

24. HOW DOES COLLABORATIVE PROCUREMENT OPERATE IN ITALY?

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24.1 What is the approach to alliances in Italy?

Historically, there has been a negative attitude in Italy towards alliance contracts and other collaborative contracts. This can be traced to a number of reasons, for example:

- These contracts are not included among the specific contract types described in the Civil Code¹
- Italian operators are sceptical of adopting standard contracts because they believe that they are too complex; and it is common practice, even for major contracts, to come to an agreement with a handshake
- Legal advisers still prefer to draft tailor-made contracts by setting the details case by case.

In order to describe how Italian academics and practitioners look at collaborative contracts, it is necessary to consider how scholars in Italy as a civil law jurisdiction have developed contract theory by reference to the Civil Code². Despite the Code recognising the principle of party authority³, it is a common perception that the Code offers a framework that covers most of the issues arising from the implementation of any contract. This creates a reluctance to introduce contractual models designed to support and expand on the law, and a preference to trust the law rather than the contract⁴.

The contract is perceived as a bespoke tool to govern only particular elements of a legal relationship. As a consequence, with the exception of specific sectors⁵, the potential good practice of standard model contracts is underestimated and the contract as a tool governing the issues that can affect a specific relationship is undervalued. Limited attempts to create model contracts have been pursued

¹ This provides a general framework that regulates all kind of contracts; the fact that these contracts are not included in the Civil Code is very relevant because in Italy the law is entrusted with the task of authorising private and public organisations to undertake transactions with a legal value. There is a famous saying used a lot by Italian legal experts: *Ubi lex voluit dixit, ubi non voluit non dixit* – meaning ‘when the law wants something to happen it says it, when the law does not want something to happen, it remains silent’. So, while parties are free to create collaborative contracts, the absence of a legal category may suggest to some parties that collaborative contracts are not needed.

² For general guidance on the theory of contracts according to the Italian literature: De Nova, G. (2014); Galgano, F. (2011); Sacco, R. & De Nova, G. (2004). On atypical contracts in the Italian system: De Nova, G. (2010). On public contracts in the light of Italian scholars, see, *ex multis*: Racca et al (2011); Racca, G. M. (2012); Racca and Yukins (2014); Torchia, L. (2016); Ramajoli and Galli (2017); Valaguzza, S. (2018).

³ Article 1322(1) of the Civil Code.

⁴ A detailed description of the civil law system that highlights the differences with the common law can be found, in particular, in Monateri, P.G. & Somma, A. (2016).

⁵ In particular, when one contracting party is dominant, for example in the case of contracts stipulated by banks and insurance companies.

by professional or trade associations but superficially drafted, tailor-made contracts are still used even in relation to complex projects. The commercial assumption persists that model contracts cannot solve 'real' problems, underpinned by the culture of the Italian legal profession which is more focused on litigation than on contract engineering.

Italian construction operators, especially in the private sector, do not attempt to draft inclusive, clear and consistent contracts, but instead base the success of a legal relationship on the selection of their counterparts. Reliance on people replaces the faith in the contract which, while it might appear consistent with collaborative relationships, is a risky approach in a litigious environment.

In Italy, there is no special legislation governing the construction market, and regulation of the sector is divided between provisions applicable to:

- Construction involving only private sector organisations, contained in the Civil Code and mainly regulating procurement⁶
- Provisions applicable to construction by a public sector client, contained in the Code of Public Contracts (now the Legislative Decree no. 50/2016)⁷.

In addition, Italian construction contracts are often:

- Fragmented, in that they are divided among many contracts awarded to the professionals involved in each specific project
- Static, in that they focus on every individual negotiated relationship, without taking into account wider interactions
- Occasional, in that the contents of contracts are often the result of decisions by the most powerful contracting party, not necessarily consistent with the principles of the legal system or with the overall sector.

A lack of specialisation in construction law is a weakness which could be addressed by adopting guidelines and model contracts designed to simplify the issues most commonly faced and to improve contractual performance through clauses based on studying the needs of the sector⁸. Among these needs, a pivotal role can be played by contracts that improve the coordination between the professionals involved in a specific project from its initial conception.

⁶ Luminoso, A. (ed) (2010); Costanza, M. (ed). (2000); Cuffaro, V. (2011); DeTilla, M. (2007); Mangini, V. & Iacuanello Bruggi, M. (1997); Russo, E. & Criaco, C. (2005); Miglietta, M. & Miglietta, A. (2006); Di Gregorio, V. (2013); Panetta, R. (2012).

⁷ Cianflone, A. & Giovannini, G. (2002). Lasalvia, M. (2017); Cabiddu, M.A. & Colombo, M.C. (2017); Carullo, A. & Iudica, G. (2011); Garella, F. & Mariani, M. (2016); Ferrari, G.F. (2013); Clarich, M. (ed) (2010).

⁸ For example, Italian case law shows that, with regard to the execution of procurement contracts for design and works, the issues most commonly examined by judges are those regarding: supposed errors of one of the parties; the admissibility of requests from the public administration to the contractor to execute variations to the project; price revisions; interruption of works; the promptness of supplies; the interpretation of specific contract terms.

The economic crisis in Europe, the complexity of Italian national rules, the reluctance of the legal system to depart from more traditional tools, and the high level of litigation are all elements that demand a vigorous and innovative intervention, both in the private and in the public sectors, aimed at greater cost and time control, optimisation of processes and exchanges of information, improvement of efficiency and promotion of healthy competition.

In practice, the lack of exposure to collaborative contracts means that all the relationships between the parties involved in a project are regulated by single contracts that form a chain, without the integration offered by an alliance. The consequence is a lack of cooperation that often creates cost overruns and delays and that greatly increases the risk of disputes. Health and safety records also show that something is not working correctly in the relationships between contractors, subcontractors, designers and managing bodies⁹: The adoption of alliance contract models, and their regular use as a new contractual norm, could provide the answer to real and unavoidable needs.

To overcome reactionary attitudes, it is very important to offer a clear picture of the advantages that alliance contracts can provide, in particular as to the cost and value of any project and more generally to the economy of the country. A first step towards the promotion of collaborative procurement was taken by the University of Milan, when in December 2016 it received from King's College London and the ACA Council a licence for the translation and adaptation of the Framework Alliance Contract 'FAC-1'. This contract promotes the collaborative environment that is needed in Italy to overcome the adversarial attitude that dominates the construction sector and that is responsible for extra costs and delays. The application of FAC-1 is also consistent with the general principles of Italian public law, namely transparency, efficiency and control over quality.

The Italian version of FAC-1 was subject to consultation among Italian academics, public and private sector clients, consultants and contractors and has been adapted to make it compatible with the Italian legal framework. Consultees included the Municipality of Milan, the Ministry of Infrastructure and Transport, the Administrative Court of Milan, Associations of Constructing Companies, and the most important public players in railways and in highways infrastructures. The reactions were very positive.

FAC-1 is increasingly attracting the interest of economic operators, public authorities and the public-contracts regulator. FAC-1 would give both public authorities and private clients the opportunity to act strategically, while taking advantage of the opportunities offered by new digital technologies and modern contracts.

FAC-1 represents the first example of an alliance model contract in Italy, designed for and directly applicable to the construction sector¹⁰. Figure 1 at the end of this Chapter 24 summarises changes made to FAC-1 for the purpose of its translation into Italian. In October 2017, the Italian version of FAC-1 was launched and, since then it has been adopted on several important projects.

⁹ For example, in the period 2013–2017 we counted 7 deaths and many people injured because of collapsed bridges and viaducts in the north and in the south of Italy.

¹⁰ The Italian version of FAC-1 can be purchased at the following link:

<http://www.ebuildingcontracts.co.uk/italian-fac-1/>. For info and technical support is possible to email the following address: fac-1@unimi.it.

In July 2018, the Italian Centre of Construction Law and Management¹¹ (CCLM) launched the first two trials of FAC-1 in Italy in the context of the public sector, both of which are summarised in Section 10.10:

- FAC-1 Liscate School – a €5 million works contract for a new build public school in the Municipality of Liscate
- FAC-1 Science for Citizens Project – a € 335 million project for the PFI design, construction and operation of a campus for University of Milan

The very first trial of FAC-1 in Italy concerned the construction of a school in Liscate, a municipality in the area of Milan, for an amount of approximately € 5 million (five million euros). The idea of applying FAC-1 in this context resulted from the project being modelled in BIM by a design team supported by the Polytechnic of Milan. They saw that the application of FAC-1 would enable a deeper synergy between the client, the designers, the main contractor and the supply chain.

Two crucial factors had a positive impact on the adoption of FAC-1 in this case. Firstly, the management of the public tender was entrusted to a central purchasing body acting on behalf of several municipalities. It had wide experience of public contracts and was willing to trial something new. Secondly, the accountability of the universities involved as consultants to the client, as well as the role of CCLM, strongly influenced the decision to trial FAC-1.

FAC-1 was explained during a meeting with prospective contractors, following an on-site inspection for the purpose of assessing the condition of the site. The Polytechnic's representative explained the criteria for evaluation of offers and the representative of CCLM outlined the features of FAC-1. It was specified that the goal of the contracting authority was to secure the commitment of participants to being members of a coordinated team with a shared objective, namely to respect the timeline and costs associated with construction.

The agreed objectives of the alliance are:

- To monitor the timeline and costs of the works
- To avoid modifications necessitated by design errors or insufficiently detailed study of the project
- To deal with potential unforeseen events in the most efficient way possible, both by means of information modelling and collaborative contracting techniques.

The alliance members are the client, the contractor, the design team, the construction manager and the safety coordinator. Subcontractors and suppliers will be invited to join the alliance but not the FAC-1 Core Group. The FAC-1 Independent Adviser is CCLM.

Among the FAC-1 Alliance Activities are weekly meetings of the alliance members, the preliminary development of a supplies calendar and development of a timeline for the appointment of subcontractors in order to secure Supply Chain Collaboration.

¹¹ <http://www.cclm.eu>.

For the FAC-1 Success Measures and Targets, mathematical formulae have been developed that will allow mapping of compliance with the FAC-1 Timetable and with agreed cost estimates for the project. If application of the formulae indicates that one or more Objectives have not been met, the alliance member identified will be required to provide explanations as to how such failures occurred and to propose remedial measures to the FAC-1 Core Group.

Regarding Incentives, it was agreed that the achievement of Objectives would result in alliance members being officially recognised as eligible to carry out alliance activities and experienced in using innovative contract forms. These measures are being considered as the basis for award of a corporate credit rating by the National Anti-Bribery Authority.

The second and most noteworthy test of FAC-1 in Italy concerns the design, construction and operation of a new university campus in Milan in the area where it hosted the international exhibition Expo 2015. This privately funded project will involve Lendlease as the concessionaire, noting their experience of collaborative projects such as North Wales Prison in the UK.

The campus project involves urban regeneration in an important part of the city, planned with the intention of placing research centres of excellence (such as the Human Technopole) side by side with the University of Milan's scientific, educational and research faculties, and with a range of recreational and other facilities.

The specific circumstances of the campus project have made the University's request to use FAC-1 especially compelling. In particular, the promoter raised risk issues that may obstruct the success of the project, depending on the activities and interests of third parties such as:

- The public entities involved in administrative procedures and in the issue of building permits in compliance with town-planning legislation and environmental law
- The owners of surrounding properties
- The developer of the area surrounding the campus
- The university's professors and researchers.

FAC-1, with the aim of coordinating and controlling a wide range of activities, has been recognized as a useful instrument to deal with the above complexities.

Alliance members will include the client and the publicly-owned company responsible for urban regeneration (Arexpo), and also the concessionaire, the construction manager and the safety coordinator. Stakeholders will include project funders and public bodies involved in permits and authorizations.

FAC-1 will govern the complex interactions between the alliance members and stakeholders, during the design and construction phases, in order to ensure that the design responds to the needs of the client and in order to measure the time and cost of the works, also to avoid modifications deriving from design errors or insufficient study of the project. The Italian National Anti-Bribery Authority will monitor the use of FAC-1 on this project in order to assess the potential for improved transparency and improved value through collaborative construction procurement.

The objectives of the alliance are:

- To coordinate the agreed activities of each alliance member
- To minimise the negative effects of unforeseen events
- To address promptly, and in a cooperative manner, the needs of the design and the construction teams
- To point out promptly, in accordance with the Early Warning System, each and every issue that emerges during the design and execution of the works.

In the FAC-1 Risk Register relating to Alliance Activities, we have included a 0 to 5 index for the assessment of specific risks, the impacts of those risks on the Framework Programme and the agreed risk management strategies. For example, the risk of insufficient flexibility in the project is considered very high and could negatively affect compliance with the client's needs. Consequently, the information and coordination obligations relating to this risk have been reinforced.

In this context, there is relevant innovation in a new move towards model contracts and alliances in the public sector. Legislative Decree no. 50/2016 has delegated the National Anti-Bribery Authority to adopt and to impose on contracting authorities new model contracts, model tender documents and model public notices, with the intention of promoting efficiency in the public contracts marketplace. This is a unique initiative and the model contracts, if accepted, could also be drafted by an organisation that has the specific task of preventing corruption and that is entrusted with regulatory functions. Therefore, new contracts will emerge as a regulatory tool created by a third party for use in the Italian public sector and not as a spontaneous product of self-regulation. Standardisation resulting from regulation implies that model contracts will be imposed rather than selected on the basis of their merits and consistency. It is possible that the future of alliance contracts in Italy may in part depend on the foresight of the National Anti-Bribery Authority, to whom the Italian translation of FAC-1 has been presented as a possible way to better orient the industry in relation to public contracts.

The adoption of FAC-1 on two pilot projects in Italy has triggered a keen interest in this contract form. The monitoring of these pilot projects will be crucial.

24.2. What is the approach to BIM in Italy?

In Italy, in the ambit of private construction, BIM represents a medium for improved value that currently only the best architecture and engineering firms are able to offer. Working with BIM represents an important competitive advantage, as well as improving the ability to answer the client's needs for accurate timing, cost and design solutions.

In Italy, there are no specific regulations applicable to BIM in relation to private sector works, and the use of BIM¹² is not yet compulsory. Nevertheless, the 2016 Public Contracts Regulations¹³ introduced some significant provisions, applicable to the construction of public works, that enhance a digital transition and indicate a strategy to promote digital modelling tools. This is of great importance since,

¹² We here rely on the definition given by Eastman, et al (2016). With regard to the Italian legal system, the most complete analysis of BIM as an innovative method of planning, especially with reference to its practical application in the construction sector, is made by Ciribini, A. (2013).

¹³ The new Code of Public Contracts, Legislative Decree no. 50/2016, implementing EU Directives 23, 24 and 25/2014.

in Italy, the public sector provides the most significant quantity and quality of work for the construction industry.

In particular, the new regulations established that the planning and design of public works should ensure the 'incremental use of specific digital methods and tools such as those for modelling building and infrastructure'¹⁴. The regulations provide that public authorities such as Government, public enterprises and local administrations may require the use of digital methods and processes in a tender¹⁵. The regulations also entrusted a commission established within the Ministry of the Infrastructure and Transport with definition of the methods and timeframe for the progressive mandatory implementation of BIM.

In December 2017 the Minister of Infrastructure and Transport published Decree n. 560/2017, which provides a gradual introduction of BIM in the design of public works, making it mandatory from 2019 for complex projects with a tendered value equal to or higher than €100 million. By 2025, it is proposed that this mandate will apply to all projects commissioned by contracting authorities, with the intention of promoting the evolution of the construction sector through the application of advanced technological processes. To start with, the public sector recognises that in a 'crumbled scenery of actors and responsibilities' in the markets of services, architecture and engineering 'only a slow but gradual evolution of a strong public customer and its function seems to be able to determine the necessary change'¹⁶.

The intended path and established deadlines show that, in the public sector, BIM will gradually be made mandatory with a timescale that is not aligned with other more technologically developed countries¹⁷. The delays that have characterised the switch from traditional design to digital modelling may derive from the fear of reduced competition between operators in the sector. In Italy, the fragmented and diverse market for design services appears inward-looking and driven by the interests of professional associations that are often not able adequately to keep pace with new developments. This tendency can frustrate the promotion of good practice, precision and quality in public works and can protect those enterprises that are not in line with current developments.

That said, we are witnessing the use of BIM in some public tenders, with some inevitable difficulty for contracting authorities, especially in the arrangement of the tender documents. The requests to offer a BIM model in a public tender mainly follow these alternatives:

- To specify what is expected from all the participants, without evaluating the different BIM offers
- To make BIM one of the aspects that must be evaluated as part of the technical offer.

¹⁴ Article 23, para. 1.

¹⁵ Article 23, para. 13.

¹⁶ Ermolli, S.R. & De Toro, P. (2013).

¹⁷ For example, data provided by the European Commission shows that in Italy Internet and informative tools have very low rate of application in the ordinary relationships between citizens and public administrations- Eurostat report (2017). This report states that in the last 12 months only 25% of Italians used Internet to interact with public authorities.

In the latter case, it is essential that the contracting authority specifies in detail the expected BIM modelling in order to make the technical offers comparable. It should also be taken into consideration that in Italy there are 36,000 contracting authorities¹⁸. Therefore, it is unrealistic to imagine that they all have the adequate professional skills to set up a tender procedure for BIM or to understand how BIM models work.

The first uses of BIM in public tenders have been followed by disputes arising from the adjudication of the contract¹⁹. In May 2017, the Administrative Courthouse of Milan had to deal with a judicial claim related to the request for BIM in a public tender for the design and construction of a school in Milan. The plaintiffs challenged the evaluation of the offer presented by the highest bidder, who supposedly had presented an incomplete and inconsistent BIM model containing a two-dimensional (2D) representation of the entire electrical system of the building, instead of a three-dimensional (3D) one as required by the tender documents.

The case was dismissed by the administrative judges on the basis of a technical assessment carried out by the Director of the Department of Structural, Geotechnical and Building Engineering of the Polytechnic of Turin, on behalf of the court. The judgment established that:

- A 'BIM format' does not exist, since BIM is a method of work and not an instrument; therefore, the digital representation of the model is irrelevant; this is consistent with the technical literature which has affirmed that 'BIM is not a thing nor a type of software but rather a human activity that involves, ultimately, extensive modifications to processes in the construction sector'²⁰
- The goal of BIM is to introduce 'a more efficient process of planning, design, construction, management and maintenance [by using] a standard model of information in a digital format for each building, new or existing, containing all the information created or gathered on that building in a format usable by all the parties involved in its lifecycle'
- It is not mandatory to use BIM guidelines when requesting BIM in a public tender.

As the cited case shows, the path towards the acceptance of BIM in Italy is rough and it will take time before the necessary knowledge and good practice will be shared by all the operators in both the public and the private sectors. In this regard, the use of FAC-1 could increase the spontaneous and efficient use of BIM in construction contracts in Italy: indeed, a modern collaborative contract could be used as a platform to facilitate the coordination of each party's competences and to control the multiple activities of the alliance members during the design and the execution phases.

When presenting FAC-1 to public authorities, the CCLM emphasised the fact that BIM is going to become compulsory for public contracts over a certain threshold. We proposed collaborative contracts as a necessary corollary to the efficient use of BIM. It was easy to explain to public clients and

¹⁸ According to data collected in November 2017.

¹⁹ Regional Administrative Court for Lombardy, Milan, 29 May 2017 no. 1210, in www.giustizia-amministrativa.it.

²⁰ Eastman et al (2016), 361.

economic operators that, if a project is BIM based, there is a need to coordinate different participants with different roles and responsibilities.

According to this logic, FAC-1 is likely to become the most effective instrument to govern the interactions between the different players involved in a project using BIM, while also regulating the responsibilities and activities of each alliance member.

The use of digital tools and methods is changing the way in which design activity is conceived, and it is also affecting team-working habits which now tend to be more and more integrated at all levels. This significant change in contractual relationships requires a re-thinking of the contractual framework, for example to deal with issues of shared responsibility among team members and to integrate the intellectual property rights connected with digital projects.

In Italy, as a consequence of the attention to so-called 'Legal BIM', the level of interest in alliancing and collaborative contracting is now very high. The use of new technologies is bringing about a radical modernization of the traditional contractual approaches hitherto used in the construction world. Professionals, businesses and scholars are now beginning to appreciate how beneficial this evolution can be. It represents a shift from adversarial contract types to collaborative contracts, in which all involved parties can move in the same direction, with an awareness of being key players in the success or failure of a project or programme of work. In this way, all parties are winners or all are losers.

In summary, the public sector is particularly suited to collaborative procurement because the compulsory use of BIM requires a contractual framework that imposes discipline on the relationships between the team members involved in the realization of a project.

24.3 What is the approach to construction contracts in Italy?

The approach to construction contracts in Italy is fragmented, driven by the regulations applicable to public contracts, not adequately specialised and highly adversarial. Construction contracts are well understood and the current law does not address the real needs of the sector. The approach based on general rules in the Civil Code weakens the construction sector, which has suffered a significant crisis in recent years.

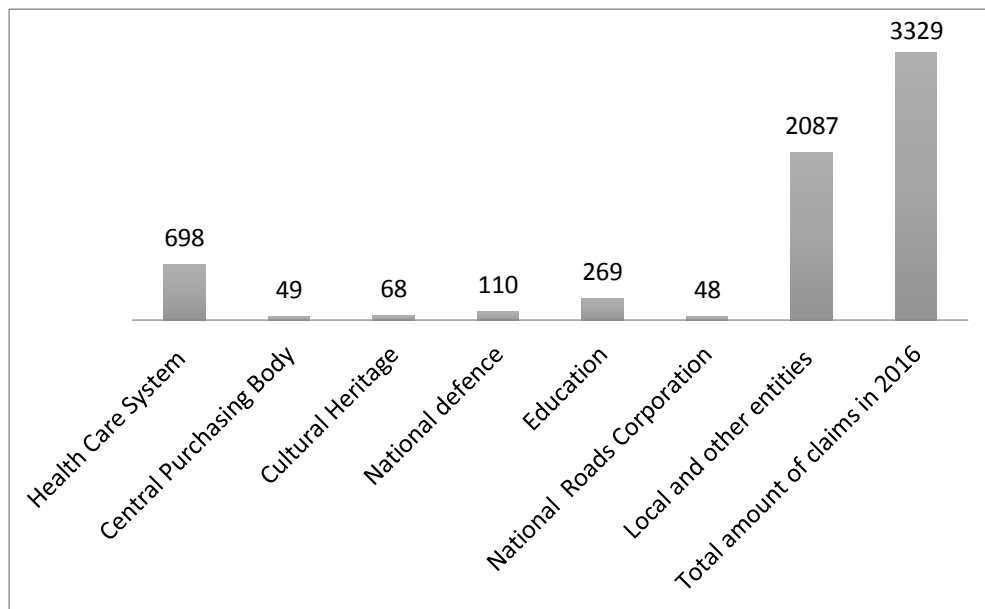
In Italy, there is no general regulation of construction law applicable to both public and private contracts. Therefore, the approach varies according to the private or public nature of the client. The most interesting and innovative rules and provisions come from the field of public works and, more specifically, the regulatory activity of the National Anti-Bribery Authority. This an example of strategic regulation²¹ aimed at enhancing the medium and long-term development of the country. Therefore, we can say that currently in Italy the public sector is the driver of the positive values of progress and development. It is the public sector that is promoting model contracts and digital methods, along with other objectives such as sustainable development, the preference for quality over price, new technologies for innovation and public-private partnerships.

²¹ The expression 'strategic regulation', in the field of public contracts, has been coined in Valaguzza, S. (2016)(1). See on this matter also Valaguzza, S. (2016)(2), 1; Lachimia, A. & Valaguzza, S. (2017).

It must be noted that the very detailed public contract regulations in the Code of Public Contracts are also taken into account by private operators in order to regulate their businesses, but that the very limited provisions of the Civil Code applicable to private procurement are unable to deal with the issues concerning the realisation of complex works. Other activities of contracting authorities also provide useful material for the private sector. For example, the price list based on estimates of market prices, used for public tenders, has become an easy point of reference for private sector clients.

Due to a lack of non-adversarial norms, a lack of trust in contractual modelling and the low costs of litigation, most issues continue to be resolved in courts of law. Figure 1 shows the high number of disputes concerning public procurement claims brought before the Regional Administrative Courts of First Instance in 2016 and divided into subtopics. The data has been collected with the support of the National Anti-Bribery Authority’s database and elaborated by the Council of State’s Press and Communication Office²².

Figure 1



Disputes in the construction sector discourage foreign enterprises and cause the isolation of the Italian market²³. Claims and disputes derive from the fact that bespoke contracts, usually drafted on behalf of clients, are less able to express and balance the different needs and attitudes of the parties involved in a project. In this context, disputes often arise to avoid compliance with the requests of the client. It will be possible to overcome this situation only with the adoption of model contracts and good practice equivalent to those used in other countries.

²² According to the research, 1,023 public procurements challenged were below the €200,000 threshold, 689 were between the €200,000 and €1 million thresholds and 1617 were above €1 million. All data are retrieved from *Giorn. dir. amm.*, issue 2, 2018, 249.

²³ According to the report of PWC/European Commission (2016) ‘Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds’, only 1% of procurements in Italy are won by foreign firms.

The attempt to reduce litigation in the construction sector is one of the courses of action that the Italian Minister of Infrastructure has declared a willingness to promote, and is one where the public sector can play a leading role²⁴. The reduction of excessive disputes in this sector is one of the current goals of Italian politics, also in the public sector, and the new Code of Public Contracts proposes alternative resolution methods that favour extra-judicial conciliation.

24.4 What is the potential for a framework alliance in Italy?

In the context described in the previous sections, the introduction of alliance contract models has very significant potential. Alliance contracts would allow us to deal with the issue of shared responsibility using a clear and appropriate discipline for each of the complex relationships existing between all the parties involved in any project, including those with sub-contractors.

In the private sector, the use of alliance contracts would give clients the chance to involve construction companies and professionals from the initial stage of the project, thus reducing errors in the execution of the works and improving compliance with the timescales and costs of the operation. Furthermore, an alliance contract could benefit businesses in the construction sector by enabling them to regulate their mutual and shared responsibilities. This is very important in civil law jurisprudence which assumes the joint responsibility of all the subjects involved in a project.

In the public sector, alliance contracts would allow the application of general principles established by the public law, such as:

- Transparency (in line with anti-corruption policy)
- Efficiency (avoiding or reducing extra costs)
- Control over the quality of execution (with reduction of mistakes in the design of public works and consequently with reduction of contractual variations necessary to correct errors in the project development).

Where BIM is applied, it is also useful to use an alliance contract. If the parties agree to share relevant information related to a given project, it is necessary for them to coordinate each other's competencies and to control the multiple activities of team members during execution with appropriate and specific contractual systems.

In short, the use of alliance contracts in Italy would enable alliance members to:

- Reduce costs during implementation and verify the timing of execution
- Coordinate the activities of alliance members with more guaranteed results and reduced unforeseen interferences
- Manage complex works in an efficient way, integrating the contributions of different expertise and integrating the work of multiple clients

²⁴ A system is under consideration that rewards enterprises that complete projects without bringing any conflict to trial.

- Achieve improved value in terms of sustainability of the works or services, improved organisation of sites, improved employment and working conditions and improved cooperation with the supply chain
- Involve all professionals in cooperation that could prevent or reduce the errors made by other members of the alliance
- Promote transparency in relation to the purposes and specific goals of cooperation, and define the methods for measurement of performance
- Prevent risks during the construction phase and establish procedures to manage them
- Reduce litigation by preventing and managing potential claims.

In addition, alliance contracts would enrich the system with solid legal support for the use of BIM in the construction sector, through:

- The development of positive interaction between different members of a design team
- The coordination of the different phases of work
- Agreement of all critical aspects of the multilateral relationships between the parties, such as intellectual property rights and responsibilities for managing the project.

The alliance contract appears to be an advantageous model for all members of a team involved in any project. All professionals can benefit from greater control over the realisation of the project, from the saving of time and costs through the alliance, from the anticipation of issues that could arise during the construction phase and from the elimination of barriers between the design and the construction phases, with a consequent reduction of variations as well as of litigation. All team members can be urged to demonstrate their expertise, for example by exploiting economies of scale, and to earn additional payments or other incentives.

Furthermore, all members of the alliance can enjoy the benefits deriving from the collaborative culture in which their work is executed, through clear allocation of responsibilities, simplification and coordination of those activities and reduced likelihood of errors during execution. All members of the alliance would also benefit from the increased level of transparency and from shared data, so that the objectives of each party are more easily achieved and are combined with general benefits for the alliance members as a whole.

24.5 What are the legal issues affecting an alliance in Italy?

The first obstacle to the adoption of alliances in Italy is the mentality with which construction sector businesses sometimes approach contracts, not in order to clarify and develop legal relationships, but as a source of privileges and advantages to the strongest party in the negotiation. In both the public and private sectors, operators attempt to maintain competitive advantages deriving from informative asymmetries. This creates reluctance to be part of an alliance that gives responsibilities to all the parties to share information, to connect their responsibilities and to disclose to the client the risks and potential obstacles to the success of the project.

However, if we examine Italian case law more thoroughly, the attitudes described above should be overcome. The most recent decisions of the civil courts recognise the existence of 'a substantial cohesion of the relationship' between the designer, the site manager, the manager, the contractor and also the client, thus recognising in distinct contracts an alliance in substantial terms²⁵. Therefore, it is becoming crucial to agree the interactions and responsibilities of the different parties involved in a specific project. This should lead to greater adoption of the new approach offered by collaborative contracts, where the risks and the tasks of each professional are regulated in a rational and consistent manner in order to avoid the imposition or assumption of inappropriate responsibilities.

For example, if all the team members involved in a given project were aware of the legal risks of being responsible for another party's mistake when they are engaged under different contracts²⁶ then, in order to avoid being trapped in the negative effects of another party's act or omission, they would agree to a more coordinated approach through alliance activities. What we lack in Italy, especially in public and private construction projects, is education as to the benefits of cooperation and of building contractual relationships inspired by the successful resolution of conflicts. FAC-1 could be the solution to reduce litigation, inefficiencies, high expense and fragmentation in the construction sector.

There are no real obstacles, in the Italian legal system, to overt recognition of the model contracts that establish and discipline an alliance²⁷. The illusion of the self-sufficiency of the law and of the tailor-made single bespoke contracts could be overcome if economic operators had a clear picture of the risks they run on a daily basis and of the advantages they could obtain by adopting and implementing alliance contracts. The legal assessment of the pros and cons of alliance contracts can be highlighted to operators in the sector, in order to convey the economic and legal advantages of cooperation, sharing information and implementing collaborative procurement in ways that cross the borders between separate contracts.

In the pilot projects described in Section 24.2 we have assessed the use of FAC-1 in the public sector, using tender procedures carried out according to traditional methods and applying the Italian regulations on public procurement. A primary benefit of this approach will be to encourage contracting authorities to think not only about the award procedure but also about the substance of what is expected from a given project in terms of added value.

Furthermore, to reward an economic operator's willingness to cooperate and to evaluate its ability to propose solutions to issues arising - instead of taking advantage of them - encourages strategic re-

²⁵ Court of Monza, Sect. II, 1 September 2016, no. 2364. On the topic also cf. Cass. Civ., sect. II, 27 August 2012, no. 14650; Cass. Civ., Sect. II, 2 February 2008, no. 2800; Cass. Civ., Sect. II, 26 September 2016, n. 18831; Cass. Civ., Sect. II, 27 A 2012, no. 14650.

²⁶ It has been recently stated, for example, that 'the contractor, when he must realize somebody else's projects, must always respect the rules and is subject to responsibilities despite interference from the client, so that the responsibility of the contractor, with the consequent compensatory obligation, does not fail even in the case of faults attributable to planning errors or supervision of works, if having realized the presence of a fault he did not promptly report it to the client and notify his disagreement, meaning he did not observe faults recognisable as being within his expertise and ability'. Cass. Sez. Civ., ord. no. 20214/2017.

²⁷ Rolfi, F. (2006); La Rocca, D. (2006); Angeloni, F. (2004), 41; Cannata, C.A. (1999), 12; Camardi, C. (1997), 74; Barcellona, M. (1987), 677; Donisi, C. (1980), 649; Cian, G. (1968), 253; Giorgianni, M. (1951), 29; De Vincentiis, Q. (1906), 249.

thinking by the construction sector in Italy. With the aim of introducing a new construction strategy, it is very important that the National Anti-Bribery Authority has shown interest in the legal framework of alliance contracts. For this purpose, CCLM was recommended to trial FAC-1 as a collaboration tool, without at this stage offering additional economic incentives to alliance members but instead offering formal recognition that enhances the reputation of alliance members who adopt collaborative behaviours.

Formal acknowledgement of the benefits of collaborative contracts, as instruments that can create added value in public procurement, would help in spreading adoption of this model. It would assist all who believe in alliancing if a soft regulation at a supranational level (such as a green paper of the European Commission) described the benefits of collaboration in the field of public sector contracts and offered suggestions as to its wider adoption. Therefore, discussion and circulation of evidence from the use of the alliance contracts in practice is very important.

Figure 2

TABLE OF DIFFERENCES BETWEEN THE ENGLISH AND THE ITALIAN VERSIONS OF FAC-1

REFERENCE	ENGLISH VERSION	ITALIAN VERSION (translated into English)	EXPLANATIONS
Title	Framework Alliance Contract	Framework dell'Accordo Collaborativo	The acronym of both definitions is 'FAC-1'.
Inside cover	Description of the nature and origin of FAC-1 and details about intellectual property rights on the document and publication	A preface was added, explaining the contents and the structure of FAC-1.	The explanatory preface is intended to bring the operators closer to the model contract, which is far from the way that contracts are structured in Italy.
FAA, reference to clause 1.6	The Core Group members are:	Added footnote: 'Every Alliance Member should appoint a delegate to be part of the Core Group'.	The footnote was added – answering the request of the sector to clarify that individual members should not fear the decisions of the Core Group, since they are all represented in the same body.
FAA, clauses 10.1 and 10.2	The following amendments apply to the duties of care under	Added in italics: '(only to provide a higher, additional or more specific duty than	Italian law does not permit us to derogate from the duty of care.

	clauses 10.1 and/or 10.2	the one established by the Contract Terms)'. '.	
FAA, reference to clause 15.3	Adjudication	Deleted	Adjudication does not exist in Italian law and is arguably not compatible with the approaches to alternative dispute resolution permitted in the Italian system.
FAA, signatures	Or executed as a deed by ...	Signed and authenticated by ...	In Italian law execution as a deed does not exist. The typical approaches are signature, authenticated signature and a public act drafted by a notary public.
Clause 10	Duty of care	10.1 makes reference to a suitable duty of care, according to the roles, expertise and responsibilities of the Alliance Members. 10.2 makes reference to a duty of 'fairness and bona fide'. 10.3 and 10.4 make reference to the duty owed in respect of contractual obligations.	The clause has been adapted to the Italian contractual duty, which cannot be derogated from by the parties.
Clause 14	Termination	14.2.2.1 In case an Alliance Member doesn't meet an Objective or a revised Objective, the Client or the Additional Client will have the power to terminate the contract or (only in the case in which the performance of said Alliance Member is	The clause has been adapted to the Italian rules on termination which cannot be derogated from by the parties. The Italian bankruptcy law forbids termination

		<p>not considered essential) the appointment of that Alliance Member, only after the notification of an invitation to remedy within 20 Working Days. If the objective is not reached after that period , the contract or that appointment will be automatically terminated.</p> <p>14.3.1. The other Alliance Members shall have the right to cease to be a party, to require immediate execution of the Client’s performance and to suspend their own performance unless adequate warranty is provided.</p> <p>14.3.2. The norms contained in the bankruptcy law shall apply.</p> <p>14.4 In case of breach, every Alliance Member shall notify it to the Core Group, which shall provide guidance and recommendations; in parallel, the Alliance Member shall invite the breaching member to remedy within 20 Working Days. If the breach is not resolved within that period, the FAC-1 contract or (only in the case in which the performance of said Alliance Member is not considered essential) the appointment of the</p>	<p>in case of insolvency events.</p>
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		breaching Alliance Member will be automatically terminated.	
Clause 15	<ul style="list-style-type: none"> - Adjudication - Conciliation or Dispute Board - Arbitration 	<ul style="list-style-type: none"> ➤ No adjudication ➤ Conciliation or amicable agreement (i.e. a contract by which the parties, through mutual agreement, define an imminent or actual difference) ➤ Arbitration, as it is described in the English version 	<p>Adjudication does not exist in Italian law.</p> <p>Amicable agreement is a common tool to solve disputes in Italy.</p> <p>Arbitration may not be applicable to public administrations but it is only facilitative.</p>
Definition: Independent Adviser	An independent adviser who may be identified in the Framework Alliance Agreement and appointed on terms agreed by the Alliance Members to provide fair and constructive advice to the Alliance Members on the implementation of the Framework Alliance Contract and the avoidance or resolution of any dispute.	There can be more than one independent adviser, of different expertise.	This reflects the fact that differences and disputes could rise both on technical issues and on legal issues.
Definition: insolvency event		<ul style="list-style-type: none"> ➤ any case in which (where the Alliance Member is a legal person) events or other exterior facts demonstrate that it is not able to regularly satisfy its obligations; or: ➤ any case in which (where the Alliance Member is a natural 	The definition has been adapted to the Italian insolvency rules which cannot be derogated from by the parties.

		<p>person) he/she has filed a restructuring plan in court;</p> <p>➤ any other event equivalent to those indicated above, in any other jurisdiction outside Italy;</p>	
Appendix 4		Does not consider adjudication.	
Final page	Signatures	A double signature is required for clauses 1.3, 1.4, 5.6, 7.5, 8.10, 13.1, 13.2, 14 and 15.	According to the Italian Civil Code, such clauses – where inserted in a document such as the Contract Terms – should be expressly double-signed for acceptance.