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Articles

Giuseppe Vettori

Contract without numbers and without adjectives. Beyond the consumer and the weak enterprise

Abstract: The essay examines the law of contract under the current system of Italian and European sources. Traditional categories based on the qualities of contractors (consumers, customers, weak companies) have difficulty in sorting out the new phenomena; rather, we need a new method to regulate contracts, governed by a set of sources from which to draw elements of compliance with the rule and new forms of protection, through an activity of deconstruction and innovation that Italian Courts have already begun, using some instruments in particular. They have used the legal concepts of ‘concrete cause’ and a conflict with mandatory rules, as instruments for the control of legality and validity. They have used constitutionally guaranteed rights and duties, as limits to contractual freedom. Finally, they have used good faith as a criterion of liability in the assessment of behaviour both pre- and post-contract signature, with an autonomous function with respect to the assessment of contract validity.

Résumé: Cet article examine le droit des contrats à travers le système actuel des sources italiennes et européennes. Les catégories traditionnelles fondées sur les qualités des contractants (consommateurs, clients, sociétés faibles) peinent à répondre aux nouveaux phénomènes; nous avons plutôt besoin d’une nouvelle méthode pour réguler les contrats, régis par un ensemble de sources dont on puisse tirer des éléments de conformité avec la règle et de nouvelles formes de protection, à travers une activité de déconstruction et d’innovation que les tribunaux italiens ont déjà commencée, usant de certains instruments en particulier. Ils ont utilisé les concepts juridiques de “cause concrète” et un conflit avec des règles impératives comme instruments pour le contrôle de légalité et de validité. Ils ont utilisé des droits et devoirs constitutionnellement garantis comme limites à la liberté contractuelle. Finalement, ils ont utilisé la bonne foi comme un critère de responsabilité dans l’appréciation du comportement pre- et post-contractuel, avec une fonction autonome en ce qui concerne l’appréciation de la validité du contrat.

Zusammenfassung: Der Beitrag betrachtet das Vertragsrecht in dem Zuschnitt, wie er sich auf Grund italienischer und Europäischer Rechtsgrundlagen ergibt.

Herkömmliche Ansätze, die auf die Kategorie des jeweiligen Vertragsschließenden abstellen (Verbraucher, Kunden, KMUs), können häufig schwer Phänomene der heutigen Welt adäquat erfassen. Der Ansatz für eine Regulierung des Vertragsrechts muss angesichts der Vielfältigkeit vielmehr in der Art eines beweglichen Systems auf ganz verschiedene Elemente rekurren: von Elementen der Compliance bis zu neuen Schutzformen, all dies in einem Prozess der Dekonstruktion und Neufindung, die gerade im italienischen Recht derzeit auch in den Entscheidungen der höchsten Gericht durchaus bereits im Gange ist. Dazu haben sie das Konzept einer „konkreten casua“ genutzt ebenso wie eine subtilen Umgang mit dem zwingenden Recht, sowohl in Fragen der Rechtswidrigkeit als auch der Wirksamkeit. Hierfür haben sie auf verfassungsmäßig garantierte Rechte und Pflichten zurückgegriffen, um die Vertragsfreiheit flexibel zu regulieren und beschränken. Insbesondere hat sich auch eine starke Rechtsprechung zu Treu und Glauben entwickelt, um prä- und postkontraaktuelles Verhalten zu beurteilen – ganz unabhängig von Wirksamkeitsfragen.

Keywords: contract, rights, remedies

Giuseppe Vettori: Prof. University of Florence,
E-Mail: g.vettori@studiovettori.eu

1 Globalization between myth and reality

Ten years ago, a successful book¹ described globalization as a feature of the times and as a sharp break from what had been before. The legal dimension of the phenomenon was framed in terms of the decline of the legislative monopoly of States and in the emergence of an order that ‘developed out of facts’ and ‘mingled’ therewith, replacing the canon of conformity with that of effectiveness.

This led to a complex system where law was only one of the many sources of norms, and where the rules were intermingled with experience, bypassing the geometry of codes. This system was developed in a common law environment and was designed not for the citizen but for the *homo economicus*. It was the product of a market outlined not by a set of laws, interpreted according to an

1 M.R. Ferrarese, *Le istituzioni della globalizzazione – Diritto e diritti nella società trans-nazionale* (Bologna: Il Mulino, 2000); see now by the same author, *Prima lezione di diritto globale* (Rome-Bari: Laterza, 2012).

authoritative analysis,² but by rules and principles invented by practice, by operators and juridical sciences, with full effectiveness and authority in the business world.

Even then, the harshest critics did not fail to notice the serious risk³ of legitimating and encouraging a legal system that would only protect trade, as the uninhibited expression of global capitalism.⁴ However, the observation of some of the positive traits of this production of law ‘arising from below’, induced optimism for a number of reasons.

First of all, this globalized system seemed to have the capacity to undermine the dominant hold of the positivist method – a method which was not very prone to deterioration over time, in Italy as in Europe; and then in addition this system seemed to offer the possibility of consolidating a pluralist system of law that was capable of sustaining and not destroying a legalism that needed to free itself from the formalism and absolutism of national law.⁵ Such optimism was slightly marred by a worry that law, freed from political authority, would end up falling into the even more arrogant embrace of economic and political power.⁶

What happened went beyond those legitimate concerns, since finance and technology ended up by swallowing the market, together with the law that should have regulated it and with politics that should have set purposes and goals. While, a year ago, we could point to a potential change of epoch,⁷ we are now witnessing something more than that.

As it has been authoritatively explained,⁸ the financial system has hastily exploited the global dimension thanks to technology, though also thanks to the belief that it is possible to set principles, going beyond strict formal rules or conflicting ideologies, such as to bring together interests and instruments capable of creating and spreading new wealth. Every real economic system needs goods and means of production and transmission, with their corresponding costs. This is not the case with finance. Finance does not even need paper: just a click for the instantaneous transmission of data.

2 N. Irti, *L'ordine giuridico del mercato* (Rome-Bari: Laterza, 2009).

3 P. Grossi, ‘Globalizzazione e pluralismo giuridico’ *Quaderni fiorentini* 2001, 29, 551 et seq.

4 Grossi, n 3 above, 557.

5 Grossi, n 3 above, 557.

6 Grossi, n 3 above, 558.

7 G. Vettori, *Diritto privato e ordinamento comunitario* (Milan: Giuffrè, 2009) 1.

8 P. Schlesinger, ‘La globalizzazione nel sistema finanziario’ *Persona e mercato* 4 (2011) 245, at www.personaemercato.it. See also S. Mazzamuto, *Il contratto di diritto europeo* (Turin: Giappichelli, 2012) 257 et seq.

Yet it is certain that a control system is also required. Financial operators have, however, been able to reject rules that would have only limited, so they claim, a freedom arising from a natural order of things that has been able to ensure well-being both in America, as shown by the ample possibilities of access to houses, and in other countries – such as China, India, Russia and Brazil – as demonstrated by the improvement in the quality of life of millions of people.⁹

The method used is clear. For years, the market absorbed everything. Securitised liabilities, scattered all over the world, were transformed into electronic traces that concealed the negative underlying relationship and increasingly frequent insolvencies. The loans taken out on the basis of fictitious property-based collateral were unable to ensure the return of credit, leading to the foreseeable insolvency of creditors and the collapse of the real estate market. Bad loans were fragmented and divided all over the world, without allowing for the reconstruction of the original relationship. There followed the toxic nature of securities¹⁰ and their circulation for a value that far exceeded the world's GDP.¹¹

When the seriousness of the crisis was perceived, America, after some uncertainty, gave an impressive contribution (more than seven thousand billion dollars)¹² to save banks, which have now returned these amounts and developed a turnover that is much higher than that of the past. In addition, some of them have been sued in Court for their responsibility for managing the relationships that caused the crisis.¹³

⁹ Schlesinger, n 8 above, 246.

¹⁰ Schlesinger, n 8 above, 247.

¹¹ M. Onado, *I nodi al pettine. La crisi finanziaria e le regole non scritte* (Rome-Bari: Laterza, 2009) 7 et seq. W.N. Palmieri, *La follia della finanza. Accadde alla luce del sole* (Milan: CEDAM, 2011); G. Tremonti, *Uscita di sicurezza* (Milan: Rizzoli, 2012).

¹² With respect to what was approved in America before March 2009, it has been pointed out that the banking rescue measure was equal to 7 times the cost of the war in Vietnam; 23 times the Apollo space program with which America landed on the moon; 47 times the Marshall Plan for the reconstruction of Western Europe after the Second World War' (F. Rampini, *Le dieci cose che non saranno più le stesse* [Milan: Mondadori, 2009] 7).

¹³ The value of derivatives is much higher than the world's GDP, concentrated almost entirely in a group of few Banks which have been recently accused, by governments themselves, of having given false assessments on the quality and reliability of financial instruments which incorporated subprime mortgages and were sold to investors who were unaware of the poor economic conditions of the borrowers and were therefore victims of a series of insolvencies that caused no less than thirty billion damages to the sole two funds that were later nationalized. According to a persuasive commentary (G. Rossi, 'Se si sveglia la politica e attacca i mercati' in *Sole 4 ore*, 4 September 2011), the decision is such as to undermine the principles and myths on which the global economy has been grounded. The idea of market self-sufficiency as a legal area of trade efficiency and equity, is now abandoned. Sanctuaries that were thought to be untouchable, are

As is known by all of us, Europe is going through terrible times. This happened after Europe overcame, with a substantial privatisation, the dualism between the English system, where markets were governed by private organizations, and the continental system based on Stock Exchanges that were subject to public scrutiny. Europe also enacted the Eurosim Directive in 1993 and then the Mifid Directives, though with a system of controls that differed in each State, so this set of rules has failed to create a common framework. Hence, in the absence of homogeneous controls, the trading contract, though identical in all countries and giving rise to simple transactions, repeated daily without major operational or litigation problems, has prevailed.¹⁴ The trust in the self-sufficiency of the contract and of the rules imposed only by the market (which was not regulated uniformly) lasted for many years. But it suddenly collapsed in 2008 in all European countries that more or less belonged to the area of the single currency launched in 1999, without the presence of any tools for the rectification, adaptation and overcoming of the recurrent crises occurring in each market.

The weakness of a monetary unity without a political union has become evident in a number of countries (PIGS: Portugal, Ireland, Italy, Greece and Spain), where monetary stability has not prevented low growth or export difficulties when compared to stronger countries such as Germany, and has certainly not prompted the overcoming of domestic structural problems such as the public debt. The uncertainties of the past months have highlighted the difficulties of a Union that is now suggesting the revision of its Treaties so as to launch new rules, though only including the countries that will accept them. Uncertainties remain and heavily burden the present.

It has been said that this long season lacks a narration that can make us participate in and be aware of our present times. If this is the case, as I believe, then it might be useful to refer to a great book that rightly perceives the traits and reactions that enabled America to overcome the 1939 Great Depression. The faces and feelings of the victims emerge very clearly from this beautiful image of a family in search of work and of a place to live: 'women observed their husbands to understand whether the end was really near. Women were silent and observed. And

now being demolished. A central role is now being given to private law categories and civil justice which, in the search for procedural truth, has sometimes proved to be more efficient than criminal repression and than supervisory bodies. It is resorted to in America not only by private entities and investors but also by Institutions to restore the rule of law against financial capitalism, which has influenced legislative and executive power and is now asked to account for the damages to the Market and its integrity.

¹⁴ Schlesinger, n 8 above, 247–250.

if anger replaced fear in their husbands' faces, they gave a sigh of relief. The end was not near yet. The end would never come as long as fear turned into fury'.¹⁵

Our reaction cannot but be this one. We need to turn fear into action.

2 Contract and derivatives. Italian Courts' judgements

In this spirit, we will now start our discussion by examining first the main protagonists of the crisis: contract and derivatives,¹⁶ which have been the subject of the Italian Supreme Courts' attention.¹⁷

A recent Constitutional Court ruling includes a number of extremely interesting passages that trace the foundations, rules and principles of the market and of financial contracts.¹⁸ Let us examine them.

¹⁵ J. Steinbeck, *Furore* (Rome: Bompiani, 2002).

¹⁶ The number of publications on derivatives is beginning to be substantial. Among the most significant works and without pretending to give a complete picture, see E. Barcellona, 'Note sui derivati creditizi: market failure o regulation failure?' *Banca, borsa e titoli di credito* 2009 I 652 (where a derivative is defined as a 'contract with which a price is given to a risk'); S. Gilotta, 'In tema di interest rate swap' (Note to T. Lanciano, 6 December 2005) *Giurisprudenza Commerciale* 2007 II 134; V. Sangiovanni, 'I contratti derivati fra normativa e giurisprudenza' *Nuova Giurisprudenza Civile Commentata* 2010 II 39; D. Maffei, 'Contratti derivati' *Banca, borsa e titoli di credito* 2011 V 604.

¹⁷ As is well known, in a totally appropriate way, the t u f (Italian Consolidated Finance Law) does not provide a definition or a notion of derivative contract (see on this point E. Righini, 'Strumenti e prodotti finanziari (entry)' *Enciclopedia del diritto Anali* 2011, 1162), so the Supreme Court itself has intervened on this point: as for swap contracts, the judgement 5114/2001 defines them as 'the contract in which two parties agree to exchange, on one or more predetermined dates, sums of money that are calculated by applying two different parameters (in terms of interest or exchange rates) to an identical amount, with payment on the agreed date of an amount with a net basis, on the basis of a set-off' (Supreme Court, sect I, 6 April 2001, n 5114, *Foro italiano* 2001 I para 2186, with a note by E. Filograna "'Swaps" abusivi: profili di invalidità e responsabilità precontrattuale'). Case-law has also provided another very famous definition: see the House of Lords, 24 January 1991, *Hazell v Hammersmith and Fulham London Borough Council*, in *Foro italiano* 1991 IV para 309.

¹⁸ Const Court, 18 February 2010, n 52, *Banca, borsa e titoli di credito* 2011 II with a note by E. Gironi, 'Natura e funzione della disciplina dei servizi di investimento e qualificazione degli strumenti derivati nella giurisprudenza costituzionale', 35; and in *Contratti* 2010, 12, with a note by A.M. Benedetti, 'La competenza statale sulla tutela della pubblica amministrazione-cliente nel settore dei derivati finanziari', 1109. The ruling rejects the issue of constitutional legitimacy proposed on a primary basis by the Region of Calabria against Article 3 of Law n 203 of

The Court recalls that, for the last fifteen years, under the impetus of some European Directives,¹⁹ the public law model of the securities market has been abandoned and a private law model has been endorsed in accordance with the principles of liberalisation of this sector. The subsequent law (note 58, 1998) has regulated the organization and management entrusted to a joint-stock company in accordance with a specific regulation. Hence, the Stock Exchange is no longer a public service; yet, the presence of investors' interests and of the integrity of the market demands supervision in order to ensure transparency, orderly trading and investor protection.²⁰

This is to protect the market itself, its stability and investors, through 'mandatory rules on the conclusion, form and content of single contracts that are aimed at protecting the legal sphere of those having access to this type of financing'²¹ and who often suffer from an information asymmetry. But there is more.

According to the Court, there is a close relationship between contract and the market for a number of obvious reasons. The rules that apply to derivative contracts are bound to influence the general rules of the market. Therefore, the law targets each transaction, but it also directly affects the regulation of the segment of economic activity consisting of the financial market into which that transaction falls. There ensues an interrelation between the subject-matter of the civil law system, the regulation of the contract and the regulation of the financial market, due to the subject and especially the impact of derivatives on the overall market system itself.

The ensuing conclusion is meaningful. The regulation of derivatives brings together a number of issues relating to financial markets, the civil order, the control of public finances. In any event, the essential core of the regulation, in accordance with the principle of prevalence, is represented 'by the protection of savings and financial markets, and by the regulation of private law relations and of

22 December 2008: this provision assigns to the Minister of Economy and Finance, after hearing the Bank of Italy and the National Commission for Companies and the Stock Exchange, the task of enacting regulations (in agreement with the representatives of local entities) with which to identify the type of contracts relating to the financial derivatives referred to in Article 1(3), t u f, which the Regions, autonomous Provinces of Trento and Bolzano and local entities can enter into, and indicates the derivative components, whether express or implied, that the entities themselves can include in financing contracts. The same rule provides for the avoidance of contracts entered into in violation of this regulation. On this point, see M. Antonielli, 'Enti pubblici e strumenti finanziari: I nuovi confini della finanza globale' *Il diritto dell'economia* 2011, 1, 19.

¹⁹ Legislative Decree of 23 July 1996, n 415.

²⁰ Const Court, 18 February 2010, n 18 above.

²¹ Const Court, 18 February 2010, n 18 above.

the related remedies that can be enforced in the event of a breach of the applicable provisions'.²²

The recent Council of State ruling is even more important. The case originated from a debt restructuring operation, with the issuance of a bond combined with a derivative, in order to protect a public entity against interest rate fluctuations. The operation had been entrusted to a Company on the basis of a complex procedure.²³ About two years later, the Administration cancelled its decisions (to assign the operation to the Company) automatically because, according to an analysis entrusted to third parties, it was found out that:

1. the initial value of the swap was not equal to zero and implied a disadvantage for the public entity that was such as to infringe the principle of economic convenience set out in Article 41 of the Financial Law 448/2001.
2. Due to the effect of the 'implicit costs' of the swap, which had never been disclosed by the banks, the economic convenience of the bond was frustrated.
3. The law specifically provides for the possibility of annulling administrative measures automatically, even where these are legitimate, 'in order to achieve savings or lower financial charges'.
4. The company entrusted with debt restructuring had violated the principle of good faith and fairness by failing to disclose the implicit costs of the derivatives.

Following the appeal, the TAR (Regional Administrative Court) of Tuscany specified that swaps were forward contracts that allowed contractors to reduce the risk of interest rate fluctuations, without an exchange of capital and thus only with an exchange 'of flows corresponding to the differential between two interest rates'. So that 'to ensure a balance between the parties at the time of contract signature, the contract should express a differential result equal to zero, whereas the swaps in question had a negative value at the expense of the Entity, which had legitimately cancelled its decisions to outsource such restructuring. According to the Tuscan Administrative Court, this did not entail the

²² Const Court, 18 February 2010, n 18 above.

²³ Council of State, 7 September 2011, n 5032. The judgement is one of a number of rulings that have involved banks, on the one hand, and public administrations, on the other, with the former having signed derivative contracts for the sole purpose of restructuring their own public debt. On this particular dispute resulting from this widespread public finance policy, see A. Carleo, C.D. Mottura and L. Mottura, 'Sul "valore" di derivato. Argomentazioni in margine alla disputa tra banche e amministrazioni' *I contratti* 2011, 4, 383.

automatic cancellation of the contract over which the ordinary Court had upheld its competence to rule.²⁴

The Council of State first examined whether the Public Administration had the power to cancel an activity carried out under public contracts awarded and being executed. Having established the possibility of enforcing this power in the event of significant flaws affecting the entire procedure, for the purpose of protecting the public interest and the principles of legality, fairness and good operation of the public administration (Article 97 Constitution), the Council specified that 'where the power of annulment is exercised, the private party has a legitimate interest, even where this exercise produces indirect effects on a contract that has been entered into'. This is because the conclusion of the contract and its execution are not sufficient to exclude the jurisdiction of the Administrative Court and to establish that of the ordinary Court.

On the basis of these preliminary points, the Council evaluated in detail the exercise of the power in question, and found that the Province of Pisa had not withdrawn from the contract; rather, it had exercised an administrative power of self-protection in relation to an award that violated the principle of economic convenience (Article 41 Law 28 December 2001, n 448) due to the presence, in this case, both of an original negative differential and of implicit costs that had not been effectively disclosed and had been revealed only after the contract had been signed. As for the latter, their conclusion was precise.

The case did not concern a breach of the pre-contractual information duty that was to be established for the purposes of the parties' negotiating will; rather, it concerned a 'circumstance, ie blameless ignorance, which had prevented the entity from checking the economic convenience of the economic transaction and of its restructuring'. Hence, the presence of implicit costs had not affected the negotiations; rather, they had had an impact at an internal level, due to 'the effective protection of the public interest entrusted to the Administration'.

The conclusion was that the power of self-protection had been exercised not so much to avoid an unbalanced contract as 'a result of the absence of a proper assessment of the economic convenience which legitimated the debt restructuring operation'²⁵ (Article 41 Law 448/2001), emerging as early as in the course of the call for bids to award the restructuring operation and in the choice of the best bid.

There ensued the competence of the Administrative Court and the irrelevance of the contractual clause that derogated from the Italian jurisdiction. Indeed, this

²⁴ The TAR (Tuscany) ruling n 6579 of 11 November 2010 is available at www.ilcaso.it; for a comment, see C.D. Mottura and L. Mottura, 'I derivati nella finanza locale: il caso della Provincia di Pisa' *Strumenti finanziari e fiscalità* 2011. Differently, Council of State 27 November 2012, n. 5962.

²⁵ Supreme Court, United Sections 20 April 2010, n 9308.

derogation can concern only assignable rights (Supreme Court, United Sections, 20 April 2010, n 9308) and not the proper exercise of administrative power.

The Council of State was then asked to establish whether the Administrative Court was competent to decide on the effectiveness of the contract in the light of award annulment. The Council gave an affirmative answer for a number of reasons.

Firstly, because the legitimate annulment of the award entailed 'the automatic cancellation of the effects of the contract, with the referral of the corresponding disputes to the Administrative Court' in accordance with the law (Law 20 March 2010, n 53, later transposed into Article 122 of the Administrative Procedure Code) and with the principles of simplification and concentration of protections.

Secondly, because the exclusive competence of the Administrative Court is reasonable only in the presence of both a 'substantial connection between award and contract' and of an 'inextricable mixture of public and private interests' and therefore of a difficulty to identify, with absolute certainty, legitimate interests and subjective rights.

Therefore, after affirming the existence and correctness of the public entity's power of annulment and the Administrative Court's competence to rule also on the effects of the contract, the Council of State framed the topical nature of the infringed public interest not only in the principles of economy and financial convenience, but also 'in the need to annul the implicit costs, originally not known and not readily accessible, which burden the entity's resources throughout the transaction', thereby significantly affecting the administration's economic-financial resources. According to the Council, no relevance had to be attached to the successful bidder's reliance on the approved award, given the reasonable amount of time that had elapsed and the reticent behaviour of the banks which were entrusted with the transaction. On the basis of these points, the Council of State then asked a Court-appointed expert witness to establish, in the case at hand, the initial economic imbalance and the existence of undisclosed implicit costs.

3 Remedies

The two judgements illustrate a specific point. The theory of remedies has revolutionised, also in our environment, the relationship between law and process.

In the light of the predominance of financial economy and of the potential of contract to create rights and obligations, the protections and remedies against the violation of interests which the law and the legal system deem worthy of protec-

tion, must be reviewed.²⁶ This should be done in a way that is very different from the past.

The Constitutional Court reminds us that contract and the market are interwoven and call for the adaptation of private law tools to address the complexity of the regulations that apply in each sector. The Council of State has isolated those anomalies of derivatives that legitimize an annulment mechanism of self-protection to be used by public administrations. The Supreme Court²⁷ has specified that, to declare the possession of the required experience in securities is a source of evidence only in the absence of 'specific circumstances that can prove the lack of those requisites and their knowledge or knowability to the intermediary, who has anyhow an obligation of due care, fairness and transparency in the interests of customers and of the integrity of the markets and, in particular, the obligation to' acquire the necessary information from customers so that they are always well informed (Article 21 TUF).²⁸

Let us discuss some recent developments.

a) The information duty ranging between legal typology and actual behaviour

The Supreme Court judgments given in 2005 and 2007 have extended the information and good faith obligation beyond the pre-contractual phase and beyond the conclusion of an invalid contract, unlike what is indicated in Article 1338 Civil Code. In addition, the conclusion of a contract that is valid yet disadvantageous due to the other party's bad faith, implies also a liability and compensation for damages.

The Supreme Court has thus clearly acknowledged the autonomous importance of conduct, also in the presence of the legal or negotiating typology, as it

²⁶ G. Vettori, 'Contratto di investimenti e rimedi' *Obbligazioni e contratti* 2007, 10, 785.

²⁷ Supreme Court, 26 May 2009, n 12138, *Foro italiano* 2010 I para 129, with a note by G. Larocca, 'Gli "operatori qualificati" in cassazione: un altro capitolo del difficile rapporto della suprema corte con il diritto privato del mercato finanziario'; see also the comment by J. Mazzantini, 'La giurisprudenza sulla nozione di operatore qualificato nei contratti derivati' *Persona e mercato* 2011, 2, www.personaemercato.it.

²⁸ Court of Milan, 19 April 2011. On the so-called *know your customer rule*, see: F. Capriglione, *Intermediari finanziari, investitori, mercati* (Padua: CEDAM, 2008) 147–156; B. Inzitari and V. Piccinini, *La tutela del cliente nella negoziazione di strumenti finanziari* (Padua: CEDAM, 2008) 45–51; F. Greco, *Informazione pre-contrattuale e rimedi nella disciplina dell'intermediazione finanziaria* (Milan: Giuffrè, 2010) 44–60; G. Grisi, 'Informazioni (obblighi di) (entry)' *Enciclopedia del diritto Annali* 2011.

has been long suggested by legal theory. Therefore, the presence of the legal typology does not make conduct irrelevant. A negotiation statement that is different from the information that is known or knowable to the other party, does not exempt from liability. The importance of this approach is quite evident.

A party's behaviour guides the analysis and evaluation towards a concrete, not an abstract circumstance. It does not imply the reference to an abstract quality such as that of the consumer, investor-customer or professional; rather, it calls for the assessment of the single relationship and of the contractor's concrete position.

Besides, the information duty, made effective by the good faith rule, enriches the remedies available and meets the legal typology and its regulation. This is because the obligation to collect an informed consent makes the constitutionally guaranteed right to conscious self-determination, in every financial and non-financial scope of private relationships, both autonomous and visible.²⁹

The consequences of this theoretical development are clearly traced and withstand the recent criticisms levied by some Courts and legal theorists.³⁰ The arguments used by the critics are the following: *a)* the concretization of the good faith clause should remain consistent with the regulatory system, so that a circumstance that is irrelevant in terms of negotiating content and execution cannot be relevant in relation to the relationship that precedes the conclusion of the contract; *b)* the criterion of liability should always be commensurate to the negotiating typology because 'the structure thereof still represents the limit' of the functional possibilities of the parties' relationship.³¹

This strictly formalist approach has two defects. On the one hand, it reduces the juridical assessment to mere compliance with a structure, thus going against the convictions that have been developed by legal theory as from the Seventies.³² On the other hand, it nullifies the autonomous value of the general clause which

²⁹ Supreme Court, 29 September 2005, n 19024; Supreme Court, United Sections, 19 December 2007, n 26724 both in *Foro italiano* 2006 I para 1105, and in the same publication, 2008 I para 784.

³⁰ E. Scoditti, 'Teoria e prassi nel diritto italiano su fattispecie e rapporto contrattuale' *I contratti* 2010, 12, 1155; E. Scoditti, 'Responsabilità precontrattuale e conclusione di contratto valido: l'area degli obblighi di informazione' note on Supreme Court, 8 October 2008, n 24795, in *Foro italiano* 2009 I para 440, though also see G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Naples: Scientifiche Italiane, 1996) 245; G. D'Amico, 'Buona fede "in contrahendo"' *Rivista di Diritto Privato* 2003, 351 *et seq.*

³¹ Scoditti, n 30 above.

³² See recently G. Benedetti, 'La rescissione', in M. Bessone (dir by), *Il contratto in generale*, XIII (Milan: Giuffrè, 2007).

should operate within the boundaries already set by existing rules. This has been denied since the Sixties by prevailing Supreme Court case law.³³

The best response is given by a recent ruling that intends to give continuity to the role and function of pre-contractual liability in relation to information duties.³⁴ The ruling specifies that the obligation to provide compensation for a breach of good faith, regardless of the conclusion and validity itself of the contract, is by now part of 'living law', in line also with 'the principles confirmed at European level' (Article 2:301(2) of the *Principles of European Contract Law*).³⁵

b) Cause in concrete and contrast with criminal law

The presence of an initial imbalance and of undisclosed implicit costs has been deemed sufficient by administrative judges to legitimise the annulment of an award of a restructuring plan and of a derivative contract by a public entity, in accordance with the special protections provided by sectorial regulations for the public interest. This leads us to wonder about the existence or inexistence of a legitimate cause in concrete,³⁶ when these requirements are lacking in the relationship between companies and Banks. And there is more.

More and more frequently, the party's behaviour has the potential to adversely affect interests protected by different legal rules, and the judge must consider multi-offensive illegal behaviour. In short, the single fact must be compared with different abstract typologies that evaluate different aspects.³⁷ A contractual or extra-contractual liability can often arise at the same time and, more frequently, special rules can cover the same facts. It suffices to think of corporate offences. False corporate communications (Article 2621 Civil Code) and

³³ See, only for the quoted case-law, G. Vettori, 'Regole di validità e di responsabilità di fronte alle Sezioni Unite. La buona fede come rimedio risarcitorio' *Obbligazioni e contratti* 2008, 104; G. Vettori, 'Centralità del giudice e filtro in Cassazione' *Obbligazioni e contratti* 2010, 486 *et seq.*; G. Vettori, 'L'abuso del diritto' *Obbligazioni e contratti* 2010, 166.

³⁴ Supreme Court, 11 June 2010, n 14056 (judge drawing up the judgement: Rordorf).

³⁵ Supreme Court, 11 June 2010, n 14056, *ibid.*

³⁶ Two recent Supreme Court rulings are extremely clear in this sense. The first (Supreme Court, 8 May 2006, n 10490) defines a cause as 'the individual function of each specific contract, regardless of the single, abstract, contractual stereotype, being it understood that this synthesis must concern the contractual dynamics and not the mere will of the parties'. The second (Supreme Court, 19 June 2009, n 14343) anchors the worthiness and legality of the cause to constitutional values and to the duty of solidarity.

³⁷ For these considerations, see M. Rabitti, *Contratto illecito e norma penale (Contributo allo studio della nullità)* (Milan: Giuffrè, 2000) 27.

any obstacle to the exercise of Authorities' functions, expose wrongdoers and the company to sanctions (Legislative Decree n 231/2001). Market manipulation, sanctioned by the Market Abuse Directive and by the regulations on TUF and TUB (Italian Finance and Banking Law), is subject to the control of criminal and civil courts and of Consob. Corruption is considered as a criminal, revenue, administrative, tax and civil unlawful conduct in the presence of an illegal contract.

The legal framework that results from this mixture of rules and principles has been recently considered by theoretical and practical case-law.

First of all, the United Sections of the Supreme Court have acknowledged the binding effect of criminal rulings in civil or administrative proceedings in relation solely to acquittals; as for acquittals in case of time-barred actions or amnesty, it has been held that the civil court 'taking account of the evidence acquired in criminal proceedings, should entirely and independently evaluate the facts in dispute (if necessary, providing for a different attribution of the percentage of liability to the co-perpetrators when compared to that established by the criminal court)'.³⁸

It has also to be determined whether contract avoidance can be declared when the contractual content is contrary to criminal law, even where the psychological requirement of guilt and wilful conduct is not satisfied.³⁹

A positive sign in this sense can be recently drawn, for the purposes of compensation for damage, from some famous judgements on non-financial loss.⁴⁰ The Constitutional Court has specified that 'the reference to the offence contained in Article 185 Criminal Code ... no longer postulates the recurrence of a concrete typology of offence, though only of a legal typology corresponding, in its objectivity, to the abstract regulation of a crime'. There follows an important conclusion.⁴¹ Unlike the criminal court, the civil court is not required to assess the psychological element (wilful conduct, guilt), because what matters for its purposes is not the execution of the offence; rather, what matters is the existence of the offensive fact, this meaning the material element consisting of the offender's conduct, the

³⁸ Supreme Court, 26 January 2011, n 1768.

³⁹ Rabitti, n 37 above. As it has been pointed out, criminal case-law, albeit excluding the subjective element, detected the presence of the objective conditions of the crime of embezzlement in a case where public money was paid in the absence of an express obligation of an Entity and of a beneficiary's right thereto. As a result, the civil court declared the avoidance of a sale due to its conflict with criminal law, deeming the cause of exchange unlawful where property was to be given to an Entity as a result of a contractual provision that excluded consideration for the acquisition of goods as indemnity.

⁴⁰ Supreme Court, 19 November 2007, n 23918; Supreme Court, 26 June 2008, n 16810; Supreme Court, 3 March 2009, n 5057.

⁴¹ Rabitti, n 37 above.

event and the causal link. In this latter respect, the most recent clarifications given by the Courts are highly significant.

The distinction between material and juridical causality specified by the United Sections of the Supreme Court has been confirmed and clarified.⁴² To establish the unlawfulness of a fact, reference should be made to the rules on causality laid down in Articles 40 and 41 of the Criminal Code; their proof is different in criminal proceedings, where causality must be proven beyond reasonable doubt, whereas in civil proceedings the proof of 'what is more likely than not' will suffice. Once a fact is ascribed to its perpetrator/s, the possibility of compensatory damages needs to be established, in civil proceedings, according to the ordinary legal test of causation (Article 2223 Civil Code). Such decision can lead to the referral of different damages to each perpetrator, according to the different degree of causal intensity of his/her conduct.⁴³

A similar assessment can be made by comparing the material element of the offence with the contract content pursuant to Article 1418 Civil Code, identifying the mandatory limits to private parties' negotiation autonomy.

c) Cause in concrete and the avoidance of derivatives

By resorting to the practical goal pursued by the negotiating parties, the Courts have convincingly protected investors' interest. Let us see how.

By limiting our discussion to the rulings on financial derivatives, especially interest rate swaps (I R S), it should first be noted that these are contracts with which the parties accept a given allocation of the monetary risk. More precisely, this takes place according to an 'exchange, at pre-set maturity dates, of cash flows arising from the application of different parameters to the same capital (the so-called notional amount)'.⁴⁴ This contract is entered into for two separate reasons. Either for hedging purposes, where the client intends to resort to the exchange of cash flows to protect himself against the monetary risk connected to a separate and previous debt/credit operation. Or for speculative purposes, where the IRS is signed in the absence of an underlying relationship between the parties. To

⁴² Supreme Court, 11 January 2008, n 581.

⁴³ See the recent Supreme Court decision, 21 July 2011, n 15991, *Corriere giuridico* 2011, 1672 *et seq.*

⁴⁴ Court of Bari, 15 July 2010 (judge drawing up the judgement: Scoditti), *I Contratti* 2011, 3, with a note by G. Orefice, 'Operatore qualificato e nullità virtuale o per mancanza di causa', 250, and by A. Pisapia, 'Rinegoziazione del contratto e nullità per mancanza di causa', in the same publication, 260.

identify the function of these contracts, a decisive role is played by the contract rules and by the reconstruction of the meaning of the parties' act in the dynamics of their relationship.

The client's goal is effectively protected by the Courts precisely by resorting to the scheme of the cause in concrete. By comparing the practical purpose underlying the derivative with the function achieved by the agreement, the Courts have not hesitated to declare the avoidance of derivatives that frustrate – as better specified below – the interest of investors in the protection against the monetary risk.

A first manifestation of this protection concerns the renegotiation of swap contracts. When a financial intermediary offers a client a new IRS derivative which incorporates what the investor owes to the bank, it is necessary to check whether the new swap can actually perform a hedging function or whether – as a result of implicit costs and past liabilities – it cannot *ab initio* achieve that purpose. In this case, where the swap derivative or its renegotiation cannot serve as a possible tool for monetary risk distribution (since the impact of past liabilities and implicit costs is excessive), the contract is null for lack of cause.⁴⁵ In other words, the fact that the swap derivative is the umpteenth agreement for the exchange of flows between the parties does not justify a configuration thereof that excludes *ab initio* the monetary risk coverage function.

A second point pertains to the impact of risk allocation on the concrete function of the derivative agreed on by the parties. If the contract reveals that the risk lies entirely with the client, the Court can declare the swap null for lack of cause.⁴⁶

The Courts have shown a third approach where the concrete investigation as to the cause interferes with the negotiation connection. The case concerned a building firm, on the one hand, and a bank, on the other, with which the former, after taking out a loan to build some properties, had signed an IRS derivative contract to protect itself against fluctuations of the loan rates. Although the

⁴⁵ Court of Bari, 15 July 2010, *ibid*.

⁴⁶ Court of Modena, measure of 23 December 2011, *I Contratti* 2012, 3, 130, with a note by V. Sangiovanni, 'Contratto di swap, alea unilaterale e interessi non meritevoli di tutela', so that: 'in the case of a unilateral risk, the interest, albeit legitimate, pursued by the bank (= the achievement of an economic benefit) ceases to be worthy of protection. In fact, this interest dominates the counterparty's interest so much as to fully eliminate it. In other words, there is no longer a "bet" on future interest rate trends; rather, a contract structured in such a way as to ensure, in all cases, a benefit to the bank at the expense of the other party'. An identical judgement on such unworthiness of protection had been previously passed by the Court of Brindisi, 8 July 2008, *Banca, borsa e titoli di credito* 2010 II 353, with a note by E. Sabatelli, 'Validità del prodotto finanziario My Way e tutela dell'investitore'.

building firm had never executed the underlying financing contract (which was secured by a mortgage on the building land), the summoned bank had charged its client for the amounts accrued under the IRS. After establishing that the practical function pursued by the parties with the contract was the protection against the monetary risk related to the loan, the Court rejected the appeal against the precautionary measure that suspended the derivative charges, for a very clear reason: 'if the parties do not execute the loan agreement, this cannot but influence the swap contract whose risk coverage function is frustrated, since there is no performance to guarantee or no return of amounts borrowed'.⁴⁷

This point is worthy of special consideration. By resorting to the scheme of the cause in concrete, the agreement, which conceals the obvious information/technical imbalance between the parties, is struck with avoidance to the extent that the function of the transaction is altered or eliminated. This is especially the case where the possibility of monetary risk protection is frustrated, inexistent or reduced by the contract.⁴⁸

4 Beyond the consumer

If old categories are struggling to regulate new phenomena, there arises the need for a more efficient method and for more efficient protections in relation to acts and relationships. Going beyond widespread banalities, my reference to contractual justice had precisely this intent, at least as far as I am concerned.⁴⁹ I urged the rethinking and adjustment of remedies, combining equality and singularity with the usual tools of analogy, principles and general clauses.

Domestic and Community laws have already gone beyond the figure of the consumer. Suffice it to give some summary indications.

The Tourism Code refers to the figure of a 'buyer, transferee, or any person yet to be named, provided he meets all the conditions required for the use of the service ... related to a tourist service'.⁵⁰ The proposed Community Sales Regulation

⁴⁷ Court of Salerno, measure of 21 June 2011, www.ilcaso.it.

⁴⁸ See for the latest case-law, L.G. Vigoriti, 'Profili soggettivi e oggettivi dei contratti di swap su tassi di interesse' *Nuova giurisprudenza di diritto civile e commerciale* 2012, 2, 133 *et seq*.

⁴⁹ G. Vettori, 'Giustizia e rimedi nel diritto europeo dei contratti' *Europa e diritto privato* 2006, 58.

⁵⁰ S. Mazzamuto, 'La nuova Direttiva sui diritti del consumatore' *Europa e diritto privato* 2011, 905 *et seq*; G. De Cristofaro, 'La disciplina dei contratti aventi ad oggetto "pacchetti turistici" nel "codice del turismo" (D Legisl 23 maggio 2011, n 79): Profili di novità e questioni problematiche', 1st and 2nd part, *Studium iuris* 11 and 12, 2011, 1143 *et seq*, 1282 *et seq*.

is designed for consumers and Small and Medium-Sized Enterprises (Article 7(1)). The Directive on Consumer Rights also applies 'to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis' (Article 3(1)). The Decree of 24 January 2012, n 1 (the so-called 'Save Italy' decree), coordinated with the conversion law of 24 March 2012, n 27, extends to microenterprises the protection against deceptive and aggressive trade practices (Article 7), improves consumer information on fuel prices (Article 19) and insurance conditions (Article 34), establishes an administrative protection against unfair terms (Article 5), makes class actions more effective and introduces the Companies' Court.

In the light of these rules, it is hardly convincing to wonder whether, in addition to consumer law⁵¹ and the alleged category of the third contract,⁵² and of corporate contracts,⁵³ we can develop the idea of an asymmetric contract.⁵⁴

There is no need for new categories based on the qualities of contractors (consumers, customers, weak companies); rather, we need a new method to regulate the contract, governed by a set of sources from which to draw elements of compliance with the rule and new forms of protection, through an activity of deconstruction and innovation that Italian Courts have already begun, using some instruments in particular. They have used the concrete cause and the conflict with mandatory rules, as instruments for the control of legality and validity, in an articulated system of sources. They have used constitutionally guaranteed rights and duties, as limits to contractual freedom. Finally, they have used good faith as a criterion of liability in the assessment of behaviour both pre- and post-contract signature, with an autonomous function with respect to the assessment of contract validity.

This should be implemented in line with the best developments of 19th century civil legal theory, which should be consolidated and strongly innovated without unnecessary abstractions. A decisive role is played by the legal importance of every subjective position that is the subject of a regulation or of legislative attention, thereby specifying rights and obligations contained in provisions and principles to be translated into rules and new application techniques that pay attention to the definition of new general and special safeguards.⁵⁵

51 Mazzamuto, n 50 above; lastly, Mazzamuto, n 8 above.

52 G. Gitti and G. Villa, *Il terzo contratto* (Bologna: Il Mulino, 2008).

53 See recently on this issue G. De Nova, 'Contratti fra imprese' *Enciclopedia del diritto Annali* 2011.

54 V. Roppo, 'Regolazione del mercato e interessi di riferimento: dalla protezione del consumatore alla protezione del cliente?' *Rivista di Diritto Privato* 2011, 5–7.

55 Vettori, n 7 above, 98 *et seq.*

It remains to be seen how this can be done. We will now discuss some paths that have already been pursued.

5 European law and the proposal of a European Regulation on sales

The European approach to a set of uniform rules governing contracts, after a long process, has shown to be very 'bashful' when compared to expectations, as can be seen both in the Commission's Communication and in the European Parliament's resolution.⁵⁶

The former⁵⁷ clearly indicates the objectives to be pursued and the subject of Community intervention. Contracts are at the heart of all commercial transactions, and the differences between the legal systems of the 27 Member States are one of the major obstacles for cross-border trade and for the full implementation of the Single Market. This implies additional costs and complexities for traders, as well as greater problems for consumers when shopping in countries other than their own. As regards traders, suffice it to point out that they will have to become familiar with the law and the mandatory rules of each State, they will need to obtain legal advice, update their own web sites in relation to these diversities, with an increase in costs that has the greatest impact on SMEs.⁵⁸ It is estimated that almost half of consumers are discouraged from buying from other EU countries due to uncertainty about their rights, in particular in case of on-line transactions.

There ensue the objectives that have been clearly stated by the Commission. We need to 'remove the remaining barriers to cross-border trade, helping traders in their transactions and making cross-border shopping easier for consumers',⁵⁹ eventually creating a single set of uniform rules for businesses and consumers in

56 C. Castronovo, 'L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles dal DCFR alla proposta di Regolamento di un diritto comune europeo della vendita' *Europa e diritto privato* 2011, 4, 837; M. Meli, 'Proposta di Regolamento – Diritto comune europeo della vendita' *Nuove leggi civili commentate* 2012, 1, 183 *et seq.*

57 COM(2011) 636 of 11 October 2011, at www.europa.eu.

58 The Commission estimates that the turnover which companies forgo due to these obstacles amounts to 26 billion Euro every year, see COM(2011) 636, 3.

59 COM(2011) 636, 3–4, 'It has been demonstrated that bilateral trade between countries that have a legal system based on a common origin, such as common law or the Nordic legal tradition, is 40 % higher than trade between two countries without this commonality'.

cross-border trade by overcoming the many current deficiencies that influence both of them.

The Rome I Regulation on the law applicable to contractual obligations enables the parties to choose which law applies to their contract and to determine which law applies in the absence of such a choice. Yet, this cannot remove the differences between different national legal systems. Furthermore, Article 6(2) of that text requires traders to comply with the mandatory level of consumer protection in the consumer's country of residence, so that the trader's general conditions of sale may have to be amended to meet the requirements of the countries in which the company works. These difficulties are not overcome by existing European rules, since harmonisation measures do not cover the whole life-cycle of a contract and apply only to consumers. There exist Community and international rules for companies, though the framework is equally unsatisfactory. Late payment rules allow for a different intervention of each State, while the Vienna Convention on contracts for the international sale of goods has not been ratified in the United Kingdom, Ireland, Portugal and Malta.

Hence, after a decade of work on the proposal to unify contract law, there has arisen the idea of a common European sales law, whose features, effectiveness, relationship with the *acquis* and advantages for consumers and business, are illustrated by the Commission. Let's take a closer look at this basic structure that should be entrusted, according to the announced proposal, to a Regulation of the European Parliament and Council according to a 'Feasibility Study' drafted by a group of experts.

a) Functioning and Features

The set of rules will 'form part of the national law of each Member State as a "second regime" of contract law' for cross-border trade, and will have the following features.

- it will be common to all Member States.
- it will be an optional system (opt-in system), so that neither businesses nor consumers will be obliged to conclude a contract on the basis of the Common European Sales Law.
- it will focus on sales contracts and related services, with particular attention to online negotiations.
- it will be limited to cross-border contracts, unless the national State decides to extend its scope to national contracts.
- it will focus on business to consumer contracts (B2C) and business to business contracts (B2B) in which at least one of the parties is a SME. Contracts

between private individuals (C2C) and contracts between traders where neither of the parties is an SME are not included, as there is 'at the moment no demonstrable need for EU-wide action for these types of cross-border contracts'. However, the States will be able to extend this regime to relations between traders, without any limitation.

In other words, it will be an identical set of consumer protection rules and, at the same time, a 'comprehensive set of contract law rules' concerning the 'rights and obligations of the parties and the remedies for non-performance, pre-contractual information duties, the conclusion of a contract (including formal requirements), the right of withdrawal and its consequences, avoidance resulting from a mistake, fraud or unfair exploitation, interpretation, the content and effects of a contract, the assessment and consequences of unfairness in contract terms, restitution after avoidance and termination as well as prescription'.

On the other hand, the Proposal makes a limited choice. Certain topics 'that are either very important for national laws or less relevant for cross-border contracts (such as rules on legal capacity, illegality/immorality or representation and the plurality of debtors and creditors) will not be addressed by the Common European Sales Law. These topics continue to be governed by the rules of the national law that is applicable under the Rome I Regulation'. The proposal has an international vocation, at least in its intentions, in that, in order to be applicable, it is sufficient that only one party is established in a Member State of the EU. 'Traders could use the same set of contract terms when dealing with other traders from within and from outside the EU. European consumers could enjoy more product choice with the guaranteed level of high protection offered by the Common European Sales Law where traders from third countries are willing to sell their products in the internal market on this basis'. According to the Commission, this enables 'the Common European Sales Law to become a standard setter for international transactions in the area of sales contracts'.⁶⁰

Ultimately, 'the Common European Sales Law will be an optional addition to existing contract law rules without replacing them. It would be sellers who would in practice take the initiative in opting to use the Common European Sales Law. Buyers would then have to give explicit consent before this type of contract could be used. At least in the intentions of the proposal, for B2B contracts it could be easier to agree on a neutral law that is equally accessible for both parties in their own language'.⁶¹

⁶⁰ COM(2011) 636, 10.

⁶¹ COM(2011) 636, 13.

This would be done through the development of adequate flanking measures in relation to European model contract terms for specialist areas of trade or sectors of activity, to be adopted after the entry in force of the text; according to the Commission, this should be a concrete solution for a tangible problem for businesses and consumers and would be an innovative approach in line with the principle of proportionality, with national traditions and the parties' choices.

It is evident that the context is far too cautious and incomplete. The consequences are limited to cross-border negotiations, the instrument is optional and does not deal either with financial contracts or with the parties' legal capacity or with the illegality or immorality of contracts. Once again, a decisive impetus to Community law will be given by the Court of Justice, which has recently given its opinion in the field of contract and remedies,⁶² and will certainly have to do so in the future.

6 The Consumer Rights Directive

Rights are the other major protagonist of the crisis.

Some argue that the theories of modernity and the global order exclude any unitary reference to the Person and give importance only to single interests that operate in a market where their coexistence is grounded on freedom of economic initiative,⁶³ eroding the institutions of the Welfare State launched by the constituents. The only objectivation would be the 'reduction of all private relationships to the so-called consumer protection and to the guarantee of free competition', so that the legal world would end up 'coinciding with the economic world and with its automatisms'.⁶⁴

⁶² See Court of Justice, 15 March 2012, C-453/10 (*Okresný sud Presov, Slovak Republic v Jana Perinikova*, See *Perenic*, www.curia.europa.eu. For the legal theory, see S. Pagliantini, 'La nullità di protezione tra rilevanza d'ufficio e convalida' *Persona e Mercato* 2009 I 20; and the recent G. Passagnoli, 'Note critiche in tema di sanabilità e rinunziabilità delle nullità di protezione' *Persona e Mercato* 2012, 1; L. Valle, 'La nullità delle clausole vessatorie: le pronunce della Corte di Giustizia dell'Unione europea e il confronto con le altre nullità di protezione' *Contratto e impresa* 2011, 6, 1366.

⁶³ Grossi, n 3 above, 55.

⁶⁴ Barcellona, n 16 above, 75 *et seq.* This way, no importance would be attached to 'the existential conditions of contractors, all referable to the abstract schemes of consensus', definitely abandoning the idea of the Person, replaced by the totality of objective relations between goods (as Marx said, you meet goods, not people, at the market). There follows the acknowledgement of *apost-human* epoch based on cognitive hedonism and the infinite satisfaction of human needs, which calls for a change that can give a central role to the community spirit.

A response to this reconstruction calls for the specification of certain features of the present, referring to the consumption relationship and fundamental rights. We will discuss both of them in turn.

The recent Directive on Consumer Rights deserves careful consideration. Let us examine it closely.

The intent is clear. The intent is to replace Directive 85/577/CEE of 20 December 1985 (on contracts negotiated away from business premises) and 97/7/EC of 20 May 1997 (on distance contracts) with a new measure that goes beyond the previous minimum harmonisation, presenting rules that prohibit Member States from issuing 'diverging provisions' (Article 4) and thus ensure a higher level of consumer protection within the meaning of Article 169 TFEU. This is designed to promote an effective internal market on the basis of clearly defined rules, though this objective is subject to the possibility for Member States to extend this regulation to other entities and subjects.

The priority is equally clear. To establish information requirements for distance contracts, for off business premises contracts and for contracts other than these two types. To regulate the right of withdrawal in this context and to 'harmonise certain provisions dealing with the performance and some other aspects of business-to-consumer contracts' (recital 9). This will be done without prejudice to the law applicable to contractual obligations (Rome I), and by completing the information requirements of the Directive of 12 December 2006 (2006/123/CE) on services in the internal market and the Directive of 8 June 2000 (2000/31/EC) on electronic commerce.

The exclusions are equally meaningful. The central issues of contract law are not altered by the Directive, since Member States remain competent to regulate the conclusion and validity of a contract, the 'general contractual legal remedies, the rules on public economic order, for instance rules on excessive or extortionate prices, and the rules on unethical legal transactions' (recital 14).⁶⁵

⁶⁵ The Directive does not apply to (art 3): social services (recital 29), health services provided by health professionals to patients covered by the Directive of 9 March 2011 2011/24/EU (recital 30), gambling (recital 31), financial services, package travel and timeshare already governed by special regulations. The directive applies to: 'contracts for the supply of water, gas or electricity' and for 'the supply of heat, inter alia, in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating' (recital 25); 'service contracts in particular those related to the construction of annexes to buildings (for example a garage or a veranda) and those related to repair and renovation of buildings other than substantial conversion, as well as contracts related to the services of a real estate agent and those related to the rental of accommodation for non-residential purposes'. The Directives does not cover contracts for the transfer of immovable property (recital 26); passenger transport contracts, only in the case of 'excessive fees for the use of means of payment or hidden

In this context, the trader should give the consumer clear and comprehensible information tailored to the 'specific needs of consumers' and taking account of their infirmity, vulnerability, age or credulity which the trader can reasonably expect to foresee, and the method used for the contract or offer (recital 34).

The Directive distinguishes between distance contracts or off-premises contracts and other contracts. For the latter, the Directive specifies the information requirements 'if that information is not already apparent from the context' (Article 5.1); while, for the former, the regulation is more detailed. This information shall 'form an integral part of the distance or off-premises contract and shall not be altered unless the contracting parties expressly agree otherwise' (Article 6.5), thereby establishing a close link between information and contents of the contract, with very positive effects as regards the result of violations. In some cases (Article 6.6 on additional charges or other costs), the consumer 'shall not bear those charges or costs'. In others (Article 27 on unsolicited supplies), the consumer 'shall be exempted from the obligation to provide any consideration'. In any case, the link between information and content may lead to techniques that nullify or replace the omitted content, thereby enriching the protection granted.

The right of withdrawal (Article 9), when provided by law (distance contracts and off-premises contracts) and subject to the exceptions (recital 49) will be free from formalities and will have the same period, which may be extended up to 12 months where the trader has not 'adequately informed the consumer prior to the conclusion of a distance or off-premises contract' (recital 42 and Article 10) and will imply the refund of all payments and the return of goods, in a period of 14 days from the notice of withdrawal (Article 10.2).

The issue of delivery is very delicate, though the Directive nonetheless makes specific points. It proposes to 'clarify and to harmonise the national rules as to when delivery should occur' without any impact on the place and modality thereof and on 'the conditions for the transfer of the ownership of the goods and the moment at which such transfer takes place' which remain subject to national law, according to the Vienna Convention model. The Directive examines remedies in case of late delivery (recital 52–53 and Article 18) and the passing of risk. The Directive provides that the consumer is protected against 'any risk of loss of or damage to the goods occurring before he has acquired the physical possession of the goods' (Article 20).

costs', being passenger transport already subject to other Union legislation, or in the case of public transport and taxis, to regulation at national level (recital 27); contracts for 'the transport of goods and car rental which are services, with the exception of the right of withdrawal' (recital 27).

The Directive reiterates the importance of class actions, the non-waivability of rights and their knowability, providing expressly that 'any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer' (Article 25).

Lastly, the Directive declares the need to respect fundamental rights and to observe the principles recognized by the Charter of Fundamental Rights of the European Union; this opens up a further discussion (recital 66), going even beyond the consumer.

7 Fundamental rights and contract

The relationship between rights and contract arises clearly as a visible hand of Community law on some essential aspects. *Full information, the ban on discrimination, the principles that derive from regulated markets (freedom of access, affordability and good practice), unfair commercial practices, health and safety in the regulation of services, the control on contractual content.*⁶⁶ Though this concerns every other subjective, constitutionally guaranteed position in that, inter alia, the Charter of Fundamental Rights gives full effect to the values of freedom, equality and dignity with a necessarily unitary sequence expressed already in Article 3 of our Constitution. The coordination between the two texts implies that there is no freedom without equality and that there is no equality without the protection of the Dignity and rights of every natural or legal person, whether or not involved in an economic activity. It remains to be seen how these essential indications can be used and how they're being used.

As it has been authoritatively and recently argued, there are three approaches to the connection between contract and constitutional provisions.⁶⁷ The first and oldest approach denies the direct relevance of contract, granting fundamental rules the sole value of a hermeneutical context. The others follow a different direction. One approach supports a link between the autonomy of private individuals and the content of articles 2 and 32, which describe decisive aspects of the person and his freedom, while the other considers private economic initiative,

⁶⁶ H.-W. Micklitz, 'La mano visibile del diritto privato europeo in materia normativa. La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolazione' *EUI Working Papers*, Department of Law, 2010, available at <http://cadmus.eui.eu/>.

⁶⁷ See, recently, G. Benedetti, 'Persona e contratto' *Obbligazioni e contratti* 2012.

which is governed by article 41, as a direct reference to the contract, the true archetype of that activity.⁶⁸

The Nice Charter does not express a clear opinion on this point and merely regulates freedom of enterprise,⁶⁹ and the ECHR⁷⁰ deals with the problem even more indirectly, protecting reliance on contractual renewal (provided for by an option) as a good protected by protocol 11, thereby ambiguously linking a compulsory expectation to a contract to the protection of property, according to a scheme that was typical of nineteenth century codifications but that was widely overcome throughout the twentieth century.

The problem is therefore interpretive and systematic, though it has to be acknowledged that contract, just like all other essential institutions of civil life (the person, family, intermediate groups, property, contract, testament) is not devoid of a constitutional significance.⁷¹ This point is well known to our Supreme Court, which has used the reference to Dignity and to the rights provided for in the Charter of Fundamental Rights in a number of cases. The reasons given for a recent judgement originating from the control of a clause attached to a lease, is very illustrative.⁷²

The Court's reasoning followed a precise direction. The Court first pointed out that the system is today 'a set of heterogeneous, though mutually harmonized sources according to a strict hierarchical relationship dominated by the Constitution which, directly or indirectly, gives each of them their own regulatory function'. In this context, a pre-eminent role is played by 'those rules that relate to the inviolable values of the human being and whose wording is not exhausted in purely programmatic formulas; rather, such wording has a preceptive value that makes the rules directly applicable also to inter-subjective relations'.⁷³ Turning to the contract, the Supreme Court stated that 'negotiating autonomy cannot be separated from the nature of the interests on which a given provision is bound to have an impact. And since every interest is referrable to a value, we need to identify, through the analysis of interests, which of them expresses values that are recognized and protected in the Constitution'.

68 Benedetti, n 67 above, though also G. Vettori (ed), *Contratto e costituzione in Europa* (Padua: CEDAM, 2005).

69 On this point, G. Vettori (ed), *Carta europea e diritti dei privati* (Padua: CEDAM, 2002).

70 ECHR, *Stretch v United Kingdom*, sec IV, 24 June 2003, n 44277.

71 Benedetti, n 67 above.

72 Supreme Court, 19 June 2009, n 14343 (judge drafting the sentence: D'Amico), in *Foro italiano On-line*.

73 On this point: Supreme Court, 15 July 2005, n 15022; Supreme Court, 31 May 2003, n 8828; Supreme Court, 31 May 2003, n 8827.

After reconstructing the regulatory framework, it was clearly concluded that 'the constitutional basis of negotiating autonomy should be identified in the light of multiple regulatory supports, by reason of the nature of the interests entrusted to single expressions of autonomy and of the constitutional values to which these interests may be referred'. So that 'the constitutional foundations of negotiating autonomy are key guidelines for the interpreter, from which to draw inspiration in order to express, with regard to each concrete contract, those value judgements which the law entrusts thereto'. Having thus identified the source, it is easy to identify the implementing instruments for each single case: 'the controls as to the worthiness of interests and lawfulness of the cause should be carried out under Article 2 of the Constitution, which protects inviolable rights and requires the fulfilment of the inescapable duties of solidarity'. The path was thus widely traced for further developments, which soon came.

This path was used in order to establish, within a constitutionally oriented interpretation, the content of non-financial loss as a damage to a legally protected good,⁷⁴ the scope and foundation of informed consent in the case of medical treatment,⁷⁵ the damage caused by the de-skilling of a hospital doctor,⁷⁶ and then later in order to focus on the role that the Constitution can have in delimiting the protected interest and remedies available in a number of cases relating to the protection of foreigners, minors, the elderly and disabled.⁷⁷

While the Courts, when dealing with the reconciliation of a foreign relative with a minor, balanced conflicting interests with a specific reference to Articles 7 and 24 of the European Charter⁷⁸ on the disabled and the elderly, their references to Articles 25 and 26 have affected the civil law safeguards in a very significant manner.

A first judgement dealt with the request, by a relative, for the refund of prepaid costs for a person with a disability, who had been supported by social services which had previously taken care of placing that person in a dedicated home. The problem was to identify the source of the right to such refund and of the obligation of the Municipality, which the Courts had denied in the absence of

74 See the judgements indicated in the analysis by M. Mauro, 'L'incidenza della Carta di Nizza nella giurisprudenza della Cassazione Civile: rassegna giurisprudenziale' *Persona e Mercato* (www.personaemercato.it) 4, 2011, 327; and, in the same publication, the reference to Supreme Court 10 March 2010, n 5770 and Supreme Court, 13 July 2011, n 15373.

75 See Supreme Court, 9 February 2010, n 2847; Supreme Court, 28 July 2011, n 16543; Supreme Court, 30 March 2011, n 7237; and Const Court 23 December 2008, n 438, in *Foro italiano* 2009 I para 1328 *et seq.*

76 Supreme Court, 2 February 2010, n 2352, in *Foro italiano* 2010 I para 1145.

77 See also Mauro, n 74 above, 333.

78 See Supreme Court, 25 October 2010, n 21799, *Giustizia civile* 2011, 3.

a specific administrative act. The Supreme Court⁷⁹ held that the Entity's obligation was grounded since it could be inferred from the constitutional duty of solidarity and from Article 26 of the Nice Charter, so much so that this right could be protected under Article 700 Civil Procedure Code. It then held that the prepayment of such costs satisfied the requirement of *utiliter coeptum* of the *negotiorum gestio* provided for in Article 2028 Civil Code and thus allowed for their refund.

The second judgement is even more significant. The Supreme Court⁸⁰ had to decide on the validity of a contract between a terminally ill old woman and a carer, whereby the bare interest in a property had been transferred as consideration for such care. The contract was classified as atypical and the control of the interests involved was carried out under Article 25 of the Constitution, this being intended 'as a preceptive and not just programmatic and guiding provision for national judges', which could lead to a judgement of lack or unlawfulness of cause, as the delimitation of a worthy interest pursuant to Article 1322 Civil Code.

It can be concluded that the contract does not lend itself to being segmented into divergent lines but always tends, from time to time, to close in a circle which exalts its full vitality as an essential instrument of private autonomy, controlled in its purposes, conduct and in respecting the rights and freedoms of others.

⁷⁹ Supreme Court, 6 August 2010, n 18378, *Giustizia civile* 2011, 3, 680, discussed by Mauro, n 74 above, 336.

⁸⁰ Supreme Court, 7 February 2011, n 2945, mentioned in Mauro, n 74 above, 337.