of conservation. Indeed, valorization of cultural heritage is one of the focal points of the cultural policy of the federal government; therefore, there are various federal programs. One of them is "National valuable cultural monuments" which was launched to support the conservation of monuments, archaeological monuments and historic parks and gardens. From 1950 to 2012, this program obtained about 342 million euros permitting the restoring of more than 600 cultural monuments.

Conservation and historic preservation are indeed competence of the *Länder*. In addition, there are considerable resources provided by communities, churches, foundations and private monument owners. Donations are regulated in the German civil code – *bürgerliches Gesetzbuch* BGB under sect 516 *et seq.* The classification as a "donation, gift" does not prevent that the company may install a plaque with its name (indeed, according to § 516 BGB the gift must be free). Private funders receive tax relief and a certain compensation for their investments. Therefore, particularly in these last years, a lot of importance was given to income tax law. According to this law, there are two tax reductions for owners of historic buildings or monuments. Both if the building is let or not.

Finally, it is evident that Germany has introduced a significant number of tax measures which should benefit the owners of historic properties and ensure that these properties are adequately maintained for future generations.

## 6. Conclusion

The private patronage of culture in general, and in particular, restoration of cultural heritage cannot be considered a rare phenomenon. It should be noted, however, that prior to the entry into force of *d.lgs.* no. 42/2004, the legislator had never issued a comprehensive law on this topic with the result that interventions took place outside of a precise frame of reference. Indeed, by the lack of legislation on sponsorship, the actions of individuals to support the conservation of cultural heritage were labeled as *donatio sub modo*, contracts of service, advertising contracts or simply among the different forms of patronage. Following the full recognition by the doctrine and jurisprudence of sponsorship contract as an atypical, onerous and corresponding contract was due by the intervention of the legislator. It issued provisions contained, both in general (with art. 43, l. 449/1997, art. 119, *d.lgs.* no. 267/2000 and art. 26, *d.lgs.* no. 163/2006), and special laws (art. 120, *d.lgs.* 42/2004 “Code of Cultural Heritage”).

Also in Italy, sponsorship can be considered - at least in the abstract - the most appropriate and effective tool in terms of collaboration and partnership between public bodies and private entities for the protection and enhancement of historical and artistic heritage.

This review has showed that the role of individuals in the field of cultural heritage must be considered essential for the development of the sector, especially in times of economic crisis. In this context, the tools used up to now are related, for the most part, to finance activities which are then taken directly from the public subject to protection, enhancement and management of the cultural property. Between these instruments, one of liberal disbursements found a lack of practical application for the reasons already mentioned, the inadequacy of their fiscal convenience, the lack of visibility and / or image return to the donor, for certain burdensome bureaucratic procedures, the existence of other forms of donation alternatives regarding initiatives that are perceived by the donor of higher ethical value. Sponsorship, however, has had better luck. However, despite some practical application of the institution, the regulation has the same uncertainties and unresolved issues, both for the phase identification of the sponsor, as well as for the adjustment of the contractual relationship later.

To this end, the best practices that could be created, prepared model type, better mechanisms for the tax benefit of the sponsor.

However, in order for the involvement of private capital, the sponsorship contract has limitations that belong to the very nature of the contract. Firstly, the fact that the return of the cost incurred by the sponsor is obtained only indirectly from the operation, being tied to the positive impact that advertising has on a certain business. The increase in revenue of a certain commercial activity could, however, also be achieved by pursuing different paths. It is also known that the costs of advertising are the first companies reduce in times of crisis, since it is not closely related to the costs of production and, therefore, fixed at least in the short or medium term.

Moreover, for implementing investors' participation in cultural heritage financing, it is necessary to provide to private individuals a direct return on their investments. As the German legislation has indicated.

This opens the way for the use of contracts for public private partnership, with the application of new models and the definition of new roles for the public partner and the private sector, in relation to cultural heritage.

The application of these models to the field of cultural heritage, as it was pointed out, poses serious problems for the constitutionally provided necessity of their direct protection by the state and the nature of public goods, which could be contradicted by their subjection to private management. The private management of cultural heritage should, therefore, be limited to the enhancement.

These difficulties may, however, be a certain limit to the interest of private transactions of this nature. Once again, the reasons of efficiency, which is traditionally the responsibility of economists, must be reconciled with those of equity, a task for the legislators.

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