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Disproportionate Confirmatory Deposits: Judicial Inquiry into Parties' Intent rather than Automatic Nullity

The Italian Supreme Court of Cassation (Judgment no. 19987/2026) mandates judicial recharacterisation as an advance price payment for sums exceeding contractual equilibrium

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Current Legal Framework as of 3 September 2026: The Italian Supreme Court of Cassation holds that stipulating a confirmatory deposit manifestly disproportionate to the total purchase price (amounting in the case at hand to 92.5%) requires the court of its own motion to recharacterise the payment as an advance on the purchase price on grounds of breach of objective good faith and constitutional solidarity under Article 2 of the Italian Constitution.

ABSTRACT

This article examines Judgment no. 19987 of 15 June 2026 of the Italian Supreme Court of Cassation, Civil Division, concerning the validity and causal qualification of a **confirmatory deposit** stipulated in a manifestly disproportionate amount relative to the total purchase price in a preliminary contract for the sale of real property. The analysis explores the judicial duty to look beyond the formal contractual label (*nomen iuris*), the substantive boundaries placed upon private autonomy by the canon of **equitable balancing of interests** under Article 1371 of the Italian Civil Code and the principle of **contractual solidarity** enshrined in Article 2 of the Italian Constitution, as well as the court's *ex officio* power to reclassify excessive payments as a mere **advance payment on the price**, thereby precluding statutory withdrawal and recovery of double the deposit.

Key Takeaways

- **Overcoming formal contractual labels:** The formal *nomen iuris* chosen by the contracting parties does not bind the court when determining the actual causal function of an advance payment.
- **Proportionality review:** A confirmatory deposit equal to 92.5% of the purchase price distorts the typical statutory function of pre-estimating damages for breach on a lump-sum basis.
- **Recharacterisation as advance price payment:** A manifestly excessive upfront transfer must be reclassified as an advance payment toward the agreed sale price.
- **Exclusion of double recovery:** Recharacterisation renders the statutory withdrawal remedy and the claim for payment of double the deposit inapplicable.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Civil Law & Contratti e obbligazioni

LEADING DECISION
Italian Supreme Court of Cassation, Civil Division, Judgment of 15 June 2026, no. 19987 — A manifestly disproportionate confirmat

Legal Principle / Editorial Headnote

In preliminary contracts for the sale of real property, qualifying an upfront monetary transfer as a confirmatory deposit (caparra confirmatoria) pursuant to Article 1385 of the Italian Civil Code presupposes that, within the concrete arrangement of interests pursued by the parties, the sum paid retains a proportionate function as an advance, lump-sum pre-estimation of damages for potential breach, without resulting in a manifest disproportion that upsets the synallagmatic equilibrium of the contractual relationship; where the agreed sum corresponds to nearly the entirety of the stipulated consideration (in the present case, 92.5% of the total purchase price), the trial court, exercising its ex officio powers of contract interpretation and legal qualification and acting in compliance with objective good faith under Article 1375 of the Civil Code and the constitutional duty of solidarity under Article 2 of the Italian Constitution, is required to ascertain whether the causal scheme of the confirmatory deposit has been improperly deployed and, upon finding partial nullity (voidness ab initio) of the disproportionate clause for conflict with the limits of private autonomy under Articles 1322 and 1371 of the Civil Code, must recharacterise the transfer as an advance payment on the price, with the consequent inadmissibility of any claim for statutory withdrawal and recovery of double the amount paid.

01. CONTRACTUAL BACKGROUND AND ISSUES ON THE MERITS

The issue of a **disproportionate confirmatory deposit and clause nullity** in preliminary real estate sale and purchase agreements strikes at the core of contractual equilibrium and judicial review over private autonomy. In Judgment no. 19987 of 15 June 2026 rendered by the **Italian Supreme Court of Cassation, Civil Division**[1], the Supreme Court addressed the paradigmatic case of a contractual stipulation providing for a confirmatory deposit (*caparra confirmatoria*) exceeding ninety-two per cent of the total agreed purchase price, drawing a clear dividing line between the legitimate exercise of freedom of contract and the abusive distortion of statutory contractual instruments.

The dispute originated from the execution of a preliminary sale contract concerning the transfer of a prestigious **commercial and office real estate complex**. Under the written terms of the agreement, the contracting parties agreed upon a substantial overall purchase price while simultaneously stipulating the immediate delivery of a sum expressly designated by the parties as a **confirmatory deposit**, corresponding to approximately 92.59% of the total agreed consideration. The remaining balance of the price, representing a marginal share of less than eight per cent, was scheduled to be paid upon execution of the final notarial deed of sale.

Prior to the expiry of the deadline set for closing the final conveyance, sharp disagreements arose between the contracting parties regarding the urban-planning, building, and cadastral compliance of certain portions of the property, as well as the **discharge of prejudicial encumbrances** recorded against the asset. Following the failure to execute the notarial deed, the promissory seller brought proceedings before the competent Court of First Instance seeking **specific performance** of the obligation to conclude the final contract pursuant to Article 2932 of the Italian Civil Code, maintaining that the property was fully compliant and that the counterparty's refusal to complete the conveyance was unjustified.

Entering an appearance in the proceedings, the promissory buyer raised an exception alleging material breach on the part of the seller, declared its withdrawal from the preliminary contract pursuant to Article 1385(2) of the Italian Civil Code, and filed a counterclaim seeking an order compelling the promissory seller to pay **double the confirmatory deposit** delivered, for an aggregate monetary sum equal to nearly twice the entire commercial value of the property stipulated in the preliminary contract.

Having ascertained the seller's breach, the court of first instance dismissed the claim for specific performance under Article 2932 of the Civil Code and upheld the counterclaim, ordering the selling company to pay double the amount formally labelled as a confirmatory deposit. The Court of Appeal upheld the first-instance judgment in its entirety, taking the view that the adjudicating court was strictly bound by the literal wording and express formal classification adopted by the contracting parties, in deference to the principle of the **inviolability of contractual autonomy** under Article 1322 of the Italian Civil Code.

The promissory seller lodged an appeal before the Italian Supreme Court of Cassation against the appellate judgment, alleging infringement and misapplication of Articles 1384, 1385, 1322, 1371, 1418, and 1419 of the Civil Code, as well as Article 2 of the Italian Constitution, on the ground that the lower courts had failed to declare the nullity of a manifestly disproportionate confirmatory deposit and had omitted to recharacterise it as a mere **advance payment on the price**, thereby failing to prevent an intolerable punitive duplication of a purchase price paid almost in full in advance.

The factual scenario scrutinised by the Supreme Court highlights a widespread commercial practice in corporate and real estate transactions whereby massive upfront financial transfers are structured under the nominal label of a confirmatory deposit, frequently with the aim of locking in the transaction or creating positions of undue contractual leverage to the detriment of the promissory seller. The jurisprudential tension resolved by Judgment no. 19987/2026 clarifies that the legal system does not acquiesce in such drafting artifices, restoring substantive coherence between the economic nature of the performance and the applicable legal regime.

02. THE CAUSAL FUNCTION OF THE CONFIRMATORY DEPOSIT AND OVERCOMING FORMAL LABELS

2.1 — The Multifunctional Nature of the Institution under Article 1385 of the Civil Code

In examining **disproportionate confirmatory deposits and clause nullity**, Judgment no. 19987/2026 thoroughly reconstructs the doctrinal architecture of the institution governed by Article 1385 of the Italian Civil Code. The confirmatory deposit (*caparra confirmatoria*) possesses a **composite, multifunctional structure**: it operates simultaneously as tangible confirmation that the contractual agreement has been concluded, as partial advance performance of the obligation in the event of due fulfilment (whereby the sum is imputed to the consideration owed or returned), and as a **conventional, lump-sum pre-estimation of damages** in the pathological event that one of the contracting parties commits a breach.

From a doctrinal standpoint, the distinction between a confirmatory deposit and other forms of advance patrimonial payment or pre-liquidated compensation lies in the specific accessory link connecting the deposit agreement to the principal obligation. Whereas an advance payment on the price constitutes a mere anticipatory performance devoid of any sanctioning function, and a penalty clause (*clausola penale*) operates independently of any physical delivery of money as an obligatory promise of lump-sum damages, a confirmatory deposit requires a real transfer (*datio rei*) accompanied by a bilateral and symmetrical termination mechanism. Whenever that symmetry is shattered by an exorbitant amount, the sanctioning effect oversteps the boundaries of its typical causal function and degenerates into an abusive private penalty.

Precisely because Article 1385 of the Civil Code introduces an exceptional derogation from the ordinary rules governing contractual damages—relieving the non-breaching party of the **burden of pleading and proving** both the existence (*an*) and the quantum of the loss suffered—the typical cause (*causa*) of a confirmatory deposit necessarily presupposes a **physiological quantitative proportion** relative to the economic value of the principal obligation under the contract. Where the sum delivered no longer reflects a reasonable advance estimate of potential harm, but absorbs virtually the entire value of the asset, the typical statutory function of the deposit is irremediably betrayed and distorted.

Accordingly, the interpretative inquiry entrusted to the trial court in construing contractual stipulations (cf. Italian Supreme Court of Cassation, Civil Division, Order no. 14565/2026[2]) cannot stop at the lexical surface of the instrument. The **principle of substance over form** requires the monetary transfer to be legally qualified in accordance with its real causal arrangement, since the *nomen iuris* employed by the contracting parties constitutes merely an initial evidentiary indication and never an insurmountable barrier to the judicial review of causal lawfulness entrusted to the court.

2.2 — Inquiry into Actual Contractual Intent and the Threshold of Disproportion

The Supreme Court observes that whenever the size of the monetary transfer reaches abnormal percentages (exceeding ninety-two per cent of the overall purchase price in the dispute at hand), manifest excess disproportion acquires the status of a **highly significant symptomatic indicator** of a departure from the statutory model of Article 1385 of the Civil Code. In such circumstances, the sum paid is not aimed at pre-estimating damages for withdrawal on a lump-sum basis, but constitutes in substance an almost complete advance payment of the sale consideration—namely, a mere down payment on the price.

Corroborating this conclusion, the Civil Division highlighted an interpretative circumstance of primary importance in the case under review: within the contractual text, although the parties had used the formal expression “confirmatory deposit”, they had omitted any express regulation of the typical statutory consequences of that institution, such as the right of extra-judicial withdrawal and liability for payment of double the deposit. Combined with the extreme onerousness of the upfront outlay, that omission revealed that the contractual programme was designed to secure the **financial funding of the conveyance** rather than to confer upon one party, in the event of a breakdown of the transaction, a **parasitic windfall** equal to twice the entire value of the property.

03. CONSTITUTIONAL LIMITS ON CONTRACTUAL AUTONOMY AND EQUITABLE REVIEW

> *“Private autonomy does not tolerate disproportionate clauses that turn a confirmatory deposit into speculative leverage contrary to constitutional solidarity and good faith.”*

3.1 — The Principle of Solidarity under Article 2 of the Constitution and Integrative Good Faith

The dimension of deepest doctrinal significance in the ruling lies in its application of constitutional principles directly to general contract law. Judgment no. 19987/2026 stands authoritatively in the path charted by constitutional jurisprudence—most notably the landmark decision of the Italian Constitutional Court of 2 April 2014, no. 77[3]—

which definitively moved beyond the nineteenth-century dogma of contractual will as an inviolable sovereign realm immune from any judicial review of reasonableness.

Contractual autonomy protected under Article 1322 of the Italian Civil Code encounters an impassable boundary in the **non-derogable duties of economic and social solidarity** enshrined in Article 2 of the Italian Constitution, which permeate private-law relationships through the general clause of **good faith in performance** (*buona fede in executivis*) under Article 1375 of the Civil Code and the duty to safeguard the counterparty's legal sphere insofar as doing so does not entail an appreciable sacrifice of one's own interest.

Within the architecture of the Italian Civil Code, whereas a manifestly excessive penalty clause is subject to *ex officio* equitable reduction by the court pursuant to Article 1384 of the Civil Code (as recently clarified with respect to penalty clauses in preliminary contracts and judicial reduction regarding ancillary stipulations in preliminary agreements[4]), the statutory rules governing confirmatory deposits contain no express provision for quantitative reduction. Nevertheless, as the Supreme Court underscored, the systemic remedy when confronted with a grossly disproportionate deposit is not a remedial vacuum, but rather the court's *ex officio* finding of **partial nullity of the clause** (voidness *ab initio*) under Articles 1418 and 1419 of the Civil Code for conflict with mandatory rules and constitutional public policy.

The innovative reach of the Civil Division's ruling lies in its explicit recognition of the permeability of civil-law categories to constitutional values. Review of whether an arrangement of interests is worthy of legal protection—long confined solely to innominate or atypical contracts under Article 1322(2) of the Civil Code—now extends to individual clauses embedded within nominate statutory contract types whenever those clauses are structured so as to generate an unjustified normative and economic imbalance between the contracting parties. Judicial intervention thus does not amount to an arbitrary intrusion into private autonomy, but ensures that contract remains an instrument of fair cooperation and **distributive justice**.

3.2 — The Canon of Equitable Balancing of Interests under Article 1371 of the Civil Code

Complementing this constitutional foundation, the Supreme Court of Cassation gives decisive weight to the closing rule of contract construction codified in Article 1371 of the Italian Civil Code, under which, where a contract remains obscure or susceptible to multiple readings after ordinary interpretative canons have been exhausted, an onerous contract must be construed in the sense that achieves an **equitable balancing of the parties' interests**.

A contractual arrangement enabling the promissory buyer, upon termination of the preliminary contract, to pocket double a deposit equal to 92.5% of the asset's value would produce an intolerable disproportion: the non-breaching party would obtain a sum corresponding to roughly 185% of the entire market value of the property, securing an unjustified windfall that exceeds any interest worthy of protection under Article 1322(2) of the Civil Code. The legal order withholds enforcement from stipulations that engineer **unjustified punitive enrichment** outside the boundaries of statutory remedial schemes.

04. JUDICIAL RECHARACTERISATION POWERS AND THE PROHIBITION OF UNJUSTIFIED ENRICHMENT

4.1 — Conversion of an Anomalous Confirmatory Deposit into an Advance on the Purchase Price

With respect to practical application and remedial consequences, the judgment under review lays down a precise guideline for trial courts: once manifest disproportion and the resulting causal distortion are ascertained, the adjudicating court holds both the power and the duty to **recharacterise the sum *ex officio* as an advance payment on the price**.

That interpretative operation disapplies the special statutory regime governing confirmatory deposits under Article 1385 of the Civil Code and consequently bars any claim for payment of double the amount received or paid (cf. Italian Supreme Court of Cassation, Civil Division, Order no. 20994/2026[5]).

As a result, the dispute is channelled back into the ordinary framework of contractual termination for breach pursuant to Article 1453 of the Italian Civil Code. Within that general remedial regime, the non-breaching party may no longer rely on the lump-sum withdrawal mechanism, yet retains the right to claim restitution of the advance price paid together with **full compensation for actual damages** suffered, provided that specific proof is furnished as to both actual loss (*damnum emergens*) and lost profit (*lucrum cessans*) under Article 1223 of the Civil Code (Italian Supreme Court of Cassation, Civil Division, Judgment no. 4301/2026[6]; Italian Supreme Court of Cassation, Joint Divisions (*Sezioni Unite*), Judgment no. 553/2009[7]).

Recharacterising the deposit as an advance on the purchase price also carries major implications for the burden of proof and the rules governing default (*mora*). The aggrieved party can no longer benefit from the irrebuttable presumption of loss associated with retaining a confirmatory deposit, and must instead prove in detail the concrete pecuniary harm caused by the failure to execute the final deed of sale. Such evidence must cover both out-of-pocket losses incurred (such as advisory, appraisal, or brokerage expenses) and lost profits measured by the differential between the agreed contract price and the market value of the property at the time of breach, ruling out speculative claims resting on hypothetical or uncertain future prospects (cf. Italian Supreme Court of Cassation, Civil Division, Order no. 8011/2026[4]).

4.2 — The Restitutionary Regime and the Prohibition of Cumulative Remedies

The systematic framework set out in Judgment no. 19987/2026 dovetails seamlessly with the rules governing contractual restitution. In line with the principles established by the Italian Supreme Court of Cassation, Civil Division, in Order no. 23375/2026[8] and Order no. 8573/2026[9], once the **dissolution of the contractual bond** is declared, the supervening failure of the legal cause justifying the patrimonial transfers made in performance of the preliminary agreement requires restitution of the advance price payment under the rules on **recovery of undue payment** (*indebito oggettivo*) pursuant to Article 2033 of the Italian Civil Code, since retention of the sum by the seller becomes devoid of legal title (Italian Supreme Court of Cassation, Civil Division, Judgment no. 20878/2026[10]).

Ultimately, the Supreme Court's ruling on **disproportionate confirmatory deposits and clause nullity** delivers a foundational lesson in legal rationality and the **ethical governance of contractual relations**: party autonomy warrants recognition and enforcement only insofar as it pursues socially and economically appreciable interests, whereas the legal order steps in firmly to neutralise predatory stipulations that subvert the balancing function of civil law.

Finally, from the standpoint of protecting legitimate reliance and legal certainty in commercial transactions, the obligation to return objective undue payments ensures that neither contracting party derives a patrimonial advantage **devoid of valid causal justification** from the unwinding of a preliminary agreement. Restitution under Article 2033 of the Civil Code restores the ***status quo ante***, leaving intact solely the right to damages for actual, proven loss, thereby safeguarding the standards of fairness and good faith that must govern contractual conduct throughout every stage of the transaction.

References & Authorities Cited

Statutory Provisions

⚖ Constitution of the Italian Republic • Article 2 (Non-derogable duties of solidarity), Article 41 (Private economic initiative), Article 111 (Due process of law)

⚖ Italian Civil Code (Royal Decree no. 262 of 16 March 1942) • Article 1223 (Measure of damages), Article 1322 (Contractual autonomy), Article 1371 (Final rules of contract interpretation), Article 1375 (Performance in good faith), Article 1384 (Reduction of penalty clause), Article 1385 (Confirmatory deposit)

⚖ Italian Civil Code (Royal Decree no. 262 of 16 March 1942) • Article 1418 (Grounds of contract nullity), Article 1419 (Partial nullity), Article 1453 (Termination of contract for breach), Article 2033 (Objective undue payment), Article 2932 (Specific performance of the obligation to conclude a contract)

Case Law Cited

1. **Italian Supreme Court of Cassation, Civil Division, Judgment of 15 June 2026, no. 19987** — A manifestly disproportionate confirmatory deposit (amounting to 92.5% of the purchase price) requires the court of its own motion to recharacterise the transfer as an advance payment on the price on grounds of conflict with objective good faith and constitutional solidarity under Article 2 of the Italian Constitution. Outcome: appeal upheld, judgment quashed and remanded.

2. **Italian Supreme Court of Cassation, Civil Division, Order of 16 May 2026, no. 14565** — Interpretation of preliminary sale contracts and Supreme Court review over the substantive legal qualification of actual contractual intent beyond formal labels.

3. **Italian Constitutional Court, Order of 2 April 2014, no. 77** — Corrective powers of ordinary courts to restore equitable balance in manifestly disproportionate deposit clauses through objective good faith and partial nullity under Article 2 of the Italian Constitution. Outcome: declared manifestly inadmissible.

4. **Italian Supreme Court of Cassation, Civil Division, Order of 31 March 2026, no. 8011** — Limits on compensation for lost profits (*lucrum cessans*) following termination of a preliminary contract and strict evidentiary standards governing causation.

5. **Italian Supreme Court of Cassation, Civil Division, Order of 20 June 2026, no. 20994** — Subjective and objective prerequisites and boundaries of the action seeking payment of double the confirmatory deposit under Article 1385 of the Civil Code.

6. **Italian Supreme Court of Cassation, Civil Division, Judgment of 25 February 2026, no. 4301** — Structural incompatibility between retaining a confirmatory deposit pursuant to statutory withdrawal and claiming further compensation for additional damages.

7. **Italian Supreme Court of Cassation, Joint Divisions (*Sezioni Unite*), Judgment of 14 January 2009, no. 553** — Prohibition of cumulative remedies between statutory withdrawal with retention of the confirmatory deposit under Article 1385 of the Civil Code and judicial termination for breach with ordinary damages under Article 1453 of the Civil Code. ↑

8. **Italian Supreme Court of Cassation, Civil Division, Order of 16 July 2026, no. 23375** — Judicial qualification of a claim seeking contractual termination alongside payment of double the deposit as an action for statutory withdrawal under Article 1385(2) of the Civil Code. ↑

9. **Italian Supreme Court of Cassation, Civil Division, Order of 6 April 2026, no. 8573** — Restitution of advance payments on the purchase price as objective undue payment (*indebito oggettivo*) under Article 2033 of the Civil Code following judicial termination of the contract. ↑

10. **Italian Supreme Court of Cassation, Civil Division, Judgment of 19 June 2026, no. 20878** — Dissolution of a preliminary contract upon fulfilment of a condition subsequent and resulting restitutionary obligations regarding sums paid without surviving legal title (*sine titulo*). ↑

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