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Contract Law for Interesting Times

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THE ECONOMIC APPROACH TO LAW AS AN INTERDISCIPLINARY LEMON AND CALABRESIAN LAW AND ECONOMICS AS TRUST MARK*

Fabrizio Esposito

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This article moves from the premise that the economic approach to law is valuable to legal research when it does not distort the content and function of the legal norms it purports to analyze. The value comes from useful analytical frameworks, especially of market-relatead matters. This value is particularly important for comparative law since it offers standpoints to look at the law of different jurisdictions from a detached point of view. However, the economic approach has lost momentum and failed to attract the attention of comparativists even in the United States, where it is mainstream legal scholarship. Garoupa and Ulen's explanation of these 'hard realities' rests on two main causes with limited explanatory power because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent). At the same time, in previous scholarship, Garoupa and Ulen claimed that the economic approach to law was less successful outside the United States and Israel due to legal parochialism: rent-seeking academic gatekeepers raise barriers to foreign legal innovation to their own benefit. Evidently, legal parochialism fails to explain the hard realities of the economic approach to comparative law in the United States. A plausible diagnosis reconciling this explanatory conflict is that we face an interdisciplinary lemon problem: quality variation of the economic approach to law and its opacity to legal scholars leads to a suboptimal level of interaction with economic analysts. The principled dereliction of problematic economic analysis negatively impacts also useful economic analysis. This article claims that shifting the focus from mainstream (comparative) Economic Analysis of Law to Calabresian Law and Economics will improve the situation. The latter offers a set of research questions and methods of interest to comparativists and answers them in methodologically sound ways, to the benefit of comparative research.

Keywords: Economic approach to comparative law – legal parochialism – principled dereliction – interdisciplinary lemon problem – Calabresian Law and Economics

INTRODUCTION

In a famous paper, Gunther Teubner introduced the concept of legal irritants.[1] In the context of European integration through law, Teubner exposed "a fundamental irritation which triggers a whole series of new and unexpected events" caused by legal transplants.[2] Indeed, Teubner's own reflections on the law as an autopoietic system[3] suggest that "law

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1 Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences," *The Modern Law Review* 61 (1998): 11.

2 *Ibid., 18*.

3 See, generally, Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell Publishers, 1993).

and …" movements can be legal irritants – that is, interdisciplinary irritants. When, moreover, the alien discipline under consideration is economics, namely the imperialistic social science *par excellence*,[4] the idea of an interdisciplinary irritant becomes a plausible one;[5] even more so considering that leading scholars within the economic approach to law[6] have expressed preoccupation about the fundamental irritation caused by their discipline.[7]

Ignoring the possibility that the economic approach to law is a Teubnerian legal irritant, Garoupa and Ulen have tried to explain the limited success of the economic approach to law outside the United States and Israel moving from the premise that the economic approach to law is an innovation.[8] This qualification is significant because it assumes that the economic approach to law is something positive or desirable, that rational legal academics should want to consume, provided that their selfish interest is aligned with the social interest.[9] In other words, legal scholarship faces a social dilemma: individual and societal costs and benefits are not aligned.[10] Garoupa and Ulen claim that this social dilemma is caused primarily by legal parochialism. "[L]egal parochialism operates like protectionism in trade":[11] in all legal academic markets, rent-seeking gatekeepers ostracize

[4] On the concept of scientific imperialism and its application to economics, see the essays in in Uskali Mäki, Adrian Walsh, and Manuela Fernández Pinto, eds., *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity* (New York: Routledge, 2017).

[5] Katja Langenbucher, *Economic Transplants: On Lawmaking for Corporations and Capital Markets* (Cambridge: Cambridge University Press, 2017) uses the expression "economic transplants" to present the use of economic concepts in legal practice as analogical to legal transplants. This is in line with the observation that comparative legal research can be expanded beyond its traditional realms; see, generally, Mathias Siems, "The Power of Comparative Law: What Types of Units Can Comparative Law Compare?," *The American Journal of Comparative Law* 67 (2019): 861. Accordingly, it is plausible to extend the idea of legal irritants from legal transplants to economic transplants which, Langenbucher defines so broadly as to cover the whole spectrum of scholarship produced using the economic approach to law.

[6] I will use "economic approach to law" as in Richard A. Posner, "The Economic Approach to Law," *Texas Law Review* 53 (1975): 757, to refer to what Calabresi calls Economic Analysis of Law on the one hand and Law and Economics on the other in Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (New Haven: Yale University Press, 2016). Note that according to this terminology, what Nuno Garoupa and Thomas S. Ulen, "Comparative Law and Economics: Aspirations and Hard Realities," *The American Journal of Comparative Law* 69 (2021): 664, name Comparative Law and Economics is a subfield of what Calabresi calls Economic Analysis of Law, not of Calabresian Law and Economics – the approach that I endorse here, as I did elsewhere; *see* [.

[7] See, for example, Anthony Ogus, "Law and Economics in the Legal Academy, or, What I Should Have Said to Discipulus," *The University of Toronto Law Journal* 60 (2010): 169, Alan Schwartz, "Two Culture Problems in Law and Economics," *University of Illinois Law Review* (2011): 1531, Qi Zhou, "What Can Economists Learn from Contract Lawyers?," in *Regulatory Reform in China and the EU*, ed. Stefan E. Weishaar, Niels Philipsen, and Wenming Xu (Cheltenham: Edward Elgar Publishing, 2017), 117. *See*, extensively, Section III.

[8] *See* Nuno Garoupa and Thomas Ulen, "The Market for Legal Innovation: Law and Economics in Europe and the United States," *Alabama Law Review* 59 (2008): 1555, and, more extensively on legal parochialism, Nuno Garoupa, "Updating the Law and Economics of Legal Parochialism," in *Law and Economics in Europe and the U.S.: The Legacy of Juergen Backhaus*, ed. Alain Marciano and Giovanni Battista Ramello (Cheltenham: Edward Elgar Publishing, 2016), 171.

[9] *See below*, Sections II.

[10] *Social Dilemma*, American Psychological Association, https://dictionary.apa.org/social-dilemma (last visited May 10, 2024). More extensively, see Ulrich Schulz, Wulf Albers, and Ulrich Mueller, *Social Dilemmas and Cooperation* (Berlin: Springer, 2012).

[11] Garoupa *supra* note 8, 179; *see also* Garoupa and Ulen, *supra* note 8.

foreign legal innovation to their own benefit. In the United States and Israel, this mechanism has more limited success because the local academic market (presented as a single one for both countries) is too large to effectively exclude the economic approach to law.

Recently, Garoupa and Ulen have reflected on the "hard realities" of the economic approach to comparative law. Notably, their analysis is in line with those offered by Paris and Vargas Weil. [12] An element that transpires from this recent scholarship is disappointment; this disappointment stems from the belief that the economic approach to law is valuable to legal scholarship because it offers a precise *lingua franca*.[13] Garoupa and Ulen's analysis stands out because they offer an evidence-based explanation of these hard realities: beliefs about methodological mismatches and implausible assumptions of the economic approach to law make it unpalatable to comparativists.[14]

Interestingly, the explanation of these hard realities rests uncomfortably with Garoupa and Ulen's previous legal parochialism perspective but approximates the legal irritant perspective. Looking at comparative legal scholarship in the United States, Garoupa and Ulen give more explanatory weight to the fact that comparativists believe they have good reasons not to consume the comparative economic approach to law.[15] This fact arguably follows from their focus on the limited success of the economic approach to comparative law in the United States, where this approach is considered successful in legal scholarship. However, since legal parochialism is a general phenomenon in their view, it should also be considered when focusing on comparative legal scholarship. In sum, Garoupa and Ulen have offered two explanations: one based on parochialism (selfish) and the other on rational distaste (non-selfish).

This article develops arguments in favor of the non-selfish explanation. Significantly, these arguments are not limited to comparative legal scholarship, but it is not surprising that the problem is more apparent in this field. The analysis ultimately leads to the following diagnosis: the economic approach to law is an interdisciplinary lemon. The intuition is that some of the scholarship produced by the economic approach to law makes legal discourse more confused and distorts legal concepts and the function of legal norms, contrary to the perception of the proponents of this approach. In light of the difficulties in distinguishing this problematic scholarship from the rest, legal scholars disengage,[16] leading to a shrinking

[12] See also F. Parisi, "The Multifaceted Method of Comparative Law and Economics," *Comparative Law Review* 12 (2023): 25, Giovanni B. Ramello, "Comparative Law and Economics," in *Encyclopedia of Law and Economics*, ed. Alain Marciano and Giovanni B. Ramello (Cheltenham: Edward Elgar Publishing, July 2023), and Ernesto Vargas Weil, "Map and Territory in Comparative Law and Economics," *Global Journal of Comparative Law* 11 (2022): 1.

[13] *See below*, footnote 27 and the accompanying text.

[14] *See below*, Section I.

[15] Cf. Garoupa, *supra* note 8, and Garoupa and Ulen, *supra* note 8 (not ruling out entirely the relevance that legal scholars' 'rational distaste' for the economic approach to law may play a role but significantly downplaying its explanatory relevance). *See below*, Section II.

[16] Directorate-General for Justice and Consumers (European Commission) et al., *Behavioural Study on Unfair Commercial Practices in the Digital Environment: Dark Patterns and Manipulative Personalisation: Final Report* (Luxembourg: Publications Office of the European Union, 2022), https://data.europa.eu/doi/10.2838/859030 (last visited May 24, 2024), 282 (noting that disengagement is a "market-related" phenomenon, not one imputable only to consumers). See also Christine Riefa, Paolo

of the economic approach to law akin to Akerlof's famous market for lemons.[17] Following Akerlof's path-breaking analysis,[18] it is up to scholars involved in the economic approach to law to help other legal scholars (whether comparativists or not) to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc.

Building on this diagnosis, this article presents Calabresian Law and Economics as a subfield that can be the trust mark that addresses the interdisciplinary lemon problem. In fact, it was recently observed that "(t)o a comparatist's ears, Calabresi's approach may sound like the theory of legalformants in action at its finest".[19] Two complementary developments of Calabresian Law and Economics are auspicious to this end: the Legal-Economic Performance (LEP)[20] and Legal-Economic Fitness (LEF)[21] frameworks. On the one hand, the LEP framework offers a method to describe situations of human interdependence with attention to their legal nuances, to then analyze the economic consequences of different institutional interventions with a rich and diversified set of methods, and without any normative pre-commitment. The LEP framework can, therefore, credibly deliver on the promise of a *lingua franca*; one that is, however, both legal and economic.[22] On the other hand, the LEF framework focuses on identifying those versions of an economic concept that fit best with actual legal reasoning. The recently formulated consumer welfare hypothesis[23] illustrates well the potential of this method. It will also be shown that the consumer welfare hypothesis is particularly promising for comparative legal research.[24] A thought-provoking implication of the consumer welfare hypothesis for the field is a *praesumptio efficientiam*, to be understood as a specification of the functionalist *praesumptio similitudinis*.

A caveat is in order. This article defends some claims about the relationship between the economic approach to law and comparative legal scholarship without explicitly articulating the varieties of comparative legal scholarship. At the same time, the article makes claims

Siciliani, and Harriet Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (Cambridge: Cambridge University Press, 2019), 40–42.

17 George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84 (1970): 488.

18 Stefan Grundmann, "Knowledge and Information," in *New Private Law Theory: A Pluralist Approach*, ed. Stefan Grundmann, Hans-Wolfgang Micklitz, and Moritz Renner (Cambridge: Cambridge University Press, 2021), 241-46.

19 Marco Giraudo, "Some Remarks on Lawyers' Use of Knowledge. Charting a Course," *Isaidat Law Review* 13 (2021): 20, referring in particular to Sacco's theory of legal formants; see, Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," *The American Journal of Comparative Law* 39 (1991): 1.

20 Sarah Klammer and Eric A. Scorsone, *The Legal Foundations of Micro-Institutional Performance: A Heterodox Law & Economics Approach* (Cheltenham: Edward Elgar Publishing, 2022).

21 Fabrizio Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century* (Cheltenham: Edward Elgar Publishing, 2022).

22 *See below*, Section III.a.

23 See Esposito, *supra* note 21. See, Nuno Garoupa, "Fabrizio Esposito, 2022, The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century, Edward Elgar," *European Review of Contract Law* 20, no. 1 (April 2024): 148–53, and Valentina Calderai, "The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century," *European Law Review* 49, no. 2 (2024): 210–13.

24 *See below*, Section III.b.

about the beneficial contributions and possible interactions between the two disciplines. It necessarily follows that several aspects will remain underdeveloped. These are unavoidable limitations within the confinement of an article, even a long one. However, as Hans-Wolfgang Micklitz uses to say, "the goal is starting a conversation". In fact, the ultimate claim of this article is that scholars in the economic approach to law need to listen more[25] comparative legal scholars and make an effort to understand, rather than brush off, their concerns; at the same time, comparative legal scholars have arguably to benefit from engaging specifically with a minoritarian strand in the economic approach to law, namely Calabresian Law and Economics. The contribution of this article consists, first and foremost, in cleaning up and fertilizing the cognitive space where this interdisciplinary scholarship could root, blossom, and eventually flourish.

The article is structured as follows. Section I offers an analytical summary of Garoupa and Ulen's reflection on the hard realities of the economic approach to comparative law and compares it to the alternative explanation: the interdisciplinary lemon problem. Section II reflects on the unique role that comparative legal research can play in fruitfully and meaningfully integrating the economic approach to law within the legal community, but also exposes the limits of the value proposition the economic approach to law formulates for comparative legal research. Building on these findings, it then articulates the diagnosis that the economic approach to law is an interdisciplinary lemon. Section III explains why Calabresian Law and Economics would operate as a reliable trust mark, thereby reassuring that a certain piece of scholarship is typically worthy of comparativists' attention. In particular, the LEP framework is proposed as a general methodological approach for Comparative Calabresian Law and Economics. At the same time, the systematic investigation of the consumer welfare hypothesis using the LEF framework constitutes a progressive research program (in Lakatos's sense[26]) that, if properly nurtured, would eventually flourish in a grand theory of exchange contracts. The Conclusion summarizes the analysis and formulates the action plan that could be instrumental for Comparative Calabresian Law and Economics to root, blossom, and eventually flourish.

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[25] Similarly, Deirdre Nansen McCloskey, *Bettering Humanomics: A New, and Old, Approach to Economic Science* (Chicago: University of Chicago Press, 2021), especially viii-ix.

[26] See, in particular, Imre Lakatos, "Falsification and the Methodology of Scientific Research Programmes," in *Can Theories Be Refuted? Essays on the Duhem-Quine Thesis*, ed. Sandra G. Harding (Dordrecht: Reidel, 1976), 205; see, generally, Alan Musgrave and Charles Pigden, "Imre Lakatos," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta and Uri Nodelman, Spring 2023 ed. (2023), summarizing Lakatos's "research programme" account of scientific practice as follows:

> Each theory produced within a research programme contains the same common or "hard core" assumptions, surrounded by a "protective belt" of auxiliary hypotheses. When a particular theory is refuted, adherents of a programme do not pin the blame on their hard-core assumptions, which they render "irrefutable by fiat". Instead, criticism is directed at the hypotheses in the "protective belt" and they are modified to deal with the problem. Importantly, these modifications are not random—they are in the best cases guided by the heuristic principles implicit in the "hard core" of the programme. A programme progresses theoretically if the new theory solves the anomaly faced by the old and is independently testable, making new predictions. A programme progresses empirically if at least one of these new predictions is confirmed.

Moreover, a programme is theoretically progressive because it generates new hypotheses (and, more generally, research questions).

I. TWO COMPETING VIEWS OF COMPARATIVE LEGAL SCHOLARS' COLD SHOULDER

This section summarizes Garoupa and Ulen's account and, with equal clarity, articulates the alternative view that this article argues for: the economic approach to law is an interdisciplinary lemon, and Calabresian Law and Economics is a reliable trust mark for legal scholars.

Garoupa and Ulen claim that:

> (1) The economic approach to law is valuable to comparative legal research because it offers a clear *lingua franca* for legal scholarship. However, (2) the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists even in the United States, where the economic approach to law is mainstream in legal scholarship. (3) Plausible causes are: the limited success of comparative law in the United States; a methodological mismatch between the economic approach to law and comparative law; an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law. (4) While this is the current situation, it might be too early to declare the economic approach to comparative law a faulty project because there might be forces at play that will lead the field to success in the future.

This claim comprises: a value proposition, proposition 1; the recognition of hard realities, proposition 2; a diagnosis of the hard reality, proposition 3; finally, a prognosis for the future, proposition 4. Notably, this view is based primarily on direct observation, publicly available data and, fundamentally, on the interview of "nineteen leading scholars".[27]

This article offers a different account, where comparative legal scholars are in good company to remain unimpressed by the economic approach to law and offers constructive proposals for reviving the field, relying on the Calabresian Law and Economics tradition (Comparative Calabresian Law and Economics):

> (1') The economic approach to law is valuable to comparative legal research because it offers a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*. However, (2) the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists even in the United States, where the economic approach to law is mainstream in legal scholarship. (3') *The following causes have limited relevance because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent)*: the limited success of comparative law in the United States; a methodological mismatch between the economic approach to law and comparative law, and an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law*; instead, a plausible cause is the quality variation of the economic approach to law and its opacity to legal scholars, which leads to an interdisciplinary lemon problem.* (4') While this is the current situation, it might be too early to declare the economic approach to

[27] Garoupa and Ulen, *supra* note 6, 682.

> comparative law a faulty project because there *are* forces at play that will lead the field to success in the future, *and these forces consist in shifting the attention from mainstream Economic Analysis of Law to Calabresian Law and Economics, which offers a set of research questions that comparative legal scholars may find interesting and answers them in methodologically sound ways, thereby operating as the quality signal (trust mark) that can address the interdisciplinary lemon problem*.

In other words, building on the recognition of the hard realities (proposition 2), a different diagnosis (proposition 3') is proposed, resting on a more cautious and self-critical value proposition (proposition 1'). This analysis will lead to a clearer and more optimistic prognosis (proposition 4').

II. A HARD LOOK AT HARD REALITIES: THE ECONOMIC APPROACH STRUGGLES TO DELIVER VALUE

According to Garoupa and Ulen, the following value proposition (proposition 1) is true: The economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship. In their own words: "law-and-economics tools were especially useful in seeking to understand differences among legal substance, practices, and institutions, just as a single microeconomics could help to explain the differences in the actual economies of the world".[28] In this regard, and before assessing the merits of proposition 1, it should be noted that a *lingua franca* and conceptual precisions are some of the benefits associated with comparative legal research in general.[29] In this sense, comparativists have a rational reason to take the economic approach to law seriously – if proposition 1 is true.

Notably, proposition 1 is attractive to legal scholars in general; however, if true, it is particularly palatable for comparativists. Siems opens his textbook with this quote from Merryman: "Lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan".[30] If the problem economists are facing is getting parochial legal scholars to listen, comparativists are the most likely to do so. In fact, there are significant similarities between comparative research and economic analysis. As Huka observes, "comparative law and law and economics [*rectius* – the economic approach to law] are both essentially comparative in nature".[31] Michaels adds: "comparatists know that looking through the eyes of foreign law enables us better to understand our own, so looking through the eyes of foreign disciplines should similarly help us better to understand our own discipline".[32]

The economic approach to law is most compatible with the functionalist approach to comparative legal research. In fact, economic analysis could be fruitfully applied to the comparative institutional analysis of how similar problems are addressed in different legal contexts;[33] this possibility is more plausible when the focus is market-related institutions,

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[28] Garoupa and Ulen, *supra* note 6, 671. *See also below*, footnotes 40-42 and the accompanying text.
[29] Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2019), 345-73, 372-3.
[30] Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2022), 1.
[31] Jaakko Husa, *Interdisciplinary Comparative Law: Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd* (Cheltenham: Edward Elgar Publishing, 2022), 114.
[32] Michaels, *supra* note 29, 342.
[33] *See below*, footnote 77 and the accompanying text.

but there is reason to believe that the scope can be expanded beyond this realm.[34] In sum, economics can offer a detached standpoint for the comparison of different institutional arrangements.

Readers finding the opposition between functionalist and 'postmodernist' approaches to be a matter of degree rather than a qualitative distinction leading to incompatibility, can agree that the economic approach to comparative law should be of interest also to moderate postmodernists. Without any intent to provoke, the next section will suggest that even skeptics of the functional approach could incorporate in their research a sophisticated economic approach to comparative legal research. This approach is called Calabresian Law and Economics.[35]

However, the economic approach's ability to deliver what proposition 1 promises is, unfortunately, uneven. Accordingly, as it will be described more in detail in this section, the economic approach to law is not very good at reassuring legal scholars that, normally, the economic approach to law delivers the value it promises. Before articulating this partial explanation of the economic approach to comparative law's hard realities, it is helpful to offer examples in support of proposition 1 and examples of situations where that same value proposition is patently false.

a. An often ungrammatical lingua franca

Proposition 1 is arguably true, in part.[36] This section provides examples of that. However, examples of the opposite are also offered: in multiple occasions, the economic approach to law distorts the legal concepts it purports to clarify, to the effect that the results of the mainstream economic approach to law cannot be relied upon as a *lingua franca* for comparative legal research. Even worse, sometimes, the economic approach to law seems uninterested in legal concepts or even conceptual rigor. For example, this is how Mattei opens his seminal book on the economic approach to comparative law: "Legal interpretation should not be guided by justice. It should be guided by efficiency".[37] Notably, a more qualified argument in favour of the legal relevance of efficiency was offered by Craswell with the idea of a 'jurisprudential preface'.[38] From a legal theory perspective, however, even Craswell's cautious perspective is not cautious enough.[39]

Moving on, in Ulen's celebrated textbook written with Bob Cooter, one reads[40]:

> [w]hich law is better? Perhaps you think that fairness requires injurers to pay for the damage they cause. If so, you will approach the question as traditional

[34] *See below*, footnotes 156-172 and the accompanying text for important qualifications to this claim, and the constructive proposal of relying on the economic concept of situation of interdependence.
[35] *See below*, footnotes 138-152 and the accompanying text.
[36] Also, Langenbucher, *supra* note 5, offers a series of hard looks at value proposition 1 and would arguably endorse value proposition 1'. More extensively, Shawn Bayern, *The Analytical Failures of Law and Economics* (Cambridge: Cambridge University Press, 2023).
[37] Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997), 7.
[38] Richard Craswell, "Default Rules, Efficiency, and Prudence," *Southern California Interdisciplinary Law Journal* 3 (1993): 289.
[39] *See*, generally, Fabrizio Esposito and Giovanni Tuzet, "Economic Consequences for Lawyers: Beyond the Jurisprudential Preface," *Journal of Argumentation in Context* 9 (2020): 368.
[40] Thomas Ulen and Robert B. Cooter, *Law and Economics* (Boston: Pearson, 2016), 82.

> lawyers do, by thinking about causes and fairness. … Professor Coase, however, answered in terms of efficiency.

This statement is particularly noteworthy since Garoupa, Ulen[41] and Parisi[42] consider Cooter to be the scholar who, better than anyone else,[43] has articulated proposition 1. Two points must be stressed. First, none of these scholars acknowledges that the *lingua franca* ideal is an aspiration internal to comparative legal research.[44] Second, the level of dismissal for legal concepts in Cooter and Ulen's textbook is remarkable. One could claim that this textbook is outdated and does not fully reflect the state of the art. Indeed, Garoupa and Ulen report that Ulen has, over time, abandoned the legal-topic structure to teach the economic approach to law, in favor of an economic-concept-based structure.[45] Yet, in one of the chapters in the *Oxford Handbook Of Law and Economics*, in the volume dedicated to methodology (no less), one reads: "[W]e could define a 'perfect social norm' as a behavioral regularity caused by coordination, non-legal sanctions, and internalization. However, we will not labor over the definition. Economics is more concerned with causes than meanings, and so are we".[46]

One point both citations touch upon is causation. Hence, in the context of causation, one is entitled to expect that the rigor of the alleged *lingua franca* operates with full force. However, Ben-Shahar, one of the leading scholars in the field, in his 2000 chapter on causation for the *Encyclopedia of Law and Economics*, wrote: "The economic analysis of the law of causation illuminates both the cause-in-fact and the proximate cause doctrines".[47] This is a clear commitment to proposition 1. However, what is actually happening is an attempt to reformulate legal concepts to make them fit with economic optimal deterrence theory; in Ben-Shahar's own words[48]:

> This chapter … clarifies the basic distinction between retrospective (*ex post*) causation and prospective (*ex ante*) causation, a distinction that forms the core of many subsequent economic discussions of causation. Next, the explicit role of causation doctrines in inducing optimal care and activity levels is examined … . The analysis is then extended to cover several complications often plaguing the determination of causation: uncertainty over causation, joint actions among tortfeasors and unforeseeability of harm.

What is the distinction between retrospective and prospective causation? The former "exists if, all else held fixed, but for the action the harmful consequence would not have occurred".[49] This is, in other words, the familiar but-for test. "Prospective causation exists

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41 Garoupa and Ulen, *supra* note 6, 670-72.
42 Parisi, *supra* note 12, 28.
43 Parisi, nevertheless, believes that the intellectual father of the '*lingua franca* ideal' is Ugo Mattei and the place of birth is Mattei, *supra* note 37; *Id.* at 26. *Similarly*, Vargas Weil, *supra* note 12,1.
44 Michaels, *supra* note 29, 372-73; *see*, extensively, Uwe Kischel, Comparative Law (New York> Oxford University Press, 2019), 46-85.
45 Garoupa and Ulen, *supra* note 6, 681-85.
46 Emanuela Carbonara, "Law and Social Norms," in: *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts*, ed. Francesco Parisi (New York: Oxford University Press, 2017), 466, 469.
47 Omri Ben-Shahar, "Causation and Foreseeability," in: *Encyclopedia of Law and Economics*, eds. Boudewijn Bouckaert & Gerrit De Geest, vol. 2 (Chelthenam: Edward Elgar, 2000), 644, 645.
48 *Ibid.*
49 *Ivi*, 647.

when an action raises the probability of the harmful consequence".[50] Ben-Shahar illustrates the improvement of adopting the latter by reference to *Berry v. Sugar Notch Morough*.[51]

Unfortunately, the alleged improvement provided by the economic approach to law in 1980[52] was at the core of the jurisprudential analysis of causation offered by legal philosopher HLA Hart in 1959.[53] Moreover, contrary to Ben-Shahar, Hart articulates his analysis in the familiar terms of cause, effect, and purpose of the norm, concluding that purpose can lead to a teleological reduction of the results of the but-for test. That is not all: the conceptual analysis provided by Hart illuminates the core of the court decision in *Berry*, namely[54]:

> That [the driver's] speed brought him to the place of the accident at the moment of the accident was the merest chance, and a thing which no foresight could have predicted. The same thing might as readily have happened to a car running slowly, or it might have been that a high speed alone would have carried him beyond the tree to a place of safety.

Admittedly, the court is not fully transparent in making the point, but it is pretty clear that the argument is that the purpose of the norm is to reduce speed and that since the accident could have happened at a lower speed, having violated the speed limit did not cause the accident in a legally relevant sense. Note also that Ben-Shahar belittles the language used by the court, namely "coincidental harm" and "abnormal risk" by writing that to avoid an unreasonable result, the court had to use "elusive concepts".[55]

At the same time, the advantage of the economic approach would be that "under prospective causation inquiry, the action of speeding is recognized to have not affected the likelihood of harm".[56] However, reading the case shows that the court is considering that, in principle, the likelihood or effect of the accident could have been lower at a lower speed. This is due to the higher space to break and the higher protection the vehicle would have offered. Yet, contrary to Ben-Shahar's hasty analysis, the court carefully points out the institutional limits that a jury would face in evaluating these elements; accordingly, the court concluded that it was best not to ask juries to consider them.[57] In sum, contrary to Ben-Shahar's celebratory views, legal scholarship had been and is still offering a better account of *Berry*.

It is well known that the concept of transaction cost is central to the economic approach to law. Hence, one would expect such a central idea for a potential *lingua franca* to be reasonably clear. Yet, Vatiero, an institutional economist, concludes that the very concept

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[50] *Ibidem*.
[51] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899).
[52] Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," 9 J Leg Stud 463 (1980).
[53] H. L. A. Hart, "Causation and Sine Qua Non," in: *Causation in the Law*, 2nd edn, eds. H. L. A. Hart & Tony Honoré (1982), 109.
[54] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899), 348-9.
[55] Ben-Shahar, *supra* note 47, 647.
[56] *Ibid.*
[57] *Berry v. Borough of Sugar Notch*, 43 A. 240 (1899), 349.

of a transaction has not received enough attention from economists; even more surprisingly, he tries to clarify the concept by relying on legal categories.[58] As discussed in Section III, Vatiero is not alone in believing that legal concepts can help clarify economic ones.

Let us consider other concepts central to the microeconomic tools used by mainstream Economic Analysis of Law, such as market power, consumer welfare, and consumer sovereignty. These notions are intuitively central to any economic analysis of market relations.

Recently, Petit explains how competition law scholarship is ripe with controversies caused by "misconceptions about market power".[59] Notably, Petit sees economists as co-responsible in that "the market power story is not always uniformly told by economists. Subtle definitional differences that matter get overlooked in favour of 'simplistic notions', and all the more if lawyers are in the audience".[60]

We find a similar pattern for consumer welfare and consumer sovereignty. About consumer welfare, a famous misconception that economists have not helped in addressing is due to Bork. Bork famously argued that the term "consumer", as used in the Sherman Act, applies to consumers and producers in a specific market because producers in that market are consumers in other markets.[61] This claim, aptly called by part of the literature the Chicago trap,[62] conflates a normative argument often found in Economics 101 – namely that transfers cancel out because the benefits to consumers equal the benefit to producers – with a doctrinal argument on the meaning of "consumer" in the Sherman Act. A cursory investigation of the current state-of-the-art in competition law is enough to sense that the debate is more confused because of this claim, with leading scholars missing the point and others spending valuable energy trying to clarify the matter.[63]

The expression consumer sovereignty has been used sparingly in the economic approach to law. A scholar who has used it quite systematically is Alan Schwartz in a series of papers in the early 80s.[64] His account of the concept has been the reference point for the limited but significant economic approach to law literature relying on the concept of consumer

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[58] Massimiliano Vatiero, *The Theory of Transaction in Institutional Economics: A History* (Milton Park: Routledge, 2020).

[59] Nicolas Petit, "Understanding Market Power: An Economics Perspective," in: *Research Handbook on Abuse of Dominance and Monopolization*, eds. Pınar Akman, Or Brook & Konstantinos Stylianou (Chelthenam: Edward Elgar, 2023), 26.

[60] *Ibid.*, 26-7.

[61] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 110.

[62] See Doris Hildebrand, The Role of Economic Analysis in EU Competition Law: The European School (Alphen aan den Rijn: Kluwer, 2016), 26 (adding that "consumer welfare" is "*the most abused term* in competition economics", emphasis in the original). For a balanced analysis, see Daniel A. Crane, "The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy," 79 Antitrust Law Journal 835 (2014) and the references therein.

[63] See, for example, for the United States, Lina M Khan, "Amazon's Antitrust Paradox," 126 The Yale Law Journal 710 (2017) and compare with Herbert Hovenkamp, "Is Antitrust's Consumer Welfare Principle Imperiled?," 45 Journal of Corporation Law 101 (2019); for the European Union, see Ariel Ezrachi, "The Goals of EU Competition Law and the Digital Economy," BEUC Discussion Paper (2018) and the systematic analysis paper by Konstantinos Stylianou & Marios Iacovides, "The Goals of EU Competition Law: A Comprehensive Empirical Investigation," 42 Legal Studies 620 (2022).

[64] For a *locus classicus*, see Alan Schwartz, "Proposals for Products Liability Reform: A Theoretical Synthesis," 97 The Yale Law Journal 353 (1988).

sovereignty. The problem is that, for consumers to be sovereign in his account, it is sufficient that their preferences determine what is produced. However, a review of the economic literature on this concept shows that this account of what consumer sovereignty entitles consumers to is dramatically impoverished.[65]

These examples concerning central concepts in the economic analysis of market transactions confirm that perhaps the *lingua franca* value proposition is excessively gallant to the economic approach to law. Sometimes the economists' contribution is yet another voice in a cauldron of voices, leading to more noise rather than more clarity.

Finally, the view that efficiency is about maximizing total welfare is intimately connected to a surprisingly resilient critique of the internal market project, namely that it instrumentalizes consumers and consumer law.[66] This view is intimately connected to the idea of the maximization of total welfare: if the purpose of the market is to maximize total welfare, and the European Union harmonizes consumer law to foster the internal market project, then the justification for EU consumer law is supporting an institutional reform that is meant to increase total welfare. Hence, EU consumer law is not really committed to the interest of consumers but is used instrumentally to create the internal market. As Epstein wrote in the prestigious and widely read among EU lawyers *Common Market Law Review* in 2013: "Consumer protection is not an end in itself, especially in competitive markets; it can be justified, if at all, solely as a means to maximize the net value for both parties".[67] This is total welfare maximization as applied to contract settings.[68]

These are all examples of situations where the relevance of the economic approach to law cannot be denied. At the same time, all these examples show that the value proposition proposed by Garoupa and Ulen does not work.

An even more fundamental example of the failure to clarify legal concepts is the alleged opposition between the forward-looking or *ex ante* perspective characterizing economic analysis and opposed to the backward-looking or *ex post* perspective characterizing legal reasoning. Even admitting, for the sake of argument, that this difference is occasionally useful, every legal scholar knows that arguments based on consequences and focusing on the deterrence of sanctions play important – albeit not exclusive – roles in legal reasoning. Unfortunately, in the economic approach to law, this distinction is turned into a disciplinary boundary, occasionally with extremely aggressive language.[69] Momentously,

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[65] See Esposito, *supra note* 21, 30-9 and the references therein.

[66] Recently, Martijn W. Hesselink, Justifying Contract in Europe: Political Philosophies of European Contract Law (2021); Laura Burgers, Marija Bartl & Chantal Mak, "Introduction. The Evolving Concept of Private Law in Europe," (2022), https://papers.ssrn.com/abstract=4304717 (last visited May 26, 2024). Contra: Stephen Weatherill, The Internal Market as a Legal Concept (2017), 117 and Valentina Calderai, "The Consumer Welfare Hypothesis in Law and Economics Towards a Synthesis for the 21st Century," *European Law Review* 49, no. 2 (2024): 210.

[67] Richard Epstein, "Harmonization, Heterogeneity and Regulation: CESL, the Lost Opportunity for Constructive Harmonization," 50 Common Market Law Review 207 (2013), 219.

[68] For a *locus classicus*, see Anthony T. Kronman & Richard A. Posner, The Economics of Contract Law (1979), 1-2.

[69] *See* Frank H. Easterbrook, "The Most Insignificant Justice: Further Evidence," 50 The University of Chicago Law Review 481 (1983), at 486; compare with the milder view in Frank H. Easterbrook, "Foreword: The Court and the Economic System," 98 Harvard Law Review 4 (1984), 10-11.

even Garoupa and Ulen still buy into this idea,[70] although many scholars in the field have rejected it for a long time.[71]

As anticipated, this section does not claim that the economic approach to law never clarifies legal concepts and never improves legal analysis. Accordingly, some examples supporting value proposition 1 follow.

The first example comes from an area very far from markets, competition, and contracts, namely, proportionality. Proportionality reasoning is a very successful approach to resolving the conflict between human, fundamental, and constitutional rights. It is well-known that Robert Alexy's analysis of proportionality is very influential. It is perhaps less known that Alexy relied on multiple economic concepts to articulate his account of proportionality.[72] Notably, however, Alexy did not reduce the legal concepts used in proportionality analysis to economic concepts; instead, he relied on those economic concepts to clarify the legal concepts at play. The result was a legal *lingua franca*, widely used worldwide, which benefited from economic insights.

Moving to consumer law, an interdisciplinary team composed of an economist, a consumer lawyer, and a consumer activist has written a concise and highly insightful book entitled *Consumer Theories of Harm*.[73] The book articulates a framework for identifying situations where consumers are likely to be in a particularly weak position in the market and uses it to analyze several regulatory responses to these challenges. Consumer law scholars have received the book extremely well.[74]

This is a short list (only two, actually) of examples where economic analysis delivers on its value proposition to improve the clarity of legal discourse.[75] However, later this article will provide additional examples. It will do more: the rest of the article explains that there is a minoritarian economic approach to law with the credentials to systematically produce scholarship that succeeds in being helpful to and compatible with comparative legal research: Calabresian Law and Economics.

The following subsections focus on one aspect of legal concepts often threatened by the economic approach to law, namely the identification of the purpose and function of legal norms. It will become apparent that this common risk makes the economic approach to law difficult to accept, even for comparativists using the functionalist method.

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[70] Garoupa and Ulen, *supra* note 8, 667.

[71] *See*, e.g., Craswell, *supra note* 38; Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking about the Law (2008), 3-12.

[72] Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010).

[73] Riefa et al., *supra* note 16.

[74] Jules Stuyck, "Book Review: Consumer Theories of Harm, An Economic Approach to Consumer Law Enforcement and Policy Making Paolo Siciliani, Christine Riefa and Harriet Gamper, Hart, Oxford, 2019," 9 Journal of European Consumer and Market Law (2020) and, more at length, Fabrizio Esposito, "Towards a General Theory of Harm for Consumer Law," 44 J Consum Policy 329 (2021).

[75] Régis Lanneau, "The Relevance of Law and Economics for Practical Reasoning," in: *The Law and Economics of Justice*, eds. Avishalom Tor & Klaus Mathis (Dordrecht: Springer, 2024) (offering additional examples of situations where economic analysis raises conceptual concerns rather than offering useful conceptual insight).

b. A principled dereliction

The seed of the main reason why the economic approach to law fails to win the heart even of functionalists is planted even in Garoupa and Ulen's plea for reconsideration. They observe that, in the economic approach to law, the "scholarly gold standard is a demonstration that a particular legal rule or standard is demonstrably inefficient".[76] If this is the case, functionalists who do not see a specific institution as having the function of promoting efficiency will be justified, having read Garoupa and Ulen's article, to remain uninterested in the economic approach to law. The reason is simple: they believe that a specific legal institution does not have the function of promoting an efficient allocation of resources. The gold standard for one epistemic community has little value in a different community that does not recognize gold as a holder of value.[77]

In an attempt to benefit from the economic approach to law, comparativists have identified two ways to use efficiency analysis. One is more straightforward and can be called the externalist perspective: "Efficiency becomes the *tertium comparationis* of the comparison".[78] Accordingly, while one can offer rankings of norms from the perspective of their efficiency, as soon as one acknowledges that this account is partial,[79] the resulting ranking will be perceived as incomplete and arbitrary, at best. Arguably, for this reason, one can observe that this monistic approach has been largely abandoned in the analysis of domestic law, in favour of pluralist frameworks, where efficiency is balanced against other values.[80] Normative pluralism significantly weakens the promise of clarity enshrined in value proposition 1.[81]

The situation is even worse if one adopts the internalist perspective and takes as starting point the (set of) function(s) an institution has under national law (e.g., protect consumers against manipulation or reduce tax evasion). From the internalist perspective, foreign law is surveyed to search for alternative ways to achieve the domestic (set of) function(s).[82] Here, efficiency simply refers to the relationship between institutional input and output,

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[76] Garoupa and Ulen, *supra* note 8, 683.

[77] While gold is almost universally recognized in the modern economy as a holder of value, in some ancient societies in was almost unknown, so it could not play the role of a holder of value. *Generally*, Erica Schoenberger, "Why is Gold Valuable? Nature, Social Power and the Value of Things," 18(1) Cultural Geographies 3 (2011).

[78] Kischel, *supra* note 44, 117.

[79] Florian Faust, "Comparative Law and Economic Analysis of Law," in: *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann & Reinhard Zimmermann (New York: Oxford University Press, 2019), 826, 835.

[80] *See* Richard A. Posner, "Utilitarianism, Economics, and Legal Theory," 8 The Journal of Legal Studies 103 (1979) already operated along these lines. Recently, see Omri Ben-Shahar & Ariel Porat, Personalized Law: Different Rules for Different People (2021). For theoretical analyses, see Kraus, *supra* note 71, and Klaus Mathis, Efficiency Instead of Justice?: Searching for the Philosophical Foundations of the Economic Analysis of Law (Dordrecht: Springer, 2009).

[81] Generally, Daniel Markovits & Alan Schwartz, "Plural Values in Contract Law: Theory and Implementation," 20 *Theoretical Inquiries L.* 571 (2019); with specific reference for comparative legal research, see Julie De Coninck, "The Functional Method of Comparative Law: 'Quo Vadis'?," 74 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 318 (2010), at 340; similarly, but less powerfully, Michaels, *suprasupra* note 29, 344 and 362; more extensively, see Jaakko Husa, "Farewell to Functionalism or Methodological Tolerance?," 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 419 (2003).

[82] Cfr. Faust, *supra* note 79.

evaluated in light of the (set of) function(s) the institution has under national law.[83] This internalist perspective is quite different from the externalist one, but the difference can be easily missed.[84]

The difference between the two leads to a radical and general obstacle to the economic approach to law highlighted by Dworkin more than 40 years ago[85] and exposed to the comparative law community by James Gordley:[86] the internalist challenge. Suppose that a particular scholar believes that the function of contracts and contract law is to ensure commutative justice in contractual relations or that the purpose is to let individuals achieve self-authorship.[87] As long as you move from either of these premises, any comparative analysis in terms of the relative efficiency of legal institutions will not interest you because this is not the goal that those institutions have from your perspective.

This will hold even if, like Gordley or Dagan and Heller, you ultimately believe there is remarkable convergence between economic and philosophical frameworks in justifying specific doctrines. The reason is that convergence in outcomes without an agreement in the justifications is shallow and does not allow for the formulation of normative implications for the philosophical framework based on economic analysis. This is the case because since the two frameworks disagree about the justifications of outcomes, one can never be sure that the perspectives will converge over new cases. Convergence needs to be established on a case-by-case basis each and every time, making it of limited help, if any.

A similar situation can be observed in tort law, where the main conflict is between corrective justice and economic efficiency. Here, Calabresi has illustrated a different approach.[88] The competing theories are presented as different accounts of the same practice. Instead of alternatives, they are presented as complementary; they are, to use Calabresi's famous expression, different views of the same Cathedral. Calabresi moves from the economic perspective as foundational,[89] but then observes that "if – in order to deter by charging certain activities' their costs' – a society gives people the right to recover,

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[83] For economics, see Paul R. Krugman & Robin Wells, Economics (New York: Worth Publishers, 2009), 109. For the economic approach to law, see Avery W. Katz, "Economic Foundations of Contract Law," in: *Philosophical Foundations of Contract Law*, eds. Gregory Klass, George Letsas & Prince Saprai (New York: Oxford University Press, 2014) 174 and Lewis Kornhauser, "The Economic Analysis of Law," in The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, Spring 2022 ed. (2022), https://plato.stanford.edu/archives/spr2022/entries/legal-econanalysis/ (last visited May 24, 2024).

[84] Kischel, for example, does not distinguish between the two; compare Kischel, *supra* note 44, 115, para 60 and 117-8, para 66.

[85] Ronald M. Dworkin, "Is Wealth a Value?," 9 The Journal of Legal Studies 191 (1980).

[86] The economic approach to law "tr(ies) to show that a legal rule could promote 'efficiency' and conclude that they have thereby identified the purpose of the rule. … Indeed, the proponents of some economic explanations congratulate themselves on their ingenuity in discovering purposes for rules that never occurred to anyone else before, even to their colleagues who study law and economics"; James Gordley, "Comparative Law and Legal History," in: *The Oxford Handbook of Comparative Law*, eds. Mathias Reimann & Reinhard Zimmermann (New York: Oxford University Press, 2019), 754, 765-6.

[87] In contemporary English-speaking scholarship, the first perspective is biunivocally associated with James Gordley's scholarship; see, see, for example, James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press, 1993). For the second, see Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (New York: Cambridge University Press, 2017).

[88] See, Guido Calabresi, "Toward A Unified Theory of Torts," 1 Journal of Tort Law 1 (2007).

[89] More precisely, Calabresi follows a cost internalization logic: "(C)ompensation was simply an effective way of charging activities with their costs" (*Id.* at 5).

such recoveries will surely affect what people think their rights are. And that in turn will surely affect that society's notions of corrective justice".[90] In Michaels's terms, Calabresi proposes an adaptionist account, which is "particularly apt for comparative law".[91]

Generalizing, to address the Dworkinian challenge, what is needed is an account of a specific institutional practice in terms that can accommodate within a unified account both the economic and the legal perspectives. Notably, even pluralistic frameworks cannot really meet the Dworkinian challenge unless efficiency is somehow internalized in the system.[92] After all, if efficiency is not internalized, it cannot be considered part of the values a legal system is trying to foster.

Against this background, the economic approach to comparative law does something different. It normally posits that certain institutions aim to increase economic efficiency and ultimately ranks the systems according to their ability to do so. However, in such an analysis, much of the functional diversity the comparative analysis should bring about is sidelined as irrelevant. This follows from the fact that the problem is not identified in descriptive terms, such as: "How do different legal systems govern car accidents?". Instead, the question is formulated in normative terms and efficiency is the goal: "Which system is more efficient in governing car accidents?". As just noted, the answer to the second question is unattractive to the law community until the Dworkinian challenge is met. As Section III.a shows, the Legal-Economic Performance framework allows to integrate economic and legal analyses in a way that circumvents the Dworkinian challenge. Section III.b adds that the Dworkinian challenge can be met using the Legal-Economic Fitness framework.

To summarize. To contribute to legal analysis, economic concepts need to be integrated into accounts of legal practices that are acceptable to the legal community. This is a critique that the economic approach to law has failed to address for over 40 years. What is needed in each and every one of these situations is a sort of Rosetta Stone allowing for the translation of economic concepts into legal concepts and vice versa. This is an observation that Bruce Ackerman[93] formulated more than 30 years ago, and that is also at the core of Calabrasian Law and Economics, as we shall see in Section III.

Notably, at least two additional reasons may justify the principled dereliction – the choice not to consume – the economic approach to comparative legal research. Garoupa and Ulen mention both, at least in part.

First, "[c]omparatists tend to become very exercised when they perceive law and economics as being antithetical to some of their deepest-held views about law"; in particular, (comparative) legal scholars "perceive law as being about fairness, social justice, and morality. Additionally, they find the egoistic assumption of law and economics abhorrent".[94] Contrary to Garoupa and Ulen's belief "that those feelings about fairness

[90] *Id.*, 9.
[91] Michaels, *supra* note 2, 348.
[92] Esposito and Tuzet, *supra* note 39 and F. Esposito, "Rever Engineering Legal Reasoning", in Peter Cserne and Fabrizio Esposito (eds.), *Economics in Legal Reasoning* (Palgrave, 2020).
[93] Bruce A. Ackerman, "Law, Economics, and the Problem of Legal Culture," 1986 Duke Law Journal 929 (1986). See also Schwartz, *supra* note 7 and Bayern, *supra* note 36.
[94] Garoupa and Ulen, *supra* note 8, 684. *See also* Kischel, *supra* note 44, 116.

and egoism and economics had been addressed",[95] I submit that this problem has not been addressed,[96] as hinted to also by Parisi.[97] Properly addressing this problem would indeed have fundamental implications for the success prospects of the economic approach to comparative law and, more generally, to legal research.

Second, the excessive focus on rational and selfish behavior given to Garoupa and Ulen as a reason to reject the economic approach to law calls for two separate lines of reflection. As noted above, even Garoupa and Ulen's legal parochialism explanation[98] rests on selfish behavior. However, at least for part of the literature, this claim is inaccurate.[99] A whole field of research has been developing over the last 20 years by challenging these assumptions. On the other hand, it must be emphasized that behavioral studies' hallmark is that the assumptions of rational and selfish behavior are relaxed, not rejected. And for a good reason.

Scholarship in various disciplines is still capable of producing insightful results relying upon these assumptions. For example, Robert Frank in the *Darwin Economy* identifies a social dilemma that stems from the fact "that in many important domains of life, performance is graded on the curve", in the sense that the reward derives from the ranking, not the absolute quality of the performance;[100] this problem exists even if one assumes that individuals are rational and markets are competitive. More fundamentally, the multidisciplinary research on reciprocal behavior moves from models where rational and selfish agents cooperate based on their reputation only,[101] to then explain the development of social norms and institutions as part of the adaptive process that supports cooperation via reciprocal behavior.[102]

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[95] Garoupa and Ulen, *supra* note 8, 684.

[96] To see that this is not the case, it is sufficient to check the survey of the critiques in the *Oxford Handbook of Law and Economics* offered by Driesen and Malloy; David Driesen & Robin Paul Malloy, "Critiques of Law and Economics," in *The Oxford Handbook of Law and Economics: Volume 1: Methodology and Concepts*, ed. Francesco Parisi (New York: Oxford University Press, 2017), 300. At the same time, in Nuno Garoupa, *Trends in Comparative Law and Economics* (Milton Park: Routledge, 2022), the term "fairness" appears only twice and it means "making administrative adjudication acceptable" (p. 50); and other terms as "justice" and "equity" are never used to refer to the related substantive values.

[97] Parisi, *supra* note 12.

[98] Cfr. *supra* note 11 and the accompanying text.

[99] Faust, *supra* note 79, 829 observes: "it has been widely acknowledged that the model of the rational, utility-maximizing individual has to be refined". *See also* Giesela Rühl, "Behavioral Analysis and Comparative Law: Improving the Empirical Foundation for Comparative Legal Research," in: *Research Methods in Consumer Law*, eds. Hans-Wolfgang Micklitz, Anne-Lise Sibony & Fabrizio Esposito (Chelthenam: Edward Elgar, 2018), 477-512 (discussing the benefits for comparative research deriving from behavioral scholarship). See, generally, Eyal Zamir & Doron Teichman, *Behavioral Law and Economics* (New York: Oxford University Press, 2018).

[100] Robert H. Frank, *The Darwin Economy: Liberty, Competition, and the Common Good* (Princeton: Princeton University Press, 2012), 11.

[101] A turning point in this regard is represented by the study in Hisashi Ohtsuki & Yoh Iwasa, "How Should We Define Goodness? Reputation Dynamics in Indirect Reciprocity," 231 J Theor Biol 107 (2004).

[102] *See*, generally, Martin A. Nowak and Karl Sigmund, "Evolution of Indirect Reciprocity," *Nature* 437 (2005): 1291 and Isamu Okada, "A Review of Theoretical Studies on Indirect Reciprocity," *Games* 11 (2020): 27. Marco Perugini et al., "The Personal Norm of Reciprocity," *European Journal of Personality* 17 (2003): 251 review specifically the literature on the role played by the internalization of social norms in this context. *See also* Jon Elster, "Reciprocity and Norms," in *Social Ethics and Normative Economics: Essays in Honour of Serge-Christophe Kolm*, edited by Marc Fleurbaey, Maurice Salles, and John A. Weymark (Berlin: Springer, 2011), 327-337.

We can find a parallel with Holmes's idea of the bad man.[103] The point is not that we are all or that most of us are selfish. The point is that command and control are particularly relevant to govern the behavior of those people who are not motivated by the social values incorporated in legal norms.[104]

As anticipated, the critique is not completely ungrounded. Even leading scholars like Cooter and Porat can abuse the self-interest assumption. In their 2014 book, *Getting Incentives Right*, (ironically) Cooter and Porat conclude that "if the rule is no liability, the injurer has no economic incentive to take precaution and so will minimize expenditure on precaution by taking none".[105] Normative proposals are derived from this conclusion, which is based on an unconvincing use of rational choice theory and an unconvincing defence thereof.[106] In fact, one will take zero precautions without economic incentives only if no other motivating factor is at play. Hence, the focus is Holmes's bad man, not a normal person, and the level of precaution normal people will take remains unknown. Failing to acknowledge this is a real problem and can explain legal scholars' disengagement. Similarly to Cooter and Porat, writing in 2022 on the prestigious *Stanford Encyclopedia of Philosophy*, Kornhauser goes as far as saying that the influence on behavior of elements other than economic incentives has not been addressed by "[p]hilosophers".[107] This is not true.[108] Moreover, in the 1990s, scholars in the economic approach to law started investigating the expressive function of the law and its interaction with social norms;[109] this topic is now integrated into mainstream Economic Analysis of Law.[110]

At most, therefore, what we observe about the modeling of individuals is again a problem of opacity, namely the problem of struggling to identify those situations where the assumptions of rational and selfish behavior are reasonable from those where they are not. In adjudication contexts, the negative reaction of the legal community to implausible economic considerations has been amply documented. Even a Nobel Prize awardee can fail to be considered an expert by a US trial judge if the proposed model seems too

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[103] *See*, William Twining, "Bad Man Revisited," *Cornell Law Review* 58 (1973): 275; Marco Jimenez, "Finding the Good in Holmes's Bad Man," *Fordham Law Review* 79 (2011): 2069.

[104] Here I am assuming, for simplicity, that social values are morally defensible and that legal norms are aligned, so that the social fabric is coherent. This obviously need not be the case, which leads to important phenomena, such as immoral laws, changes of social values, and crowding out effects. At the same time, I am not assuming that command and control is the best way kind of legal intervention. For an accessible introduction, *see* Benjamin van Rooij and Adam Fine, *The Behavioral Code: The Hidden Ways the Law Makes Us Better or Worse* (Boston: Beacon Press, 2021).

[105] Robert D. Cooter and Ariel Porat, *Getting Incentives Right: Improving Torts, Contracts, and Restitution* (Princeton, Princeton University Press: 2014), 94.

[106] *See* Ronen Perry, "Getting Incentives Righter: A Comment on Getting Incentives Right," *Jerusalem Review of Legal Studies* 12 (2015): 202 and Robert Cooter and Ariel Porat, "Getting Incentives Right—Responding to Critics," *Jerusalem Review of Legal Studies* 12 (2015): 237, 249.

[107] Kornhauser, *supra* note 83.

[108] *See*, generally, Elizabeth Anderson, "Beyond Homo Economicus: New Developments in Theories of Social Norms," *Philosophy & Public Affairs* 29 (2000): 170.

[109] *See*, generally, Cass Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144 (1996): 2021; Robert Cooter, "Expressive Law and Economics," *The Journal of Legal Studies* 27 (1998): 585; Eric A. Posner, *Law and Social Norms* (2000).

[110] Cfr. Carbonara, *supra* note 46.

simplistic to fit the relevant factual scenario.[111] A recent comparative US-UK study on the use of economic evidence in the regulatory state found similar dynamics behind the allocation of decisional power to the institutional actors involved.[112]

This dynamic is ultimately connected to a broader concern that, especially comparativists may have, namely the risk of reductionist explanations. Parsimony is a methodological virtue.[113] *Ceteris paribus*, a more parsimonious explanation is preferable. However, whether the *ceteris* are *paribus* is often controversial. Disagreement on this point leads to consider an explanation derogatorily reductionist.[114] The 2008 article by Garoupa and Ulen on the market of legal innovations is an excellent example of such a phenomenon. In fact, Garoupa and Ulen dedicate a significant number of pages and careful reflection to identify a long list of factors that may contribute to explaining the limited success of the economic approach to law outside the United States and Israel. This list includes: political ideology and normative philosophy; private funding supporting the economic approach to law; common vs civil law; the structure of legal education, the characteristics of academic positions; the influence of legal realism and other elements of legal culture. However, their proposed explanation derives solely from applying the model of protectionism in trade to the market of legal innovation. All the other considered factors have been explained away as "derivative of whether the legal academy is competitive".[115] Yet, at the very least, market openness can hardly explain the usefulness of economic concepts to offer an organizing framework that legal dogmatics provides in civil law countries, which the authors present as central to the common vs civil law distinction.[116]

In light of the previous analysis, it is possible to reconsider the diagnosis Garoupa and Ulen offer in support of their observation that the economic approach to comparative law has lost momentum and failed to attract the attention of comparativists (proposition 2). Their initial diagnosis (proposition 3) must be qualified to accommodate the wealth of counterevidence offered above. Notably, the offered evidence is not meant to reject *in toto* the proposed explanation. The only part that is rejected is the assumption that comparative legal scholarship in the United States is a special case: there is no qualitative difference in the attitude of comparativists, who are just more explicit in the assessment. Accordingly, the qualified version of proposition 3 defended in this article is: (3') *The following causes have limited relevance because the problem of the economic approach is not limited to comparative legal scholarship (but comparativists make it more apparent)*: the limited success of comparative law in

111 *See*, Nicola Giocoli, "Rejected! Antitrust Economists as Expert Witnesses in the Post-Daubert World," *Journal of the History of Economic Thought* 42 (2020): 203.

112 Despoina Mantzari, *Courts, Regulators, and the Scrutiny of Economic Evidence* (New York: Cambridge University Press, 2022).

113 *See*, Xavier Gabaix and David Laibson, "The Seven Properties of Good Models," in *The Foundations of Positive and Normative Economics: A Handbook*, ed. Andrew Caplin and Andrew Schotter (New York: Oxford University Press, 2008), 292. As one of several desirable properties, parsimony should not be overemphasized; see generally Albert O. Hirschman, "Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse," *Economics & Philosophy* 1 (1985): 7. See also Péter Cserne, "The Uneasy Case for Parsimony in (Law and) Economics: Conceptual, Empirical and Normative Arguments," *Global Jurist* 19 (2019).

114 *See*, generally, Raphael van Riel and Robert Van Gulick, "Scientific Reduction," in *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Spring 2019 ed. (2019).

115 Garoupa and Ulen, *supra* note 8, 1619.

116 Garoupa and Ulen, *supra* note 8, 1588 and Faust, *supra* note 79, 844.

the United States; a methodological mismatch between the economic approach to law and comparative law, and an ideological misunderstanding about the role that egoism and efficiency play in the contemporary mainstream economic approach to law; *instead, a plausible cause is the quality variation of the economic approach to law and its opacity to legal scholars, which leads to an interdisciplinary lemon problem*.

The following section uses economic analysis to derive a consequential implication of proposition 3': the economic approach to law is currently an interdisciplinary lemon, not a uniform interdisciplinary irritant. The task is, therefore, explaining how to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. Only when this screening is made easy can one expect comparativists to systematically perceive the value for them of the economic approach to law (proposition 1'). A way to do so is to focus on Calabresian Law and Economics, as discussed in Section III.

c. Behind the hard reality: Protectionism and/or lemon problem?

Garoupa and Ulen's hard realities article bridges two strands of literature. The first, arguably more familiar to comparativists, consists of reflections on the relationship between the economic approach to law and comparative legal research.[117] The second one is the so-called economic analysis of the economic approach to law and consists in investigating the success of the economic approach to law with the tools typical of economic analysis. As noted in the Introduction, the present article was prompted by the observation that Garoupa and Ulen have failed to relate their analysis of the hard realities of the economic approach to comparative legal research with legal parochialism – their original contribution to the economic analysis of the economic approach to law.

Before offering an alternative to the legal parochialism hypothesis, it is noteworthy that much of the *explanandum* in this line of research is controversial. Garoupa and Ulen build on the widely shared view that the economic approach to law is mainstream in the United States (with the important exception of comparative law) and Israel but not so much everywhere else.[118] Depoorter and Demot suggest that the discipline's success in the European context is higher than normally perceived and is, in any event, growing.[119] A recent empirical investigation suggests that when the focus is on hardcore journals associated with the economic approach to law, the discipline is quite successful outside the United States.[120] At the same time, Mattei has predicted that the economic approach to law has entered into a process of decline which is connected more broadly to "a decline

[117] Cfr. Faust, *supra* note 79, Parisi, *supra* note 12, Vargas Weil, *supra* note 12.
[118] *See also* Oren Gazal-Ayal, "Economic Analysis of Law in North America, Europe and Israel," *Review of Law & Economics* 3 (2007): 485.
[119] Ben Depoorter and Jef Demot, "The Cross-Atlantic Law and Economics Divide: A Dissent," *University of Illinois Law Review* 2011 (2011): 1593
[120] Jaroslaw Kantorowicz and Elena Kantorowicz-Reznichenko, "Law & Economics at Sixty: Mapping the Field with Bibliometric and Machine Learning Tools," *Journal of Economic Surveys* 2024 (2024): 1.

phase of US legal scholarship in the global scenario",[121] while Siems is optimistic about the relevance of the economic approach to comparative law.[122]

Section II found that legal researchers have rational, non-selfish reasons to reject the economic approach to law. Again, this does not mean that those parochial motivations initially identified by Garoupa and Ulen are not at play, at least partly. However, this does not mean the whole problem can be meaningfully reduced to parochialism either.

The parochialism account articulated by Garoupa and Ulen runs as follows. All legal academic communities are parochial, and they try to increase entry barriers to benefit the insiders. More specifically, gatekeepers defend their prominence in the local debate by limiting access to scholars with different perspectives. Like protectionism in trade, the implication is that the broader local community – the consumers of legal scholarship – loses. Probably every academic has experienced, to a larger or narrower extent, the effects of such a mechanism. In normative terms, this is a form of epistemic injustice, defined as "those forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative practices".[123] Epistemic injustice is indeed a problem that is denounced in a large variety of academic contexts.[124] The charge of imperialism moved to economists can be seen as a form of epistemic injustice.[125]

To a large extent, we might face a problem of divergent perceptions between insiders and outsiders. Garoupa and Ulen, as noted, were surprised to learn that their view on efficiency, fairness, rationality and egoism does not match the one of comparativists. Similarly, Cooter and Gilbert confidently state that "[p]eople mostly agree on the value of efficiency but disagree on distribution".[126] Similarly, Faust states that "[a]n efficiency evaluation will be acceptable to most, if not all, modern societies".[127] Bearing in mind the

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121 Ugo Mattei, "The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi," *Maryland Law Review* 64 (2005): 220, 220.

122 Cfr. Mathias Siems, "New Directions in Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2019), 852.

123 Ian James Kidd, José Medina, and Gaile Pohlhaus Jr., "Introduction," in: *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 1. The authors continue: "These issues include a wide range of topics concerning wrongful treatment and unjust structures in meaning-making and knowledge producing practices, such as the following: exclusion and silencing; invisibility and inaudibility (or distorted presence or representation); having one's meanings or contributions systematically distorted, misheard, or misrepresented; having diminished status or standing in communicative practices; unfair differentials in authority and/or epistemic agency; being unfairly distrusted; receiving no or minimal uptake; being coopted or instrumentalized; being marginalized as a result of dysfunctional dynamics; etc." See also, Morten Fibieger Byskov, "What Makes Epistemic Injustice an 'Injustice'?" *Journal of Social Philosophy* 52 (2021): 114, and Leonie Smith and Alfred Archer, "Epistemic Injustice and the Attention Economy," *Ethical Theory and Moral Practice* 23 (2020): 777.

124 Heidi Frasswick, "Epistemic Injustice in Science," in *The Routledge Handbook of Epistemic Injustice*, ed. Ian James Kidd, José Medina, and Gaile Pohlhaus Jr. (New York: Routledge, 2017), 1. For specific instances, see Swethaa S. Ballakrishnen and Sarah B. Lawsky, "Law, Legal Socializations, and Epistemic Injustice," *Law & Social Inquiry* 47 (2022): 1026; Himani Bhakuni and Seye Abimbola, "Epistemic Injustice in Academic Global Health," *The Lancet Global Health* 9 (2021): e1465.

125 Kristina Rolin, "Scientific Imperialism and Epistemic Injustice," in *Scientific Imperialism: Exploring the Boundaries of Interdisciplinarity*, ed. Uskali Mäki, Adrian Walsh, and Manuela Fernández Pinto (New York: Routledge, 2018).

126 Robert D. Cooter and Michael D. Gilbert, *Public Law and Economics* (New York: Oxford University Press, 2022), 29.

127 Faust, *supra* note 79, 835-6 (immediately adding that "there will be disagreement about the role efficiency is to play", nonetheless concluding that a ranking in efficiency terms "permits a comparison of the rules").

citations from Cooter and Ulen's textbook and Mattei's seminal book reported in Section II, one cannot be surprised if Kischel writes instead: "From the outset, the direct question of which solution is fairer or more just does not arise in economic analysis".[128]

This observation allows us to focus on a limit of the legal parochialism hypothesis, namely that it qualifies the economic approach to law as a product that rational legal scholars – the consumers – should buy because of value proposition 1, but they do not do it because individual and social interests are not aligned (hence, the nature of a social dilemma). However, Section II has shown that this is only part of the story. There are rational reasons that justify the choice of not consuming scholarship from the economic approach to law, which are not selfish but principled.[129] These reasons warrant caution in formulating value propositions about what the economic approach to law has to offer to legal scholars.

Against this background, a humbler view, encapsulated in value proposition 1', seems more appropriate: The economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*.

Building on proposition 1', we can apply with full force to the hard reality of the economic approach to law the economic logic behind Akerlof's analysis of the market for used cars with uncertain quality.[130] Akerlof's celebrated model illustrates the effects of asymmetric information about higher- and lower-quality goods on market outcomes.[131] In other words, the hard reality of the economic approach to comparative law (proposition 2) is explained by the fact that legal scholars in general (proposition 3') struggle to distinguish scholarship produced by the economic approach to law based on its quality.

The mechanism identified in Akerlof's seminal model is the following. If used cars are of different quality, a uniform market price will be systematically advantageous to the sellers of low-quality cars (the lemons) since they will get a price that is more than the car's worth. Conversely, some (not all, at least at the beginning) sellers of high-quality cars who cannot signal that their product is of high quality will prefer to keep the car and enjoy its value directly instead of monetizing it. In parallel, without appropriate institutional protection, buyers are reluctant to buy out of fear of overpaying a lemon. This leads to a dynamic effect where the average quality and, consequently, the market price drops and more sellers choose to leave the market; the average quality and, consequently, the market price drop

[128] Kischel *supra* note 44, 114.

[129] In economic terms, they are based on the justified belief that reading time might be better invested in reading something from outside the economic approach to law; that is, the opportunity cost is higher than the benefit.

[130] George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *The Quarterly Journal of Economics* 84 (1970): 488. For empirical evidence supporting the model, *see* Winand Emon and George Sheldon, "The Market for Used Cars: New Evidence of the Lemons Phenomenon," *Applied Economics* 41 (2009): 2867. For an analysis of this model's impact on legal scholarship, see Grundmann, *supra* note 18, 241-6.

[131] In economic terms, these are more precisely called vertically differentiated goods, as opposed to horizontally differentiated goods. Vertically differentiated goods are ranked on the basis of quality variations that are widely shared (e.g. Casio vs Rolex; Twingo vs Ferrari). Horizontally differentiated goods will be ranked differently by different people on the basis of their preferences (e.g. pizza margherita vs Ceasar salad; baseball vs basketball).

more and more sellers leave; the average quality and, consequently, the market price drop more etc. In sum, consumers do not trust sellers, sellers do not demonstrate trustworthiness, and the market collapses.

In reality, we do not see such a mechanism at play so drastically in markets with quality asymmetry, thanks to complementary institutions. As Akerlof noted, remedies for lack of conformity, commercial guarantees, and trust marks, are among the institutional mechanisms to reassure clients that they are not buying a lemon.[132]

The interdisciplinary lemon hypothesis has two crucial features. First, it explains why the scholars initially focusing on the economic approach to comparative law have largely moved their attention elsewhere rather than enlarging their ranks:[133] there was little demand, and so scholars moved to other sub-fields, either in the economic approach to law or in more traditional areas of legal research under the adaptionist pressure of publish or perish (or just out of frustration). Second, the interdisciplinary lemon hypothesis indicates that the independent variable is not parochial legal scholars: legal scholars are the buyers who prefer to stay away from the market because the sellers fail to reassure them about the quality of their products.[134] Ultimately, the burden of persuasion is on the proponents of the economic approach – its producers and sellers.

To clarify. The claim is not that only Calabresian Law and Economics is valuable to comparative legal scholarship. For example, Garoupa and his co-authors have contributed significantly to the critique of legal origin scholarship from within the Economic Analysis of Law.[135] The claim is that to overcome the opacity which leads to the interdisciplinary lemon problem, it is sufficient (not necessary) to make scholarship in the Calabresian Law and Economics Tradition salient.

The interdisciplinary lemon hypothesis is compatible with the professional incentive hypothesis proposed by Gazal-Ayal.[136] Contrary to Garoupa and Ulen, Gazal-Ayal does not limit his analysis to comparing legal academic markets. Instead, he compares the determinants of professional success for academics in economics and law. On these grounds, he concludes that the differences between the incentives provided by the disciplines have a remarkable explanatory power of the mixed success of the economic approach to law. Consistently with Gazal-Ayal's view, the interdisciplinary lemon hypothesis holds that legal scholars from different fields and legal contexts face barriers of varying heights to perceive that the economic approach to law can produce research that is valuable to them. Hence, context and chance lead to different degrees of expansion of the discipline.

Garoupa and Ulen did not consider this scenario, as shown by their surprise when they learned that comparativists still harbor negative "feelings" for – *rectius*, have principled

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[132] Akerlof, *supra* note 130, 500. For a recent overview, see Schäfer Hans-Bernd and Ott Claus, *The Economic Analysis of Civil Law* (Chelthnam: Edward Elgar, 2022), 459-464.

[133] Garoupa and Ulen, *supra* note 8, especially 682-683 and Parisi, *supra* note 12, 32.

[134] *See also* Schäfer and Ott, *supra* note 132, 458. Riefa et al., *supra* note 16, 40-42 (discussing the rational apathy of consumers).

[135] *See* Nuno Garoupa, Carlos Gómez Ligüerre, and Lela Mélon, *Legal Origins and the Efficiency Dilemma* (Milton Park: Routledge, 2017).

[136] Gazal-Ayal, *supra* note 118.

objections to – the economic approach to law.[137] Perhaps they did not consider this option because they can discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. If this is the case, a clear directive follows: insiders of the economic approach to law shall help legal scholars overcome this opacity problem. They are the cheapest cost avoiders,[138] so it is efficient that this duty falls primarily upon them.

In sum, like in any academic community, there is a certain degree of parochialism among legal scholars (comparativists or not). At the same time, the lack of trust generated by opacity over the quality from a legal standpoint of the economic approach to law also has an important role in explaining the hard reality of the economic approach to comparative law.

This perspective offers a new explanation for the success of the economic approach to law in the United States and Israel. The explanation is simply that: legal education in the United States (where most Israeli academics received their post-graduate education) builds upon previous undergraduate studies; accordingly, it is plausible that undergraduate education equips US and Israeli legal scholars better than others in overcoming the interdisciplinary lemon problem; in parallel, it could make these scholars less capable of perceiving the existence of the problem in the first place since their training in other disciplines may make them less concerned with the distortion of legal concepts.

Some collective and coordinated effort by comparative legal scholars to engage systematically with the economic approach to comparative law could be extremely helpful to test the lemon problem hypothesis. For example, Garoupa has recently mapped the field of the economic approach to comparative law with a book that is concise, but also broad in scope.[139] If a lemon problem exists, a significant part of the findings presented as valuable in the book will actually have the limits stressed by this article: comparativists will not consider these findings as 'innovation' because they distort the analyzed legal concepts and legal functions. A group of experts on the different topics covered by the book could test this hypothesis rather easily.

This second and complementary, not alternative, explanation in terms of interdisciplinary lemon problem has a practical advantage over the one in terms of legal parochialism (only). The interdisciplinary lemon hypothesis suggests a clear way to increase the positive impact of economic analysis on legal scholarship: the economic approach to law needs to be critically assessed by its insiders to identify the features that make it sound from a legal point of view. As in Akerlof's analysis, it is up to sellers to reassure the buyers.

Section III argues in detail that a trust mark to this effect exists already: it is a brand of the economic approach to law that is not mainstream, and it is called Calabresian Law and Economics.

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[137] Garoupa and Ulen, *supra* note 6, 684. *See above*, Section II.b.

[138] Seminal on this concept, Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Have> Yale University Press, 1970). *See*, generally, Farnsworth, *supra* note 61, 47-56.

[139] Garoupa, *supra* note 96.

III. CALABRESIAN LAW AND ECONOMICS AS TRUST MARK

Guido Calabresi, emeritus professor and former Dean of the Yale Law School, US federal judge, tort law leading scholar, is also a founding father of the economic approach to law, of which he heralds (if not embodies) the so-called New Haven School of Law and Economics.

In 2016, Calabresi published an inspirational book called *The Future of Law and Economics*. In this book, Calabresi distinguishes between the mainstream approach in the field – Economic Analysis of Law – and an alternative approach that he has practiced his entire life – Law and Economics. According to this distinction, the Economic Analysis of Law is essentially normative, theory-driven, and externalist. Economic models and accounts of legal institutions are used to check if those institutions fit with models belonging to a given economic school, paradigm, approach, etc; for the distinction to hold, which school, paradigm, approach, etc, does not matter.[140] If legal institutions do not fit, economic rationality prevails: legal institutions are criticized, and their reform is demanded.[141] Economic rationality is presented as external, and its legal relevance is not argued for; it is just assumed or, better, demanded. Moreover, fitness is primarily focused on the content of legal norms, not the justification given to those norms in legal practice.[142]

On the contrary, Law and Economics has a descriptive, observation-driven, and internalist approach. In Calabresi's words[143]:

> What I call Law and Economics instead begins with an agnostic acceptance of the world as it is, as the lawyer describes it to be. It then looks to whether economic theory can explain that world, that reality. And if it cannot, it asks two questions. The first is, are the legal scholars who are describing the legal reality really looking at the world as it really is? … If, however, even a more comprehensive view of legal reality discloses rules and practices that economic theory cannot explain, Law and Economics asks the second question. Can economic theory be amplified, can it be made broader or more subtle … so that it can explain why the real world of law is as it is?

Calabresian Law and Economics is descriptive in that its primary aim is making sense of legal institutions in economic terms. This means that Calabresian Law and Economics uses economic concepts to offer a functionalist description of institutional practice as described by participants.[144] It is observation-driven because if a specific economic model fails to make sense of those legal institutions, the problem is the model, not the observed

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[140] Calabresi, *supra* note 6, 7.

[141] Calabresi, *supra* note 6, 2-3. This critique cuts deeper and is largely independent from the useful list of common analytical problems in the economic approach to law by Bayern, *supra* note 36.

[142] *See* Brian H. Bix, *Law and Economics and the Role of Explanation: A Comment on Guido Calabresi, The Future of Law and Economics,* 48 European Journal of Law and Economics 113 (2019); Fabrizio Esposito, *On the Fitness between Law and Economics—Or Sunstein between Posner and Calabresi* 19(3) Global Jurist (2019); Giovanni Tuzet, *Calabresi and Mill: Bilateralism, Moral Externalities and Value Pluralism*, 19 Global Jurist (2019); Giraudo, *supra* note 19.

[143] Calabresi, *supra* note 6, 3-4.

[144] *See* Michaels, *supra* note 29, 365 on the relevance of this perspective for comparative legal research.

reality.[145] Finally, Calabresian Law and Economics is internalist in that the observed data include the justifications given to existing legal institutions.[146]

It is widely accepted within the economic approach to law that Calabresian Law ad Economics is not mainstream.[147] This situation has not been fundamentally changed by the behavioral turn in economics and in the economic approach to law, although an important degree of convergence can be observed in part of the literature.[148] For example, according to Garoupa and Ulen's account, proving the inefficiency of a legal institution is the gold standard in the Economic Approach to Law; and it cannot be doubted that claiming that an institution is efficient or inefficient is, according to economists, a reason to argue for its change.[149] It is the reality that needs to fit with the model, not the other way around. This is externalist and normative discourse, pure and simple.[150]

It should be noted, however, that especially in the past, the distinction between the mainstream approach associated with the Chicago School was described by its flagbearer Richard Posner as a positive approach in opposition to the one of the New Haven School, which Posner presented as normative.[151] This distinction relied on Posner's most impressive intellectual achievement, the so-called efficiency hypothesis of the common law.

At least at the beginning of the economic approach to law, Posner did not offer a justification for the claim that efficiency had an important role to play in US (common) law. Posner was trying to show that efficiency emerged from within the law as an important legal value. In other words, back then, efficiency did not have a normative justification separated from the authority of the common law itself. The situation changed in 1979,[152] and efficiency has been assessed as an independent normative standard ever since. However, the positive versus normative labels are still used in the field to distinguish two approaches,[153] in a way that is opposite to the distinction proposed by Calabresi. This is another example of the difficulty that the intended consumers of the economic approach to law face because of the opacity of its language to outsiders: 'descriptive' and 'positive' as well as 'normative' can have opposite meanings depending on the scholar using the terms.

As discussed, Calabresian Law and Economics has a descriptive, observation-driven, and internalist approach. Since reality comes first, it is hard to charge Calabresian Law and

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145 Note that Calabresi points out that the problem could be also in the representation of the reality provided by legal scholars, which may not accurate.

146 *See* Esposito, *supra* note 142.

147 *Generally*, Alain Marciano and Giovanni Ramello, "Consent, Choice, and Guido Calabresi's Heterodox Economic Analysis of Law," *Law and Contemporary Problems* 77 (2014): 97.

148 This has been noted by Calabresi, *supra* note 6, 4-5. For a fuller analysis, see Esposito, *supra* note 6.

149 *See* Klammer and Scorsone, *supra* note 20, 22-25. *See*, for example, Herbert Gintis, *Individuality and Entanglement: The Moral and Material Bases of Social Life* (Princeton: Princeton University Press, 2016), 251-252.

150 Cfr. Garoupa, *supra* note 76, 7.

151 *See*, Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981), 775.

152 Posner, *supra* note 80. For a review of his different positions on the matter, *see* Mathis, *supra* note 80, 143-183.

153 Cfr. F. Parisi, "Positive, Normative and Functional Schools in Law and Economics," *European Journal of Law and Economics* 18 (2004): 259.

Economics with unacceptable normative or descriptive pre-commitments. If an analysis in this tradition rests on faulty descriptive assumptions, reason demands to scholars committed to this tradition to abandon said assumptions. It also follows that Calabresian Law and Economics could welcome an efficiency hypothesis of the law, if tested in a descriptive, observation-driven way, and from the internal point of view.[154]

Two recent proposals in the tradition of Calabresian Law and Economics develop on these two ideas at book length. The first one is the Legal-Economic Performance (LPE) framework. This general analytical framework is not necessarily connected to individual egoism and efficiency and builds on the premise that legal conceptual tools can improve the quality of economic analyses. The diffusion of this framework could lead quite easily to the diffusion of Comparative Calabresian Law and Economics. The second book challenges the traditional definition of efficiency in the analysis of exchange contracts using the Legal-Economic Fitness (LEF) framework. The LEF framework does not reify normative concepts such as efficiency, fairness, and equality; instead, it tests the degree of fitness of such normative concepts (and their different conceptions) with the content of legal reasoning. This framework is used to defend the consumer welfare hypothesis, according to which EU antitrust and consumer law is better understood in efficiency terms if the welfare standard is consumer rather than total welfare. The question arises whether developing the consumer welfare hypothesis can build a path-breaking account of the law of exchange contracts. This is a grand question, particularly appropriate for comparativists to investigate.

Let us consider these two frameworks more in detail.

a. The Legal-Economic Performance framework: a lingua franca for social scientists

How can economics become a reliable *lingua franca* or offer *tertia comparationis* between institutions from different legal systems? Is there, in other words, a method that addresses the lemon problem identified in Section II credibly and systematically? A recent book by two economists operating in the institutionalist tradition offers an answer to these questions that is worthy of attention. The book is called *The Legal Foundations of Micro-Institutional Performance. A Heterodox Law & Economics Approach.*

The book "introduce[s] and appl[ies] a method of institutional impact analysis centered on the idea of human interdependence", built by connecting concepts from legal and economic literature.[155] In Klammer and Scorsone's own words[156]:

> the Legal-Economic Performance (LEP) framework … works by starting with the identification of an economic situation where agents are interacting with or in interdependence with one another. The Hohfeldian framework is used to identify the status quo and understand the current structure of legal relations. Once the analyst has identified a situation of interdependence, the next step is to identify the institutional (legal) options available to address the

[154] *See*, Guido Calabresi, "The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?" *The Proceedings of the British Academy* 10 (1982): 85, 87-8 (admitting the appeal of Posner's efficiency hypothesis *in abstracto* while calling it a sophistry *in concreto*).

[155] Klammer and Scorsone, *supra* note 20, 5.

[156] *Ids.*, 6.

> interdependence. This is where the analyst considers all of the possible alternatives that are available and the Hohfeldian language of legal structure and legal change come into play. Finally, the third part of our new framework is the determination of economic performance outcomes from the intersection of the situational and structural components outlined above.

In other words, the LEP framework has four steps: after having identified a situation of interdependence (step 0),[157] that interdependence must be analyzed in terms of jural relations (step 1); next, the institutional alternatives have to be specified (step 2); on these grounds, the outcomes can be 'determined' (step 3).

At this stage, it is helpful to clarify the notion of "situation of interdependence" since it is the starting point for applying the LEP framework. In a first approximation, interdependence exists every time a correlative relationship in the Hohfeldian sense exists.[158] However, interdependence cannot be reduced to the existing legal institutions but also requires considering how "humans interact with them".[159] Ultimately, "[i]nterdependence takes on the idea that we and our decisions are interconnected even if we have not entered into a bargaining situation".[160]

This section will connect the LEP framework to comparative legal research. First, it is noteworthy that the LEP framework rests on the opposite of proposition 1: legal research can make economic analysis more rigorous (proposition ¬1). More relevantly for comparative legal research, it will be argued that: 1) the LEP framework can be easily and meaningfully included in the comparative legal research toolkit; and 2) the reasons that make legal scholars distrust the economic approach to law do not apply to the LEP framework. Hence, the use of the LEP framework is a trust mark that could solve the interdisciplinary lemon problem.

Klammer and Scorsone do not speak directly to the comparative law community. On the contrary, their target audience is the economic community at large, to whom they offer a value proposition according to which economic analysis can benefit from using legal analytical tools to identify better the institutional features of the situations of interdependence economists are analyzing (proposition ¬1). Without the "domain knowledge" that legal scholars can provide, "we [the economists] run the risk of drawing misleading conclusions at best and useless or damaging conclusions at worst".[161] This is exactly the concern legal scholars have, as documented by topical examples in Section II.

There is no need to adjudicate between value propositions 1' and ¬1 since they are complementary. On the contrary, it is arguably the case that both are true. In fact, proposition 1' is just a version of proposition 1 that is humbler and more sensitive to 'legal reality'. At the same time, it is for the economists to assess whether Klammer and Scorsone are right and proposition ¬1 is true. Interested legal scholars should invest energy and

[157] Identifying the situation interdependence is presented as step 0 since Klammer and Scorsone consider only the next three steps as actual parts of the analysis.
[158] *Ids.*, 3.
[159] *Ids.*, 31.
[160] *Ids.*, 32.
[161] *Ids.*, 4.

resources to provide examples of what legal analysis can offer to economists in terms of institutional nuance.[162] The content of the next section can be seen as a flagship example of this potential.

Comparative legal research is particularly fit for being plugged into the Legal-Economic Performance framework. This is the case for at least two reasons. The first is more apparent and deals with the need to "identify the institutional (legal) options available to address the interdependence".[163] Here comparative legal research has a great deal to contribute; perhaps no other field is as useful as comparative legal research to this end. Notably, the LEP framework is methodologically pluralistic, especially in step 3. Klammer and Scorsone unambiguously declare: "Once the alternative institutions are carefully specified, institutional analysis is not limited to any particular method of investigation".[164] It follows that even postmodernists could have an important role in the practical application of the LEP framework.

The second opportunity of collaboration is less apparent but also significantly more fundamental, and it focuses on step 0 of the LEP framework, where one has to identify a "situation where agents are interacting with or in interdependence with one another".[165] It is arguably the case that the LEP framework articulates the first step of comparative research – namely, identifying a "social problem" [166] – in original terms.

Michaels observes that the reference to a problem is ambiguous along at least two lines. At a universal level, a problem can be a "problem of general jurisprudence" or an "empirically universal problem".[167] In the second case, two traps need to be avoided: first, defining the problem in too abstract terms (e.g., social stability) or too contingently and institutionally embedded (e.g., how to design the right to withdraw in consumer contracts); second, assigning a specific normative goal to the institution.[168] This normative presupposition is arguably the misunderstanding that leads scholars in the economic approach to law to insist that mainstream Economic Analysis of Law is particularly fit for functional comparative legal research.[169] When this happens, the focus is not on what is, but on how to achieve something; when the legal relevance of this *quid* is dubious, the

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[162] *See*, *supra* notes 50-6 and the accompanying text on *Berry v. Sugar Notch Morough*, and *infra* notes 180-85 and accompanying text on the consumer welfare hypothesis.

[163] Klammer and Scorsone, *supra* note 20, 6.

[164] *Ids.*, 103.

[165] *Ids.*, 6.

[166] This is a point where it seems that there is overlapping consensus among comparativists. This is indeed the starting point for functionalists: Siems, *supra* note 30, 16 ("The recommendation is therefore that a real-life, socio-economic problem should be the start point"). At the same time, it seems that postmodernist critiques do not challenge this part of the comparative method, as described by functionalists: see Kischel, *supra* note 44, 173-4. *See also* Balazs Fekete, "Cultural Comparative Law?," in: *Legal and Political Theory in the Post-National Age*, eds. Péter Cserne and Miklós Könczöl (Lausanne: Peter Lang, 2011); Vargas Weil, *supra* note 12, 11-3.

[167] Michaels, *supra* note 29, 367.

[168] *Id.*, 367-8, who does not distinguish the contingent from the normative clearly. However, the distinction between normative, prescriptive, and descriptive level of analyses justifies the distinction; on these three levels of analysis, see see Gillian Hadfield, "The Second Wave of Law and Economics: Learning to Surf," in *The Second Wave of Law and Economics*, eds. Gillian Hadfield & Megan Richardson (Alexandria: Federation Press, 1999), 50-66; Esposito, *supra* note 6.

[169] *See*, Garoupa and Ulen, *supra* note 6; Parisi, *supra* note 12; Vargas Weil, *supra* note 12; Mattei, *supra* note 37.

Dworkinian challenge deals an often fatal blow from a legal point of view to economic analysis, as noted in Section II.b.

The LEP framework can bring real clarity here. In fact, the focus on the situation of interdependence allows one to identify as relevant for the comparison of all and only the norms and institutions that play a role in creating and governing that situation of interdependence – *i.e.*, social problem. In other words, the situation of interdependence can be taken as a redescription of the existence of a social problem. A significant advantage is that the concept of "situation of interdependence" is detached from any normative goal (internal or otherwise). Accordingly, car accidents could be a situation of interdependence (step 0); how different legal systems govern them is described in Hohfeldian terms (steps 1 and 2); the consequences of the different approaches are identified (step 3); a comparison follows.

Normative presupposition about the goal being corrective justice, economic efficiency, etc. simply do not play any role in the identification of the situation of interdependence to be studied. Thus, the LEP framework credibly reassures the skeptical legal reader that the descriptive and the normative analyses are severable. In fact, institutional performance can be measured according to multiple indicators;[170] being wary of the distrust economists suffer for the common dismissal of distributive concerns, Klammer and Scorsone defensively add that the analysis "should include distributional consequences across stakeholders".[171] In other words, the LEP framework is committed to the ideal of the economist as a social engineer, laying down alternatives to be presented to decision-makers.[172] Of course, methodological choices and institutional preconceptions could hide normative agendas;[173] but this is a problem that comparative legal scholars are well aware of.[174] It follows that the Dworkinian challenge is not a problem for the LEP framework because pre-commitment to any institutional function, purpose, goal, or aim is sidelined by design. This is a major difference with the Economic Analysis of Law, as seen.

In sum, the Legal-Economic Performance framework is value neutral, methodologically pluralist, and clearly committed to taking legal concepts seriously to avoid distorting the observed reality. Accordingly, this framework embodies all the commitments enshrined in value proposition 1' and can contribute to addressing the interdisciplinary lemon problem. Ultimately, the LEP framework could deliver on the promise of a *lingua franca* for comparative legal research. A *lingua franca* that, notably, is not purely economic as suggested by scholars in the economic approach to comparative law; it is both economic and legal.

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170 Cfr. Klammer and Scorsone, *supra* note 20, 103: "Measures of performance might include the measurement and enforcement of implementation and other transaction costs, some valuation of gains in knowledge, social cohesion or various measures of productivity within a going concern, or measures of compliance with a rule or its adoption".

171 *Ids.*, 114.

172 *See*, Peter Bowttke & Kyle W. O'Donnell, "The Social Responsibility of Economists," in *The Oxford Handbook of Professional Economic Ethics*, eds. George F. De Martino & Deidre McCloskey (New York: Oxford University Press, 2016).

173 Cfr. Klammer and Scorsone, *supra* note 20, 114: "Analysts should be cautious of making statements about preferred alternatives without a normatively determined set of criteria".

174 Cfr. Kischel, *supra* note 44, 46-53.

b. The Legal-Economic Fitness framework and the Consumer Welfare Hypothesis as a grand question

One of the institutional economists who have inspired Klammer and Scorsone is Warren Samuels. Warren Samuels has provided a penetrating analysis of the law in action, which he distilled into the concept of the legal-economic nexus[175]:

> [T]he perceived spheres of polity and economy, of law and market, are not self-subsistent, and … it is helpful to understand what transpires by identifying the existence of a legal-economic nexus in which both seemingly distinct spheres commonly originate

An important feature of the legal-economic nexus must be stressed from the outset. The spheres Samuels refers to also include seemingly distinct "belief system(s)".[176] In other words, simply assuming that the use of different terms in legal and economic belief systems implies that different concepts are used in those systems means falling into a "linguistic trap".[177]

A recent book identifies the complementarity between Samuels's legal-economic nexus and Calabresian Law and Economics. The book is *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st Century*. In fact, the book's ultimate goal is finding the economic concepts that fit with the 'real world of law' Calabresi refers. As noted, this fitness check is the first step of any analysis in Calabresian Law and Economics. At the same time, the outcome is, using Samuels' terminology, a better description of the legal-economic nexus. Accordingly, the book introduces a methodological 'theorem', called the "*Samuels-Calabresi Theorem*: identify the concepts that fit with both legal and economic reasoning about the legal–economic nexus".[178] The Legal-Economic Fitness (LEF) framework[179] was built to operationalize Calabresi's methodological call to search for economic concepts that fit with the worldview of the legal community.

The LEF framework is descriptive, observation-driven, and internalist, as Calabresian Law and Economics requires. The LEF framework is descriptive because there is no normative defense of any efficiency hypothesis before testing its fitness with legal discourse. It is observation-driven in that the efficiency hypothesis that fits best is the one that is preferred. At the same time, the LEF framework is internalist and meets the Dworkinian challenge because each hypothesis is tested against the content of legal reasoning, not the effects of the law (according to a particular descriptive economic theory). True, the law could be ineffective in achieving a goal, but this issue can actually be better appreciated once a reasonable claim is made about the economic consequences that matter. After all, how can one lament that the law will have unintended consequences[180] without first identifying the intended ones?

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[175]Warren J. Samuels, "The Legal-Economic Nexus," *George Washington Law Review* 57, no. 6 (1989): 1556, 1558-9. See also Warren Samuels, *The Legal-Economic Nexus: Fundamental Processes* (Milton Park: Routledge, 2007).

[176] *Id.* 1989, 1556.

[177] *Id.* 2007, *supra* note 175, 246.

[178] Esposito, *supra* note 21, 12.

[179] Notably, this is not how the framework was described in the book. But the name seems quite appropriate given the emphasis on the importance of the legal-economic nexus and on the idea of concept-based fitness.

[180] Brian Bix, *Economic Approaches to Legal Reasoning and Interpretation* (Chelthenam: Edward Elgar, 2018) (noting that the economic approach to law is particularly effective in identifying unintended consequences)

As a case study, the book analyzes two competing definitions of "allocative efficiency" which co-exist in the history of economic thought.[181] The first definition states that an allocation of resources is more efficient than another when it maximizes total welfare. This is the familiar notion of efficiency that the legal community has traditionally challenged as having limited normative attractiveness. The alternative definition of allocative efficiency states that an allocation of resources is more efficient than another if the consumers in the considered market are better off. This second definition has a remarkable historical and conceptual pedigree. In particular, one can find it in the thought of Adam Smith, John Hicks (of Kaldor-Hicks efficiency), and even Ronald Coase.

Building on these findings, the book introduces and tests (successfully) the consumer welfare hypothesis. The consumer welfare hypothesis holds that "as a matter of economic theory, an allocation of resources in a market can be better or worse based on the benefits it delivers to consumers; legal structures that are at the centre of the EU market-building project fit with this understanding of allocative efficiency".[182]

To test the consumer welfare hypothesis, the book investigates the degree of fitness of these two conceptions of allocative efficiency with the content of legal reasoning in EU antitrust and consumer law based on four inferential disagreements; that is, disagreements about the content legal reasoning should have if the goal is one welfare standard or the other.[183] The LEF framework also includes criteria to distinguish the degree of fitness between economic and legal concepts and rules for aggregating the findings regarding different legal materials.[184]

Three main points need to be emphasized here. The first is how the LEF framework introduces two improvements compared to the way Posner's (total welfare) efficiency hypothesis of the common law was tested. The second is that the analysis rejects the popular assumption that efficiency and fairness are necessarily conflicting concepts. The third is that the consumer welfare hypothesis leads to a series of analytical directives that are particularly fit for answering the following grand question, which has significant comparative potential: do legal institutions governing exchange contracts fit best with the total or the consumer welfare conception of allocative efficiency? Let us consider these three points in turn.

When we compare how the consumer welfare hypothesis is tested with the approach used by Posner to advance his efficiency hypothesis of the common law, two differences stand out. The first difference is that the LEF framework looks at the content of legal reasoning. For this reason, the LEF framework addresses the Dworkinian challenge. Instead,

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[181] Esposito, *supra* note 21, 19-60.

[182] *Ivi*, 3.

[183] The disagreements, in synthesis, are:
1 Harm: all instrumentally relevant or not?
2 Defences and exceptions: internal fuzziness and external clarity or vice versa?
3 Sanctions: to deter and redress harm or to internalize social costs?
4 Deadweight loss, elasticity, and productive efficiency: quantity-effects over price-effects or vice versa?
See, *ivi*, 74-84.

[184] In synthesis, the LEF framework uses a triadic scale which distinguishes explanations of high- and low-quality as well as unacceptable explanations on the basis of their degree of fitness with legal reasoning, and aggregates them by giving lexical priority to high-quality and unacceptable explanations; *Ivi*, 63-72.

Posner's methodology focused on whether legal norms incentivize efficient behavior and disincentivize inefficient behavior, but no attention was paid to the reasons given to justify the legal validity of those norms.[185] The second is that the scope of the consumer welfare hypothesis and the evidence considered have been carefully selected and justified.[186] Instead, the scope of the efficiency hypothesis of the common law was never clearly articulated and justified.[187] Hence, the reliability and relevance for the legal community of the consumer welfare hypothesis are clearly superior to those of Posner's original total welfare efficiency hypothesis.

The widely held assumption that efficiency is opposed to fairness, equality, and justice[188] is conceptually problematic[189] and socially undesirable.[190] It is conceptually problematic in that it treats as real entities concepts developed in different disciplines;[191] that is, concepts used by different epistemic communities. It might well be the case that terms like allocative efficiency and contractual fairness offer the same justification for the same institutional arrangements. At the very least, the possibility should not be ruled out from the outset. This possibility is supported by several linguistic uses in EU law[192] and the finding that both efficiency hypotheses are supported by equality norms, albeit different in contents.[193] Moving from this conceptual premise, the LEF framework does not try to accommodate allocative efficiency and fairness in the same conceptual framework. In particular, references to fairness in legal discourse are part of the *explanadum*. In other words, the LEF

185 Posner, *supra* note 151, 775; see also, Richard Posner & William Landes, *The Economic Structure of Tort Law* (Cambridge, Mass.: Harvard University Press, 1987). Similarly, Parisi, *supra* note 153.

186 Esposito, *supra* note 21, 84-96. In particular, the LEF framework is meant to comply with Susan Haack's theory of the how evidence can warrant a claim; see, Susan Haack, *Evidence Matters: Science, Proof, and Truth in the Law* (New York: Cambridge University Press, 2014). A point that is in need of further development is the distinction between exchange and production contracts which delimits the current scope of application of the hypothesis. In fact, it is common to include labor contracts in the category of exchange contracts; *see*, e.g., James Gordley & Hao Jiang, "The Maze of Contemporary Contract Theory and a Way Out," *The American Journal of Jurisprudence* 68 (2022): 1.

187 *Generally*, Nuno Garoupa, Carlos Gómez Ligüerre & Lela Mélon, *Legal Origins and the Efficiency Dilemma* (Milton Park: Routledge, 2017).

188 The recent book-long analyses by Langenbucher, *supra* note 5, and Mantzari, *supra* note 112, both move from this conceptual separation. In the economic approach to law, see, for example, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge, Mass.: Harvard University Press, 2002), but also Calabresi, *supra* note 6; Schäfer and Ott, *supra* note 132, instead, manage to have a more blended perspective on multiple issues they analyse in their textbook.

189 David Chavanne, "Thinking Like (Law-And-) Economists – Legal Rules, Economic Prescriptions and Public Perceptions of Fairness," *Review of Law & Economics* 16 (2022): 50 offers empirical support to the claim that assuming the opposition between fairness and efficiency is implausible. Using vignettes based on normative Economic Analysis of Law, the author shows that the solution proposed by this approach in several areas is perceived as fair by respondents. This is conceptually problematic as it limits the realm of possible conceptual relations, as shown by Jody S. Kraus, "Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy," 11 Philosophical Issues 420 (2001) and Mathis, *supra* note 80, 185-6.

190 Concerning its social undesirability, *see*, Esposito, *supra* note 21, 8-11 (illustrating that this position leads to parochial entrenchment, distrust in legal institutions, and a *tabula rasa* temptation).

191 Treating concepts as real entities is the core of the so-called 'reification fallacy', which is common in Western philosophy, according to Robert Sinclair, "Reification," in *Bad Arguments: 100 of the Most Important Fallacies in Western Philosophy*, eds. Robert Arp, Steven Barbone & Michael Bruce (Hoboken: Wiley, 2018), 378. See also Konstantinos Kavoulakos, "Reification," in: *International Encyclopedia of Ethics*, eds. Hugh LaFollette and others (Hoboken: Wiley, 2019), 1.

192 Esposito, *supra* note 21, 6-8.

193 *Ivi*, especially 25, 27-9 and 32-3.

framework can compare the degree of fitness with legal discourse of different economic, moral, and political theories. The evidence shows that central legal institutions in the governance of exchange contracts can be meaningfully analyzed in efficiency terms without creating any apparent conflict with the normative rationales one finds in the relevant legal materials, such as the *desiderata* of creating the EU internal market, the protection of the consumer as the weaker party, or the protection of competition.[194] All these goals are presented as justified in efficiency terms once the maximand is consumer welfare.

The consumer welfare hypothesis has a remarkable conceptual feature, namely that it includes a concern for the distribution of the benefits generated by the exchange in the very concept of efficiency. This feature makes most of the concerns about efficiency vs distribution disappear. But not all. This is not a drawback; it is a design feature: the consumer welfare hypothesis applies only to exchange contracts and recognizes that consumer welfare is not the only societally relevant value. This means that, for example, the interest of workers or environmental concerns may prevail over the interest of consumers in a given situation. The task of an institutionally accurate theory is providing a convincing account of when this happens.[195]

The previous discussion has already provided some relevant remarks about the last point to be considered, namely that the consumer welfare hypothesis is at the center of a grand question, with significant comparative potential: do legal institutions governing exchange contracts fit best with the total or the consumer welfare conception of allocative efficiency? From a different perspective, can the systematic testing of the consumer welfare hypothesis provide path-breaking insight into the varieties of legal-economic nexus that pertain to exchange contracts in different jurisdictions? This question is clearly amenable to being investigated in multiple legal contexts synchronically and diachronically.

A thought-provoking implication of the consumer welfare hypothesis is a sort of *praesumptio efficientiam*, to be understood as a specification of the functionalist *praesumptio similitudinis*. The *praesumptio efficientiam* would hold that legal institutions pertaining to the legal-economic nexus about exchange contracts can be meaningfully compared to see how much they fit with the consumer and the total welfare hypotheses. Notably, Williamson introduced an idea along these lines in institutional economics, although it was always controversial.[196] Would Williamson's position be less controversial if the welfare standard was consumer welfare?

Notably, the evidence supporting the consumer welfare hypothesis suggests that at least a weak *praesumptio efficientiam* could be worth exploring. In fact, the choice of testing the hypothesis in the context of EU antitrust and EU consumer law is based on the observation that EU antitrust and EU consumer law adopt very different notions of 'consumer' and rely on very different institutional frameworks; hence, it can be expected that the hypothesis also holds in the context of intermediate definitions of consumer, such

194 *Ivi*, 97-174.
195 *Ivi*, 180.
196 On this matter, *see* Irène Berthonnet, "North Vs Williamson: The Debate Over Institutions' Efficiency," *History of Economic Ideas* 21 (2013): 53.

as air passenger, energy client, or investor.[197] Ultimately, this is a form of intra-system *praesumptio efficientiam*. While extending this presumption to comparative settings might be premature, the claim seems worth investigating.

CONCLUSION. THE FUTURE OF THE ECONOMIC APPROACH TO COMPARATIVE LAW: GOOD FORTUNE OR CALABRESIAN?

Garoupa and Ulen conclude their article with a timid note of optimism: "It may take much, much longer for any effects of [the economic approach to comparative law] to manifest themselves".[198] This note of optimism is timid, arguably because it fails to identify any reason for optimism. No method, research topic, academic network, or other remarks by the authors support the belief that the mainstream economic approach to law can become more attractive for comparativists (or any other legal scholar, for that matter). In other words, Garoupa and Ulen do little more than relying on good fortune. The same goes for Vargas Weil, who offers a remarkable account of the benefits of the economic approach to comparative law, but does not formulate any concrete proposal.[199] Parisi has reason to be more optimistic, as he writes in a special issue where a group of young and talented researchers has produced comparative legal research using economic insights.[200] However, regardless of the intrinsic quality of this new wave of scholarship, the interdisciplinary lemon problem remains an obstacle to this scholarship's ability to attract readers.[201]

Contrary to this recent literature, this article identifies a precise path leading to a brighter future for the economic approach to comparative law: Calabresian Law and Economics. This path starts with recognizing that the economic approach to law sometimes fails to deliver on Garoupa and Ulen's value proposition 1, as made explicit by value proposition 1': the economic approach to law is valuable to comparative legal research because it can offer a clear *lingua franca* for legal scholarship, *provided it does not distort legal concepts and the function of the legal norms it seeks to analyze*.

Accordingly, the value of scholarship produced by the economic approach to law for legal scholars is opaque. This opacity leads to an interdisciplinary lemon problem (proposition 3'). The interdisciplinary lemon problem hypothesis provides a rational explanation for the hard reality of the economic approach to comparative law, which is not based (only) on parochialism or selfishness. On the contrary, it is rational for legal scholars who want to produce useful research to disengage themselves from a field where they struggle to discern the good stuff from the lemons, the wheat from the chaff, the sheep from the goats, the milk from the foam, etc. The way to address the lemon problem is by offering

197 Esposito, *supra* note 21, 85-6.
198 Garoupa and Ulen, *supra* note 6, 688.
199 Vargas Weil, *supra* note 12.
200 *See* Vanessa Villanueva Collao, "Empirical Methods in Comparative Law: Data Talks," *Comparative Law Review* 12 (2023): 55; Giuseppe Versaci, "The Law of Penalty Clauses: 'New' Comparative and Economic Remarks," *Comparative Law Review* 12 (2023): 115; Koki Arai, "Comparative Law and Economics in the Field of Modern Competition Law," *Comparative Law Review* 13 (2023): 141; Francesca Leucci, "Comparing the Efficiency of Remedies for Environmental Harm: US v. EU," *Comparative Law Review* 13 (2023): 171; Federico Riganti, "The Key Role of Comparative Law and Economics in the Study of ESG," *Comparative Law Review* 12 (2023): 208.
201 *See above*, Section II.c.

straightforward ways to distinguish research valuable for comparative legal scholars from that which is not; a trust mark is the most plausible solution.

Calabresian Law and Economics is that trust mark. In other words, comparativists can consume research rooted in the Calabresian tradition with confidence; the rest should be consumed with care and at one's own risk and peril. It may go well, or not; the point is that it is hard, time-consuming and energy.draining to establish that.

It follows that the challenge for the economic approach to law in the 21st century is making it easy for legal scholars to distinguish research that belongs to Calabresian Law and Economics from research that does not. Quoting Calabresi's scholarship or that of authors closely associated with the New Haven School of Law and Economics is neither necessary nor sufficient for research to be qualified as Calabresian Law and Economics. This qualification is based on methodological commitments: the analysis shall be descriptive (at least as a first step), observation-driven, and internalist.

To provide guidance in this regard, Section III has proposed a general framework for an economic analysis that is Calabresian, which should appeal to comparative legal scholars: the Legal-Economic Performance (LEP) framework. According to the LEP framework, the analysis is composed of four steps: the identification of a situation of interdependence is followed by its qualification within the Hohfeldian framework of jural positions; then, comparative law can contribute to the identification of the possible institutional arrangements to address said situation of interdependence. Finally, a multimethod approach can be used to identify and quantify, to the extent possible, the performance of alternative institutional arrangements. Importantly, the normative evaluation of the performance so identified is excluded from the normal tasks that belong to the LEP framework, and it can be performed on the basis of multiple normative standpoints. In other words, the LEP framework is methodologically pluralist, built on the importance of legal concepts, and credibly committed to the ideal of the economist as a social engineer. It is, therefore, descriptive and observation-driven. It is not internalist, but it is compatible with any internal perspective. For these reasons, the LEP framework has all the credentials to support an economic approach to comparative law that is fruitful for both legal and economic analyses: Comparative Calabresian Law and Economics.

Section III has also introduced a different framework, with a more limited purpose: the Legal-Economic Fitness (LEF) framework. The LEF framework aims to identify economic concepts that fit with legal reasoning. If applied systematically, this approach will identify the linguistic grounds for a common legal-economic vocabulary for analyzing varieties of the legal-economic nexus. A *lingua franca*, not only for legal analysis; a *lingua franca* for legal-economic analysis. It was then suggested that a detailed and coordinated engagement by comparative legal scholars with Garoupa's recent map of the economic approach to comparative law could be a feasible and effective way to move in this direction.[202]

The consumer welfare hypothesis epitomizes the potential of this approach. This hypothesis challenges the mainstream view that allocative efficiency is about maximizing

[202] Garoupa, *supra* note 9.

total welfare; it holds that, from an(other, respectable) economic point of view, allocative efficiency is about maximizing consumer welfare only. This hypothesis relies on a careful analysis of economic thought and is supported by the inferential analysis of EU antitrust and EU consumer law.

A more systematic exploration of the consumer welfare hypothesis constitutes an original and innovative research question that is particularly amenable to be studied from a comparative law perspective. Perhaps provocatively, one can go as far as formulating a *praesumptio efficientiam* in favor of the consumer welfare hypothesis as starting point to analyze the portion of the legal-economic nexus about exchange contracts. This presumption can be systematically tested by relying on the LEF framework.

On these grounds, there is reason to believe that a bright future for the economic approach to comparative law exists, to the extent that energies are invested in producing research in the Calabresian tradition.

At the institutional level, it should be noted that recent years have observed the birth of rapidly expanding associations that could credibly nurture the growth and eventually flourishing of Calabresian Law and Economics. One is APPEAL, and the other is WINIR. 'APPEAL' stands for Association for the Promotion of Political Economy and the Law. Its main aims are: "Understanding the economy as a system interconnected with law and government"; "[q]uestioning policies and theories that assume self-regulating or optimizing markets"; "[e]xpanding the possibilities for policies responding to inequality, insecurity, and environmental destruction"; and "[d]eveloping a law and economics that enhances democracy, justice, along with inclusive and sustainable prosperity".[203] This association is relatively young, but its commitments go precisely in the direction of Calabresian Law and Economics, and the relevance for APPEAL of the LEP framework has been recognized already.[204] 'WINIR' stands for World Interdisciplinary Network for Institutional Research. It is a 10-year-old association open to multiple methods for studying institutions, credibly committed "to try to develop a cross-disciplinary consensus on some key issues"[205] and particularly open to comparative institutional analysis. The relevance of the LEF framework for WINIR has been recognized already.[206]

In sum, comparative legal scholars willing to invest energy in the economic approach to law are advised to: first, pay particular attention to the Calabresian tradition, starting with

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[203] *Home*, Association for the Promotion of Political Economy and the Law (APPEAL), https://www.politicaleconomylaw.org/content.aspx?page_id=0&club_id=456963 (last visited May 10, 2024). See also Martha McCluskey, "Association for the Promotion of Political Economy and the Law (APPEAL): Transforming Law and Economic Power," *Journal of Law and Political Economy* 4 (2023).

[204] Scorsone presented his co-authored book on December 2, 2022 to the whole network, and a workshop including both authors was held on April 29, 2023: *Past Events*, Association for the Promotion of Political Economy and the Law (APPEAL), https://www.politicaleconomylaw.org/content.aspx?page_id=22&club_id=456963&module_id=258898 (last visited December 10, 2023). Recently, he became a member of APPEAL's Board.

[205] *About*, World Interdisciplinary Network for Institutional Research (WINIR), https://winir.org/?page=about&side=about_winir (last visited December 10, 2023). See also, S. Deakin, D. Gindis, G. M. Hodgson, K. Huang & K. Pistor, "Legal Institutionalism: Capitalism and the Constitutive Role of Law," *Journal of Comparative Economics* 45 (2017): 188.

[206] A special panel on the framework was organized at the 2022 WINIR conference; cfr. *WINIR 2022-Programme*, World Interdisciplinary Network for Institutional Research (WINIR), https://winir.org/winir-2022-programme/ (last visited May 10, 2024).

Calabresi's seminal writings, but also more recent developments, namely the LEP and LEF frameworks; and, second, join APPEAL and WINIR and engage with their members. This is the concrete proposal for a brighter future for the economic approach to comparative law. The alternative is relying on good fortune.

PERFORMANCE OF CONTRACTS AND SOCIAL CRISIS – A COMPARATIVE STUDY OF FRENCH AND GERMAN LEGAL SYSTEMS REGARDING UNEXPECTED CHANGES

Julian Amoulong – Alexandro Mariano Pastore

TABLE. OF CONTENTS

This article examines, through a comparative legal approach, the manners by which French and German legal systems deal with unexpected changes of circumstances after the conclusion of a contract in a context of social crisis, taking COVID-19 as occasion. Accordingly, statutory provisions for impossibility and hardship in the respective systems are analysed, as well as their applicability to the coronavirus pandemic. Furthermore, a spotlight is placed on the so-called emergency legislation enacted during the crisis. This article is not only intended to explain the existing legal solutions, but also to give an opinion on them.

Keywords: Private Comparative Law – Performance of Contracts – Unexpected changes – France – Germany

INTRODUCTION

The outbreak of Coronavirus disease (COVID-19), caused by the SARS-CoV-2 virus[1], was situated in Wuhan (China) in December 2019. On March 11, 2020, the World Health Organization (WHO), through an assessment delivered by its Director-General, first referred to COVID-19 as a pandemic.[2] Just two days later, the WHO pointed out Europe as the new pandemic epicenter. In the following months, the pandemic was worldwide in the spotlight, daily covered by global media, spreading faster than supposed. Since hospitals were overfilled with patients, public authorities resorted to collective quarantines, restrictions to business activities and people´s movement, and even lockdowns of cities or even regions for weeks, attempting to counter the infection speed, while treatments and vaccines were not available. On May 4, 2023, WHO downgraded the COVID-19 status, ending the global emergency. Thus far, WHO records more than 750 million cases and almost 7 million deaths.[3]

It has been said that COVID-19 upended the world, changing not only public health systems, but also spreading through other fields, on a scale possibly never seen before (given the fact that the previous pandemics came about before the globalization), in a chain reaction that led to a "crisis of human society".[4] Although the legal problems that arose (such as the impracticality or price shifting for the parties) occurred equally everywhere, they were treated differently by the legal systems, which can be attributed to

[1] *see* World Health Organization (WHO) https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Apr. 1, 2024).
[2] For the detailed timeline of the pandemic, *see* World Health Organization (WHO) https://www.who.int/news/item/29-06-2020-covidtimeline (last visited Apr. 1, 2024).
[3] For a comprehensive overview of the cases recorded worldwide, *see* World Health Organization (WHO) https://data.who.int/dashboards/covid19/cases?n=c (last visited Apr. 1, 2024).
[4] Luo Li et al., *The Pandemic Crisis and Its Global Legal Impact on Information Protection, Creative Economy and Business Activities*, *in* Global Pandemic, Technology and Business 1, 9 (2021).

the fact that different countries provide different solutions and are based on different doctrines.

This article covers the solutions provided by French and German legal systems to deal with the matter of unexpected changes (thus, after the conclusion of a contract) amid social crisis and their possible application to the coronavirus pandemic, comparing one system to another, i.e., through their similarities and differences.[5]

I. ORIGINS OF IMPOSSIBILITY AND HARDSHIP

Roman Law admitted different standards of liability for non-performance of contracts (*dolus malus, culpa lata, culpa levis in concreto* and *culpa levis in abstracto)*[6], along with exempting circumstances: *vis maior* (casus maior) and *casus fortuitus (casus minor)*.[7] They both relate to irresistible and unforeseeable events, beyond the control of the contracting party[8], in accordance with the maxim *impossibilium nulla obligatio est* ("The impossible is no legal obligation.")[9], also found as *ad impossibilia nemo tenetur (*"Nobody is held to to the impossible.").[10]

Prof. Gordley drew on the evolution of legal solutions given to situations in which unforeseen circumstances after the conclusion of a contract can significantly impact its performance and even render it impossible. He analyses the shift from Roman Law into Middle Ages – period when the widely known *clausula rebus sic stantibus* ("By the clause the situation thus remaining."[11]) is said to have emerged[12], due to the influence of canonists over the postglossators, as an exception to the rigidity of *Pacta sunt servanda* ("Pacts must be respected")[13] put forward by Grotius.[14]

Then, proceeding with the historical evolution, he places the unforeseen changes already in the national legal outcomes of France, Germany and England by the 18th and 19th Centuries, with the modern formulation under the *Code Civil* (1804) and the *Bürgerliches*

[5] For the methodology of comparative law studies, *see* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* The Oxford Handbook of Comparative Law 383-420 (Mathias Reimann & Reinhard Zimmermann eds. 2006).

[6] Cosimo Cascione, Diritto romano manuale breve tutto il programma d'esame con domande e risposte commentate 191 (2007).

[7] Pasquale Voci, Istituzioni di diritto romano 384 (6th ed. 2004): "La responsabilità del debitore finisce se l'adempimento è reso impossibile da una circostanza fortuita: si parla di caso, o caso fortuito; e quando l´evento è particolarmente rovinoso, e ineluttabile, di forza maggiore (*vis maior*)".

[8] For the differentiation between the two, *see* René Robaye, Le droit romain 310-312 (6th ed. 2023).

[9] Aaron X. Fellmeth & Maurice Horwitz, Guide to Latin in International Law 127 (2n ed. 2021).

[10] *Id*. at 127.

[11] *Id.* at 56.

[12] For the linguistic variations of the formulation, *see* María do Carmo Henríquez Salido et al., *La clàusula «rebus sic stantibus» en la jurisprudència actual*, 66 Revista de Llengua i Dret 189, 191 (2016).

[13] Fellmeth & Horwitz, *supra* note 9 at 222.

[14] *see* Pascal Pichonnaz, Les fondements romains du droit privé 364-365 (1st ed. 2008): "La justification du caractère obligatoire de tous les pactes se fondait d´abord sur la morale et deviendra une pierre angulaire de la doctrine du droit naturel de Grotius."

Gesetzbuch (1900)[15], conceived during the period known, in European Legal History, as the age of Codification, in the expression coined by Jeremy Bentham.[16]

Despite being allocated within the same Subgroup[17], the development of private law in Germany has been profoundly in contrast to France, which is the reason, why they both developed differently regarding the treatment of unexpected circumstances. This was also due to the situation that a unified German state did not yet exist at the beginning and middle of the 19th century, by which time the Code Civil had long already been in force in France.[18] Even Since France and Germany figure as the major representatives of the Romano-Germanic Subgroup (Civil Law), they represent an interesting and traditional choice in Comparative Law.

When it comes specifically to the expression of the legal solutions to unexpected changes that affect the performance of contracts in France and Germany[19], one should come across two different concepts: impossibility[20] and hardship[21], that will be presented in each of the legal systems herein taken for comparison, before moving forward into the possible use of such legal mechanisms to pandemic coronavirus. For now, it is worthy to mention those concepts will be addressed as developed in *statutory laws and settled case law* of those countries, not as contractual provisions. Indeed, it is quite frequent in business contracts laying down the so-called "force majeure clauses" and "hardship clauses", freely agreed by parties, determining the definition of the events and the legal consequences.

Therefore, a clear distinction must be made between the possibility of contractually resolving impossibility and hardship situations by means of contractual clauses written for this purpose and the legally prescribed solution[22], which is the main focus of this article.

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[15] *see* James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 Am. J. Comp. Law 513-530 (2004).

[16] *see* Jean-Louis Halpérin, *The Age of Codification and Legal Modernization in Private Law*, *in* The Oxford Handbook of European Legal History 908, 908 (Heikki Pihlajamäki, Markus D. Dubber, & Mark Godfrey eds., 2018).

[17] Already in 19th Century, Prof. René David systematized, under a comparative perspective, the world major legal systems, arranging them in Groups or Families The Western Law is split in Anglo-Saxon Subgroup (Common Law) and Romano-Germanic Subgroup (Civil Law). *see* René David, Camille Jauffret-Spinosi & Marie Goré, Les grands systèmes de droit contemporains (12th ed. 2016).

[18] Zimmermann therefore also describes the German civil code as "Late Fruit of the Codification Movement", *see* Reinhard Zimmermann, The New German Law of Obligations: Historical and Comparative Perspective 6 (2005).

[19] *see* Angela Carpi, *Le Sopravvenienze Contrattuali Nella Mixed Jurisdiction Della Louisiana, Tra Rigidità Del Sistema E Necessità Di Riforma. L'ipotesi Della Forza Maggiore*, *in* Chi resiste alla globalizzazione? Globalismi, regionalismi, nazionalismi nel diritto del XXI secolo 59, 60 (Angela Carpi Michele Raziadei Timoteo eds., 2023).

[20] Also known as principle or doctrine of impossibility.

[21] The term "hardship" itself does not belong to Civil Law. Nevertheless, following the proposal of Hannes Rössler, this term is hereby employed as a generic term, under a legal comparative approach, comprising the French *théorie d´imprévision* and the German *Störung der Geschäftsgrundlage*. *see* Hannes Rössler, *Hardship in German Codified Private Law – in Comparative Perspective to English, French and International Contract Law*, 15 European Review of Private Law 483, 485 (2007).

[22] Ivo Bach, *The Impact of Force Majeure on Contractual Obligations, in* German National Reports on the 21st International Congress of Comparative Law 205, 221 (Martin Schmidt-Kessel ed., 2022)

In any case, with this contractual nature, such clauses are found both in Civil Law and Common Law, with a view to ruling any possible factual or legal change that could impact the performance. That is the reason why, even if this work deals with the two countries of Continental Europe, belonging to Civil Law, it is important – as a preliminary step, essential in order to prevent glaring errors – to take into account that the legal concept *force majeure*[23], as emerged in the French Civil Code does not correspond to the force majeure found in Common Law[24], where force majeure is merely an optional contractual disposition. Definitely, Common Law handles impossibility on a different basis, framed by case law: the doctrine of frustration, which comprises impossibility of performance (absolute), impracticability (relative) and frustration of purpose.[25]

II. FRENCH LEGAL SYSTEM

2.1 *The French approach to unexpected changes*

The *Code Civil* (Civil Code), also known as the Napoleonic Code and enacted in 1804, *"provides the overall framework of the law of contract and contains the general principles applicable to all types of contract"*[26], in its Book II, Title III. The freedom of contract and its consequent binding force are paramount principles in French Law[27]; once a valid contract is concluded, it must be performed in good faith by both parties.[28] There are few hypotheses by which non-performance of the original terms of contracts is lawful. They consist of an exception to the rule and, under such conditions, they are applied in a very restrict way.

The French Law of Obligations was extensively reshaped in 2016, by *Ordonnance*[29] n° 2016-131 of February 10, 2016, which entered into force on October 1, 2016, and was later ratified and revised through Law nº 2018-287 of April 20, 2018. The Reform comprises not only contracts, but also the general regime of obligations and the proof of obligations. It has been said that the Reform embodied rules and concepts developed and already put in place by case law since the enactment of the Civil Code in 1804, so doing in order to

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[23] Apart from quotes (which will kept as read the original), in this article the expression "*force majeure",* in italics, refers to the French Law aception, whereas "force majeure" belongs to British/American one. Besides, all other words in French or German, as foreign words, will be also found in italics.

[24] Regarding the terminology of force majeure in the French system, *see* Vernon Valentine Palmer, *Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts*, 70 Am. J. Comp. Law 70, 73 (2022): "Force majeure in the French legal tradition has a different role and significance. It is the short-hand expression for the defense of 'impossibility,' a defense arising by operation of law under the Code Civil. The defense applies when three basic conditions are satisfied: *irrésistibilité*, *imprévisibilité*, and *extériorité*."; Regarding the terminology of force majeure in the United States, *see id*. at 73:

"As stated previously, in the United States, the same term refers to contract clauses which derogate from the common law doctrines. One should bear in mind that similar clauses are found in international contracts, including those drafted in France and other continental countries."

[25] Regarding the terminology of impossibility, *see id.* at 71-72.

[26] Solène Rowan, The New French Law of Contract 20 (2022).

[27] However, this freedom – implicitly enshrined – has evolved throughout the centuries (from *principle de l'autonomie de la volonté* into *volonté contrôlée*, *volontarisme social* or *solidarisme contractuel*). *see*, Philippe Malinvaud, Mustapha Mekki & Jean-Baptiste Seube, Droit des obligations 88 (17th ed. 2023).

[28] Code civil [C. civ.] [Civil Code] art. 1102-1104 (Fr.) (Current Version).

[29] A legislative authorization to the Executive issue a statute law, in accordance with art. 38 of French Constitution.

re-establish the primacy of statutory law as legal source[30], along with other important innovations[31], in order to carry the social and legal evolution across the decades[32] and restore the French legal influence among international systems[33], also as for international business[34]. In a broader perspective, this evolution takes place in the scenario of multiple initiatives tending to harmonize the law of obligations across Europe, such as UNIDROIT´s Principles, the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL).[35]

Therefore, it is convenient to split the legal analysis of the elements at stake into before and after the Reform of 2016, examining the legal solutions provided for unexpected changes in French Law: impossibility under the form of *force majeure* and *cas fortuit*, on one hand, and hardship through *théorie d´imprévision*, on the other hand.

In a nutshell, impossibility was codified in France since the Napoleonic Code entered into force, as *force majeure* and *cas fortuit* by article 1148, and nowadays only *force majeure* by article 1218, whereas hardship was not set up in the Civil Code: it was progressively put in place by case law, through *théorie d´imprévision* (literally, theory of unpredictability), and now is codified under article 1195.

2.1.1. *Before the Reform of French Law of Obligations*

a. Impossibility (Force Majeure and Cas Fortuit)

The Article 1147 of the Civil Code contains the general provision of full compensation (interest and damages) in case of non-performance or delay in the execution of the obligation, unless the debtor can establish that non-performance was due to *a cause étrangère*

[30] Regarding the matter of "law in books" *versus* "law in action", as enshrined by Roscoe Pound (although in the context of Common Law) *see*, Roscoe Pound, *Law in Books and Law in Action* , 44 AM. L. REV. 1, 12 (1910): "It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled."

[31] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 61.

[32] *see* Rowan, *supra* note 26 at 1:
"Indeed, since its enactment in 1804, almost all of the articles on contract law had remained completely untouched, making this the first re-examination of the subject in over 200 years."

[33] *see* Rowan, *supra* note 26 at 4.

[34] *see* Rowan, *supra* note 26 at 4:
"A final important factor behind the reforms was a recognition that French contract law was materially less attractive as a choice of law for cross-border contracts than the equivalent regimes of some common law countries."

[35] Angela Carpi, L'inadempimento importante nel sistema francese. Uno studio di diritto comparato 125, 126 (2010).

(an external cause[36]), not imputed to him provided, moreover, the absence of bad faith on his part.[37]

Additionally, article 1148 precises that in case of *force majeure* or *cas fortuit* (fortuitous event) there is no ground for the payment of damages or interest.[38] Nonetheless, the definitions and precise requirements of the abovementioned exemption of responsibility were not provided, but rather progressively shaped by judicial decisions and doctrine. It must be noted that the theoretical distinction between *force majeure* and *cas fortuit* (imprecise and controversial already in Roman sources[39]) currently has little practical importance for contractual matters in French Law since both lead to the same legal effects.[40] Actually, the former tends to prevail over and even assimilate the former in the civil domain[41]; they can be seen as synonyms.[42]

Force majeure relates to an event which is deemed unforeseeable, irresistible and external to the person affected, which makes the performance impossible.[43] Traditionally, the concerning event should fulfil all of them at once. Also, they should be interpreted as absolute unforeseeability and irresistibility.[44] About those requirements, two remarks could be convenient.

First, despite the rigid interpretation of the provision, the development of case law brought some mitigation by stating that a predictable but irresistible event was considered sufficient to characterize the occurrence of force majeure (as long as external to the person).[45] This

[36] For the terms and provisions of Civil Code after the Reform, this article adopts the translations made by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker. The integral text (including revisions made by Loi nº 2018-87) is available at https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/Translationrevised2018final.pdf (last visited Apr. 1, 2024);
For the terms and provisions of Civil Code before the Reform (articles 1147 and 1148), the translation adopted is the one made by David W. Gruning. The integral text (in force in 1st July, 2013) is available at:
https://web.archive.org/web/20191020172634/https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf (last visited Apr. 1, 2024);
Gordley translates *cause étrangère*, *force majeure* and *cas fortuit* respectively as "extrinsic cause", "irresistible force" and "chance event", *see* Gordley, *supra* note 15 at 517.

[37] Code civil [C. civ.] [Civil Code] art. 1147 (Fr.): Le débiteur est condamné, s'il y a lieu, au paiement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part.

[38] Code civil [C. civ.] [Civil Code] art. 1148 (Fr.): Art. 1148. Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.

[39] *see* Robaye, *supra* note 8 at 310-312.

[40] However, for extracontractual liability (torts), the distinction might be significant.

[41] Muriel Fabre-Magnan, Droit des obligations: Contrat et engagement unilatéral 262 (6th ed. 2021): "La force majeure évoque l´idée d´insurmontabilité d´un événement, alors qu´un cas fortuit vise un événement survenu de façon inattendue et imprévisible, ce qui est le plus souvent le cas des faits de la nature (cyclone, tempête, etc.). En droit civil, on parle plutôt de force majeure."

[42] *see* Malinvaud, Mekki, & Seube, supra note 27 at 739; *see* also François Chénedé, Droit des obligations et des contrats: consolidations, innovations, applications 577 (3rd ed. 2023): "Aujourd´hui les deux termes de cas fortuit et force majeure sont devenus synonymes."

[43] *see* Fabre-Magnan, *supra* note 41 at 263.

[44] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 505.

[45] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 6, 2002, Bull. civ. I, No. 258 p. 201 (Fr.): "Attendu que pour faire droit à la demande de Mme Y..., le jugement retient que la

was the position that had been adopted by the 1st Civil Chamber[46] of the *Cour de Cassation* ("Court of Cassation", the supreme court of the French judicial system), followed by its Commercial Chamber[47] and the Labour Chamber[48].

The dissent between the 1st and 2nd Civil Chambers seems to be overcome since the Reform of the Civil Code expressly demands unpredictable nature for characterizing *force majeure* (as we will see).

Second, the "external" condition led to a debate about a sickness, which is an internal event in the organic sense. Nonetheless, it was lately recognized external, for the characterization of *force majeure*, leading to the clarification that, more precisely, it should be interpreted as "out of the control" of the contracting party.[49]

b. Hardship (Théorie d´Imprévision)

It was already mentioned that the Napoleonic Code did not espouse any provision related to *imprévision*.[50] *Cour de Cassation* reaffirmed the principle of *pacta sunt servanda* in the famous case *Canal de Craponne* (1876)[51], holding that tribunals were not competent to modify the terms of the agreement in order to restore the conditions found in the moment the agreement had been negotiated.

However, *Conseil d´Etat* (Council of State, the supreme court of the French administrative system)[52]authorized the judicial review of the terms of the agreement in order to restore the economic balance of the obligations through the landmark case *Gaz de Bordeaux* (1916)[53], under the ground of the continuity of the public service. Of course, the scope of application was limited to public contracts. When it comes to private contracts, only in the 90´s the decisions of *Cour de Cassation* depart from the rigid previous case law. Indeed, in the case *Huard* (1992)[54] the Court stated the obligation of renegotiation, on the ground of good faith. The Court did not ascribe itself the power to renegotiate the balance: it rather imposed on the party the obligation to do so.

maladie d'une personne âgée n'est pas imprévisible; Qu'en statuant ainsi alors que la seule irresistibilité de l'événement caractérise la force majeure, le tribunal a violé le texte susvisé. "

[46] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 9, 1994, Bull. civ. I, No. 91 p. 70 (Fr.).

[47] Cour de cassation [Cass.] [supreme court for judicial matters] com., Oct. 1, 1997, Bull. civ. IV, No. 240 p. 209 (Fr.).

[48] Cour de cassation [Cass.] [supreme court for judicial matters] soc., Feb. 12, 2003, Bull. civ. V, No. 50 p. 43 (Fr.).

[49] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 10, 1998, Bull. civ. I, No. 53 p. 34 (Fr.).

[50] Article 900-2 of the Civil Code, which states a judicial review of conditions and charges encumbering donation or legacy (not contracts in general) in case of *imprévision*, was only inserted in 1984.

[51] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 6, 1876, D. 1876, I, 193.

[52] In France we have the dual jurisdictional system, split in judicial and administrative.

[53] Conseil d'État, [CE] [highest administrative court] Mar. 30, 1916, 59.928, Rec. Lebon 125.

[54] Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 3, 1992, Bull. civ. IV, No. 338 p. 241 (Fr.).

2.1.2. *After the Reform of French Law of Obligations*

a. Impossibility (Force Majeure and Cas Fortuit)

The original dispositions set up by the Napoleonic Code concerning *cause étrangère* (art. 1147) as well as *force majeure* and *cas fortuit* (art. 1148) went through meaningful changes. Indeed, in contrast to the previous structure, now article 1218 only refers to *force majeure*[55], whose requirements are set in the legal provision.[56] It also distinguishes, in paragraph 2, between temporary and permanent impossibility and the respective effects.

The event must be beyond debtor´s control, not reasonably foreseen by him, who could not avoid the effects by appropriate measures. In short, the requirements can be summed up as *imprévisibilité*, *irrésistibilité* and *extériorité* (unforeseeability, irresistibility [57] and exteriority) – and so have been applied by *Cour de Cassation*[58]. In this sense, the three criteria forged by the Court before the Reform have been codified, and also restored the original condition of fulfillment of all of them at once in order to characterize the occurrence of *force majeure*.[59]

It is convenient to remark that now the requirement of unforeseeability is not anymore taken in an absolute, objective view, rather it is conceived as reasonable unforeseeability[60], or in other words, in a relative, subjective perspective. Reasonability implies that many natural phenomena – such as earthquakes, floods, tsunamis, meteorite or comet falls, volcanic eruptions and pandemics – are usually deemed not foreseeable. Indeed, although History has been pervaded by these phenomena, and Science disposes of instruments to render their occurrence more and more predictable, in general it cannot achieve the point that it should reasonably expected that parties could take their occurrence and effects into account when concluding a contract. Also, some human actions – like wars, labour strikes and also *fait du prince* (decisions taken by public authorities) [61] – can be reasonably unforeseeable.

If it amounts to a temporary impossibility, the consequence is normally the suspension of the performance or even the termination of the contract, depending on the period of delay. Accordingly, if it is the case of permanent impossibility, the contract is terminated by force of law.

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[55] *Cas fortuit* is still stated in other articles of the Civil Code.

[56] However, this does not mean that the new art. 1218 of the French Civil Code is the corresponding provision to art. 1147 and 1148 which deal with contractual liability in the case of non-performance. Rather, art. 1218 represents the new main provision referring to *force majeure*. Regarding contractual liability in the case of non-performance we find the corresponding statutory provision in art. 1231-1, where it is stated that debtor is condemned to pay for damages for non-performance, unless he justifies this on the ground that performance was prevented by *force majeure*, for which one can then again refer to art. 1218.

[57] French Ministry of Justice, *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations,* JORF (Journal officiel "Lois et Décrets") n° 0035 du 11 février 2016 (2016): "irrésistible, tants dans sa survenance (inévitable) que dans ses effets (insurmontable)".

[58] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Dec. 7, 2022, 21-19.793 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000046727257 (last visited Aug. 1, 2024).

[59] Despite the fact that the *Rapport* cocerning the Reform states that exteriority would not be a requirement anymore, *see* Chénedé, *supra* note 42 at 159.

[60] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 507.

[61] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 739.

Furthermore, decisions rendered by *Cour de Cassation* have brought some particularities regarding *force majeure* under article 1218, restricting its application both under the personal and material perspective. First, it can only be invoked by the debtor, the creditor cannot.[62] The reasoning, by the way, proceeds from the wording of the article: "beyond the control of the debtor", instead of "beyond the control of the party".[63] Second, in a case arisen for the payment of alleged impact of COVID-19, the Court held that the performance – since the obligation consisted in payment of an amount – did not become impossible, but rather merely more difficult or onerous, thus *force majeure* is not applicable in case of monetary obligation[64], the so-called *force majeure financière* (economic *force majeure*).[65]

b. Hardship (Théorie d´Imprévision)

Moreover, the Reform innovated substantially in art. 1195, by enshrining the *théorie d´imprévision* to private contracts. Indeed, art. 1195 states that, in case of an unforeseeable change of circumstances resulting in excessively onerous performance, one of the parties can ask the other to renegotiate the contract. They can even agree on termination and, without agreement, one of the parties can bring a claim before courts, in order to "revise the contract or put an end to it".

The keystone here is the unforeseeability – just like one of the three requirements for *force majeure*. The provision at stakes applies only when the party "had not accepted the risk of such a change", i.e., it excludes the aleatory contracts, as such defined by art. 1108.[66] The last part of art. 1195 states that the affected party shall continue to perform his obligation during the renegotiation of the contract.

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[62] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 25, 2020, 19-21.060 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000042619557?isSuggest=true (last visited Apr. 1, 2024): "le créancier qui n'a pu profiter de la prestation à laquelle il avait droit ne peut obtenir la résolution du contrat en invoquant la force majeure"

[63] *see* Chénedé, *supra* note 42 at 160.

[64] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jun. 15, 2020, 21-10.119 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000047737790?init=true&page=1&query=21-10.119&searchField=ALL&tab_selection=all (last visited Apr. 1, 2024)
Actually, one should note that the case would better fit the hypothesis of imprévision, not force majeure, as it will be explained in the following topic.

[65] *see* Jean-Sébastien Borghetti, *Non-Performance and the Change of Circumstances under French Law*, *in* Coronavirus and the Law in Europe 506, 516 (Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst, Fryderyk Zoll eds., 2021): "The technical reason for this is that, while the debtor of such an obligation may be de facto incapable of paying what she owes, there can be no radical impossibility to perform as long as there is money in the economy. The fundamental reason behind this technical explanation is that insolvency cannot be regarded as a cause of discharge of contract, lest the whole economy be put at risk."

[66] Code civil [C. civ.] [Civil Code] art. 1109 (Fr.) - A contract is commutative where each of the parties undertakes to provide a benefit to the other which is regarded as the equivalent of what he receives.
It is aleatory where the parties agree that the effects of the contract— both as regards its resulting benefits and losses—shall depend on an uncertain event.

2.3 *Application during the coronavirus pandemic*

At this point, the focus turns to COVID-19 and its applicability in the light of the instruments forged by the French legal system to the unexpected change of circumstances. Indeed, COVID-19 may justify the application of *force majeure* or *théorie d´imprévision*.

However, such conclusion must emerge only from the concrete elements that arise in any given case. In other words, in each *given case*, examining the substantial fulfillment of statutory criteria found in the Civil Code as they as interpreted by courts, specially the supreme courts of the judicial and administrative, which case law, although deprived of formal binding force of precedents (unlike Common Law), can be seen as guiding light to the judgments rendered by lower courts.[67]

For that, the first remark concerns the extension or depth of the shift to the performance. Minor changes clearly fall out of the scope. French case law requires that the non-performance shall present *une certaine gravité* ("a certain gravity or importance"), in order to trigger the application of the concerning legal remedies. More precisely, it corresponds to the non-performance that deprives the creditor from *le bénéfice essentiel du contrat* ("the essential benefit of the contract"), which should be carefully assessed by the judge.[68]

As a consequence, in a given case, the change must be deemed quite significant, relevant, i.e., one that "renders performance excessively onerous" (for *imprévision*) as for art. 1195, or even "prevents the performance" (for *force majeure*), according to art. 1218. In both cases, the Civil Code precises "at the time of the conclusion of the contract": this is the reference, the parameter for the assessment, that shall be compared to the time of expected performance.

The date of the contract can raise another distinction, depending on whether it was before or after the Reform of the Civil Code entered into force (October 1, 2016), according to the famous maxim *tempus regit actum* ("Time rules events")[69], that is to say, the law in force at the time of the conclusion of the contract will be the one prevailing.

Nevertheless, it must be mentioned that the Civil Code provides rules for contracts in general and also those for some specific contracts. Prof. Borghetti recalls the emergency legislative measures that were adopted in France, only for specific contracts: i) tourism (travels and holiday), as well as ii) bills (water, gas, electricity) and rental owed by professional and commercial premises[70]. Indeed, Ordonnance n° 2020-315[71] allows touristic providers to offer *un avoir* (a credit note, a "voucher") as alternative to *le remboursement de l'intégralité des paiements effectués (the full refund in cash)* for resolution of contracts notified between March 1, 2020 and September 15, 2020[72]; Ordonnance nº 2020-

[67] *see* Rowan, *supra* note 26 at 24.
[68] *see* Carpi, *supra* note 35 at 22-25.
[69] Fellmeth & Horwitz, *supra* note 9 at 287.
[70] *see* Borghetti, *supra* note 65 at 510-511.
[71] *Ordonnance n° 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure.* Available at :
https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755833/ (last visited Apr. 1, 2024).
[72] More recently, in June 2023, through a preliminary ruling addressed by *Conseil d´Etat*, the European Court of Justice (ECJ) found that this provision (refund by credit note instead of cash) is contrary to

316 [73] declares unenforceable penalties and other sanctions during the health state emergency declared in France (*pénalités financières ou intérêts de retard, de dommages-intérêts, d'astreinte, d'exécution de clause résolutoire, de clause pénale ou de toute clause prévoyant une déchéance, ou d'activation des garanties ou cautions, en raison du défaut de paiement de loyers ou de charges locatives afférents à leurs locaux professionnels et commerciaux*).

Furthermore, reasonable unforeseeability is a common requirement for both *force majeure* and the theory of *imprévision* – despite the fact that it is found explicitly only in article 1218 (that belongs to *force majeure*).[74] The outbreak of pandemics is a phenomenon quite common in History, though it cannot be reasonably expected that parties could suppose the occurrence of COVID, specially the dimension of its effects worldwide – when concluding a contract.

When it comes to COVID-19, the temporal aspect does not confine to that stated above (before or after the Reform), since the date of the conclusion is not only decisive for establishing the legal regime applicable to the contract, but also can be determinant to set the degree of unforeseeability, according to the growing knowledge regarding the disease and the timeline of the events, since the first news about a new disease, passing by its spread, the classification as pandemic and so on. Yet the measures undertaken by public authorities varied significantly from a region or country to another, specially on the activities classified as non-essentials.[75] In France a strict lockdown was imposed twice in 2020: from March 17 to May 11 and from October 30 to December 15.[76]

Moreover, awareness of COVID-19 should not automatically lead to assessment of its impact. Even the term "pandemic" was employed by WHO for the first time in a declaration only on March 11, 2020, circumstance that weakens the assumption that, before that date, parties could properly assess the dimension of COVID-19 as a global pandemic.

Finally, as already exposed, the discharge due to *force majeure* only benefits the debtor and as long as it is concerned a non-monetary obligation. These restrictions have not – at least, so far – put for the amendment of terms due to *imprévision*.

To sum up, COVID-19 may characterize a significant change of circumstances that triggers the application of legal mechanisms existent in the French legal system, as long as

Directive (EU) 2015/2302 and national legislations are precluded from from derogatin that norm… (C-407/21)

[73] *Ordonnance n° 2020-316 du 25 mars 2020 relative au paiement des loyers, des factures d'eau, de gaz et d'électricité afférents aux locaux professionnels des entreprises dont l'activité est affectée par la propagation de l'épidémie de covid-19.* Available at :
https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755842 (last visited Apr. 1, 2024).

[74] *see* Cosson Bénédicte Fauvarque, *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?*, 1 Revija Kopaoničke škole prirodnog prava 11, 24 (2019):
"It was surprising that, while article 1195 requires that the change in circumstances be unforeseeable, article 1218 on force majeure is limited to an event which could not 'reasonably' have been foreseen. Harmonizing the two provisions either by using the adverb 'reasonably' in article 1195 (to give an objective connotation to the test that the court will have to implement), or by deleting it from article 1218, would have been logical, even if, in practice, this would have had only a cosmetic function."

[75] The criteria of the classification were not uniform.

[76] *see* Borghetti, *supra* note 65 at 511.

such an event is significant, reasonably unforeseeable and irresistible (externality goes without saying).

Despite the particularities dictated by the Civil Code as interpreted by French courts, the fundamental legal point concerns the concrete material impact brought to the contractual obligation, making its performance reasonably and humanly[77] impossible or merely more difficult or onerous. In the first case, the impossibility can lead to the full discharge of the obligation, (*force majeure*). In the second one, the hardness implies the modification of the obligation (*imprévision*).

III. GERMAN LEGAL SYSTEM

3. *The German approach to unexpected changes*

Turning now to the legal system on the other side of the Rhine, it should first be underlined that the development of the German approach to unexpected circumstances had taken a different course in comparison to France, since it is strongly based on *impossibility*[78] and can look back on a long history (at least in the jurisdiction) regarding its own iteration on *hardship*, centered around the "foundations of the transaction" (*Geschäftsgrundlage)*.[79]

Moreover, the German system of civil liability, whether contractual or non-contractual, is based on the fault principle (*Verschuldensprinzip*), meaning that usually at least negligence is required for being held liable, precisely what is not present in *force majeure* constellations.[80]

Because of the abovementioned, it is evident that with regard to unpredictable events, such a rich legal culture regarding *force majeure* does not exist, at least not in statutory law.[81]

This becomes apparent, if one takes a look at the Civil Code in Germany, the *Bürgerliches Gesetzbuch*[82]*,* which was finally completed and adopted in 1896 and came into force on the symbolic date of January 1, 1900, ushering the new century with a new codification.[83]

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[77] Patrick Wéry, Droit des obligations. Volume 1 . Théorie générale du contrat 599 (3rd ed. 2021).

[78] Martin Schmidt-Kessel & Christina Möllnitz, *Particular Corona Contract Law in Germany: Why Does General Contract Law Not Suffice?*, *in* Coronavirus and the Law in Europe 699, 700 (2021).

[79] Klaus Peter Berger & Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study* 6 *McGill J. Disp. Resol.* 78, 115, 117, 120 (2020).

[80] Günter Weick, *Force Majeure - Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europaische Lösung*, Zeitschrift für europäisches Privatrecht 282, 283 (2014); Philip Ridder & Marc-Philippe Weller, *Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law*, European Review of Private Law 371, 373 (2014);

[81] In this respect, it is also said that force majeure "leads a shadowy existence" in German statutory law Weick, *supra* note 80, at 282.

[82] The codification is and was, as the last big reform (*Schuldrechtsmodernisierung)* in 2002 also showed, the main source of private law in Germany. It is composed of five different books: The General part (Sections 1-240), the law of obligations (Sections 241-853), the law of property (Sections 854-1296), the family law (Sections 1297-1921) and, finally, the law of succession (Sections 1922-2386) of which the General part in particular is the most important part as it contains the general provisions of the German doctrine of legal transactions and the concept of contract, whereas for example, the specific types of contract to which the rules of the first book apply can be found further down in the second part. *see* Marin Keršić, *Conceptions of Contract in German and English Law and Their Legal Traditions*, *in* Common Law and Civil Law Today-Convergence and Divergence 363, 366 (Marko Novakovic ed., 2019).

[83] *see* James Gordley, Hao Jiang & Arthur Taylor von Mehren, *Introductory Readings*, *in* An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials 3, 25 (2021).

Here we see that, regarding the occurrence of *force majeure* in statutory provisions, the individual sections that actually refer to *höhere Gewalt*, the German equivalent for *force majeure*, are in most cases peripherical provisions[84] or special laws outside the scope of the German Civil Code dealing with *strict liability*, such as the provisions which can be found in the Road Traffic Act (*Straßenverkehrsgesetz*).[85] In such cases, where fault is not required by law as a prerequisite for liability, exceptions for *force majeure* constellations are necessary, as otherwise one would also be exposed to liability in these situations.[86] At the same time, however, it should be emphasized that the little significance *force majeure* has in German statutory law stands, without doubt, in stark contrast to general commercial transactions, in which force majeure clauses were already common before the Corona pandemic.[87]

3.1 *Impossibility (Section 275)*

If situations occur, that may constitute a case of *force majeure* in other legal systems, the first question that arises under German statutory law is whether this may represent a case of *impossibility* within the contractual relationship, for which the corresponding provision in the German Civil Code is Section 275, composed by four paragraphs.[88]

From the wording of the first paragraph of Section 275 BGB it can be inferred that a claim for performance is excluded to the extent that performance is impossible for the obligor or any other person.[89] Here, a distinction can be made between physical or factual impossibility and legal impossibility. The latter covers, for example situations in which the performance would violate private, criminal or public law restrictions[90], though it is factually possible to perform.[91]

With regard to the period of time, the performance must always be permanently impossible, unless there is a case of only temporary impossibility, where the time of performance is so fundamental, that a late performance would be seen as an equivalent of a permanent impossibility.[92] In cases of temporary impossibility which do not fall under

[84] For example, in a statutory provision on the statute of limitations (section 206 of the German Civil Code), in a staturoy provision on the liability of the innkeeper (section 701 of the German Civil Code) and in a statutory provision in loan law (section 484 of the German Civil Code).

[85] Weick, *supra* note 80, at 284-285.

[86] Ridder & Weller, *supra* note 80 at 371, 373.

[87] Weick, *supra* note 80, at 284-285.

[88] Assuming that no contractual clause has been agreed on for this purpose.
Yvonne Bezer & Philipp Hoffmann*, COVID-19 als Act of God/Force Majeure/Höhere Gwalt? Rechtliche Implikationen der Corona-Krise auf bestehende Verträge, insbesondere Liefer- und VOB/B-Bauverträge*, Neue Juristische Onlinezeitschrift, 609, 611 (2020).

[89] *see* Bach, *supra* note 22 at 207.

[90] Roland Schwarze, Das Recht der Leistungsstörungen 42 (3rd ed. 2021).

[91] Additionally, the impossibility may already exist at the time the contract is concluded, also called initial impossibility (*anfängliche Unmöglichkeit*), but it may also occur later, therefore a case of subsequent impossibility (*nachträgliche Unmöglichkeit)*
Dirk Looschelders, Schuldrecht Allgemeiner Teil 162 (21st ed. 2023)

[92] *see* Bach, *supra* note 22 at 207-208; Looschelders, *supra* note 91 at 173.
The most well-known case is here probably the decision of the Federal Court of Justice (*Bundesgerichtshof*) in which a contract was concluded for the construction of a technical plant in Iran, in which the construction could not be carried out for an unforeseeable period of time due to the political situation that arose after the contract was concluded

this category, the performance is not excluded but might be suspended until it becomes possible again.[93] However, in this context the creditor may be entitled to claim damages for delay in accordance with the Sections 280 and 286 of the German Civil Code, provided that the debtor is legally responsible for the obstacle causing the temporary impossibility.[94] Additionally, there are cases in which the exact moment for performance, for example in the case of a delivery, is of enormous importance. Such a situation, in which the performance owed – by its nature or by the content of the obligation – can only be provided at a specific time, is termed an absolute fixed obligation (*absolute Fixschuld).*[95]

In summary, it can therefore be said that Section 275 (1) BGB is relatively strict in its meaning, with the result that, if performance is still achievable under highly challenging and onerous circumstances, the provision may not apply.[96]

However, in such a case Section 275 (2) BGB may apply, if the specific performance would be so onerous for the debtor, that it might be seen as a case of a so-called "factual impossibility".[97] Due to the fact, that here the performance is still possible but more burdensome, hardship constellations might fall within the scope of Section 275 (2) BGB.[98] Section 275 (2) BGB requires in this respect though a gross disproportion between the effort of the debtor to perform and creditor's interest in performance, taking into account the subject matter of the obligation and the requirement of acting in good faith.[99] From the second sentence it can be inferred that, for determining which efforts reasonably may be required of the debtor, it also is to be taken into account whether they are responsible for the impediment preventing performance. Furthermore, in comparison to Section 275 (1) BGB the legal effect of this provision does not occur *ipso jure* but needs to be invoked as a plea in court[100], as Section 275 (2) BGB represents a so-called right to refuse performance (*Leistungsverweigerungsrecht).*[101]

However, if one considers the intention of the legislator and the reference made to the gross disproportion, it becomes clear that Section 275 (2) BGB is merely an exceptional provision, that does not cover a general, comprehensive approach to deal with hardship constellations.[102] This becomes apparent if we think about situations in which there is a price shift regarding the delivery of goods, where the ratio between the creditor and the

Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 11, 1982, 83 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 197 ff. (Ger.).

[93] Bach, *supra* note 22 at 208.

[94] Schwarze, *supra* note 90 at 57.

[95] Long term-contracts are usually also classified as cases of *absolute fixed obligation*
Looschelders, *supra* note 91 at 173.

[96] In academic discourse, the case of a ring falling to the bottom of the sea before being handed over is often used as an example to illustrate a scenario in which performance would be still possible but only under extremely difficult conditions.
see Looschelders, *supra* note 91 at 39.

[97] Bach, *supra* note 22 at 212; Ridder & Weller, *supra* note 80 at 371, 374.

[98] Bach, *supra* note 22 at 212; Ridder & Weller, *supra* note 80 at 371, 375.

[99] Looschelders, *supra* note 91 at 174.

[100] Ridder & Weller, *supra* note 80 at 371, 375.

[101] Here, this would cover indeed cover the abovementioned case of the ring falling to the bottom of the sea before being handed over, since the effort required is disproportionate to the interest of the creditor, which does not change.
Looschelders, *supra* note 91 at 174.

[102] Looschelders, *supra* note 91 at 174-175.

debtor's interests is taken into account and not just the value ratio, which leads to the result that the interest of a creditor often increases to the corresponding degree in the case of supply contracts where the market price of products rises.[103] Nevertheless, an adjustment of the respective obligations of both parties under Section 313 can be considered here, which we will address further on.

The third paragraph of Section 275 BGB describes the rather rare case of so-called personal unreasonableness (*persönliche Unzumutbarkeit*), in which the debtor may refuse performance if he is to render the performance in person – and having weighed the impediment preventing performance by them against the creditor's interest in performance – performance cannot reasonably be required of the debtor.[104]

The last paragraph of the provision concerning impossibility, Section 275 (4) BGB refers to other sections concerning the rights of the creditor and states that the exclusion of the obligation to perform does not indicate whether the impossibility also excludes the possibility of a claim for compensation and that the release from the obligation to perform may result in the rescission of the contract.[105]

Concerning the mirror-inverted obligation of the creditor to remunerate for the cases that fall under a provision of Section 275 BGB, one can find the general legal consequence in Section 326 (1) BGB, which is also referred to in Section 275 (4) BGB and states that the creditor is exempt from his obligation to pay.[106] Furthermore, this legal consequence also occurs *ipso jure*, which can be inferred from the wording, unless there is a case of Section 275 (2) or (3) BGB, since the right to refuse performance must be invoked, as described before.[107] Among the following paragraphs within Section 326 BGB one needs to consider especially Section 326 (2) BGB, according to which the obligation to remunerate remains to exist, when the creditor is solely or predominantly responsible, or if this circumstance for which the debtor is not responsible occurs at a time when the creditor is in delay of acceptance. In this case the debtor shall retain the right to claim for remuneration.

In sum, coming back to Section 275 BGB, it can be noticed that, to a certain extent, a large gap is created for the scenarios in which the performance of the obligation of a party is still possible, but only under aggravating or more onerous conditions, which cannot be overcome by the previously presented system of provisions, also not Section 275 (2) and Section 275 (3).

[103] Constantin Willems, *Das Allgemeine Vertragsrecht in den Zeiten der Corona-Pandemie,* Zeitschrift Für Das Juristische Studium 183, 186 (2020).
[104] Wolfgang Ernst, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 275 paras 121-122 (9th ed. 2022).
[105] Wolfgang Ernst, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 275 para. 6 (9th ed. 2022).
[106] This is also plausible, as it is logical that no payment has to be made without the benefit being received, unless there are special circumstances.
[107] Schwarze, *supra* note 90 at 192-194.

3.2 *Hardship (Section 313)*

Whereas we had already observed that German statutory law does not properly classify *force majeure*, we now see that the German law system can look back on a long history regarding its own iteration on hardship[108], called *Störung der Geschäftsgrundlage*[109], which has its origin in German case law and developed in this area over decades, now more than a century. The corresponding provision in the German Civil Code is Section 313, which was introduced with the Reform of the law of obligation in 2002 (*Schuldrechtsmodernisierung*).[110]

At the same time, however, it should be emphasized that during the drafting process of the German Civil Code, which took more than twenty years and involved three different commissions[111], there was criticism of a possible insertion of the *clausula rebus sic stantibus* principle, so that the first version (when the German Civil Code came into force) did not include a section corresponding to such a provision[112], also because it was feared that the incorporation would generate a certain degree of legal uncertainty, which is why they did not want to open the floodgates to this.[113]

The turning point in this respect was to come a full twenty years after the German Civil Code came into force, when the hyperinflation caused prices to rise dramatically over a period of two years, affecting all private contracts. This prompted the former Supreme Court of Germany, the *Reichsgericht*, after first trying to respond to this with the impossibility, to develop and establish the *Störung der Geschäftsgrundlage*, applying the principle of good faith in accordance with Section 242 of the German Civil Code[114], after several decisions in the two years prior to this had already indicated a change of direction here.[115] If one examines the decision of the court precisely, one also finds the reference made to *Oertmann*[116], who was the originator of the concept of the *Störung der Geschäftsgrundlage.*[117] However, who was not mentioned in the decision, was *Windscheid*, who was already a member of the first commission drafting the German Civil Code[118], who was

[108] For the sake of simplicity and for the purpose of a comparative legal analysis, this article uses the term hardship, which originates from common law. The German *Störung der Geschäftsgrundlage* is referred to as a variant, iteration or approach to it.

[109] With regard to the terminology, the *Störung der Geschäftsgrundlage,* which we can find in Section 313, is referred to in English as both *Disturbance of Foundation of Contract*, or *Disappearance of the contractual basis*, although there is no difference in terms of content. Apparently no consensus has yet been reached here, as the term of *collapse of the underlying basis of transaction* is also used. *see* Rössler, *supra* note 21 at 483, 488.

[110] 26.11.2001 BGBI. I p. 3138, 3150.

[111] Gordley, Hao Jiang, and Taylor von Mehren, *supra* note 83 at 24-25; Tobias Lutzi, *Introducing Imprévision into French Contract Law – A Paradigm Shift in Comparative Perspective*, *in* The French Contract Law Reform: a Source of Inspiration? 89, 100 (Sophie Stijns & Sanne Jansen eds., 2017)

[112] Berger & Behn, *supra* note 79 at. 120-122.

[113] Lutzi, *supra* note 110 at 100.

[114] Reichsgericht [RG] [Supreme Court of the German Empire] Feb. 3, 1922, 103 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 328, 328-333 (Ger.).

[115] Lutzi, *supra* note 111 at 100.

[116] Reichsgericht [RG] [Supreme Court of the German Empire] Feb. 3, 1922, 103 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 328, 332 (Ger.).

[117] Schwarze, *supra* note 90 at 89.

[118] Gordley, Hao Jiang, and Taylor von Mehren, *supra* note 83 at 24, 25.

unable to push through his idea of introducing his own approach to *clausula rebus sic stantibus*[119], but nevertheless had an impact on the arising of the *Störung der Geschäftsgrundlage.*
Today, Section 313 BGB consists of three paragraphs, of which the most crucial is the first one, which describes the facts or the conditions that must prevail for the provision to apply.[120] In this regard we can distinguish between three elements, which have emerged from case law. Firstly, the factual element (I.), i.e. the change of circumstances that became the basis of a contract (*Geschäftsgrundlage)* since the contract was concluded. Secondly, the hypothetical element (II.) i.e. the examination of the hypothetical will of the parties as to whether the parties would have concluded the contract or would have Concluded it differently if they had foreseen it. And thirdly, the normative element (III) for risk allocation and reasonableness according to which the change must be so severe, that one of the parties cannot reasonably be expected to maintain the contract without adaptation.[121]
Regarding the term basis of the contract (*Geschäftsgrundlage)*, which is not defined in Section 313 BGB, courts interpret it as the common ideas of both contracting parties, which were not incorporated into the contract but which came to light when the contract was concluded, or to put it in a different way, the ideas of one of the contracting parties, which are recognizable to the other party and not objected to by him, regarding the existence, future occurrence or continuation of certain circumstances on which the parties' business intentions are based.[122] Accordingly, the basis of the contract can only be what the parties have not expressly or impliedly agreed as the content[123].
Section 313 (1) further requires that the circumstances that have become the basis of the contract have changed seriously after the conclusion of the contract. In this respect the change must, on the one hand, be of some significance and, on the other hand, not only exist by itself but also have a concrete effect on the contractual relationship[124], causing, for example, an equivalence or rendering the object of performance unusable.[125] Regarding the normative element, when determining unreasonableness, the contractual and statutory

[119] Lutzi, *supra* note 111 at 100.
[120] The second paragraph extends the scope of application to situations in which a change in circumstances is deemed to have occurred if fundamental ideas that formed the basis of the contract turn out to be incorrect.
[121] Thomas Finkenauer, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 313 para. 56 (9th ed. 2022)
[122] In addition to this subjective formula, which has been shaped by case law, there is also the objective formula, according to which all circumstances whose existence or continuation is necessary for the contract to still exist as a meaningful provision in accordance with the intentions of both contracting parties are to be understood as such.
Astrid Stadler, *in* Jauernig, Kommentar Zum BGB, § 313 para. 3-4 (19th ed. 2023).
[123] Looschelders, *supra* note 91 at 296.
[124] Regarding the effect of the disturbance of the basis of the contract, a distinction is made between the so-called large contractual basis (*große Geschäftsgrundlage*), which includes fundamental changes in political, economic or social circumstances such as revolutions, inflation and natural distasters and the small contractual basis (*kleine Geschäftsgrundlage*) which is usually based on changes that are only relevant for the respective contract.
Astrid Stadler, *in* Jauernig, Kommentar Zum BGB, § 313 para. 5 (19th ed. 2023);
[125] Looschelders, *supra* note 91 at 296.

distribution of risk is of particular importance and the interests of both parties in the individual case need to be weighed up.[126]
With regard to the legal consequences of Section 313 BGB, a distinction is made between two alternatives: an adjustment of the contract according to Section 313 (1) BGB can be demanded and, if not possible or not reasonably acceptable, rescission or termination in the case of long-term obligations.[127]

4. *Application during the coronavirus pandemic*

4.1 *General measures in civil law to mitigate the consequences of the pandemic*

The first law to mitigate the consequences of the COVID-19 pandemic was passed on March 25, 2020 in the German Bundestag and on March 27, 2020 in the Bundesrat.[128] This law, that introduced the new article 240 of the Introductory Act to the Civil Code (EGBGB) [129], which consisted, initially, of four temporal paragraphs concerning contractual relationships with regard to long-term contracts, which were limited in time and of which the first and most important Section was labeled as "moratorium".
The so-called moratorium (Art. 240 Sec. 1 para. 1) gave consumers and small entrepreneurs a right to refuse performance in the case of "essential long-term contracts"[130] (*wesentliche Dauerschuldsverhältnisse*) provided that the contract was concluded before March 8, 2020 and that the circumstances of the incapacity to perform were based on the consequences of the pandemic and the provisions of the service would endanger their livelihood or, in the case of the small entrepreneurs, that the enterprise is unable to provide the service or that the enterprise would not be able to provide the service without jeopardizing the economic basis of its business.
An exception to both rules was also inserted (Art. 240 Sec. 1 para. 3) which applied if the performance of the right to refuse was unacceptable for the other contracting party. In such constellations, at least the possibility of termination for the debtor remained.
Rental and lease contracts were deliberately excluded from the basic rule (Art. 240 Sec. 1 para. 4) of the first paragraph, as a separate rule had been established in the second section, according to which a tenant could not be terminated if they were unable to pay between April 1 and June 30, 2020 due to the pandemic. The third paragraph contained provisions

[126] Looschelders, *supra* note 91 at 300.
[127] Looschelders, *supra* note 91 at 295.
[128] Jonas Rehn, *Maßnahmen wider (der heiligen) Corona: Änderungen im Zivilrecht durch Art. 5 des Gesetzes zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht (COVFAG),* 30 *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 277, 277 (2020); Publication of the Bundestag on the Internet, https://www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-recht-688962.
[129] The Introductory Act to the Civil Code regulates, among other things, private international law and the scope of individual statutory provision contained in the German Civil Code in terms of time and territory
Franz Jürgen Säcker, *in* Münchner Kommentar zum Bürgerlichen Gesetzbuch, Vorbemerkung (Vor Art. 1 EGBGB) paras 1-2 (9th ed. 2024).
[130] The definition for "essential long-term contracts" (*wesentliche Dauerschuldverhältnisse)* can also be found in the moratorium (Art. 240 Sec. 1 para. 1 & 2) and was a modified for the respective addressees. In this respect "essential long-term contracts" for consumers were those that were required to cover common basic services whereas for small entrepreneurs those that are required to cover services for the appropriate continuation of business operations.

on loan law, which we will not go into here, and the fourth contained the possibility for the federal government to extend the measures.
In summary, the initial aim was to intercept the provisions of the German Civil Code (BGB) in particular, which give right to terminate long-term contracts in accordance with Sections 314 and 323 BGB, creating "a bridge" for contracts before the pandemic, with the aim of preserving as many contracts as possible in accordance with the principle of "pacta sunt servanda" while at the same time protecting consumers. Nevertheless, it should be emphasized that, at this point, the regulations did not contain any provisions regarding a possible adjustment of the contract, nor did they refer to Section 313 BGB, for example.

4.2. *The Introduction of Art. 240 Section 7 EGBGB*

An interesting question that the first amendment to Art. 240 EGBGB had left out was the fact that, although the created Section 2 provided protection against termination for a certain period of time, there was no possibility to adjust the contract, although most of the commercial premises could no longer be used to their full extent, if not at all, in accordance with their purpose due to the various coronavirus regulations.[131]
These issues were finally addressed at the very end of 2020 through an insertion of Section 7[132], which applied to commercial leases and came into force on December 31, 2020.[133]
The newly introduced Section 7 consisted of two paragraphs and referred to Section 313 BGB. The first paragraph states that if rented land or rented premises that are not residential premises can´t be used for the tenants business or can only be used with significant restrictions as a result of government measures to combat the COVID-19 pandemic, it is assumed that a circumstance within the meaning of Section 313 (1) of the German Civil Code, which has become the basis of the contract (*Geschäftsgrundlage*), has changed significantly after the contract.
First of all, it can be seen from the Section that only commercial rent is covered, which makes sense in view of the above-mentioned relationship to the income of a business. Furthermore, it can be inferred from the provision that the introduction of Art. 240 Sec. 7 EGBGB was not intended to change the regulatory content of Section 313 BGB itself. Rather, the provision only affects existing doubts regarding the existence of the conditions. Accordingly, Art. 240 Sec. 7 EGBGB merely established the statutory presumption that a serious change in a circumstance that has become the basis of the rental agreement has occurred in the event of a business restriction caused by government measures.[134] It is therefore evident that the real problem with the application of Section

[131] In other words, they were effectively unable to use the rented units in order to finance their business.
[132] After three further amendments had been made within Art. 240 EGBGB in the meantime, establishing Section 5 & 6 which, however, concerned vouchers for leisure events and the package travel law. 15.05.2020 BGBI. I p. 948; 10.07.2020 BGBI p. 1643.; 06.08.2020 BGBI. I p. 1870.
[133] 22.12.2020 BGBI. I p. 3328.
[134] However, this rebuttable presumption does not apply to all elements of Section 313 BGB. In this regard, returning to the previously presented requirements of Section 313 BGB, only the factual or real element (I.) of Section 313 (1) BGB should by covered by this rebuttable presumption. Consequently, the party invoking Section 313 BGB must also provide evidence of the normative (II.) and hypothetical

313 BGB to commercial leases during the pandemic lay in the third and final element, unreasonableness (III.).
In this respect, it must have been unreasonable for one party to uphold the contract without alteration according to Section 313 (1) BGB.
This point had already been discussed in detail in legal journals and articles before the first court ruling, and the question arose as to whether this element could be categorized at all or whether a guideline for assessment could be created.
Thus, the unreasonableness of closure orders and other restrictions on operations is based on the legal and contractual distribution of risk, foreseeability, the nature of the business and possible personal responsibility. It was therefore more than questionable whether f.e. so-called case groups could be formed for this purpose. It was already clear before the introduction of Art. 240 Sec. 7 EGBGB that this problem would arise in the application of Section § 313 (1) BGB, as many voices in the literature initially spoke out in favor of applying the German provision for hardship, as a worldwide pandemic with subsequent operating restrictions and changes in economic transactions is similar to, for example, the Spanish flu, the world wars and hyperinflation, which already has been mentioned before.

4.3 *Judgement no. XII ZR 8/21 of the German Federal Court of Justice*

It was now a question of how the German courts would deal with these new provisions added to the EGBGB. In the first decisions of the German Higher Regional Courts concerning commercial premises rents, the applicability of Section 313 (1) BGB was initially affirmed, but with different justifications regarding unreasonableness and the approach to contract adjustment.
In addition to this, most of the German courts refused the approach of dealing with governmental restrictions to premises as defect in the rental object (*Mietmängel*), which would leave the door open for rent reduction under German law. In fact this solution was widely discussed before in the academic world and seen as a convenient way to deal with these issues within rental law.[135]
A good example of the different handling of this issue is the decision of the Dresden Higher Regional Court (*Oberlandesgericht Dresden*), in which the court of second instance, after the court of first instance had taken the view that the commercial rent had to be paid in full despite the restriction and losses, took the view that the risk of the pandemic, since it could not be allocated to the parties in principle, had to be borne equally by then and accordingly an adjustment to 50% of the rent had to made for the period, even leaving open the question of the extent to which state aid payments must be included in the review and calculation.[136]

element (III.) At the same time, it can generally be assumed that the parties could not have assumed pandemic-related restrictions and closures and would not have concluded the contract in this way or under different conditions if they had been aware of this. In this sense, it can be assumed with the introduction of Art. 240 Sec. 7 EGBGB that the hypothetical element should not raise major concerns Christian Schmitt, *Mietreduktion wegen coronabedingter Geschäftsschließung – Anmerkungen aus Sicht eines Insolvenzpraktikers*, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 159, 160-162 (2022).

[135] This approach is f.e. discussed in: Silvio Sittner, *Mietrechtspraxis unter Covid-19 Neue Juristische Wochenschrift*. 1169-1174 (2020).

[136] OLG Dresden, 24 Feb. 2021, 5 U 1782/20, *Neue Justiz (NJ)* 2021, 170 et seq.

This case was later brought to the Federal Court of Justice (*Bundesgerichtshof*), which gave its ruling on the matter.[137] The highest court of ordinary jurisdiction in Germany initially agreed with the prevailing opinion that the corona-related closures did not constitute a rental defect (*Mietmangel)* within the meaning of German rental law. Furthermore, the issue of whether this might constitute a case of impossibility according to German law, was addressed. The Federal Court of Justice rejected this blanket solution, which would lead to an exemption from the obligation to pay[138] and stated in a relatively succinct manner that the duty to grant the use of the rented object and maintain it in these conditions as contractually agreed, was not made impossible by the fact that the rented property could not be used due to government restrictions, as the creditor was able to provide its contractually obligated performance since the further use of the rented object is subject to the risk of the debtor. [139].

Concerning the most important question, the scope of Section 313 BGB, it was stated that the lower court correctly affirmed its application but did not take certain points into account. The court stated that the various restrictions during the pandemic concerned a so-called "large contractual basis" (*große Störung der Geschäftsgrundlage*) and referred to the newly created Art. 240 Sec. 7 EGBGB, which has retroactive effect. After brief explanations regarding the assumption of risks[140], the judgement explains that the mere existence of the real element within Section 313 BGB does not itself trigger a claim for adjustment, which is nothing new in this respect. The criterion frequently described in this article and referred to as the hypothetical element of the review of Section 313 BGB is affirmed relatively quickly by the court.[141]

Regarding the unreasonableness the explanations differ in particular from those of the previous court. First, the court states that, in principle, the turnover of a commercial property falls within the scope of risk of the commercial operator or tenant. However, if the loss of profit is due to government measures, this goes beyond the actual usage risk (*Verwendungsrisiko*). This falls into the category of ordinary risks of life (*Allgemeines Lebensrisiko*), which cannot be attributed to any individual contracting party. With regard to unreasonableness, however, the individual case must be taken into account, so that a generic solution, such as dividing the risk equally, is ruled out.[142] Furthermore, it is important for the assessment, what disadvantages the tenant has suffered as a result of the closure of the business and its duration and to what extent this could have been mitigated.

[137] BGH, 12.01.2022 – XII ZR 8/21, NZM 2022, 99-107.
[138] According the interplay between Section 275 and Section 326 German Civil Code which was described beforehand.
[139] BGH, 12.01.2022 – XII ZR 8/21, NZM 2022, 103.
At this point, the distinction between cases of impossibility and those concerning the interference with the basic of the transaction (*Geschäftsgrundlage)* becomes very clear. Essentially the latter one does not concern conditions that are contractually owed.
[140] in German law this is often referred to as usage risk in rent law (*Verwendungsrisiko*)
[141] In this respect, it can be assumed that the parties would have concluded the rental agreement with a different content if they had foreseen and considered the possibilities of a pandemic and the associated risk of a government ordered business closure when concluding the agreement in 2013.
[142] And at this point the Federal Court of Justice decides against the view of the court of the former instance, who opted for dividing the risk and therefore the adjustment equally between the parties.

In addition, an adjustment should not result in overcompensation, so that the financial benefits, such as state aid and insurance payments, but not, for example state loans, must also be taken into account in the assessment.
Overall, this judgement can be seen as a guideline for the handling of Section 313 BGB in rental law, as it was the first major decision of the Federal Court of Justice in this regard. This jurisdiction was confirmed in the following judgements of the twelfth senate, which is to have the competence for commercial rents, in which the court applied Section 313 BGB in similar situations and was able to specify the exact requirements more precisely.[143]
In a recent judgement the ruling of a Regional Court was rejected, which had taken the view that the payment obligation in a charter contract for a yacht could be waived due to impossibility, as it could not be used during the pandemic because of restrictions on accommodation and overnight stays. This court had also not relied on Section 313 BGB, so the case was referred back to the Regional court by the Federal Court of Justice for a new decision.[144]

CONCLUSION

The question of significance and usefulness of Comparative Law was exposed to much criticism in the early years. In this respect it was brought out that there is no clear aim when comparing legal solutions in order to archive mere knowledge.[145] With regard to the added value of such a comparative law study, it can be said that – by reviewing the presumably most influential civil law codifications and legal systems – the outcome may serve, on the one hand, to a better understanding of the legal systems in the case of unification projects and, on the other hand, to a better understanding of the origins of the concepts.
Regarding hardship, the introduction of *théorie d´imprévision*, through article 1195 of the Civil Code, demanded a long and complex process in the French legal system, bringing it in line with European and International frameworks.[146] It promotes alternative means of dispute resolution, but consenting, if necessary, judicial review of the terms of private contracts rendered unbalanced due unexpected events that affect performance.
Still, *théorie d´imprévision* differs from *Geschäftsgrundlage*, since the latter focuses on the performance being rendered excessively onerous whereas the German approach is broader and goes further and requires in this respect that the basis of the contract has undergone a serious change since the contract was concluded.[147]

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[143] *see* here for example: BGH, 16.02.2023 – XII ZR 17/21, NZM 2022, 292-295; BGH, 13.07.2023 – XII ZR 75/12, NJW-RR 2022, 1307.
[144] BGH, 11.10.2023 – XII ZR 87/22, MDR 2024, 20-22.
[145] *see* for the general discussion of the justification and the purposiveness of Comparative Law Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instllment I of II)*, 39 The American Journal of Comparative Law 1-34 (1991).
[146] *see* Cosson Bénédicte Fauvarque, *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?*, 1 Revija Kopaoničke škole prirodnog prava 11, 12 (2019):
"In the French reform, there was neither slavish copying, nor the 'myth of the foreign legislator',4 nor acculturation or intrusion of European law. Article 1195 is one of the most striking illustrations of the phenomena of hybridization across legal families and is also a testimony to legal pluralism within Europe. It draws its inspiration from the European and international environment, whilst differentiating itself from them in several respects."
[147] Berger & Behn, *supra* note 79 at 117-120.

As far as impossibility is concerned, we will inevitably have to accept that there will be no alignment between the two systems in the near future: *force majeure* in French Civil Code has been moved to a different position, from art. 1148 to 1218, and its three requirements – once forged by case law – are now present. Unforeseenability is qualified by reasonability, characterizing a relative, subjective view. From the German side, no changes are be expected here either to *höhere Gewalt*, at most with regard to the use as a contractual clause, especially now more frequently due to the recent pandemic, as it would not be possible to amend or insert an exception for the cases of *force majeure* without a complete overhaul of German contract law and the provision regarding the impossibility. However, this reform would not be neither necessary nor advisable, as the current system has managed well without such a provision.

We could see that both France and Germany resorted to the enactment of emergency legislation: in France, restricted to specific contracts of tourism, bills and rental of professional and commercial establishments, whilst in Germany the introduction of Article 240 EGBGB and its moratorium, as the culmination of this development in Germany, allowed generous exceptions for long term obligations of consumers, which usually could have been ended by termination, in order to preserve a large number of contracts.

Such a strong response to the situation (created by the pandemic itself but also due to restrictions issued by the same governments) was necessary, as the existing and established provisions for contractual relationships would have led to problems of interpretation and application by the courts, causing protracted legal disputes and less legal certainty. Nevertheless, the European Court of Justice (ECJ) more recently ruled against the French emergency legislation adopted during the pandemic[148], holding that it was contrary to EU Law – what shows that many contracts, also in other EU countries, can be re-examined, thus partially hinding the envisaged aim of avoiding long-lasting legal disputes and legal uncertainty.

COVID-19 was a great challenge to human society, an example of social crisis on a global scale, bringing about millions of deaths around the world in the course of few months. Health systems were unable to properly deal with the hundreds of millions of cases. Nor did EU legal systems, for which the coronavirus was a "stress test".[149] When it comes particularly to France and Germany, despite the differences between the legal concepts, the statutory mechanisms of impossibility and hardship could not deal with the dimensions of the crisis, at least without the "bridge" brought by emergency legislation – initiative that is now under check. This weakness is quite alarming, since massive social crisis can occur: new pandemics are likely in the near future, according to many epidemiologists' conjectures.

[148] France: C-407/21. Also Slovakia: C-540/21.

[149] Christian Twigg-Flesner, *The Covid-19 Pandemic – a Stress Test for Contract Law?*, 9 Journal of European Consumer and Market Law 89-92 (2020).

CONTRACTUAL MISTAKE, SMART CONTRACT AND ARTIFICIAL INTELLIGENCE FROM A COMPARATIVE PERSPECTIVE*

Jacopo Fortuna **

TABLE OF CONTENTS:

I. INTRODUCTION

In a digitalised world, in which more and more human activities tend to be carried out through technological tools, issues related to the effects produced by digital systems take on increasing relevance. For the jurist, the correction or management of the consequences of a malfunction or, in any case, of unintended effects produced by a computer system used in the performance of activities with legal relevance poses new challenges and raises many points for reflection. Indeed, if we talk about the relationship between new technologies and mistake, the latter can occur not only within the computer system itself but also in man, since human beings can easily make mistakes in interpreting and predicting the behaviour and effects resulting from the activity of a machine.Digital contracting is certainly one of the most interesting areas in which the problem of mistake should be analysed and smart contracts, due to their characteristics and their peculiar self-execution, present problems of no small importance. Indeed, effects automatically produced by these softwares, which tend to be unchangeable, could be the result of the system's error[1] or could in any case be far from the will of the parties.

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[1] On the topic of computer errors and computer errors in smart contracts: T. Huckle, T. Neckel, *Bits and Bugs: A Scientific and Historical Review of Software Failures in Computational Science*, Filadelfia (Pennsylvania), 2019; Y. Wang, X. Chen, Y. Huang, H. Zhu, J. Bian, Z. Zheng, *An empirical study on real bug fixes from solidity smart contract projects*, in The Journal of Systems & Software, 2023, (*https://www.sciencedirect.com/science/article/pii/S0164121223001826*); H. Liu, Y. Fan, L. Feng, Z. Wei, *Vulnerable smart contract function locating based on Multi-Relational Nested Graph Convolutional Network*, in The Journal of Systems & Software, 2023 (*https://www.sciencedirect.com/science/article/pii/S016412122300170X?via%3Dihub*); A. Gupta, R. Gupta, D.

Moreover, in contracts concluded by smart contracts, the most statistically plausible vice is precisely the mistake, so an analysis of the relationship between this type of vice and the self-executing software result even more relevant[2].Furthermore, when the smart contract is implemented through artificial intelligence these problems become more complex, since the autonomy that characterises AI systems not only makes it more difficult for contracting parties to interpret and predict what will be the effects produced by the system, but also makes it considerably more complex to understand if there have been and what kind of computer errors have marred the proper functioning of the AI.These issues will be dealt with in this paper through a comparison between the Italian system and the English system. Indeed, is important to observe the approach of these two states to the smart contract phenomenon given the effort made by them in recent years, in different ways, in analysing the relationship between smart contracts and law. If Italy has adopted a pioneering stance on the matter by giving a legislative definition to these digital phenomena[3], England has tackled an in-depth and multi-year study at an institutional level, offering interesting insights that help understand the issues and possible solutions[4].

Jadav, S. Tanwar, N. Kumar, M. Shabaz, *Proxy smart contracts for zero trust architecture implementation in Decentralised Oracle Networks based applications in Computer Communications*, 2023, (*https://www.sciencedirect.com/science/article/pii/S0140366423001470?via%3Dihub*).

[2] Cf., I. Martone, *Gli smart contracts. Fenomenologia e funzioni*, Napoli, 2022, p. 153 and p. 154: "Tra le forme di invalidità enucleate dal codice, limitando l'osservazione alla sfera della volizione, non sembra revocabile in dubbio che il vizio statisticamente più plausibile nell'alveo della contrattazione algoritmica sia l'errore". In the same sense, see M. Giaccaglia, *Il contratto del futuro? Brevi riflessioni sullo smart contract e sulla perdurante vitalità delle categorie giuridiche attuali e delle norme vigenti del Codice civile italiano*, in Tecnologia e Diritto, 1/2021, pp. 161-162. S. A. Cerrato*, Appunti su Smart Contract e diritto dei contratti*, in Banca Borsa e Titoli di credito, 3/2020, pp. 392-393.

[3] Decreto-Legge no. 135 of 14/12/2018, converted by law no. 12 del 11/02/2019, art 8-ter, comma 1: «si definiscono "tecnologie basate su registri distribuiti" le tecnologie e i protocolli informatici che usano un registro condiviso, distribuito, replica bile, accessibile simultaneamente, architetturalmente decentralizzato su basi crittografiche, tali da consentire la registrazione, la convalida, l'aggiornamento e l'archiviazione di dati sia in chiaro che ulteriormente protetti da crittografia verificabili da ciascun partecipante, non alterabili e non modificabili» e comma 2: «Si definisce "smart contract" un programma per elaboratore che opera su tecnologie basate su registri distribuiti e la cui esecuzione vincola automaticamente due o più parti sulla base di effetti predefiniti dalle stesse. Gli smart contract soddisfano il requisito della forma scritta previa identificazione informatica delle parti interessate, attraverso un processo avente i requisiti fissati dall'Agenzia per l'Italia digitale con linee guida da adottare entro novanta giorni dalla data di entrata in vigore della legge di conversione del presente decreto».

[4] UK Government Chief Scientific Adviser, Government Office for Science, Distributed Ledger Technology: beyond block chain, 2016, *gov.uk*.; UK Jurisdiction Taskforce Legal Statement on cryptoassets and smart contracts, November 2019, (*https://www.blockchain4europe.eu/wp-content/uploads/2021/05/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf*); Law Commission, Smart contracts - Call for evidence, December 2020; Law Commission, Smart legal contracts - Advice to Government, November 2021. About Law Commission, see *https://www.lawcom.gov.uk/:* "The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. The aim of the Commission is to ensure that the law is: fair, modern, simple, cost effective".

From the outset, it should be pointed out that the characteristics of smart contracts seem to show compatibility, on a theoretical level, with the general principles and provisions of contract law of the legal systems under comparison[5]. Consequently, there seems to be the possibility of applying the already existing rules to blockchain-based software. Therefore, the legal traditions examined seem to already have in themselves the appropriate tools to absorb the novelties proposed by smart contracts.

Similar conclusions were reached by the Law Commission following extensive studies involving some of the UK's leading academics[6].On the basis of the previus considerations, the aforementioned and general compatibility of the discipline of contracts with the smart contract leads to deduce that the discipline of the *errore contrattuale* in Italy and the doctrine of mistake in England are also applicable to blockchain-based computer software, despite the peculiarities of the smart contract[7].

Indeed, even in the age of digital contracting, the will continues to represent the indispensable factor in legal relations[8], and it is therefore necessary for the process of its formation to be free from vices. This is true in the digital context, but tends to decline in a very peculiar manner in smart contracts, since the latter are characterised by self-executability and greater autonomy in determining the content of the contract, especially when the protocol is implemented through artificial intelligence.

After having briefly analysed the essential features of the smart contract and AI and after having recalled the discipline of contractual mistake in Italy and in England, the aim of this paper will be to observe the interaction between the same discipline and some peculiar situations that may occur in the use of the new digital tools, questioning whether or not the contractual mistake can also be applied to the algorithmic errors that occur in smart contracts implemented through AI systems, as well as questioning the possible configurability of civil liability of third parties or nodes that essentially control the blockchain platform in which the smart contract is executed if, however, it is built on permissioned blockchain (about this type of blockchain, see the following paragraph).

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[5] On this point, allow me to refer to J. Fortuna, *Smart contract, abuso del diritto e tutela giurisdizionale: spunti di comparazione tra diritto italiano e diritto inglese,* in Rivista di Diritti Comparati, n.3, 2022, pp. 914 ff. and *Id., Smart contract e formazione del contratto: un'analisi comparatistica della nascita del vincolo giuridico*, in *Comparazione e diritto civile*, vol. II, 2021, p. 595 ff.

[6] Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit. *https://www.lawcom.gov.uk/project/smart-contracts/:* "We published our advice to Government on 25 November 2021, concluding that the current legal framework in England and Wales is clearly able to facilitate and support the use of smart legal contracts". See par. 3.140: "As we have discussed in this chapter, it is clear that smart contracts used in particular ways can satisfy the requirements for the formation of a legally binding contract under the law of England and Wales. We do not think that anything further is required in law to confirm this and, as discussed briefly below, we do not think that any confirmatory legislative statement to such effect would be helpful"; par. 3.143 - 3144: "we think that, at least at the moment, legislating in this way may cause more harm than good. In particular, any legislative definition of "smart contract" (or "smart legal contract", in our terminology) may be relatively quickly rendered obsolete by technological developments.

II. A BRIEF OUTLINE OF SMART CONTRACTS

Smart contracts are software characterised by the self-execution of its terms without the need for human intervention[9] and, in general, without the possibility of interrupting such execution or modifying its content[10]. They can be written within a blockchain, i.e. a computer network of nodes capable of managing and updating a register containing data and information with security and unambiguity. Once entered, the data and operations recorded are no longer subject to changes or alterations, thus ensuring a degree of reliability such that it is conceivable to do without banks, financial institutions, notaries, or other intermediaries[11].

Alternatively, any legislative definition may have the opposite effect, and fail to allow scope for technological developments which would not benefit from the confirmatory provision"; par. 3.146 "Given our conclusion that smart legal contracts can satisfy the requirements for a contract, a legislative statement that smart contracts are capable of being legally enforced (or to confirm that a contract is not unenforceable merely because it is a smart legal contract) seems unnecessary. In the absence of a real need for legislation, we do not think it would be justified". See, also, *https://www.lawcom.gov.uk/the-law-of-england-and-wales-can-accommodate-smart-legal-contracts-concludes-law commission/*:"The Law Commission has today confirmed that the existing law of England and Wales is able to accommodate and apply to smart legal contracts, without the need for statutory law reform. The Law Commission notes that, in some contexts, an incremental development of the common law is all that is required to facilitate the use of smart legal contracts within the existing legal framework. The Law Commission's analysis demonstrates the flexibility of the common law to accommodate technological developments, particularly in the context of smart legal contracts. It confirms that the jurisdiction of England and Wales provides an ideal platform for business and innovation".

[7] Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit., par. 5.44: "We agree with these observations; in the smart legal contract context, there are increased opportunities for parties to be mistaken about something fundamental or material to the performance of the contract. We do not, however, think this necessitates expanding the scope of the doctrine of common mistake. In our view, the same principles of common mistake should continue to apply to smart legal contracts as they do traditional contracts. As Allen & Overy said, "in terms of determining whether a common mistake was made when entering into a smart contract the existing law suffices"".

[8] Cf. F. Bravo, *Contratto cibernetico*, in *Dir. informatica*, fasc. 2, 2011, p. 169. ff.; M. Giaccaglia, *Considerazioni su Blockchain e smart contract (oltre le criptovalute),* in *Contratto e Impresa*, 2019, p. 957, in note (68); L. Parola, P. Merati, G. Gavotti, *Blockchain e smart contract: questioni giuridiche aperte*, in i Contratti, 2018, pp. 685-686; Law Commission, *Smart contracts - Call for evidence*, Decembre 2020, op. cit., par. 3.15, 3.16, 3.17, 3.18, 3.19; Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit., par. 3.26-3.29.

[9] A.M. Benedetti, *Contratto, algoritmi e diritto civile transnazionale: cinque questioni e due scenari*, in *Riv. dir. civ.*, 2021, p. 414.

[10] Cf. A. Stazi, *Automazione contrattuale e "contratti intelligenti". Gli smart contracts nel diritto comprato*, Torino, 2019, p. 105 and see A. M. Gambino – A. Stazi, *Contract Automation from Telematic Agreements to Smart Contracts*, in *The Italian Law Journal*, 2021, p. 107 ff.; G. Remotti, *Blockchain smart contract. Un primo inquadramento*, in *Oss. dir. civ. e comm.*, 2020, p. 189 ff. To exemplify the embryonic concept of the smart contract, even if not based on blockchain, think of the functioning of the vending machine, which mechanically realises the delivery of the object upon introduction of the necessary amount of coins. The topic was studied and explored by Antonio Cicu: A. Cicu, *Gli automi nel diritto privato*, in *Il Filangieri*, 1901, p. 561 ff.

[11] Cf. C.L. Reyes, *Moving beyond Bitcoin to an Endogenous Theory of Decentralized Ledger Technology Regulation: An Initial Proposal*, in *Vill. L. Rev.*, 61, 2016, p. 191 ff.; A. Alpini, *L'impatto delle nuove tecnologie sul diritto*, 2018, in *comparazionedirittocivile.it*; M. Bellini, *Che cosa sono e come funzionano le Block-chain*, in *Distributed Ledgers Tecnology - DLT*, 2018, in *blockchain4innovation.it*; C. Licini, *Il notaio dell'era digitale: riflessioni gius-economiche*, in *Notariato*, 2, 2018, p. 142 ff.; L. Trautman, *Virtual Currencies Bitcoin*

It consists of a series of blocks, containing transactions, interconnected in such a way that the validity of each transaction must be proven by the network of nodes on which the blockchain is distributed[12]. Each node is made up (physically) of the server (computer) of each participant and contains within it the archive of the entire blockchain, i.e. of all the blocks containing transactions, of which up-to-date copies are kept[13].

The blockchain can be public or private depending on whether the content is visible and accessible only to certain users (permissioned blockchain) or to everyone (permissionless blockchain). This implies that access to the permissioned blockchain system requires authorisation and the management of the activities performed within it is reserved to certain subjects. Therefore, in public blockchains there are no identity-related restrictions for participation in the network and anyone can obtain the entire 'ledger' and view the data of completed transactions[14]. The distinction between permissioned and permissionless blockchains concerns both the rules of access to the chain[15] and the possibility for the nodes or entities managing the permissioned blockchain to intervene on the activities carried out within the ledger and performed by all other nodes. In this case, in fact, the effects of operations can be modified by those in control of the blockchain, if this is made possible by the programming rules of the platform.

& What Now After Liberty Reserve, Silk Road, and Mt. Gox?, in *Rich. J.L & Tech.*, 20, 2014, p. 13 ff., *jolt.richmond.edu*; Report by the UK Government Chief Scientific Adviser, Government Office for Science, *Distributed Ledger Technology: beyond block chain*, 2016, *gov.uk*.

12 The integrity of the chain remains intact even if a single node is modified in its contents or stops functioning for whatever reason, as all information remains stored by the other nodes that were not subject to the tampering attempt. Transactions concluded on a blockchain-based platform therefore take place in total transparency and are considered secure, since any computer attack aimed at modifying the data would presuppose a very high computational effort, as it would require tampering with the information contained in 50% plus one of the nodes storing the data and constituting the distributed ledger technology (DLT). The difference with common centralised databases is clear, since the data is not stored in servers, where there is a client-server relationship between the network participants, but each node enjoys a position of parity with the others. It should also be noted that all the data grouped in the blocks are concatenated into the ledger through a "hashing" process, where a hash consists of a kind of fingerprint representing the information in the form of a string of characters and numbers. The blocks of the ledger have among their essential components: a hash of all the transactions contained in the block, a timestamp and a hash of the previous block that allows the sequential chain of blocks to be created.

13 Each transaction consists of an exchange of assets and must be verified, approved and archived. The information collected in the virtual space is considered certain by the community sharing the communication protocol (peer-to-peer network), and the cryptographic and IT rules that determine the functioning of the blockchain instil confidence in the security of the transactions carried out in the participants of the chain: Cf. N. Szabo, *Formalizing and securing relationships on public networks*, *First Monday*, *2*(9), 1997, su *doi.org*, and L. Piatti, *Dal Codice Civile al codice binario: blockchain e smart contracts*, in *Ciberspazio e Diritto*, 17, 56, 2016, p. 326.

14 Bitcoin and Ethereum are two examples of blockchain permissionless, blockchain based platforms in which anyone can create an account using public key cryptography without the prior authorisation of an administrator. Cfr. E. Calzolaio, *Bitcon: le sfide dell'autoregolazione*, in *Osservatorio sulle fonti*, n. 3/2021, available in: *http://www.osservatoriosullefonti.it*.

15 Cf. C. Poncibò, *Il diritto comparato e la Blockchain*, Napoli, 2020, pp. 49-50.

Smart contracts, which are aimed at applying the decentralised ledger system to the exchange relationships[16], allow for the digital representation of information concerning tangible assets, personal data, rights, certificates, company balance sheets, or other, which is entered and stored through the blockchain, and which can be transferred within the decentralised platform according to programmed conditions, thus entrusting the reference network with the transaction, without the intervention of third party intermediaries.
The logic behind smart contracts is encapsulated in the 'if this then that' formula: upon the occurrence of a certain event, the protocol will execute the result desired by the participants, contained within it, automatically, without the need for parties to certify the validity of the agreement reached by the parties or to take action for the purpose of execution, as the security of the operations concluded is guaranteed by the characteristics of the blockchain[17].
By means of the so-called peer-to-peer network, the system allows the creation of protocols with prediction of terms based on elements whose occurrence is determined through the activity of so-called 'oracles'. The oracle is to be understood as an independent programme, issuing information necessary for the performance of transactions (such as the price of goods or confirmation of delivery); the software admits that the algorithm may query it to perform a part of the contract. The oracle then becomes the element external to the parties and the decentralised system, and connects the real world to the contract, and then communicates to the smart contracts (linked to distributed ledger technology) the fulfilment of the relevant conditions.
Oracles can be based on software, hardware or human intermediaries; the latter are used when the tasks required of the oracle are too costly or impossible for machines to perform (e.g. a human intermediary is able to discern the extent and degree of a physical injury following a medical examination, and to indicate this in the relevant entry within the execution of an insurance contract). While a software-based oracle can be programmed to draw from online sources and can monitor events occurring on other blockchains, hardware oracles obtain external data retrieved from sensors and the Internet of Things[18].
The digital formation and execution of an exchange through a blockchain thus theoretically minimises the risk of breach of contract, implicit in the conclusion of any contract, and trust in the spontaneous fulfilment of the counterparty loses its relevance when the execution of the agreement is entrusted to a computer network that one has no way of influencing.

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16 Cf. P. Cuccuru, *Blockchain ed automazione contrattuale. Riflessioni sugli smart contract*, in *Nuova giur. civ. comm.*, 1, 2017, p. 110.
17 Cf. S. A. Cerrato, *Appunti su smart contract e diritto dei contratti*, in *Banca Borsa e Titoli di credito*, op. cit., p. 374; A. U. Janssen – F. P. Patti, *Demistificare gli smart contracts*, in *Oss. dir. civ.*, 2020, p. 31 ff.
18 Cf. C. Poncibò, *Il diritto comparato e la Blockchain*, op. cit., pp. 73-74 and A. Egberts, *The Oracle Problem - An Analysis of how Blockchain Oracles Undermine the Advantages of Decentralized Ledger Systems,* 2017, pp. 1-59, available in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3382343. With regard to the "IoT" (Internet of Things), this term refers to all devices capable of communicating data streams on the basis of which analyses can be carried out and actions performed (e.g. self-driving cars, drones, home automation and industrial production plants). Cf., also, L. Vagni, *Il problema della rilevanza giuridica dell'errore nella decisione dell'oracolo della blockchain*, in *lceonline (www.lceonline.eu)*, n.2, 2022, pp. 51-59.

Once formed in the blockchain, the smart contract is therefore substantially independent of the subsequent will of the parties, who may eventually, in order to modify it, proceed to write a new smart contract whose effects modify the consequences of the previous protocol, or render it completely ineffective. The main advantages of this computerised transaction protocol can be summarised, therefore, in a greater certainty and security of the economic operations concluded with the programme in question, also given the theoretical impossibility of the breach of contract, as well as in a (at least apparent) saving of intermediation costs[19].

In view of these characteristics, the smart contract can be considered either as software containing a contract, if all the prerequisites are met and it is equipped with all the essential elements of the contract, or as the execution of the legal relationship that has already arisen[20], thus being qualified as a mere phase of the traditional contract, i.e. its execution[21]. It is in the latter phase, indeed, that the smart contract expresses its real innovative scope linked to the self-execution that characterises it[22]. It is, in fact, the architecture of the blockchain which, by its structural design, leaves no room for the voluntary violation of the terms established, so much so that the effectiveness and guarantee of execution of the relationships formalised in it derives from the technological structure that hosts them[23].

The outcome of the algorithmic elaboration within the smart contracts seems to be, then, theoretically certain and easily predictable in the face of the aforementioned 'if this, then that' rule that innervates the deterministic functioning of the software[24]. Such a

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[19] Cf. P. Cuccuru, *Blockchain ed automazione contrattuale. Riflessioni sugli smartcontract*, op. cit, p. 111 ss. and cf. A. Stazi, *Automazione contrattuale e "contratti intelligenti". Gli smart contracts nel diritto comprato*, op. cit., p. 114. For a focus on smart contract understood, in accordance with Nick Szabo's vision, as software that reduces or eliminates the possibility of breach of contract: Cf. S. Capaccioli, *Smart contracts: traiettoria di un'utopia divenuta attuabile*, in *Ciberspazio e diritto*, 17, 55, 2016, pp. 25-45 and cf. S. Capaccioli, *Introduzione al trattamento tributario delle valute virtuali: criptovalute e bitcoin*, in *Diritto e Pratica Tributaria Internazionale*, 1, 2014, pp. 27-68; N. Szabo, *The Idea of Smart Contracts*, 1997, available in *szabo.best.vwh.net*.

[20] The automatic execution of the contract, in fact, does not necessarily require the use of DLT, but can rely on more traditional technologies, such as vending machines that deliver the goods after the money has been inserted into the machine as payment. For a critique of the autonomy of the smart contract from the traditional contract: see R. Pardolesi - A. Davola, *"Smart contract": lusinghe ed equivoci dell'innovazione purchessia*, in F. Capriglione (ed.) *Liber Amicorum Guido Alpa*, 2019, p. 297 ff. The creator of smart contracts himself, Nick Szabo, compares them to virtual vending machines: N. Szabo, *Formalizing and Securing Relationships on Public Networks*, op. cit.

[21] L. Parola, P. Merati, G. Gavotti, *Blockchain e smart contract: questioni giuridiche aperte*, in *i Contratti*, op. cit., p. 685: "si comprende, dunque, come lo *smart contract* afferisca non alla fase di formazione del contratto, che è e resta costituita dall'accordo tra le parti, ma a quella dell'adempimento, con la conseguenza che lo *smart contract* non integrerebbe neppure una fattispecie di contratto atipico ai sensi dell'art. 1322 c.c.".

[22] Cf. S. Capaccioli, *Smart contract: traiettoria di un'utopia divenuta attuabile*, op. cit., p. 25 ff.; P. Cuccuru, *Blockchain ed automazione contrattuale. Riflessioni sugli smart contract*, op. cit., p. 110 ff.

[23] Cf. P. CUCCURU, *Blockchain ed automazione contrattuale. Riflessioni sugli smart contract*, op. cit., p. 112.

[24] Deterministic systems such as smart contracts make the blockchain platform within which they are written "produces the exact same output when provided with the same input" and algorithms "do and only do what they have been programmed to do": *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA (I) 02, [89-98]. The Court also specifies that: "They are, in effect, mere machines carrying out actions which in another age would have been carried out by a suitably trained human. They are

characteristic however, *prima facie*, would seem to be not perfectly adherent with the idea of artificial intelligence, a term by which systems with a greater level of functional autonomy[25] are generally denominated, which often produce outcomes that are not perfectly predictable *ex ante*, even if they are the result of an original human input[26].
However, it is increasingly questioned that smart contracts must necessarily be deterministic systems[27]: in fact, "if" and "then" may not even be identifiable *a priori*[28]. Even the term 'smart contract' itself does not have an unequivocal meaning and experts also refer to it even to refer to AI systems in the strict sense[29]. It should also be noted that the definitions of smart contracts offered by national legal systems and institutions inevitably end up focusing on the "self-executing" aspect of smart contracts[30] rather than their deterministic nature. Furthermore, over time, blockchain has been implemented with increasingly complex functions to the point of making possible forms of admixture with what is defined as AI[31] (for some definitions of AI see *infra* in the next paragraph).
In this case, AI governs the entire contract cycle contained in the smart contract, including the execution of the performance. We thus have self-executing automated agreements, the result of the decision-making autonomy of AI, which are capable of taking even very complex decisions, particularly through the use of predictive algorithms[32].

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no different to a robot assembling a car rather than a worker on the factory floor or a kitchen blender relieving a cook of the manual act of mixing ingredients. All of these are machines operating as they have been programmed to operate once activated".

25 For some definitions of artificial intelligence, see below in the next paragraph.

26 See below in the next paragraph and note no.42.

27 R. De Caria, *The Legal Meaning of Smart Contracts*, in *European Review of Private Law*, 6-2019, pp. 731-752.

28 T. Schrepel (EU Commission), *Smart Contracts and the Digital Single Market Through the Lens of a "Law + Technology" Approach,* 2021, in *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3947174*.

29 C. Bomprezzi, *Blockchain-based Smart Contracts e E-Justice nella proposta AI Act*, in M. Palmirani, S. Sapienza (ed.) *La trasformazione digitale della giustizia nel dialogo tra discipline*, Milano, 2022, pp. 122-124.

30 See R. De Caria, *The Legal Meaning of Smart Contracts*, op. cit., p. 736. For some examples, in addition to the definition of smart contract offered by Italian law, which has been discussed, see The European Union Blockchain Observatory and Forum in the report Legal and Regulatory Framework of Blockchain and Smart Contracts of 27/09/2019, p. 22: "In the blockchain context, it generally means computer code that is stored on a blockchain and one or more parties can access that. These programs are often self-executing and make use of blockchain properties like tamper-resistance, decentralised processing, and the like" and Arizona House Bill No. 2417: "smart contract" means an eventdriven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger".

31 C. Bomprezzi, *Blockchain-based Smart Contracts e E-Justice nella proposta AI Act*, in M. Palmirani, S. Sapienza (ed.) *La trasformazione digitale della giustizia nel dialogo tra discipline,* op. cit., p.125. To observe some ways of integration between artificial intelligence and blockchain, some use cases and some early applications, see European Union Blockchain Observatory and Forum, *Convergence of blockchain, AI and IoT*, 2020.

32 E. Battelli, *Questioni aperte in materia di contrattazione nelle piattaforme online*, *in i Contratti*, 5/2022, p. 569. F. Di Giovanni, *Attività contrattuale e intelligenza artificiale*, in Giur.it., 7, 2019, p.1677 ff., in particular p.1681; A. Carleo (ed.), *Decisione robotica*, Bologna, 2019. G. Sartor, *Gli agenti software. Nuovi soggetti di cyberdiritto?*, in *Contr. e impr.*, 2, 2002, p. 465 ff.

III. Some definitions and characteristics of AI

A brief, albeit not exhaustive, focus on the definition and essential characteristics of artificial intelligence is now useful[33].

Article 3 (1) of the AI Act[34] states that: "'AI system' means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".

However, other definitions have been attempted in the European context. The European Commission in its Communication on artificial intelligence for Europe noted that the term artificial intelligence refers to systems that exhibit intelligent behaviour by analysing their environment and performing actions, with some degree of autonomy, to achieve specific goals[35], while the European Commission's High-level expert group on artificial intelligence explained that "Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal"[36].

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33 On this point, see S. Russell and P. Norvig, *Artificial Intelligence: A Modern Approach*, 3rd ed. Prentice Hall, 2009. A.M. Turing, *Computing Machinery and Intelligence*, in *Mind*, 49, 1950, p. 433 ff. S. Quintarelli (ed.), *Intelligenza artificiale. Cos'è davvero, come funziona, che effetti avrà*, Torino, 2020. N. Abriani, G. Shneider, *Diritto delle imprese e intelligenza artificiale*, Bologna, 2021, p. 21 ff. The expression artificial intelligence was coined in 1956 by the American mathematician John McCarthy: for a focus on the history and development of the concept of artificial intelligence, see S. Bringsjord and N. S. Govindarajulu, *Artificial Intelligence*, in *Stanford Encyclopedia of Philosophy*, 12 luglio 2018 (*https://plato.stanford.edu/entries/artificial-intelligence/*).

34 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

35 European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social committee and the Committee of regions. artificial intelligence for Europe {SWD(2018) 137 final} p.1, in which the Commission thus continues: "AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications)" See the European Parliament website *https://www.europarl.europa.eu/topics/en/article/20200827STO85804/what-is-artificial-intelligence-and-how-is-it-used*, where AI is defined as "AI is the ability of a machine to display human-like capabilities such as reasoning, learning, planning and creativity. AI enables technical systems to perceive their environment, deal with what they perceive, solve problems and act to achieve a specific goal. The computer receives data - already prepared or gathered through its own sensors such as a camera - processes it and responds. AI systems are capable of adapting their behaviour to a certain degree by analysing the effects of previous actions and working autonomously".

36 The European Commission's High-level expert group on Artificial Intelligence. *A definition of AI*, 2018, p.7.

Coming to analyse some characteristics of artificial intelligence, it should first be noted that there are different types of AI; for example, one can distinguish between: so-called "strong" AI in which the machine has the ability to understand or learn any kind of 'intellectual' task that a human being is capable of understanding or learning. In this case, the machine has a kind of 'self-awareness'; so-called "weak" AI in which the system does not emulate the complexity of the human mind and only has the capacity to perform a precise and specific task entrusted to it. This type of artificial intelligence is the one that is currently in everyday use (e.g. voice assistant, image recognition, etc.)[37].

Machine Learning (ML)[38], i.e. automatic system learning, characterises AI: it is the set of methods that allows computers to learn autonomously from the examples provided to it and the environment. ML therefore allows computers to detect patterns and learn new functions without being programmed explicitly[39]. Machine learning software self-modifies according to the data it receives and redefines its behaviour, which is not preordained, depending on the feedback it is exposed to. In ML systems, inputs are therefore provided and the system returns classified outputs; however, in order for the machine to be able to perform these tasks, it must be adequately trained (so-called training phase).

The term Deep Learning (DL)[40] refers to an area of ML that utilises Artificial Neuronal Networks (ANNs), which are inspired by the way the human nervous system processes information[41]; an ANNs is made up of multiple layers interconnected by nodes, with each node performing a series of non-linear calculations from input signals and other nodes connected to it. In Deep Learning, action after action changes the strength of the connection, so that each prediction is more accurate than the previous one. However, it

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[37] Cf. S. Mauloni, M. Mazzanti, L. Buscemi, *Focus: Nuove Tecnologie e risvolti medico legali. La nuova frontiera dell'intelligenza artificiale: profili medico-legali*, in *Rivista Italiana di Medicina Legale (e del Diritto in campo sanitario),* fasc.3, 2022, p. 682. A. Lombardi, G. Lombardi, *Intelligenza Artificiale, contratto e responsabilità civile*, Roma, 2021, p.35.

[38] A. L. Samuel, *Some studies in machine learning using the game of checkers*, in *IBM Journal of research and development*, vol. 3 (3), 1959, pp. 210-229. J. Alzubi, A. Nayyar, A. Kumar, *Machine Learning from Theory to Algorithms: An Overview*, in *Journal of Physics: Conference Series*, 1142, 2018, pp. 1-15. H. Wang, C. Ma, L. Zhou, *A Brief Review of Machine Learning and Its Application*, 2009 International Conference on Information Engineering and Computer Science, Wuhan, China, 2009, pp. 1-4, in particular p.1: "Machine learning is a subject that studies how to use computers to simulate human learning activities, and to study self-improvement methods of computers that to obtain new knowledge and new skills, identify existing knowledge, and continuously improve the performance and achievement". D. Kreuzberger, N. Kühl, S. Hirschl, *Machine Learning Operations (MLOps): Overview, Definition, and Architecture*, in *IEEE Access*, vol.11, 2023, pp. 31866-31879.

[39] Machine learning is software based on mathematical algorithms that simulate inductive reasoning, learning from information. Cf. N. Abriani, G. Shneider, *Diritto delle imprese e intelligenza artificiale*, op. cit., p. 23.

[40] Y. LeCun, Y. Bengio, G. Hinton, *Deep learning*, in *Nature*, vol. 521, n. 7553, 2015, pp. 436–444, in particular p. 436: "Deep learning allows computational models that are composed of multiple processing layers to learn representations of data with multiple levels of abstraction. […] Deep learning discovers intricate structure in large data sets by using the backpropagation algorithm to indicate how a machine should change its internal parameters that are used to compute the representation in each layer from the representation in the previous layer. Deep convolutional nets have brought about breakthroughs in processing images, video, speech and audio, whereas recurrent nets have shone light on sequential data such as text and speech".

[41] Cf. N. Abriani, G. Shneider, *Diritto delle imprese e intelligenza artificiale*, op. cit., p. 25.

can be difficult to understand the internal behaviour of the system: it is possible to observe the data 'coming in' and the 'prediction generated', but it is not easy to understand how the system achieves this prediction. This means that software functions as so-called "black boxes"[42] and is able to make automatic decisions. However, the basic requirement for training a ML model is the availability of a large amount of data (Big Data)[43].

ML is characterised by a number of learning models that allow algorithms to be classified:

1) Supervised learning: the system is instructed to solve tasks autonomously, based on previously given examples represented by possible inputs and respective desired outputs. Through such learning, the system derives a general rule by which it associates a certain input with a certain output (an example is the classification algorithm).

2) Unsupervised learning: in this type of learning, it is the system that has to create a relationship between the elements and classify them, without relying on previously indicated categories. In fact, the system is provided with a series of inputs that must be classified on the basis of common characteristics, from which a rule to be applied to subsequent inputs is derived. Grouping is an example of unsupervised learning, as it can be used to group similar items together.

3) Reinforcement learning: the actions taken by the software are aimed at maximising the reward. In fact, unlike the other types of learning, no data is required for conditioning, but the system performs trial and error, learning which actions receive a greater 'reward' in the long run. Indeed, the quality of an action of the system is given by a so-called 'reward' numerical value that is intended to encourage correct behaviour by the software agent[44].

Having observed the characteristics of smart contracts and AI, it is now necessary to analyse the discipline of contractual mistake in Italian law and of mistake in English law insofar as these legal aspects will be useful for the purposes of assessing the relationship between the same discipline and the new digital tools.

IV. CONTRACTUAL MISTAKE IN THE ITALIAN LEGAL SYSTEM

In Italy, contractual mistake (*errore contrattuale*)[45] consists in a false representation by the party about the contract or its assumptions and is the cause of the invalidity of the contract

[42] The European Commission's High-level expert group on Artificial Intelligence. *A definition of AI*, 2018, p.6: "Black-box AI and explainability. Some machine learning techniques, although very successful from the accuracy point of view, are very opaque in terms of understanding how they make decisions. The notion of black-box AI refers to such scenarios, where it is not possible to trace back to the reason for certain decisions. Explainability is a property of those AI systems that instead can provide a form of explanation for their actions".

[43] S. Mauloni, M. Mazzanti, L. Buscemi, *Focus: Nuove Tecnologie e risvolti medico legali. La nuova frontiera dell'intelligenza artificiale: profili medico-legali*, in *Rivista Italiana di Medicina Legale (e del Diritto in campo sanitario)*, op. cit., pp. 684-687.

[44] N. Abriani, G. Shneider, *Diritto delle imprese e intelligenza artificiale*, op. cit., p. 24 e 27 e S. Mauloni, M. Mazzanti, L. Buscemi, *Focus: Nuove Tecnologie e risvolti medico legali. La nuova frontiera dell'intelligenza artificiale: profili medico-legali*, op. cit., p. 685-686. Cf. A. Lombardi, G. Lombardi, *Intelligenza Artificiale, contratto e responsabilità civile*, op. cit., p. 27.

[45] About Italian contractual mistake see G. Stolfi, *Teoria del negozio giuridico*, Padova, 1947, p. 140, A. Formica, *Rassegna di giurisprudenza: errore*, in *Riv. dir. civ.*, 1955, p. 1045 ff., E. Betti, voce *Errore*, in *Nov. Dig. it.*, VI, 1960, p. 662, P. Barcellona, *Profili della teoria dell'errore nel negozio giuridico*, Milano, 1962 and Id. voce "*Errore (Diritto privato)*", in *Enc. dir.*, XV, Milano, 1966, V. Pietrobon, *L'errore*

when it is essential and recognisable ex Art. 1428 of the Italian Civil Code[46]. In fact, Art. 1427 c.c. establishes that: "Il contraente, il cui consenso fu dato per errore, estorto con violenza o carpito con dolo, può chiedere l'annullamento del contratto". Importance is attributed to the mistake because it determines the ignorance or false representation of relevant elements in which one of the contracting parties incurs, due to the general interest of the system whereby the will of the parties to bind themselves to a contract must be spontaneously and freely expressed[47].

A distinction is made between so-called *errore ostativo* (mistake on declaration) and so-called *errore vizio* (mistake as vice of will).

An *errore ostativo*[48] (mistake on declaration) is, according to Article 1433 of the Civil Code[49], the mistake that falls on the declaration of the party or on its transmission when the declaration has been inaccurately transmitted by the person (*nuncius*) or the office entrusted with it[50].

In the mistake on declaration, therefore, the declarant's will is correctly formed through a decision-making process that has not run into vices, but has then been expressed or transmitted in a manner that does not reflect the contracting party's actual will[51]. This kind

nella dottrina del negozio giuridico, Padova, 1963, F. Santoro-Passarelli, *Dottrine generali del diritto civile*, nona edizione, Napoli, 1966 (rist. 1983), p.157 ff., C. Rossello, *l'errore nel contratto*, in *Il codice civile. Commentario, fondato da Piero Schlesinger diretto da Francesco D. Busnelli*, Milano, 2019.

46 See, C. M. Bianca, *Il Contratto*, in *Diritto Civile*, Ed. III, Milano, 2019, p. 601 and cf. Cass. Civ., sez. III, 01/10/2009, n. 21074, in *Giust. civ. Mass.* 2009, 10, 1397; see Cass. Civ., sez. lav., 24/08/2004, n. 16679 in *Giust. civ. Mass. 2004, 7-8*; Cass. Civ. sez. II, 19/04/1988, n. 3065 in Giust. civ. Mass. 1988, fasc.4; see, also, A. Trabucchi, voce "*Errore (diritto civile)*", in *Noviss. Dig. It.*, VI, Torino, 1960, p. 666 and V. Roppo, *Il contratto*, in G. Iudica and P. Zatti (ed.) *Trattato di diritto privato*, 2a ed., Milano, 2011, p. 730. On the recognisability of mistake, see C. Rossello, *l'errore nel contratto*, op. cit., p.39 ff.

47 C. M. Bianca, *Il Contratto,* op. cit., p. 601. F. Camilletti, *Riflessioni sull'annullabilità del contratto per errore*, in *i Contratti*, n.2, 2019, p. 225.

48 L. Ferri, *Errore ostativo e interpretazione del contratto,* in *Riv. trim. dir. proc. civ.*, 1958, p. 1505 ff.; R. Sacco, *L'alterazione intenzionale della dichiarazione contrattuale e l'art. 1433*, in *Giur. It.*, 1961, I, 2, p. 245 ff.

49 Art. 1433 c.c.: "Le disposizioni degli articoli precedenti si applicano anche al caso in cui l'errore cade sulla dichiarazione, o in cui la dichiarazione è stata inesattamente trasmessa dalla persona o dall'ufficio che ne era stato incaricato".

50 This category of mistake is inspired by the *erreur-ostacle*, developed by French doctrine. Cf. J. Ghestin, *La notion d'erreur dans le droit positif actuel: Prix Henri Capitant 1962*, Parigi, 2013. For a reflection on the reform of the *Code civil*, see A. Gorgoni, *I vizi del consenso nella riforma del Code civil: alcuni profili a confronto con la disciplina italiana*, in G. Vettori, E. Navarretta e S. Pagliantini (ed.), *La riforma del Code civil*, *Persona e Mercato*, 1, 2018, p. 88 ff. See, C. Rossello, *l'errore nel contratto*, op. cit., p. 265: "L'art. 1433 cod. civ. stabilisce che le disposizioni in materia di errore contenute nelle norme precedenti si applicano anche nel caso in cui l'errore cada sulla dichiarazione (errore nella dichiarazione), o nell'ipotesi in cui la dichiarazione sia stata inesattamente trasmessa dalla persona o dall'ufficio incaricato (errore nella trasmissione della dichiarazione)" and p. 270: "le caratteristiche di essenzialità e riconoscibilità dell'errore prescritte dall'art. 1428 cod. civ. devono sussistere anche per l'errore nella dichiarazione o nella sua trasmissione di cui all'art. 1433 cod. civ., anche se occorre convenire sul fatto che, quanto alla essenzialità, essa è spesso *in re ipsa*, dal momento che l'errore ostativo è essenziale per definizione".

51 Cf. Cass. Civ., sez. lav., 09/01/2018, n. 274 in *Giustizia Civile Massimario 2018*.

of mistake excludes awareness of the meaning of the contract, so it is no longer governed by a conscious will; even in this case the contract is voidable.
In contrast, the mistake as vice of will relates to the formation of the will of the party, since in such a case the contracting party would not have wished to conclude the contract without the mistake. Indeed, in such a case the party has not correctly ascertained and evaluated the circumstances and factual premises of the contract and the will expressed in the declaration is vitiated.
A distinction is made between the mistake of fact (*errore di fatto)*, which relates to the elements of the contract or external circumstances, and the mistake of law (*errore di diritto)*, which relates to legal rules[52]. The mistake that falls on the elements of the contract consists in the divergence between the objective meaning of the contract and the meaning attributed to it by the party. In such a case, the interpretation of the contract to determine its meaning precedes the assessment of the mistake, in order to compare the content of the contract with the meaning given to it by the mistaken party.
Pursuant to Art. 1428 of the Italian Civil Code, a contract vitiated by a party's mistake is voidable on condition that it is essential and recognisable to the other party. The first of these requirements for the relevance of the mistake, i.e. its essentiality, presupposes an objective evaluation; indeed, the contract may be avoided only when the mistake assumes an appreciable importance with respect to the balance of interests contained in the contract[53].
For the invalidity of the contract, the mistake must be recognizable as well as essential. Article 1431 cc. provides that: "L'errore si considera riconoscibile quando, in relazione al contenuto, alle circostanze del contratto ovvero alla qualità dei contraenti, una persona di normale diligenza avrebbe potuto rilevarlo", i.e., when a contracting party, using ordinary diligence, should have recognized the erroneous knowledge of the other party[54]. Each

[52] It seems useful to recall the definition of mistake contained in the Unidroit Principles of international commercial contracts 2016, contained in Art. 3.2.1 (Definition of mistake): "Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded".
[53] The Italian legislator has specifically provided for the instances of essentiality under Article 1429 of the Civil Code: 1) *Errore sulla natura* (mistake as to the legal nature) or *errore sull'oggetto* (mistake on the subject matter) of the contract (Article 1429 cc., no.1); 2) *errore sull'identità dell'oggetto della prestazione* (mistake on the identity of the object of performance) or *errore su una qualità dello stesso* (mistake on a quality thereof) which, according to common assessment or in relation to the circumstances, is to be considered decisive for the agreement (Art. 1429. cc. n. 2); 3) *errore sull'identità* (mistake as to the identity of the contracting party) or *errore sulle qualità* (mistake on qualities) of the person, assuming that one or the other has been determined for agreement (art. 1429 Civil Code, no. 3); 4) *errore di diritto* (mistake of law), when it was the sole or main reason for the contract (Art. 1429 Civil Code, no. 4). The normative definition in Article 1429 of the Civil Code does not seem to be peremptory and does not exclude that mistake on objective assumptions may also be essential if in relation to the circumstances it is determined for agreement.
[54] Cf. Cass. Civ., sez. III, 28/11/2019, n. 31078 in *Giustizia Civile Massimario* 2019: **"**La rilevanza dell'errore, come causa di annullamento del negozio, è caratterizzata dal duplice profilo della sua essenzialità e della riconoscibilità, intesa, quest'ultima, come capacità di rilevazione di esso da parte di una persona di media diligenza, in relazione sia alle circostanze del contratto che alle qualità dei contraenti […]"; cf., also, Cass. civ., 30/03/1979 n. 1843 in *Banca, borsa 1979, 398*, *(nota* of Salvestroni*),* op. cit.

contracting party, therefore, has the burden of verifying the other party's manifest mistake and the obligation in good faith to give notice of it.

The *ratio* for which the mistake is the cause of the invalidity of the contract only when it is recognizable is due to the fact that, otherwise, the contract would be unsuitable to arouse the other party's reliance on the seriousness and awareness of the contractual *declaratio*[55]. Moreover, recognizability is not relevant in the presence of common mistake for italian law since in such an eventuality each of the two contracting parties has determined the invalidity of the contract[56].

From what has been observed regarding the recognizability of the mistake, it follows logically that the actual knowledge of a party about the declarant's mistake must be determined for the purposes of the voidability of the contract[57].

The *errore sul motivo* (mistake on motive), as a rule, is not cause for the invalidity of the contract[58]. The irrelevance of the mistake on the motive is due to the normal irrelevance of the reasons, purposes and assumptions that induce the party to enter into the contract[59]. Indeed, the party cannot claim to disengage from the contractual obligation if it realizes that it has fallen into error on a circumstance unrelated to the content of the contract. Moreover, even if a party has realized the mistake about the reason this still does not justify the invalidity of the contract, since the need for certainty of contracting prevents the commitment made from being questioned for the personal reasons of the contractor[60].

With regard to the *errore di calcolo* (miscalculation), Article 1430 of the Civil Code provides that such a mistake does not give rise to invalidity but to the rectification of the contract unless, by falling the mistake on the quality, it has assumed a determinate importance[61]. For jurisprudence, the miscalculation is the mistake made in the arithmetic processing of

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55 C. M. Bianca, *Il Contratto*, op. cit., p. 606.

56 See, Cass. Civ., sez. II, 23/03/2017, n.7557 in *de Jure, banca dati editoriale GFL*: "Allorquando […] vi siano due volontà concordi ed entrambe viziate dal medesimo errore, non può trovare applicazione il principio dell'affidamento e, quindi, non opera il requisito della riconoscibilità dell'errore ai fini dell'annullamento, perché, in tal caso, ciascuno dei due contraenti ha dato causa all'invalidità del negozio indipendentemente dall'altro (Cass. Sez. 6-2, 15/12/2011, n. 26974; Cass. Sez. 2, 12/11/1979, n. 5829; Cass. Sez. 1, 30/05/1969, n. 1923)". Against this jurisprudential orientation, see A. De Martini, *In tema di riconoscibilità dell'errore bilaterale nel contratto*, in *Foro it.*, 1952, I, p. 431 ff.

57 Cf. Cass. Civ., sez. un., 01/07/1997, n. 5900 in *Giust. civ. Mass. 1997, 1111*.

58 An exception to this rule can be found in the regulation of donation, which can be contested on the ground of *mistake on motive*, if this is apparent from the contract and is the only one that determined the donor to draw it up (art. 787 c.c.).

59 C. Rossello, *l'errore nel contratto*, op. cit., p. 90: "L'irrilevanza dell'errore sui motivi è stata tradizionalmente giustificata alla stregua della necessità di tutela dell'altrui affidamento, in considerazione dell'impossibilità da parte del destinatario della dichiarazione di valutarne obiettivamente l'influenza determinante ai fini della stipulazione del contratto"; see, F. Martorano, *Presupposizione ed errore sui motivi nei contratti*, in *Riv. dir. civ.*, 1958, I, 69 ff.

60 C. M. Bianca, *Il Contratto*, op. cit., pp. 609-610.

61 Art. 1430 cc., Errore di calcolo: "L'errore di calcolo non dà luogo ad annullamento del contratto, ma solo a rettifica, tranne che, concretandosi in errore sulla quantità, sia stato determinante del consenso"; see F. Santoro-Passarelli, *Dottrine generali del diritto civile*, op. cit., p. 163, who defines the *errore di calcolo* (miscalculation) as: "un errore accidentale rettificabile". Cf. G. Piazza, *L'errore di calcolo e l'art. 1430 del codice civile*, in *Riv. trim. dir. proc. civ.*, 1964, p. 575 ff. G. Cian, *Alcune riflessioni in tema di rettifica*, in *Riv. dir. civ.*, 2018, 1, p. 1 ff.

data exactly assumed in the contract[62] . Indeed, since the *ratio* of the rule is to make rectifiable the miscalculation that do not appear to be determined by agreement, this kind of mistake seems rather to consist in the erroneous quantitative determination resulting either from erroneous arithmetical operation or from erroneous quantification of the exactly identified good[63]. Moreover, if the contract makes no mention of the quantity of the thing the party cannot invoke the errors made in fixing the amount of the offer and claim the adjustment of the price, as in the case of the sale for a certain amount of a fungible good present in a container of which, however, the quantity was not indicated. In the latter case, however, there needs to be a concrete assessment of whether the mistake as to the quantity of the thing not indicated in the contract could constitute an essential and recognizable mistake as to the due performance.

V. MISTAKE IN ENGLISH CONTRACT LAW

In the English common law system the concept of mistake, besides having different characteristics, is not delineated and clear as in Italy. In fact, the English mistake constitutes one of the most complex areas of contract law, to the point that commentators speak of it as a subject matter that is at times 'obscure' and 'confused'[64]. Given the difficulty in dealing with the issues related to it[65], in this paper only those aspects and features of the English doctrine of mistake that are most useful and functional for the purposes of the present investigation will be considered. In addition, again with regard to the profiles of mistake to be taken into consideration, it is appropriate to follow the approach and indications provided by the Law Commission in its paper entitled "Smart legal contracts - Advice to Government" of November 2021, which in years of study has observed the relational dynamics between certain types of mistake and blockchain-based computer protocols (see *infra* §6 and 7).

In English law, a contract may be declared invalid (more precisely void[66]) under certain conditions if one or both parties have made a mistake when concluding the contract. The

62 Cf. Cass. Civ., sez. I, 03/03/2022, n. 7066 in *Guida al diritto 2022, 18*.

63 Consider the price of goods contained in a container that is calculated on the basis of an erroneous determination of the weight of the same; on this point, see C. M. Bianca, *Il Contratto*, op. cit., p. 612.

64 G. Criscuoli, *Il contratto nel diritto inglese*, second ed., Padova, 2001, p. 194. Cf., also, E. Calzolaio, *Comparative Contract Law. An introduction*, London, 2022, p.137: "Since the 19th century, however, textbook writers and judges familiar with Roman and French law began to incorporate the 'alien' doctrine of mistake, making the false assumption that the English law of contract was based upon consent and agreement. The result is that now the rules sometimes appear vague and dependent upon uncertain categorizations […] it is true that there is not a single doctrine applicable to all kinds of mistake, as in the case in the civil law tradition. […] the common law approach to mistake is much narrower than the one adopted in the civil law countries, both for unilateral and common mistakes".

65 On *mistake* in English legal system, see S. J. Stoljar, *Mistake and misrepresentation: A Study in Contractual Principles*, Sweet and Maxwell, 1968 and C. Macmillan, *Mistakes in Contract Law*, Hart Publishing**,** 2010.

66 With regard to the so-called vitating factors, the contract may be "void" or "voidable". The contract is void when it has never produced judicial effects (ineffectiveness *ex tunc*) and it is as if it had never existed. A mistake, for example, tends to render the contract void. If a contract is voidable, on the other hand, it remains valid and effective until it is "rescinded" by the party having

mistake may be described as an incorrect belief or assumption on a question of fact or law[67]. A mistake made by both parties may be a "common mistake" or a "mutual misunderstanding", whereas a mistake made by only one party is known as a "unilateral mistake"[68].

It should be noted that the doctrine of mistake in English law of contract is generally distinguished into two macrocategories: the first tends to be identified with the term "mistake as to the terms or identity", which includes "mutual misunderstanding" and "unilateral mistake"; the second concerns the common mistake on a question of fact or law, which includes the "common mistake".

In mutual misunderstanding, each party has mistaken the content of the contract as understood by the other party (see, *infra*, §5.2); in the case of unilateral mistake only one of the parties has mistaken the actual content of the contract or the identity of the other party (see, *infra*, §5.3). In such cases the mistake is in the communication between the parties, which prevents the formation of the agreement, for instance because the parties had a misunderstanding during the negotiation or because one party addresses an offer to the offeree which the latter knows does not conform to the offeror's real will but nevertheless accepts.

In contrast, in the case of common mistake the parties agree on the content of the contract (see, *infra*, §5.1), but have concluded the agreement having reached the same mistaken belief on a question of fact or law[69]. However, when only one party has made a mistake of fact for English law there is no basis for the application of the doctrine of mistake[70].

In any event, whether in the case of mutual misunderstanding, unilateral mistake or common mistake, the contract, under certain conditions may be void, albeit on different legal grounds[71].

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the power to do so. Indeed, the effect of "rescission" is that the contract is invalid and becomes ineffective ex tunc. Examples of vitiating factors that render a contract voidable are misrepresentation, duress and undue influence. Cf. A. Burrows, *A Restatement of the English Law of Contract*, 2nd ed., 2020, pp. 178-179 and C. Mitchell, P. Mitchell, S. Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed., Mytholmroyd, UK, 2016, par. 40-02.

[67] H. Beale, *Chitty on Contracts,* 33rd ed, Sweet & Maxwell, 2021, par. 5-007; Cfr. *Pitt v Holt* [2013] UKSC 26, [2013] 2 WLR 1200 from [108] to [109]. See, also, J. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th ed, Sweet & Maxwell, 2019, par. 12-03.

[68] H. Beale, *Chitty on Contracts*, op. cit., 2021, par. 5-001.

[69] H. Beale, *Chitty on Contracts*, op. cit., 2021, par. 5-001 – 5-002.

[70] *Statoil ASA v Louis Dreyfus Energy Service LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685.

[71] H. Beale, *Chitty on Contracts*, op. cit., 2021, par. 5-009: "The first type of mistake (termed above "mistake as to the terms or as to identity") is sometimes said to operate so as to negative consent, the second (termed above "common mistake") sa as to nullify consent. In other words, in the first case, the parties may not have in fact reached an agreement; in the second, the mistake renders the agreement ineffective as a contract. In either case, if the mistake is operative the contract in said to be void ab initio".

5.1 *Common mistake*

The doctrine of common mistake concerns the situation where the parties enter into a contract based on an erroneous belief or assumption concerning a question of fact or law[72] that is relevant to the performance of the contract. English law recognises only a very limited range of common mistakes to both parties that render a contract void. In The Great Peace, the Court of Appeal ruled that a contract is void for common mistake only if: a) the parties shared a belief in the existence of a certain situation at the time the contract was made; b) contrary to that belief, the situation did not exist; c) the non-existence of the situation makes the performance of the contract or the achievement of its purpose impossible[73].

It is therefore not sufficient to render the contract invalid the fact that the performance of the contract proves to be more onerous than intended by the parties because of a mistake made at the time of the conclusion of the contract on a certain matter. Indeed, the mistake made by the parties must relate to the very possibility of performance and thus, in The Great Peace, a contract for the provision of towing a ship to safety is not invalid if the parties entered into the contract on the basis of an erroneous assumption as to the distance between the salvage vessel and the wrecked ship. Indeed, in such a case it is still possible to execute the contract according to the terms contained therein, so the contract is not void for common mistake[74].

It is useful to give some examples of common mistakes, belonging to different types. One is the common mistake of fact as to the existence of the object of the contract: in *Couturier v Hastie*[75] the parties had agreed to sell a cargo of grain carried by a ship which the parties believed to be on a voyage from Thessaloniki to England. However, the parties were not aware that, at the time the contract was concluded, the captain of the ship had already sold the grain in Tunis, as it had begun to ferment. The House of Lords held the contract void in this case due to the parties' mistake as to the existence of the object of the sale.

Another type of common mistake is the common mistake as to the existence of facts constituting the assumption of the contract: the paradigmatic case is *Griffith v Brymer*[76] . In that case the parties concluded a contract for the lease of a room from the window of

[72] See J. Beatson, A. Burrows, J. Crtwright, *Anson's Law of Contract*, 31 st, Oxford, 2020, p. 296: "Both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract".

[73] See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679 at [76]: "the following elements must be present if common mistake is to avoid a contract. (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible".

[74] V., *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679 from [162] to [166].

[75] (1856) 5 H.L. Cas. 673.

[76] (1903) 19 T.L.R. 434.

which the coronation procession of Edward VII could be seen. The parties were, however, both unaware that the passing of the procession had been cancelled. The Court therefore declared the contract void because it was based on a mistake concerning the basis of the legal relationship.

Another type of common mistake is the mistake as to the quality of the object of the contract, not to be confused with the mistake as to the nature or identity of the object (see below on this paragraph); this distinction, while theoretically easy to understand, is not always immediately recognisable when the concrete case is assessed. This hypothesis of mistake, under the common law, does not lead to invalidity: in *Leaf v International Galleries*[77] a certain painting was sold without giving decisive importance to its author, despite the common belief of the parties that the latter was a great and well-known artist. In that case, the subsequent discovery that the painting is not by the painter believed to be its author does not lead to the invalidity of the contract. In fact, there has been no lack of agreement between the parties on the sale of that specific painting, the parties not having considered the author of the painting to be decisive for the agreement, notwithstanding the mistaken belief[78].

The last *species* of common mistake that it is useful to observe is the common mistake on the nature of the object of the contract. Indeed, according to common law, a contract concluded on the basis of a common mistake by the contracting parties on the nature of its object is absolutely void for lack of real agreement. On this point, for a better understanding, it is well to cite the case *Nicholson and Venn v Smith Marriott*[79], in which the defendant had offered at auction tablecloths bearing the emblem of Charles I, claiming (in full belief of the truthfulness of its declaration) that they had been owned by the sovereign. The claimant, believing the origin of the tablecloths, decided to purchase the goods for a proportionate value. However, it later turned out that both parties had been mistaken since the tablecloths were in fact from the 18th century. In the present case, the court decided that the contract was void since the parties had specifically bargained for an heirloom of Charles I and had not reached an agreement for a different object.

A careful analysis reveals the difference with the aforementioned *Leaf v International Galleries* case; in fact, in the latter the parties had agreed to sell the painting that had actually been the object of the contract, not considering the fact that it had been painted by a particular painter like decisive for its identity, despite the common misbelief as to the actual identity of the painter. In contrast, in *Nicholson and Venn v. Smith Marriott* the parties' agreement had been reached precisely in relation to the heirloom of Charles I; therefore, once the tablecloths were revealed not to belong to that sovereign, the contract had to be declared void[80].

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77 [1950] 1 All. e.R. 639.

78 It should be noted that in equity the approach taken by the common law as described above is superseded. In fact, it is recognised that a contract, vitiated by a mistake as to the essential quality of its object, may be rendered ineffective [see *Solle v Butcher* [1949] 2 All. E. R. 1107].

79 (1947) 177 L.T. 189.

80 G. Criscuoli, *Il contratto nel diritto inglese*, op. cit., pp. 198-203.

5.2 *Mutual misunderstanding*

Mutual misunderstanding is the mistake the parties make when they misunderstand each other's true intentions, as is the case when Tizio offers to sell his petrol car while Caio believes that the offer relates to another electric car. This type of mistake, therefore, occurs when each contracting party is mistaken about the other's intention to contract on a certain object. The difference between mutual misunderstanding and common mistake is clear, since whereas the latter type of mistake is identical for both parties (whether it concerns the subject matter of the contract, its assumptions, its qualities or its legal nature), in the case of mutual misunderstanding the parties make different mistakes, misunderstanding each other's intentions. This explains why in mutual misunderstanding the mistake is in the communication between the parties and prevents the formation of the agreement. It is now useful to point out some cases where this is the case.

The first is *Raffles v. Wichelhaus*[81] , in which Wichelhaus had agreed to buy cotton from Raffles that was to arrive from Bombay on a ship called Peerless. However, by chance there were two ships with the name Peerless carrying cotton from Bombay, one leaving in October and the other in December. Since the parties were not aware of the fact that there were two vessels with the same name, the same cargo and coming from the same city, it happened that one party referred to the vessel that left in December, while the other referred to the vessel that left in October. In the present case, the contract was therefore based on a mutual misunderstanding, objectively justifiable in the eyes of a reasonable person, therefore the contract was declared void.

Another useful case for understanding is *Scriven Bros. and Co. v. Hindley and Co*[82]. Scriven had auctioned a number of bales of hemp and some bales of shives; Hindley, prior to the auction, had examined the samples and consequently decided to bid for the hemp. However, during the auction, due to the lack of clarity in the description of the lots offered for sale, Hindley offered a sum for a number of bales that she believed to contain hemp, when in fact they contained shives, a much more modest material of much less value than hemp, and the sum offered was therefore excessive and disproportionate. The auctioneer, however, accepted the offer in the belief that the participant actually intended to buy hemp, albeit for a high price that might have been justifiable on the basis of Hindley's subjective motives. In the present case, the Court denied that a valid agreement had been formed, pointing out that any reasonable buyer could have been misled by the inaccurate description of the goods in the catalogue[83].

5.3 *Unilateral mistake.*

The doctrine of unilateral mistake requires that only one of the parties be in mistake at the time of the conclusion of the contract. Normally, such a mistake does not impede the due performance but, if it can be shown that at the time of the conclusion of the contract one party was in mistake with respect to a term of the contract and the other party was aware

81 (1864) 2 H. and C. 906.
82 [1913] 3 K.B. 564.
83 G. Criscuoli, *Il contratto nel diritto inglese*, op. cit., pp. 203-205.

of that mistake, the contract may be declared void. This is because, according to English law, in such a case the parties cannot be said to have reached an agreement, which is a prerequisite for the formation of a legally binding contract[84].

A classic example of the unilateral contract doctrine can be found in *Hartog v Colin & Shields*[85]. In that case, the seller had addressed an offer to the offeree in which he offered to sell certain goods. However, by mistake, the seller had communicated an incorrect price of those goods. Taking advantage of the mistake, the buyer had pretended to accept the seller's proposal and had subsequently sued the seller when the latter had refused to deliver the offered goods. The King's Bench held that the contract was void for unilateral mistake, since the buyer knew that the seller had been mistaken about the price of the goods at the time the contract was made. Indeed, Judge Singleton observed that: "anyone with knowledge of the trade must have realised that there was a mistake" in the terms of the seller's offer and therefore the buyer "could not reasonably have supposed that the offer contained the real intention"[86]. Accordingly, there was no agreement between the parties, nor could a contract have come into existence.

It should be noted that traditionally the unilateral mistake in England, provided that it is essential in relation to the overall content of the contract, is treated differently by common law and equity depending on the position in the contractual relationship of the party not fallen in mistake. Indeed, the mistake under common law leads to the invalidity of the contract only if the party not in error knew of the mistake made by the other party and nevertheless decided to conclude the contract. In that case invalidity is determined by the fact that no agreement was reached between the parties, but also by the fact that they did not contract on an equal basis[87].

For the equity, on the other hand, the decisive factor is whether the mistake committed by one party, although unknown to the other party, would nevertheless have been recognisable on the basis of its content, the circumstances of the contract or the qualities of the contracting parties by any reasonable person with the use of ordinary diligence[88].

The unilateral mistake may also relate to the identity of the other party; this occurs when Tizio enters into a contract with Caio, believing him to be Sempronio. In many of the cases where a contracting party makes a mistake as to the identity of the other party's person, the mistake is caused by the other contracting party's misleading conduct leading to the invalidity of the contract in the face of the fraudulent, negligent or innocent

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84 H. Beale, *Chitty on Contracts*, op. cit., par. 3-018 and cf. A. Burrows, *A Restatement of the English Law of Contract*, op. cit., p. 186.

85 [1939] 3 All ER 566. In the present case, a misunderstanding arose concerning the purchase of 30,000 Argentine hare skins which the offeror wanted to sell for 10 pence each, whereas the offeree, misunderstanding the offer, intended to buy them at 10 pence per pound, i.e. by weight (thus paying three skins with ten pence).

86 See *Hartog v Colin & Shields* [1939] 3 All ER, [566] and [568].

87 In *Boulton v Jones* (1857) 2 H. and N. 564, for instance, a contract concluded following an acceptance expressed by a contracting party who was aware that the proposal was not addressed to him was declared void.

88 According to the equity, for example, ineffectiveness was declared by the Court in *Webster v. Cecil* (1861) 30 Beav. 62.

misrepresentation[89]. Apart from cases in which the contract is rendered invalid by the misrepresentation, there are situations in which the mistake is imputable to the party and the invalidity of such contracts is only triggered by the occurrence of certain conditions. The first of these is that the identity of one of the contracting parties must be essential to the existence of the legal relationship[90]. For this reason, the mistake of a person who, having made an offer to the public, refuses to consider the contract valid because the accepting party was not the person with whom he actually wished to conclude the contract is irrelevant[91]. The second condition is that the mistake must relate to the identity of the person of the other contracting party and not to some of his qualities such as solvency or social position[92]; the third is that the party claiming the mistake as to the identity of the other contracting party must prove that the mistake he made was not due to his negligence[93].

VI. The divergence between the will and the pre-contractual declarations of the parties in smart contracts.

With regard to the relationship between contractual mistake and smart contracts, it should first be noted that in the use of these software people may mainly incur two types of mistake, which are less frequent in traditional contracting: one caused by the greater difficulty for the party to perfectly understand the content of the contract drawn up in computerised code, the other caused by the divergence between the will and what is actually transposed in the blockchain platform.

Since the real characteristic trait of the smart contract resides in the automatism of its operation, the discipline of mistake in Italy tends to apply similarly to what happens in other contracts, equally formed through digitised systems but lacking self-executability. Therefore, like normal digital contracts, in order to determine the invalidity of a smart contract, it is not sufficient to merely ascertain a wrong representation of reality, but it will be necessary for at least one of the contracting parties to have made an essential and recognisable mistake (see, Art. 1428, 1429, 1431 cc. and §4)[94].

The use of a smart contract appears apt to increase the hypotheses of application of the mistake; there is, for example, a possible number of cases in which the computer software is referable to subjects that are sometimes anonymous, sometimes covered by pseudonymy: this, inevitably, increases the possibility that the mistake may fall on the identity or qualities of the person of the other contracting party[95]. In addition, the characteristics of the smart contract also make mistakes on the legal nature or subject

89 See *Phillips v Brooks Ltd.* [1919] 2 K. B. 243.
90 See, for instance, *Boulton v Jones* (1857) 1 H. and N. 564.
91 See *Dennant v Skinner* [1948] 2 K.B. 164.
92 Cf. *King's Norton Metal Co., Ltd. v Edridge, Merrett and Co., Ltd.* (1897) 14 T.L.R. 98; *Newborne v Sensolid (G.B.) Ltd.* [1954] 1 Q.B. 45.
93 Cf., *Ingram v. Little* [1960] 3 All E.R. 332. V., G. Criscuoli, *Il contratto nel diritto inglese*, op. cit., pp. 208-210.
94 I. Martone, *Gli smart contracts. Fenomenologia e funzioni*, op. cit., p. 155. Cf., A. Lombardi, G. Lombardi, *Intelligenza Artificiale, contratto e responsabilità civile*, op. cit., pp. 207-209.
95 Art. 1429 c.c. "L'errore è essenziale […] 3) quando cade sull'identità o sulle qualità della persona dell'altro contraente, sempre che l'una o le altre siano state determinanti del consenso".

matter of the contract more frequent, as well as on the identity of the object of the performance or on a quality of the same that, according to common appreciation or in relation to the circumstances, must be considered determinant for the agreement[96], also because in the transformation of the contract into computer code strings there could be either a translation, in whole or in part, that does not perfectly adhere to the contents prepared by the contracting parties, or an incomplete translation[97].

With regard, in particular, to the possible application of the Italian legal system's rules on mistake on declaration (*errore ostativo*: see, *supra*, §4) to the smart contract, it is useful to give an example. Consider, for instance, the following case: Tizio decides to exchange a token in a blockchain permissioned for an amount of 10 cryptocurrencies. In writing the program for the exchange, Tizio makes a mistake and sets it up in such a way that the token he provides is exchanged on the blockchain platform with anyone offering a single cryptocurrency. Caio, an expert in cryptocurrencies and aware of the real value of the token made available by Tizio, imagining the latter's mistake, decides to take advantage of it and pours the wrongly requested amount of cryptocurrency, so as to allow the smart contract to self-execute and proceed with the exchange. Under Italian law, this is clearly a mistake on declaration (*errore ostativo)*, since it is, pursuant to Article 1433 of the Civil Code[98], the mistake that falls on the party's declaration or transmission thereof[99].

It is a mistake on declaration because the declarant's will had been correctly formed through a decision-making process that did not run into vices (a will to exchange the token for 10 cryptocurrencies), but was then expressed or transmitted in a manner that did not reflect the party's actual will (formulated by exchanging the token for a single cryptocurrency)[100].

In such a case it is possible to deem the mistake essential in that it relates to the subject matter or the identity of the object of the performance (see Art. 1429 cc. no. 1 and 2 and §4) and is recognisable by the other party[101]; therefore, the smart contract will be voidable if so requested by Tizio. Indeed, the doubts as to the possible essentiality of the mistake

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96 Art. 1429 c.c. "L'errore è essenziale: 1) quando cade sulla natura o sull'oggetto del contratto; 2) quando cade sull'identità dell'oggetto della prestazione ovvero sopra una qualità dello stesso che, secondo il comune apprezzamento o in relazione alle circostanze, deve ritenersi determinante del consenso".

97 Cf. B. Cappiello, *Dallo "smart contract" computer code allo smart legal contract. I nuovi strumenti (para) giuridici alla luce della normativa nazionale e del diritto internazionale privato europeo: prospettive de jure condendo*, in Diritto del commercio internazionale, 2020, pp. 492-493 and see I. Martone, *Gli smart contracts. Fenomenologia e funzioni*, op. cit., pp.157-158.

98 Cf. Cass. Civ., sez. lav., 09/01/2018, n. 274 in *Giustizia Civile Massimario 2018,* op. cit.

99 On the applicability of the discipline of art. 1433 cc. to smart contract, see I. Martone, *Gli smart contracts. Fenomenologia e funzioni*, op. cit., p. 156: "a prescindere dalla specificità delle fattispecie concrete, si verserà per lo più in ipotesi nelle quali il vizio, incidendo direttamente sulle modalità di manifestazione dell'intento, tende ad assumere la veste di errore c.d. ostativo, con l'ulteriore effetto che la disciplina contenuta nell'art. 1433 cc. si rivelerebbe più che mai appropriata, soprattutto quando i c.d. bug di sistema inficiano la trasposizione in stringhe di codici". On this point see, also, L. Parola, P. Merati, G. Gavotti, *Blockchain e smart contract: questioni giuridiche aperte*, in *i Contratti*, op. cit., p. 686.

100 Cf. Cass. Civ., sez. lav., 09/01/2018, n. 274 in *Giustizia Civile Massimario 2018,* op. cit.

101 See C. Rossello, *l'errore nel contratto*, op. cit., p. 265 and p. 270.

in the case taken as an example are dispelled by the fact that the requirements of essentiality under Art. 1429 cc are not peremptory.
There is abstractly the possibility that some interpreters consider that in the present case the contract would not be voidable but rectifiable since the defect would consist in a mere miscalculation (see §4 above). In fact, Art. 1430 cc. provides that such a mistake does not give rise to invalidity but to rectification of the contract unless, since the mistake has been made in respect of quality, it has assumed decisive importance[102]. While it is true that for jurisprudence the miscalculation is that mistake made in the arithmetical elaboration of the exact data assumed in the contract[103], since the *ratio* of the rule is to make rectifiable errors of calculation that do not appear determined by agreement, part of the doctrine considers that the miscalculation consists in the erroneous quantitative determination deriving either from an erroneous arithmetical operation or from an erroneous quantification of the precisely identified good[104]; a situation, the latter, which seems to occur in the case presented.
However, it is precisely the self-executiveness of the smart contract that seems to push towards the necessity of recognising the invalidity of the contract executed by the programme, so as to determine the restitution of the patrimonial performances. In fact, since the latter have already been executed, a rectification seems difficult to hypothesise, unless the parties have agreed *ex ante* to include a clause in the smart contract that allows for a rectification in the event of an erroneous determination of the quantity of a cryptocurrency paid and the consequent automatic retraction of the effects of the computer software.
A case such as the one described above, in English law, entails the application of the discipline of the unilateral mistake (see, supra, §5.3) which renders the smart contract void for the same reasons that determined the invalidity of the contract in the aforementioned case *Hartog v Colin & Shields*[105] (see, supra, §5.3). In fact, after Tizio had written his offer

[102] Art. 1430 cc., Errore di calcolo: "L'errore di calcolo non dà luogo ad annullamento del contratto, ma solo a rettifica, tranne che, concretandosi in errore sulla quantità, sia stato determinante del consenso"; see F. Santoro-Passarelli, *Dottrine generali del diritto civile*, op. cit., p. 163, who defines the miscalculation as "un errore accidentale rettificabile".
[103] Cass. Civ., sez. I, 03/03/2022, n. 7066 in *Guida al diritto 2022, 18,* op. cit.
[104] Consider the price of goods contained in a container that is calculated on the basis of an erroneous determination of the weight of the same; on this point, see C. M. Bianca, *Il Contratto*, op. cit., pp. 612.
[105] [1939] 3 All ER. The facts are briefly recalled here: the seller had addressed an offer to the offeree in which it offered to sell certain goods. However, by mistake, the seller had communicated an incongruous price for those goods. Taking advantage of the mistake, the buyer had pretended to accept the seller's proposal and had subsequently sued the seller when the latter had refused to deliver the offered goods. The King's Bench decided that the contract was void for unilateral mistake, since the buyer knew that the seller had been mistaken about the price of the goods at the time the contract was made. Judge Singleton observed that "anyone with knowledge of the trade must have realised that there was a mistake" in the terms of the seller's offer and therefore the buyer "could not reasonably have supposed that the offer contained the real intention" (on this point, see *Hartog v Colin & Shields* [1939] 3 All ER, cit., [566] and [568]). Consequently, there was no agreement between the parties, nor could a contract have come into existence. See also, *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502.

in the blockchain platform, committing a mistake in writing it with regard to the amount of cryptocurrency, Caio, despite knowing of the other party's mistake, decided to accept the offer anyway. In accordance with English law, it could be argued that Caio's acceptance is not valid for the purpose of giving rise to a legally binding contract, which would end up being irretrievably void for failure to reach an actual agreement. Moreover, even if in some cases the unilateral mistake in England may constitute the basis for requesting the rectification of the contract[106] instead of its invalidity, given that the code has already been self-executed by the smart contract, as hypothesised above for the Italian context about miscalculation, the preferable solution for Tizio would seem to be that of claiming the invalidity of the contract on the basis of the unilateral mistake and consequently requesting the restitution of the token or, if impossible, a sum of money corresponding to the value of the same[107].

VII. THE RELEVANCE OF MISTAKE AS VICE OF WILL

The mistake of those who use a blockchain platform may also relate to the defect of correct knowledge of what will be the effects produced by the smart contract. In this case, the will to conclude a contract is vitiated by the wrong interpretation of the meaning of the computer code of the software and the consequent erroneous belief in what will be the determined result of the self-execution of the smart contract. This type of mistake seems likely to become frequent in a context where contracts are concluded directly on a platform and in computer language. It is no coincidence that one of the greatest difficulties associated with the use of smart contracts is precisely the lack of knowledge of this language, which inevitably affects most users of blockchain platforms.

Thus, it is necessary to investigate the relationship between the mistake on the effects produced by the software and the application of both the discipline on the mistake as vice of will (*errore vizio*) of the Italian legal system and the doctrine of mistake of the English legal system. However, it is first necessary to clarify one aspect: in the present case, is not illustrated a situation in which the effects of the smart contract are the result of an algorithmic error, but rather a situation in which the smart contract produces the effects for which it was programmed. A mistake by the parties in adhering to such a software, therefore, is only relevant for the purposes of the vice of agreement, as it is not the result

[106] See, for instance, *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [1998] 1 WLR 896 a [105]. Rectification is a remedy by which the court orders that the terms of a written contract be amended to be consistent with what the parties have agreed. Since rectification is an equitable remedy, the court has the discretion to refuse to grant rectification; Cf. H. Beale, *Chitty on Contracts*, 34th ed., 2021, op. cit., par. 5-057; C. Mitchell, P. Mitchell, S. Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th ed, op. cit., par. 40-32; v., *Lyme Valley Squash Club Ltd v Newcastle-under-Lyme BC* [1985] 2 All ER 405, 413. One of the cases in which rectification is permissible, however, is where one of the parties makes a mistake as to the meaning of a term of the contract and this mistake is known to the other party at the time of the conclusion of the contract. The Court, in such a case, may order rectification on the ground that it would be unfair to enforce a contract that the non-mistaken party knew to be inconsistent with the economic transaction that the other party believed it was entering into at the time of the conclusion of the contract. Cf. *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, [2020] Ch. 365 from [103] to [104].

[107] Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit., par. 5.53.

of a malfunction of the blockchain. It should be noted that the content of the contract resulting from the negotiations between computer systems, especially between deterministic computers, is the result of what the parties accepted at the time of registration and agreement with the platform[108]. The latter "produces the exact same output when provided with the same input" and the algorithms "do and only do what they have been programmed to do"[109].

Consider the case in which Tizio and Caio conclude a smart contract involving the exchange of cryptocurrency X with cryptocurrency Y on the Alfa platform, with transactions executed according to instructions given by algorithms. Software is installed in the Alfa platform to ensure that the transactions are concluded by identifying the applicable market prices from external cryptocurrency exchanges. However, Tizio and Caio make the same mistake regarding the parameters set by the platform to execute cryptocurrency exchange transactions. In the face of this common mistake, Caio obtains a patrimonial advantage from the execution of the operations performed by the smart contract, an advantage far greater than that which both he and Tizio expected, since it is the result of a factual mistake shared by the contracting parties on the operating criteria of the blockchain.

If in the present case the invalidity of the contract does not seem to be in doubt for the Italian legal system given the essential nature of the mistake (recognisability of the same does not even seem to be necessary since the mistake is common to both parties[110] - see, *supra*, §4) questions arise as to the applicability of the English common mistake discipline (see, supra, §5.1).

Indeed, although common mistake concerns the situation where the parties enter into a contract based on an erroneous common belief concerning a question of fact (or of law)[111] relevant to the performance of the contract, English law recognises only a very limited range of common mistakes that render a contract void. Indeed, it is necessary to refer once again to The Great Peace, in which the Court of Appeal held that a contract is void for common mistake only if: a) the parties shared a belief in the existence of a certain situation at the time the contract was entered into; b) contrary to that belief, the situation did not exist; c) the non-existence of the situation makes the performance of the contract or the attainment of its purpose impossible[112]. It is therefore not sufficient to render the contract

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[108] A. Alpini, *I vizi del consenso fra contratto e trattamento dei dati: la riconoscibilità dell'errore*, in *Persona e Mercato*, 2/2022, pp. 211-212; A. Alpini, *I vizi del consenso fra contratto e trattamento dei dati: la riconoscibilità dell'errore*, in *lceonilne*, 2/2022, pp. 45-46.

[109] *Quoine Pte Ltd v B2C2 Ltd, 2020*, [89-98].

[110] It should be noted that recognisability is not relevant in the presence of a mistake common to both parties since in such a case each of the two contractors has caused the invalidity of the contract: see, Cass. Civ., sez. II, 23/03/2017, n.7557 in *de Jure, banca dati editoriale GFL*. Against this jurisprudential orientation, see A. De Martini, *In tema di riconoscibilità dell'errore bilaterale nel contratto*, in Foro it., 1952, I, op. cit., p. 431 ff.

[111] See, J. Beatson, A.Burrows, J. Crtwright, *Anson's Law of Contract*, op. cit., p. 296: "Both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract".

[112] See, *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] QB 679 at [76]: "the following elements must be present if common mistake is

invalid the fact that its performance proves to be more onerous for a contracting party than that envisaged by the parties because of a mistake made at the time of the conclusion of the contract, nor is it relevant that such greater onerousness is due to the parameters adopted by the platform for the purpose of exchanging cryptocurrencies. The mistake made by the contracting parties must, in fact, concern the very possibility of performance in order to be able to determine the invalidity of the contract, whereas, in the case taken as an example, the self-execution of the software is not prevented by the mere fact that Caio obtains an unexpectedly high pecuniary advantage to the detriment of Tizio. Not dissimilar conclusions were also reached by the Law Commission[113].

However, it must be noted how, even in the English legal system, in the event that the code does not produce the effects desired by the parties, this situation may admit the applicability of the common mistake if the code is not capable of self-execution. In this case, in fact, the impossibility of the execution of the performance that is the object of the smart contract can be equated to the non-existence of the subject matter of the contract, rendering the latter void[114].

Keeping in mind the example in which Tizio and Caio are involved, it is possible to think about the case in which the mistake on the parameters adopted by the software of the Alfa platform is not common to both parties, but unilateral. If for the English legal system such a mistake by only one party will in all probability be irrelevant, since when only one contracting party has made the mistake in fact or in law there is no basis for resorting to the application of the doctrine of mistake[115], for the Italian legal system different considerations can be made. Indeed, where the mistake is not only essential, as appears to be the case here, but also recognisable by the other contracting party, the contract will be voidable. The declaration of invalidity of the contract will therefore depend on whether Caio was able to recognise the mistake into which Tizio had fallen. It should be noted that the computer language by means of which the smart contract is concluded does not facilitate the recognisability of the mistake, therefore, the existence of the prerequisites for

to avoid a contract. (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible".

113 Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit., par. 5.40: "[…] In other cases, even where the parties have made a mistake, the code might perform in such a way as to demonstrate the possibility of performing the contract, so that the mistake in question is not sufficient to vitiate the contract. It is only where the code operates in such a way that achievement of the purpose of the contract is impossible that common mistake may operate"; see, also, par. 5.41 and 5.42.

114 Cf. Law Commission, Smart legal contracts - Advice to Government, Nov. 2021, op. cit., par. 5.40: "[…] it is conceivable that where the code, as written at the time the contract is entered into, is faulty and will fail to perform as the parties intend, such an instance may be regarded as a mistake as to a current state of affairs. In this regard, we think an analogy can be drawn with the situation where, unbeknownst to the parties at the time of conclusion of the contract, the subject matter of the contract does not exist"; 5.44.

115 *Statoil ASA v Louis Dreyfus Energy Service LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685, cit.

invalidity due to the party's defect of will will mostly have to be assessed in concrete terms, on a case-by-case basis.

VIII. SMART CONTRACT MALFUNCTIONING: THE CASE QUOINE PTE LTD V B2C2 LTD.

The Quoine case[116], decided by the Singapore Court of Appeal, is useful for studying the relationship between mistake and computer contracts affected by a system malfunction.
The decision concerns transactions involving the exchange of Ether for Bitcoin on the platform operated by Quoine, carried out according to instructions given by algorithms. Quoine had installed software to ensure that transactions were concluded by identifying applicable market prices from external cryptocurrency exchanges. The company B2C2, a user of the platform, had in turn installed a so-called 'fail-safe deep-price' in the system equivalent to 10 Bitcoins in exchange for 1 Ether. However, due to an error in the platform's system, the exchange rates were not updated and some transactions were executed at an exchange rate approximately 250 times higher in favour of B2C2 with the disadvantage of two other companies with which it had concluded smart contracts for the exchange of cryptocurrencies. This was because the operator of the Quoine platform had carried out password updates of certain operating systems, as a result of which access to external data on the platform by the programme had been interrupted for a certain period of time. This had caused an alteration in the exchange rate of cryptocurrencies, as the scarcity of data on the platform had led to a decrease in market liquidity, thus generating offers to sell cryptocurrencies at abnormally high prices compared to other markets[117].
Upon learning of the error, Quoine had decided to cancel all transactions concluded by B2C2 with the other two companies, describing the incident as a mere software problem; B2C2, on the other hand, had considered the cancellation of the transactions to be a violation of the legal relationship between the user and the platform. For its part, Quoine had argued that B2C2 was aware that it was a software error and had therefore also requested the application of the unilateral mistake[118] and common mistake[119] rules to the contracts underlying the exchange transactions.
The Court, however, in its decision holds that the transactions were not voidable in the first place because Quoine had breached the terms of the contract between user and platform according to which once the fulfilment of the order has been communicated, the action is irreversible (The Irreversible Action Clauses). It also clarifies that in the present

[116] *Quoine Pte Ltd v B2C2 Ltd SGHC(I) 03[2019] e SGCA(I), 02 [2020],* cit.
[117] L. Vagni, *Il problema della rilevanza giuridica dell'errore nella decisione dell'oracolo della blockchain*, in *lceonline (www.lceonline.eu)*, op. cit., p. 57.
[118] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA, op. cit., [4]: "A central plank of Quoine's defence both at trial and on appeal was the contention that the contracts underlying the Disputed Trades ("the Trading Contracts") were void or voidable for unilateral mistake".
[119] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA, op. cit., [31] and [129]. See, also [47]: "The issues that arise in this appeal and that we will address in this Judgment are the following: […] (b) Was Quoine contractually entitled to cancel the Disputed Trades by reason of any express or implied terms of its contract with B2C2? (c) In relation to Quoine's defence of unilateral mistake, did the Judge err in finding that Mr Boonen did not have actual or constructive knowledge of a relevant mistaken belief on the part of the Counterparties in relation to the Disputed Trades? (d) Were the Trading Contracts void on the basis of common mistake at common law? […]".

case the contracts had been concluded without intermediation between the users, even though they were also contractually obliged to Quoine on the basis of the conditions of use of the Platform (the Agreement) and in particular of the aforementioned Irreversible Action Clauses, by virtue of which a fulfilled and notified order is deemed irreversible. The same Court further observes that the clause allowing Quoine to cancel the transaction, in the event that the transaction was carried out at an abnormal value (Aberrant Value Clause), was neither included in the Agreement nor adequately brought to the attention of the parties[120].

Moreover, the transactions were not legitimately removed even with the application of the doctrine of unilateral mistake, since the invalidity of the contract between B2C2 and the two companies for mistake should have concerned an essential element, also taking into account the knowledge of the mistake by the contracting parties at the time of the conclusion of the contract[121]. However, since in the present case there was no human intervention at the time of the execution of the transactions, the Court considers that the error to be assessed concerns B2C2's programmer[122] but, according to the same Court, the intention of the same programmer at the time of the elaboration of B2C2's transaction algorithm was to protect against the risk of any unjustified exposure and not to manipulate the exchange rate by exploiting Quoine's software error[123]. The Court argues, in fact, that B2C2 could not have known about the alleged mistake of the two companies with which it had traded cryptocurrencies, so Quoine had no reason to cancel the transactions[124].

120 It should be noted that the disclosure on the risks of virtual currency transactions warned that if Quoine detected that a transaction was the effect of an abnormal value, the company could cancel the transaction, as this was an obvious system error. However, this provision was not part of the agreement as it was inserted after the user's registration without being brought to the knowledge of the parties. What is of interest here is that if that provision had been included in the agreement, the recognisable mistake could have been decisive for the invalidity of the contract, since the information notice warned that the algorithmic error made recognisable by the evident abnormality of the price could have led to the cancellation of the transaction; see, *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA, op. cit., [25]: "Please be aware that in the event that a customer loses any opportunity (e.g., the Company is unable to receive a customer's order and the customer therefore loses the opportunity to place the order, losing profits that he or she ordinarily would have earned) due to emergency system maintenance or a system failure, the Company will not be able to execute a process to fix the error because it will be unable to identify the order details that the customer intended to place (the original order). The system may produce an aberrant value for the buy or sell price of the virtual currency calculated by the system. Please be aware that if the Company finds that a transaction took effect based on an aberrant value, the Company may cancel the transaction. Your understanding is appreciated".

121 B. Lomfeld, *Structured Error. Case Study on a Discourse Logic of Comparative Law*, in *The Italian Law Journal*, 2015, v. 1, n. 2, p. 249 ff.

122 The Court therefore considers it necessary to understand whether B2C2, by programming the algorithm and installing the "fail-safe deep price", had knowledge that the offer would be accepted due to the influence of a mistake and whether it acted with the intention of taking advantage of it.

123 A. Alpini, *I vizi del consenso fra contratto e trattamento dei dati: la riconoscibilità dell'errore*, in *Persona e Mercato*, op. cit., pp. 210-211 e A. Alpini, *I vizi del consenso fra contratto e trattamento dei dati: la riconoscibilità dell'errore*, in *lceonline* op. cit., pp. 44-45.

124 It should be noted that part of the doctrine has criticised the Court's argument, based on the non-recognisability of a mistake as a cause preventing the annulment of transactions, pointing out that the subject who installs an artificial intelligence programme to contract adheres in any case to a sort of open offer, and therefore ends up agreeing to conclude the transaction on any condition

According to the Court, moreover, the contracts were not vitiated by mistake either at common law or in equity, as the mistaken belief of the counterparties that they were exchanging cryptocurrency at close to the market price could not be regarded as a mistake on a decisive element of the contract, but rather as a mistake on an assumption on the basis of which the transactions had been carried out, or at most as an (erroneous) assumption that the Platform would work properly[125].

Therefore, the Court excludes that the malfunctioning of the programme can be attributed to a contractual mistake since is missing the element of recognisability of the mistake by B2C2, which did not have the possibility of knowing the other party of the contract nor did it have the possibility of fully evaluating the conditions of the contract, the result of algorithmic operations[126]. It also excludes the common mistake of the

provided by the system: see, M. Oliver, *Contracting by artificial intelligence: open offers, unilateral mistakes, and why algorithms are not agents*, in *Australian National University Journal of Law and Technology*, Vol 2(1) 2021; in particular, see p. 85: "Now suppose that the AI program makes a mistake and agrees to a bad deal. The person has clearly made a mistake - they should have done a better job programming their AI program - but that is not the kind of mistake that makes a contract voidable. It is a mismatch between what they did and what it would be prudent to do. There is no lack of consent, because the person clearly intended to enter into contracts on whatever terms their AI program agreed, and the resulting contract was on the terms their AI program agreed".

[125] Cfr. *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA, op. cit., [82] and [115].

[126] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA [39] – [43], op. cit. However, it is interesting to read the dissenting opinion of Justice Mance IJ at par. [183]: "There was a fundamental mistake, in that Quoine's system operated (and led to the sale of BTC on terms) in a way that was not conceived as possible and would never have been accepted by Quoine or the counterparties in the prevailing circumstances. Further, although B2C2 had no knowledge of the mistake as and when it occurred, the position is that, as soon as it inspected the computer print-outs next morning, it knew at once that there had been such a mistake. […] For the reasons I will give, in my opinion, the law should and can in such circumstances hold that the contract is voidable, as Quoine claims."; [192]: "The Judge's approach involves omitting a usually important element in any appraisal of such a situation, namely (here) whether there was anything drastically unusual about the surrounding circumstances or the state of the market to explain on a rational basis why such abnormal prices could occur, or whether the only possible conclusion was that some fundamental error had taken place, giving rise to transactions which the other party could never rationally have contemplated or intended"; [201]: "In the present case, there can only be one answer to the question of what any reasonable trader with knowledge of the market circumstances would have thought. There was not and never has been any suggestion that Mr Boonen's very unusual or unfathomable market developments occurred. The only explanation of the transactions, whether hypothesised in advance, observed concurrently or considered early next morning, was and is major error – as B2C2 at once saw". On this point, cf. K. Nathaniel - S. Tey, *Can Smart Contracts Outsmart the Law: The Law of Contract in Light of Smart Contracting*, in *Singapore Comparative Law Review*, 2022, pp. 110-111.

parties[127], since there was no intention between them to conclude contracts at the market exchange rate[128].

In the light of the foregoing, if the Quoine case had been decided according to the provisions on mistake of the Italian legal system, it is unlikely that the software malfunction would have been qualified as an recognisable mistake pursuant to Article 1431 of the Italian Civil Code by the party that benefited from it, therefore the contract, in all likelihood, would not have been voidable for mistake pursuant to Articles 1427 and 1428 of the Italian Civil Code.

IX. ALGORITHMIC ERRORS IN SMART CONTRACTS IMPLEMENTED THROUGH AI SYSTEMS

As noted, it is not always possible to recognise the future computer error that the blockchain platform will make, nor is it always easy to immediately notice the algorithmic error that has occurred[129]. This is even more the case if the platform is implemented through AI, as its characteristics allow the AI a great autonomy in determining the computer code containing the contract. Moreover, the operating mechanisms of the AI system are often difficult to understand (on this point, see above, §3), making it even more difficult to recognise the error committed by the digital tool.

For these reasons, it is necessary to address the hypothesis in which a computer error occurring in the platform causes results that are unintended (or at least unexpected) by the parties and this error is not detectable by the contracting parties.

Algorithmic errors can be of various types and among these there is the bug, i.e. an objectively incorrect line of code[130]; it is a deterministic type of error, therefore both during the reading of the source code and during its execution it is theoretically possible to identify the presence of an error (and possibly correct it) through so-called de-bugging.

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127 *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA, op. cit., [129]: "Quoine also argued that the Trading Contracts were void for common mistake, since B2C2 and the Counterparties had entered into the Disputed Trades under a shared mistaken assumption that they were transacting at or around the going market rate for ETH. However, B2C2 could not have been labouring under such an assumption, given that it had placed its sell orders for ETH at prices of 9.99999 BTC and 10 BTC to 1 ETH on the Platform because the intentionally pre-programmed deep price of 10 BTC to 1 ETH in the PureQuote strategy took effect (see [117(a)] above). Therefore, Quoine's defence of common mistake at common law fails".

128 L. Vagni, *Il problema della rilevanza giuridica dell'errore nella decisione dell'oracolo della blockchain*, in *lceonline (www.lceonline.eu)*, op. cit., pp. 57-58.

129 See *ex multis*, as examples, on the topic of *computer errors* and *computer errors* in *smart contract:* T. Huckle, T. Neckel, *Bits and Bugs: A Scientific and Historical Review of Software Failures in Computational Science*, op. cit.; Y. Wang, X. Chen, Y. Huang, H. Zhu, J. Bian, Z. Zheng, *An empirical study on real bug fixes from solidity smart contract projects*, in *The Journal of Systems & Software*, op. cit., (*https://www.sciencedirect.com/science/article/pii/S0164121223001826*); H. Liu, Y. Fan, L. Feng, Z. Wei, *Vulnerable smart contract function locating based on Multi-Relational Nested Graph Convolutional Network*, in *The Journal of Systems & Software*, op. cit. (*https://www.sciencedirect.com/science/article/pii/S016412122300170X?via%3Dihub*); A. Gupta, R. Gupta, D. Jadav, S. Tanwar, N. Kumar, M. Shabaz, *Proxy smart contracts for zero trust architecture implementation in Decentralised Oracle Networks based applications in Computer Communications*, op. cit., (*https://www.sciencedirect.com/science/article/pii/S0140366423001470?via%3Dihub*).

130 A. Amidei, *Le responsabilità da intelligenza artificiale tra product liability e sicurezza del prodotto*, in U. Ruffolo (a cura di), *XXVI lezioni di diritto dell'intelligenza artificiale*, Torino, 2021, p.149 ff.

A further type of error is that determined by the probabilistic nature[131] of classification algorithms, i.e. those types of algorithms that place a given input within a given class and that are subject, however, to a margin of error that can be reduced, but not completely eliminated. In fact, even a system with a very high degree of precision in the execution of its task, perhaps close to certainty, expresses its result as a percentage probability. Moreover, even by increasing the percentage of correctly performed tasks, the probabilistic nature of the algorithm can give rise to misclassifications (so-called false positives and false negatives).

In AI systems, a peculiar error is the error arising from the evolution of the system itself. In this case, such a possibility could only occur in systems based on a reinforcement learning approach (see, supra §3), i.e. capable of modifying its output in the face of interaction with the environment.

In the case of the probabilistic error, unlike in the case of the bug, the system executes code that is free of inaccuracies that could affect the system's performance, and the classification error could be related neither to forms of bias[132] that instruct the AI during training nor to interaction with the environment[133].

Now, especially algorithmic errors of a probabilistic nature or linked to the evolution of the system seem not to be reasonably recognisable by those who conclude a smart contract.

In such a case, inevitably, the error must be imputed to the platform in which the computer software blockchain based is concluded (or rather to the external subjects or nodes that govern the same), and this especially in the case of blockchain and smart contracts implemented through AI systems, in the face of the greater freedom in the executive phase proper to artificial intelligence and the less predictability in the outcomes of the system's activity, also due to the so-called black boxes (see, *supra*, §3 note no. 42).

Therefore, the discipline of contractual mistake does not appear to be applicable to the types of algorithmic errors described that occur in the execution phase of the contract drafted through smart contracts. It is therefore necessary to understand which legal instruments should be applied to redistribute the negative consequences of the malfunctioning and, to this end, the best way forward seems to be that of contractual liability.

Indeed, if the contract drafted on a smart contract cannot be invalidated due to contractual mistake, it seems possible to mitigate any negative consequences suffered by the parties

131 U. Ruffolo, *La macchina sapiens come "avvocato generale" ed il primato del giudice umano: una proposta di interazione virtuosa*, in U. Ruffolo (ed.), *XXVI Lezioni di diritto dell'intelligenza artificiale*, Torino, 2021, p. 206.

132 The evolution of algorithms and their ability to process large amounts of data means that their outputs are becoming increasingly accurate and reliable. However, there is a risk that the data used for the development of artificial intelligence tools are vitiated by prejudices. These are precomprehensive mechanisms that affect the very datasets intended to "feed" artificial intelligence machines and are summarised under the term "bias". See N. Abriani, G. Shneider, *Diritto delle imprese e intelligenza artificiale*, op. cit., p. 39.

133 C. Bomprezzi, S. Sapienza, *Algorithmic justice e classificazione di rischio nella proposta AI Act*, in M. Palmirani, S. Sapienza (ed.), *La trasformazione digitale della giustizia nel dialogo tra discipline*, Milano, 2022, pp. 98-101.

due to algorithmic error by recognizing the liability of the permissioned blockchain platform (or, better, of third parties or nodes governing it), especially if implemented through AI systems.

On this point, it is worth noting that since the 1980s there has been discussion about liability for damages caused by software[134], and new insights into liability inevitably arise when the software has a certain degree of decision-making autonomy or when the effects of the program's activities are not entirely predictable[135], as is the case when artificial intelligence is involved.

However, in the case of permissioned-based blockchain smart contracts implemented through AI, the subjects liable for algorithmic errors in the platform are either third parties or the nodes that essentially control the platform, which enables both parties to negotiate and the self-execution of the contract content[136].

X. CONCLUSIVE REMARKS

The rules on contractual mistake in Italy and England tend to apply to smart contracts similarly to other computer contracts, which are equally formed through digitized systems, even if without self-executability.

Consequently, both the Italian and English approaches to contractual mistake are applicable to situations where the will of the parties does not correspond to the pre-contractual declaration in the face of the mistake made by them in programming the smart contract (see, *supra*, §6).

In analyzing the relationship between smart contract and mistake, it is important to identify cases in which the mistake coincides with an incorrect foreshadowing of the effects produced by the smart contract (see, *supra*, §7). In such a case, the will to conclude a contract is vitiated by the misinterpretation of the meaning of the protocol computer code and the consequent mistaken belief in what will be the result of the self-execution of the smart contract. If the mistake has been made by both parties of the smart contract, the invalidity of the contract does not seem to be in doubt for the Italian legal system in the case of mistake as vice of will, while the same cannot be said about the applicability of the English common mistake discipline. In fact, although common mistake concerns the situation in which the parties enter into a contract based on an erroneous common belief concerning a matter of fact (or law), English law recognizes only a very limited range of common mistakes that render a contract void, and it is not sufficient to render the contract invalid if its performance proves more onerous for a contractor than the parties had intended because of a mistake made at the time the contract was concluded (see, *supra*, §5.1).

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134 C. Rossello, *La responsabilità da inadeguato funzionamento di programmi per elaboratore elettronico: aspetti e problemi dell'esperienza nordamericana*, in G. Alpa (ed.), *Computers e responsabilità civile*, Milano, 1985.

135 G. Finocchiaro, *Intelligenza Artificiale e responsabilità*, in *Contratto e Impresa*, 2020, p. 713 ff.

136 On the difficulties and issues related to judicial remedies in the case of smart contracts written on permissionless blockchain, allow me to refer to J. Fortuna, *Smart contract, abuso del diritto e tutela giurisdizionale: spunti di comparazione tra diritto italiano e diritto inglese,* in *Rivista di Diritti Comparati*, op. cit., pp. 915-916.

Moreover, in the case of a mistake made by only one party in the incorrect foreshadowing of the effects produced by the smart contract, if for the English legal system such a mistake will in all likelihood be irrelevant, since when only one contracting party has incurred the mistake in fact or in law there is no basis for resorting to the application of the doctrine of mistake, for the Italian legal system different considerations can be made. Indeed, in the event that the mistake, as well as being essential, is recognizable by the other contracting party, the contract will be voidable. The declaration of invalidity of the contract, therefore, will depend on the possibility that one contracting party had of recognizing the mistake into which the other fell.

In order to study the relationship between the doctrine of mistake and computer contracts affected by a system malfunction, the Quoine case, decided by the Singapore Court of Appeal, is of great interest (see, *supra*, §8). Indeed, the Court excluded the possibility that the program malfunction could be brought under the discipline of contractual mistake because it lacked, in particular, the element of recognizability of the mistake by one of the contracting parties (B2C2) who had neither the possibility of knowing who the other contracting parties would be nor had the possibility of fully assessing the terms and conditions under which the contract would be concluded, especially in the face of the software malfunction. Furthermore, if the Quoine case had been decided according to the provisions on mistake peculiar to the Italian legal system, the software malfunction would hardly have been qualified as a mistake recognizable by the party that benefited from it under Article 1431 of the Civil Code, so the contract, even in Italy, would in all probability not have been voidable for mistake under Articles 1427 and 1428 of the Civil Code.

On the other hand, the discipline of mistake does not seem to be applicable in the case of algorithmic error occurring in smart contracts implemented through AI, due to the difficult detectability of the error by the contracting parties, the greater freedom in the execution phase provided by AI, and the less predictable outcomes of the system's activity, even in the face of so-called black boxes. The error must be attributed to the platform in which the smart contract is concluded or, rather, on the external parties or permissioned blockchain nodes that govern it.

It will then be necessary in the future to thoroughly investigate the nature of the liability of the subjects controlling such blockchains.

Indeed, it seems clear that a contractual relationship is established between users and the blockchain, in which the platform assumes the obligations to enable the conclusion of the contract drawn up by smart contract, to ensure that the content of the contract corresponds to the will of the parties, and to execute the contract, producing the effects desired by the contracting parties. In the absence of any of these performances, the platform will have caused the breach of contract.

Consequently, AI's algorithmic error in the execution of the contract, when it will not have been recognizable to the parties, will not cause the application of the discipline of contractual mistake, but that of the contractual liability, attributable to the blockchain

platform implemented with AI. The parties of the contract could, therefore, sue the subjects who provided the AI system for breach of contract[137].

[137] Moreover, in addition to the blockchain platform, there could be various subjects in the supply chain that contribute to the realisation of the AI system and between the various subjects further contractual relationships could exist. The parties harmed by the algorithmic error, therefore, could sue for non-contractual civil liability against these. With regard to the regulatory and doctrinal framework on the issue of AI liability, a different direction can be observed between non-contractual and contractual civil liability. In fact, while for the former there are concrete attempts at regulation (e.g. AI Liability Directive and the new Directive on defective products - Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) {SEC(2022) 344 final} - {SWD(2022) 318 final} - {SWD(2022) 319 final} - {SWD(2022) 320 final}; Proposal for a Directive of the European Parliament and of the Council on liability for defective product {SEC(2022) 343 final} - {SWD(2022) 315 final} - {SWD(2022) 316 final} - {SWD(2022) 317 final}) for the latter there as yet no legislative initiative; hence it is still necessary to resort to the application of internal and supra-national norms and principles as regards liability for breach of contract; on this point, see G. Proietti, *Responsabilità civile, inadempimento e sistemi di intelligenza artificiale (approfondimento del 07 febbraio 2023)*, in *Giustizia Civile*, n.2, 2023, p. 1 ff.

LE PROCEDURE SECONDARIE VIRTUALI NELLA GESTIONE DELLA CRISI E DELL'INSOLVENZA *CROSS-BORDER* NEL QUADRO EUROPEO

*Marianna Marini**

SOMMARIO:

Questo lavoro approfondisce l'istituto delle procedure secondarie sintetiche o virtuali introdotto, nell'ambito della disciplina comunitaria della crisi e dell'insolvenza crossborder, dal legislatore europeo agli artt. 36 e ss. del Regolamento UE n. 2015/848. Questo istituto costituisce uno degli strumenti volti ad assicurare la gestione efficiente delle procedure concorsuali aperte nei confronti della stessa impresa multinazionale e, in particolare, appare diretto a prevenire l'apertura delle procedure secondarie potenzialmente confliggenti con le esigenze di una efficace gestione della procedura principale. In questo articolo, dopo aver riscostruito anche in via interpretativa le regole operazionali che disciplinano le procedure secondarie sintetiche, ci si sofferma in particolare sull'unilateral undertaking, su cui l'istituto si basa, per poi affrontare una serie di questioni ulteriori relative alla sua applicazione nei diversi sistemi nazionali, e in particolare nell'ordinamento italiano.

This article aims to reconstruct the legal treatment of Synthetic Insolvency Proceedings in European corporation law. This legal arrangement represents one of the instruments designed to guarantee the effective management of insolvency proceedings opened against the same multinational company. In particular, it appears to be primarily aimed at preventing the opening of secondary proceedings that could potentially conflict with an effective management of the main proceeding. This paper analyses those provisions of the European Regulation 2015/848 that regulate the Synthetic Insolvency Proceedings and it focuses on the unilateral undertaking, which is at the core of this legal tool. Finally, the paper will address some additional issues concerning the application of this Regulation in the different national legal systems, with a particular focus on the Italian legal system.

Keywords: crisi dell'impresa multinazionale – insolvenza transnazionale – procedure secondarie virtuali – *unilateral undertaking* – Regolamento UE n. 2015/848

I. ORIGINI E FUNZIONE GIURIDICA DELL'ISTITUTO EUROPEO DELLE PROCEDURE SECONDARIE SINTETICHE O VIRTUALI

Nell'ambito della disciplina comunitaria della crisi e dell'insolvenza crossborder, l'istituto delle procedure secondarie sintetiche o virtuali, disciplinato agli artt. 36 e ss. del Regolamento UE n. 2015/848, costituisce una delle novità più significative rispetto al previgente testo normativo del Reg. UE n. 2000/1346.

Come è noto, la versione Recast del Regolamento, assecondando la tendenza all'"ibridazione" dei modelli teorici tipici dei sistemi giuridici dell'insolvenza transfrontaliera[1], assume il modello dell'universalità limitata[2] per assicurare la gestione efficiente delle procedure concorsuali aperte nei confronti della stessa impresa

[1] Vattermoli, *Introduzione al multinational insolvency system*, in *Fondamenti di diritto commerciale internazionale*, diretti da A. Nigro, Vol. VI, *Profili concorsuali e tributari*, Pacini Editore, Pisa, 2020, p. 24.
[2] Westbrook, *The Lessons of Maxwell Communication*, in *64 Fordham L. Rev.,* 1996, p. 2531.

multinazionale e quello della territorialità cooperativa [3] per il coordinamento delle procedure relative al gruppo di società multinazionale: se per le diverse componenti del gruppo il coordinamento è meramente eventuale e avviene tra procedure parallele e autonome[4], per il debitore-soggetto giuridico unico, ossia la c.d. impresa multinazionale "atomo" che presenta cioè "un'articolazione organizzativa[5], (sedi secondarie stabilimenti, beni e rapporti giuridici) che trascende i confini dello Stato di origine"[6], il coordinamento tra le procedure si configura secondo la nota dicotomia procedura principale, procedura secondaria[7].

Ma l'apertura di molteplici procedure nei confronti del medesimo debitore, oltre a poter generare una serie di conflitti, e comunque di problemi di raccordo[8] tra le stesse, comporta, inevitabilmente, un aumento dei costi, destinati a gravare in definitiva sui creditori: ed è appunto al fine di ridurre tali inconvenienti che il legislatore europeo ha introdotto l'istituto delle procedure secondarie virtuali, che si inscrive in quell'insieme di iniziative e di rimedi volti a ridurre le antinomie che nella prassi vengono generate dal difficile raccordo tra procedura principale e procedure secondarie e che, pertanto, si applica esclusivamente nei confronti del debitore unico soggetto giuridico, e non in caso di crisi di un gruppo.

In particolare, ai sensi dell'art. 36 Reg. n. 2015/848, l'amministratore della procedura principale di insolvenza può concludere un impegno, con i creditori della dipendenza, che, se approvato da questi ultimi, produce l'effetto di impedire l'apertura della procedura

[3]Lopucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, in *82 Cornell L. Rev.,* 1999, pp.742 e ss.

[4] Mazzoni, *Cross-border insolvency of multinational groups of companies: proposals for an European approach in the light of the Uncitral approach*, in AA.VV., *Insolvency and Cross-border Groups. UNCITRAL Recommendations for a European perspective?,*in *Quaderni di Ricerca Giuridica della Banca d'Italia*, n. 69/2011, p. 15.

[5] L'art. 2 n. 10 Reg. n. 2015/848 definisce la nozione di dipendenza come «qualsiasi luogo di operazioni in cui un debitore esercita o ha esercitato nel periodo di tre mesi anteriori alla richiesta di apertura della procedura principale d'insolvenza, in maniera non transitoria, un'attività economica con mezzi umani e con beni».

[6] Vattermoli., *Il diritto europeo dell'insolvenza multinazionale,* in *Fondamenti di Diritto commerciale internazionale,* diretti da A. Nigro, Vol. VI, *Profili concorsuali e tributari*, Pacini Editore, Pisa, 2020, p. 93.

[7] Ai sensi dell'art. 46 del Regolamento la subordinazione della procedura secondaria a quella principale consiste nel potere dell'amministratore della procedura principale di chiedere la sospensione, per un periodo limitato di tempo, delle operazioni di realizzo dell'attivo nell'ambito della procedura secondaria, quando tale misura risulti funzionale al miglior soddisfacimento dei creditori tanto della procedura principale, quanto della procedura secondaria; e, ai sensi, dell'art. 47 di proporre un piano di ristrutturazione o di un concordato nell'ambito della procedura secondaria, ai sensi della legge applicabile a quest'ultima procedura.

[8] Benincasa, *Crisi dei gruppi transfrontalieri e regolamento comunitario sulle procedure di insolvenza. Prassi, giurisprudenza e progetti di riforma per consentire una complicata convivenza tra fenomeni economici e soluzioni giuridiche,* in *giustiziacivile.com,* 4/2015, pp. 4 e ss.

secondaria di insolvenza (art. 38, par. 2)[9], "di fatto limitando con un atto di autonomia privata la competenza giurisdizionale di uno Stato membro"[10].

Degli strumenti adottati dal legislatore comunitario nella versione Recast del EIR, alcuni, come l'istituto di cui all'art. 36, sono destinati ad operare *ex ante*, in questo caso per prevenire l'apertura delle procedure secondarie potenzialmente confliggenti con le esigenze di una efficace gestione della procedura principale, mentre altri sono destinati ad operare *ex post*[11], quando la procedura secondaria è ormai stata aperta. Nella prassi dell'insolvenza transfrontaliera, come disciplinata dal previgente Reg. UE n. 2000/1346, si riscontrava spesso una difficile coesistenza, in termini di efficace gestione complessiva della crisi dell'impresa multinazionale, tra la procedura principale e quelle secondarie[12]. Si pensi, ad esempio al fatto che nella precedente formulazione normativa le procedure secondarie potevano avere solamente natura liquidatoria, con effetti peraltro limitati ai beni ed ai rapporti territorialmente collocabili all'interno dello Stato membro di apertura, *ex* art. 3.2, mentre, con riferimento alla natura delle procedure principali, nella prassi, si propendeva essenzialmente per procedure volte al risanamento delle imprese e alla continuità aziendale delle stesse.

Inoltre, questa difficile coesistenza di procedure era amplificata dalla relativa semplicità con cui una procedura secondaria poteva essere aperta. È tuttora vigente, anche nella nuova formulazione del Reg. UE n. 2015/848, una norma che espressamente esonera il giudice adito per l'apertura della procedura secondaria dall'accertamento dello stato di insolvenza[13], in quanto lo stesso sarebbe già stato compiuto dal giudice della procedura principale. Infine, contribuivano ad alimentare la difficile convivenza tra le procedure anche la vaghezza, la scarsa forza coercitiva e l'incerta portata applicativa delle norme volte a garantire coordinamento e collaborazione tra gli organi delle diverse procedure.

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[9] In questo senso vedi anche il Considerando n. 42, Reg. UE n. 2015/848. Inoltre, ai sensi del Considerando n. 43, ai fini dell' impegno stipulato con i creditori locali, i beni e i diritti situati nello Stato della dipendenza dovrebbero formare una sottocategoria della massa fallimentare e, nel ripartire tali beni e diritti (o il ricavato del loro realizzo), l'amministratore della procedura principale di insolvenza dovrebbe rispettare "i diritti di prelazione di cui avrebbero goduto i creditori se fosse stata aperta una procedura secondaria di insolvenza in quello Stato membro". Ai fini dell'approvazione dell'impegno, invece, si applicano le regole della maggioranza previste, dalla legge nazionale della dipendenza, per l'approvazione del piano di ristrutturazione (Considerando n. 44, Reg. UE n. 2015/848).

[10] Vattermoli, *op. cit.*, p. 88.

[11] Questo orientamento del legislatore ha trovato ulteriore conforto a livello interpretativo, nel caso Bank Handlowy del 2011, nel corso del quale la Prima Sezione della Corte di Giustizia si è espressa nel senso che: deve considerarsi consentita "l'apertura di una procedura secondaria di insolvenza nello Stato membro in cui si trova una dipendenza del debitore, anche quando la procedura principale ha finalità di tutela" e possa presentarsi con quest'ultima un insanabile conflitto quanto alle rispettive finalità. La stessa Corte ha poi ribadito che "l'articolo 27 del Regolamento n. 1346/2000, come modificato dal regolamento n. 788/2008, deve essere interpretato nel senso che il giudice chiamato a pronunciarsi su una domanda di apertura di una procedura secondaria di insolvenza non può esaminare l'insolvenza del debitore nei confronti del quale è stata aperta una procedura principale in un altro Stato membro, anche se quest'ultima ha finalità di tutela". Sul tema vedi Montella, *Problemi di applicazione del Reg. n. 1346/2000 e soluzioni del nuovo Reg. n. 848/2015*, in *Fallimento e concordato fallimentare*, a cura *di* Jorio*, Torino, 2016, p. 499 e ss.* ma anche Marongiu Buonaiuti, *La revisione del Regolamento sulle procedure di insolvenza. Il coordinamento tra procedure d'insolvenza basato sulla prevalenza della procedura principale nel Regolamento (UE) n.2015/848 di rifusione*, in *www-sidi-isil.org/sidiblog*;

[12] Pottow, *A new role for secondary proceedings in international bankruptcies*, in *Tex. Int'l L. J.* 46, no. 3 (2011): 579-99.

[13] In merito si confrontino l'art. 26 Regolamento UE n. 2000/1346 e l'art. 34 del Regolamento EIR vigente.

Infatti, nonostante da diverse disposizioni trapelasse il carattere prioritario della procedura principale rispetto alle procedure secondarie[14], le disposizioni specificamente volte a disciplinare i rapporti tra procedure e organi coinvolti non apparivano del tutto idonee a garantire un efficace meccanismo di adeguamento delle procedure secondarie ad una gestione efficiente della procedura principale.

L'istituto delle procedure secondarie "virtuali" appare diretto ad evitare l'apertura della procedura secondaria "reale", in modo da assicurare all'amministratore della procedura principale una gestione unitaria dell'insolvenza o della crisi nell'ambito di un'unica procedura, alla quale partecipano anche i creditori locali, nei confronti dei quali, tuttavia, continueranno ad applicarsi le regole relative ai privilegi e alla graduazione dei crediti previste dalla legge dello Stato della dipendenza, con l'esito di riprodurre, appunto "virtualmente", all'interno della procedura principale, gli effetti che, in relazione a tali profili, sarebbero derivati dall'apertura della procedura secondaria. A questo fine, la legge richiede che l'amministratore della procedura principale si impegni con i creditori locali a riservare a costoro il medesimo trattamento cui sarebbero stati assoggettati, per quanto riguarda la ripartizione del ricavato della liquidazione dei beni della dipendenza (o con riguardo alla gestione dei beni ubicati in uno Stato membro diverso da quello dove pende la procedura principale), ed in particolare, i diritti nella ripartizione e gli ordini di prelazione previsti dal diritto nazionale di cui avrebbero goduto i creditori, se fosse stata effettivamente aperta una procedura secondaria di insolvenza in quello Stato membro.

In particolare, limitandosi ad un'interpretazione meramente letterale del dato normativo[15], la funzione delle procedure secondarie sintetiche o virtuali, potrebbe apparire essenzialmente liquidatoria. Si potrebbe cioè pensare che, optando per una procedura sintetica, si scelga di assoggettare alla liquidazione uno specifico complesso di beni, quelli della dipendenza, in base alla disciplina della *lex consursus secondarii*, indipendentemente dalla sorte degli altri beni che compongono il patrimonio del debitore, assoggettati invece alla disciplina della procedura principale unitaria: il che, come si vedrà meglio in seguito, ridurrebbe, ma non eliminerebbe del tutto il problema del difficile coordinamento tra natura, funzione e leggi applicabili alle procedure o ad alcuni fasi di queste.

Se, come già accennato, in caso di apertura di una procedura secondaria "reale" si pone un'esigenza di omogeneità e coerenza tra la natura e le finalità di questa con quelle della procedura principale (in quanto maggiori saranno i problemi di coordinamento tra le procedure e le rispettive *lex concursus* quando si tratti di procedure aventi connotati strutturali e funzionali diversi)[16], nel caso di procedura secondaria "virtuale" si porrebbe

[14] In questo senso, Leandro, *Amending the European Insolvency Regulation to Strenghten Main Proceedings,* in *Riv.dir.int.priv.proc.,* 2014, pp. 317 e ss.

[15] Un'interpretazione letterale del testo del Regolamento fa infatti riferimento unicamente ad un'ipotesi liquidatoria riferendosi al "valore di realizzo dei beni" (art. 36, par. 1); "ripartizione del ricavato del realizzo dei beni" (par. 2); "avvenuto il realizzo di tali beni" (par. 6) "ripartizioni previste prima di procedere alla ripartizione dei beni e del ricavato" e ancora di "[…una ripartizione conforme alle condizioni dell'impegno e alla legge applicabile. In tal caso, non avviene alcuna ripartizione fino a quando il giudice non abbia deciso in merito all'impugnazione" (par. 7).

[16] La dottrina italiana è unanime nel ritenere che, essendo la procedura principale l'unico modello di riferimento, si debba applicare la disciplina della procedura locale più compatibile con tale modello, tra quelle elencate nell'Allegato A dello stesso Regolamento. (sul tema Cfr. Leandro, *op. cit.*, p. 125.*;* De Cesari

solo un'esigenza di coerenza e compatibilità della destinazione liquidatoria del complesso dei beni della dipendenza rispetto alla procedura unitaria. A questo fine, non sembrerebbe necessario che quest'ultima preveda la liquidazione concorsuale, o concordata, dell'intero patrimonio (come nel caso, ove si tratti di procedura unitaria aperta in Italia, di liquidazione giudiziale o di concordato liquidatorio), risultando sufficiente che, pur nell'ambito di una procedura di risanamento, o comunque caratterizzata dalla continuazione dell'impresa (e si pensi al concordato in continuità), almeno i beni della dipendenza siano destinati ad essere liquidati [17]. Invero, abbandonando questa impostazione e optando per una preferibile interpretazione evolutiva, maggiormente in linea con il *favor* del legislatore europeo per la continuità aziendale, nel silenzio di una espressa specifica della norma sul punto, l'istituto in esame potrebbe consentire anche un utilizzo alternativo (all'ipotesi liquidatoria) dei beni della dipendenza, ma sempre nel rispetto di una condizione di pareto-efficienza a tutela degli interessi generali dei creditori locali.

L'istituto della procedura secondaria "sintetica" o "virtuale"[18] ha origine nella prassi di *common law*[19], per lo più nei casi di insolvenza di gruppi di società multinazionali[20].

Il primo caso di *virtual proceeding* risale infatti al 2006, nell'ambito della crisi del gruppo MG Rover, in cui gli *administrators* della procedura, che ricomprendeva anche la MG Rover Belux SA/NV, ottennero l'autorizzazione della Corte competente a creare una specifica classe di creditori stranieri ai quali applicare, per definire il trattamento delle rispettive pretese in sede di riparto, la propria legge locale, al fine di evitare che venisse aperta una procedura *ad hoc* in Belgio.[21] L'impiego nella prassi delle procedure secondarie virtuali ha

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Montella, *op. cit.,* p. 106). Inoltre, un obbligo di coerenza sembra essere previsto anche dalla norma di cui all'art. 38 par. 4.

[17] Il che non toglie che la circostanza che la procedura virtuale, necessariamente liquidatoria, si innesti in una procedura, quella unitaria, avente una diversa funzione potrebbe far sorgere ulteriori problemi di compatibilità tra le rispettive discipline.

[18] In questo senso, vedi per tutti Moss-Fletcher-Isaacs, *The EU Regulation on Insolvency Proceedings*, Oxford, 2016, pp. 59 e ss.

[19] Westbrook, *A Global Solution to Multinational Default*, 98, MICH. L. REV, pp. 2300 e ss.

[20] Si veda per tutti Wessels, *Contracting out of Secondary Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation,* in 9 Brook J.Corp.Fin.& Com.L. 236 (2014), p. 250.

[21] *In re* MG Rover Belux SA/NV, [2006] EWHC (Ch) 1296. La High Court affermò sul punto che l'art. 3 del Regolamento "*does not oblige the supervising court to insiste upon the adoption of its domestic law to every aspect of the insolvency or to insiste that local rights can only be taken into account if secondary insolvency proceedings are commenced. I can accordingly give permission for a payment that does not strictly accord with English law if it is just and convenient to do so and helps achieve the objective of the administration*".

Tra gli altri casi che hanno dato luogo alla *best practice* delle *virtual proceedings* poi recepite nel Regolamento n. 2015 /848 dal legislatore comunitario, si veda il caso Collins & Aikman Europe, SA, the High Court of England and Wales, Chancery Division, [2006], EWCH 1343 (Ch) – www.bailii.org, in cui i creditori locali hanno acconsentito a non dare luogo a una procedura secondaria, confluendo nella procedura principale di competenza della London High Court, in base ad un impegno rimasto un semplice accordo verbale, in cui, in cambio, si applicava alle loro pretese, nella procedura principale, il trattamento previsto dalla disciplina della procedura del proprio ordinamento nazionale.

Si veda anche il caso Nortel Networks SA, Re [2009] EWHC 206 (Ch) relativo al gruppo Nortel Networks, composto da diverse società situate sia negli Stati Uniti che in Europa. Nei confronti del gruppo Nortel Networks fu aperta una procedura negli Stati Uniti basata sul Chapter 11 del Bankrupcy Code. Nel corso della procedura gli amministratori del procedimento principale hanno presentato una specifica istanza alla High Court of Justice inglese, al fine di ottenere l'autorizzazione a chiedere ai tribunali europei locali interessati di fornire costantemente informazioni su eventuali richieste di creditori locali di avviare procedimenti secondari.

dato luogo a quelle *best practices* che si trovano oggi tradotte in alcune norme del Regolamento EIR, essendosi determinato quel passaggio dalla "pratica alla norma", sempre più frequente in materia di insolvenza transnazionale.

II. LA DISCIPLINA DELLE PROCEDURE SECONDARIE VIRTUALI AI SENSI DEL REGOLAMENTO UE N. 2015/848

La disciplina della procedura secondaria virtuale si ricava dalle disposizioni contenute agli artt. 36, 37 par. 2 e 38 par. 2 del Regolamento europeo n. 2015/848. Queste norme prevedono che, nel caso di insolvenza dell'impresa multinazionale, l'apertura di una procedura secondaria debba essere subordinata alle esigenze della procedura principale e di una sua gestione efficiente, affinché, nel rispetto degli interessi dei creditori locali, la procedura secondaria non vada ad inficiare i piani di gestione della procedura principale[22].
Come già anticipato, a questo scopo, l'art. 36 del Regolamento consente all'amministratore della procedura principale, informato dell'esistenza di beni e di creditori che potrebbero essere coinvolti in una procedura secondaria[23], "di contrarre un impegno al fine di evitare la procedura secondaria di insolvenza" con i creditori locali, garantendo a costoro di essere trattati, nella procedura principale, "come se" la procedura secondaria fosse stata aperta, e cioè di rispettare, nella ripartizione dei "beni situati nello Stato membro in cui potrebbe essere aperta la procedura secondaria di insolvenza", o, più frequentemente, delle somme realizzate all'esito della loro liquidazione, "i diritti nella ripartizione dei beni e i diritti di prelazione previsti dal diritto nazionale di cui avrebbero goduto i creditori se fosse stata aperta una procedura secondaria di insolvenza in quello Stato membro", applicando così nella procedura principale "la graduazione dei crediti localmente regolata in relazione agli *assets* della dipendenza"[24].
L'impegno, scritto, proposto dall'amministratore della procedura principale deve essere approvato, a maggioranza, dai creditori locali "conosciuti", secondo "le regole in materia di maggioranza qualificata e di voto che si applicano per l'adozione dei piani di ristrutturazione a norma del diritto dello Stato membro in cui si sarebbe potuta aprire la procedura secondaria di insolvenza" (art. 36, par. 5): per creditore locale si intende non un

L'intenzione degli amministratori è stata quella di specificare ai tribunali interessati che l'avvio di una procedura secondaria locale avrebbe compromesso la continuità aziendale e la possibilità di successo di una procedura di ristrutturazione dell'intero gruppo. Sul caso in questione "degna di nota la sentenza dell'Alta Corte di Giustizia dell'11 febbraio 2009. In tale decisione, il giudice Patten ha autorizzato gli amministratori ad inviare comunicazioni a tutti i tribunali europei interessati, citando i casi MG Rover e Collins & Aikman, e ha specificato che, alla luce della dichiarata necessità degli amministratori della procedura principale di preservare la continuità aziendale al fine di realizzare un piano di ristrutturazione globale del gruppo in grado di soddisfare le richieste di tutti gli attori coinvolti nella crisi, si potevano applicare misure alternative per raggiungere risultati migliori rispetto a quelli che sarebbero scaturiti da una semplice liquidazione "locale" degli attivi" In questo senso vedi, Benincasa Ghia, *Insolvency of Group of Companies as Rules Recipient and Circulation Tool and Secondary Virtual Proceedings*, in *International Business Law*, Ghia (cur.), Padova, 2016, pp. 30 e ss.

[22] Leandro, *Procedure secondarie "sintetiche" e diritto applicabile nella procedura principale*, in *Crisi Transfrontaliera di impresa: orizzonti internazionali ed europei*, curr. Leandro, Meo; Nuzzo Bari, 2018, p. 123.

[23] Ibidem.

[24] Pasquariello, *La regolazione europea dell'insolvenza transnazionale tra autonomia ed eteronomia: il c.d. impegno ad evitare la procedura secondaria*, in Dir. Fall., n. 6, 2019, p. 1310.

creditore che ha il suo domicilio o la sua residenza nello Stato membro della dipendenza dell'impresa multinazionale, ma quel creditore "i cui crediti nei confronti di un debitore derivano o sono legati all'attività di una dipendenza situata in uno Stato membro diverso dallo Stato membro in cui si trova il centro degli interessi principali del debitore"[25], cioè colui che avrebbe interesse a vedere la sua pretesa realizzata nel corso di una procedura secondaria[26].

Se da un lato, conformemente alle interpretazioni della dottrina maggioritaria, i rappresentanti della procedura principale non sono obbligati a proporre l'impegno[27], ogni qualvolta sia opportuno o conveniente per evitare l'apertura di una procedura secondaria, è al contempo evidente, come meglio si vedrà in seguito, che, una volta approvato dai creditori, l'impegno *ex* art. 36 diviene vincolante. Innanzitutto, l'impegno produce effetti nei confronti dell'amministratore della procedura principale, chiamato a rispondere nei confronti dei creditori locali per i danni derivanti da eventuali inadempimenti degli obblighi inerenti alla gestione della procedura consolidata virtualmente, che dovrà essere gestita in conformità dell'impegno. Inoltre, gli effetti dell'impegno si producono anche nei confronti del giudice adito per l'apertura della procedura secondaria, come pure nei confronti dei creditori locali, e, seppure indirettamente, degli altri creditori della procedura principale.

Rispetto alla procedura principale, l'approvazione dell'impegno, ai sensi del par. 6 dell'art. 36 del Regolamento UE n. 2015/848, "vincola il patrimonio". Questa disposizione diviene più chiara se letta alla luce del Considerando n. 43 dello stesso Regolamento, secondo il quale, per effetto dell'approvazione dell'impegno, i beni e i diritti ubicati nel Paese della dipendenza del debitore dovrebbero formare una sottocategoria della massa fallimentare e, nel ripartire tali beni e diritti o il ricavato del loro realizzo, il curatore della procedura principale di insolvenza dovrebbe rispettare i diritti di prelazione di cui avrebbero goduto i creditori locali se fosse stata aperta una procedura secondaria di insolvenza in quello Stato membro. Sembrerebbe dunque che l'impegno produca gli effetti di un consolidamento atipico delle procedure, nel senso che comporta una gestione unitaria delle stesse, ma nel rispetto di discipline differenti. Infatti, gli *assets* della dipendenza andrebbero a formare "una sottocategoria della massa fallimentare", dovendo l'amministratore della procedura principale, laddove venga aperta poi una procedura secondaria ai sensi degli artt. 37 e 38, consegnare all'amministratore di quest'ultima procedura i beni che erano stati dislocati al di fuori dal territorio dello Stato membro della dipendenza, ovvero il ricavato della vendita degli stessi qualora ne sia già avvenuto il realizzo (art. 36, par. 6). Ma atteso che "ogni creditore può insinuare il proprio credito nella procedura principale di insolvenza e in qualsiasi procedura secondaria" (art. 45, par. 1) [28], la sottocategoria della massa fallimentare in questione, formata dai beni della dipendenza, non è da intendersi quale massa autonoma a tutela della garanzia patrimoniale dei soli creditori locali. Essa, piuttosto, presenta un'autonomia sotto il solo profilo normativo: nel senso che la ripartizione del valore dei

[25] Art. 2 n. 11 Regolamento UE n. 2015/848.
[26] Wessels, *op. cit.*, p. 272.
[27] Laukermann, *European Insolvency Regulation*, Bornemann-Brinkmann-Dahl (eds.), 2017.
[28] Su questa regola generale del Regolamento in materia di ammissione al passivo vedi per tutti Vattermoli, *Par condicio omnium creditorum*, in *Riv. Dir. Proc. Civ.,* LXVII, 1, 2013, pp. 159 e ss.

beni da cui è formata è soggetta ad una disciplina, quella della *lex fori concursus secondarii*, diversa, e perciò autonoma, da quella applicabile alla procedura principale.
Quanto agli effetti nei confronti del giudice adito per l'apertura della procedura secondaria, costui, una volta approvato l'impegno, potrà astenersi dall'avviarla solo dopo aver verificato che l'impegno tuteli i creditori locali: l'amministratore della procedura principale è legittimato ad impugnare la decisione di apertura della procedura secondaria contestandone la motivazione agli effetti dell'impegno (art. 39, par. 2) [29].
Invece, nei confronti dei creditori locali, ivi compresi quelli dissenzienti, l'approvazione dell'impegno comporta una compressione del potere di promuovere l'apertura della procedura secondaria, incidendo sia sui termini per la presentazione dell'istanza, sia sui presupposti dell'apertura della procedura. Infatti, il par. 2 dell'art. 37 del Regolamento impone ai creditori locali un termine di trenta giorni, dalla ricezione della notifica di approvazione dell'impegno, per presentare l'istanza di apertura della procedura secondaria presso il giudice competente dello Stato della dipendenza: quest'ultimo, laddove sia stato contratto un impegno a norma dell'articolo 36, su istanza dell'amministratore delle procedure di insolvenza non apre la procedura secondaria "se ritiene che l'impegno tuteli adeguatamente gli interessi generali dei creditori locali" (art. 38, par. 2). Il giudice competente, prima di poter procedere all'apertura della procedura secondaria, dovrà dunque verificare, oltre alla sussistenza dei presupposti soggettivi e oggettivi previsti dal diritto nazionale dello Stato membro, che non sia stato approvato un impegno *ex* art. 36, o che tale impegno non garantisca in modo appropriato le pretese generali dei creditori locali.
Alla luce delle norme in esame, resta da chiedersi se gli effetti dell'approvazione dell'impegno si producano solo nei confronti dei creditori locali o se invece riguardino tutti i creditori concorsuali. Sebbene formalmente l'impegno sia assunto nei confronti dei soli creditori locali, unici soggetti legittimati ad accettarlo, questo potrebbe esplicare, per quanto in via indiretta, effetti nei confronti di tutti i creditori concorsuali, "giacché tutti sono suscettibili di risentire – anzi, auspicabilmente, di beneficiare – degli effetti della scelta dell'amministratore della procedura principale, in termini di migliore, più celere e più efficiente gestione di una sola procedura di crisi o di insolvenza, della quale è preservato il carattere universale"[30].
Il trattamento apparentemente discriminatorio delle categorie di creditori – locali e non – in termini di diritto di voto sull'impegno, nonostante gli effetti di quest'ultimo finiscano per incidere sull'intero concorso, potrebbe interpretarsi come un tentativo del legislatore comunitario di attenuare quel principio generale di universalità limitata[31], che informa l'intero sistema legislativo europeo, e che si esprime anche nell'assenza di una generale *cross-priority rule*[32]. In assenza di un riconoscimento oggettivo nella procedura principale

[29] Sul tema vedi Pasquariello, *op. cit.*, p. 1313.
[30] Pasquariello, *op. cit*, p. 1317.
[31] Su questi temi in generale si veda Mooney jr., *Harmonizing choice-of- law rules for international insolvency cases, virtual territoriality, virtual universalism, and the problem of local interest,* in *Brook. J. Corp. Fin. And Com. L.*, vol. 9, 2014.
[32] Vattermoli, *op. cit.*, p. 171.

dei privilegi vantati dai creditori esteri, i diritti dei creditori privilegiati locali potrebbero essere compromessi[33], se non si riconoscesse loro quel trattamento "as if" garantito dall'impegno, alla cui approvazione questi ultimi hanno la legittimazione esclusiva.
L'impegno si configura, dunque, nei soli confronti dei creditori locali. Ai fini della disciplina in esame, infatti, non rilevano come meritevoli di particolare tutela gli interessi degli altri creditori concorsuali[34]. I creditori locali sono gli unici legittimati ad approvare l'impegno e, dunque, a poterlo contestare. Infatti, le norme del Regolamento che disciplinano la procedura secondaria virtuale contemplano una serie di prerogative unicamente a tutela dei creditori della dipendenza, i quali, pur avendo ottenuto in virtù dell'impegno un trattamento dei loro interessi analogo a quello che avrebbero avuto in caso di apertura della procedura secondaria, hanno comunque rinunciato alla giurisdizione domestica, scontando comunque l'inconveniente di doversi rivolgere ad un giudice diverso da quello del foro nazionale di appartenenza[35].
Ai sensi dei paragrafi 5 e 7 dell'art. 36 del Regolamento n. 2015/848, sull'amministratore della procedura principale gravano taluni obblighi informativi a tutela dei creditori locali. Innanzitutto, l'amministratore dovrà informare "i creditori locali in merito all'impegno, alle regole e alle procedure per la sua approvazione e all'approvazione o al rigetto dell'impegno". Inoltre, qualora abbia contratto l'impegno, l'amministratore della procedura principale dovrà informare i creditori locali "in merito alle ripartizioni previste prima di procedere alla ripartizione dei beni e del ricavato", nel rispetto della graduazione dei crediti e dei diritti di prelazione di cui avrebbero goduto i creditori locali, se fosse stata aperta una procedura secondaria di insolvenza in quello Stato membro. Quest'ultimo obbligo di informazione è rafforzato dal rimedio dell'impugnazione, che la norma in oggetto riconosce a tutela dei creditori locali. Questi ultimi, infatti, *ex* parr. 7 e 8 dell'art. 36, hanno il potere di provocare l'intervento del giudice della procedura principale ai fini della decisione in merito all'impugnazione di provvedimenti di riparto non conformi all'impegno. Sembrerebbe più in generale che la norma in oggetto, nel prevedere la facoltà dei creditori locali di provocare l'intervento del giudice della procedura principale, non solo nel caso dell'impugnazione già menzionata, ma anche al fine di imporre al curatore della procedura principale di insolvenza di adottare le misure necessarie a garantire il rispetto delle condizioni dell'impegno previste dalla legge dello Stato di apertura della procedura principale di insolvenza, riconosca ai creditori locali un generale potere di *enforcement* dell'impegno.
A tutela dei creditori locali sorge così un ulteriore obbligo a carico dell'amministratore, ossia quello di adottare, su ordine del giudice, le misure ritenute necessarie per adempiere

[33] Westbrook, *Universal Priorities*, in *33 Tex. Int'l L. J.,* 1998, p. 36.
[34] In termini di tutela processuale si deve rilevare, infatti, che sulla base della c.d. *hotchpot rule* (sul tema vedi per tutti Vattermoli, *op. cit.,* pp. 173 e ss.), e proprio perché l'apertura di una procedura secondaria virtuale produce, rispetto alla ripartizione del valore dei beni localizzati in uno Stato diverso da quello in cui viene aperta la procedura principale, gli stessi effetti "as if secondary proceedings were opened", nel senso che tale valore deve essere distribuito secondo *la lex concursus secondarii*, la conclusione dell'impegno finirà per incidere non soltanto sulla posizione dei creditori locali, ma anche su quella degli altri, analogamente, appunto, a quanto accadrebbe se venisse aperta realmente, e non solo virtualmente, una procedura secondaria.
[35] De Cesari Montella, *Il nuovo diritto europeo della crisi d'impresa: Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza*, Torino, 2017, p. 109.

concretamente l'impegno assunto. Questa norma sembrerebbe voler limitare il potere discrezionale dell'amministratore della procedura principale rispetto alle forme di attuazione dell'impegno. Si riconosce ai creditori locali il potere di provocare ancora una volta l'intervento del giudice della procedura principale, per ottenere un provvedimento giudiziale che abbia l'effetto di qualificare come "necessarie", e non discrezionali appunto, alcune misure per l'attuazione dell'impegno. In questo senso, questa norma costituisce un rimedio di natura obbligatoria per la tutela dei creditori locali[36]. La violazione di tali obblighi, infatti, rappresenta il presupposto per l'azione di responsabilità contro l'amministratore *ex* par. 10 dell'art. 36 del Regolamento. Diversamente, quello riconosciuto dalla norma di cui al par. 9 sembrerebbe qualificabile come rimedio di natura reale per la tutela dei creditori locali[37]. La norma prevede, infatti, che i creditori locali possono anche adire i giudici dello Stato membro in cui potrebbe essere aperta la procedura secondaria di insolvenza "affinché sia imposto al giudice di adottare provvedimenti provvisori o conservativi per garantire il rispetto delle condizioni dell'impegno da parte dell'amministratore delle procedure di insolvenza". Si pensi, a titolo meramente esemplificativo, ad un provvedimento giudiziale che, a tutela dei creditori locali, imponga al giudice della procedura principale di adottare un provvedimento avente ad oggetto un sequestro conservativo dei beni sui quali i creditori locali vantino particolari diritti, al fine di assicurare il rispetto delle condizioni dell'impegno da parte dell'amministratore della procedura.

III. LA NATURA GIURIDICA DELL'IMPEGNO *EX* ART. 36 DEL REGOLAMENTO UE N. 2015/848

L'istituto delle procedure secondarie virtuali incarna contemporaneamente due delle tendenze che maggiormente caratterizzano oggi il diritto internazionale della crisi transfrontaliera. Infatti, se da una parte, come si è visto, tale istituto ha origine nella prassi di *common law* e, in quanto *best practice*, viene recepito a livello normativo dal legislatore comunitario, esprimendo uno di quei passaggi dalla pratica alla norma che sempre più spesso informano e guidano, nella sua evoluzione, l'attuale diritto internazionale della crisi e dell'insolvenza; dall'altra, fondandosi sulla fattispecie dell'*impegno*, è espressione di quel processo di privatizzazione della gestione della crisi transfrontaliera che sempre più spazio va occupando nell'ordinamento concorsuale o paraconcorsuale, internazionale ed europeo: esso, insieme agli *insolvency protocols* e all'accordo tra amministratori *ex* art. 66 par. 1, rientra tra gli strumenti di natura negoziale che caratterizzano il diritto della crisi

[36] In questo senso vedi Di Majo, *La tutela civile dei diritti*, Milano, 1987, p. 104. L'autore qualifica come obbligatoria "un tipo di tutela che presuppone *già a priori l'individuazione di un soggetto determinato*, sia esso *obbligato* in base ad un contratto o un fatto illecito produttivo di danni o ad altri fatti o atti, anche diversi dal contratto e dall'illecito, atti che l'ordinamento reputa idonei a produrre obbligazioni".

[37] E v., ancora, Di Majo, *op. ult. cit.*, p. 105, ove l'autore ritiene che si possa "convenire dunque che, mentre la tutela c.d. *reale* null'altro presuppone che l'affermazione del diritto (dell'attore) e lo stato di insoddisfazione di tale diritto, non istaurandosi alcuna relazione significativa di diritto sostanziale con il soggetto che figura quale *convenuto*, la tutela *obbligatoria* presuppone, al contrario, che si sia instaurato un rapporto di diritto sostanziale con un determinato soggetto (a mezzo *fonte dell'obbligazione*) rapporto che è all'origine della particolare *forma di responsabilità* (sia essa contrattuale o aquiliana) che si fa valere con l'azione *personale*".

crossborder, e che, come tali, le norme del Regolamento UE n. 2015/848 procedono ad istituzionalizzare.

Il principale problema sollevato da queste fattispecie attiene all'esatta qualificazione della loro natura giuridica: questione particolarmente rilevante non solo in termini puramente teorici, ma anche per la ragione che la sua soluzione consente di superare una serie di dubbi interpretativi o applicativi[38].

Limitatamente all'istituto dell'impegno, appare significativa la scelta linguistica del legislatore comunitario[39], nelle diverse traduzioni dell'art. 36: la fattispecie in esame è qualificata in inglese come "*unilateral undertaking*", in francese "*engagement unilatéral*", in tedesco "*Zusicherung*" e in spagnolo "*compromiso unilateral*".

La versione italiana dell'art. 36 del Regolamento UE n. 2015/848 qualifica la fattispecie in esame come "impegno unilaterale"[40] e ad essa ci si riferisce sempre con riferimento al verbo *contrarre*[41].

Un'interpretazione letterale di questa disposizione, con riferimento alle categorie giuridiche dell'ordinamento italiano, potrebbe indurre a riconoscere all'impegno una configurazione contrattuale[42], e più precisamente quella di contratto con obbligazioni a carico del solo proponente *ex* art. 1333 c.c.[43]. Sono diversi però gli argomenti che porterebbero a rigettare questa interpretazione letterale. In primo luogo, il legislatore comunitario prevede che l'impegno sia sottoposto alle regole locali sull'*approvazione* dei piani di ristrutturazione (art. 36, par. 5) e che dunque sia espressamente approvato alla maggioranza qualificata dei creditori, mentre la conclusione del contratto con obbligazioni a carico del solo proponente è affidata ad un meccanismo di silenzio-assenso. In secondo luogo, e più in generale, come già ritenuto da un'autorevole dottrina a proposito degli *insolvency protocols,* anche gli impegni mal si attagliano alla natura giuridica del contratto, «ciò non tanto perché appaia difficile identificare un quadro normativo privatistico in cui essi si muovano e dal quale ricevano tale "sanzione", ma in quanto i contenuti degli stessi smentiscono il dato»[44]. Il contenuto dell'impegno è solo indirettamente patrimoniale e l'amministratore della procedura principale nel contrarre l'impegno non dispone di propri diritti, ma svolge funzioni di amministrazione della procedura di insolvenza «nell'interesse principale di terzi (i creditori, la massa, il debitore) ed in conformità alla legge che la regola»[45].

Esclusa la qualificazione, suggerita dalla lettera della norma, dell'impegno in termini puramente contrattuali, appare preferibile muovere dal raffronto con analoghe figure previste dal nostro ordinamento.

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38 In questo senso ma con riferimento ad un'altra fattispecie introdotta dal Reg. UE n. 2015/848, gli *insolvency protocols* vedi Vattermoli, *Gli insolvency protocols nelle operazioni di ristrutturazione del gruppo di imprese in crisi*, in *Dir. Ban. Merc. Fin.*, n.1, 2019, pp. 31 e ss.

39 Bork, Mangano, *European Cross-border Insolvency Law*, Oxford, 2016, p. 247.

40 Wessels, *op. cit.*, p. 272.

41 In questo senso vedi il Considerando n. 42, i parr. 2,3,5,6 e 7 dell'art. 36, il par. 2 dell'art. 38 del Regolamento UE n. 2015/848.

42 De Cesari Montella, *op.cit.*, p. 107.

43 Pasquariello, *op. cit.,* p. 1316.

44 Fumagalli, *I protocolli tra le procedure nella disciplina transfrontaliera dell'insolvenza, in* Leandro, Meo e Luzzo*, Crisi transfrontaliera di impresa: orizzonti internazionali ed europei*, Bari, 2018, p. 193.

45 Ivi, p. 194.

L'impegno, in quanto volto a vincolare anche i creditori (locali) non aderenti, incidendo sia sui presupposti per l'apertura della procedura secondaria, sia sui termini per la presentazione dell'istanza, potrebbe essere assimilato ad altri strumenti negoziali di soluzione della crisi, quali il concordato o, più convincentemente, l'accordo di ristrutturazione dei debiti "*a efficacia estesa*" (art. 61 CCII), in quanto, come quest'ultimo, idoneo a derogare agli artt. 1372 e 1411 c.c.[46].

Ma l'impegno si differenzia da questi istituti sia dal punto di vista della struttura soggettiva dell'accordo, in quanto non intercorre tra soggetti privati (debitore-creditori), ma tra un pubblico ufficiale e dei privati (amministratore della procedura principale-creditori locali); sia per l'oggetto, poiché, più che essere uno strumento di soluzione della crisi, si configura come strumento per l'individuazione del mezzo di soluzione della crisi stessa.

Come già osservato da un'autorevole dottrina, «la questione che rende difficile la qualificazione giuridica di questi istituti è che siamo di fronte all'istituzionalizzazione di pratiche negoziali fino ad oggi atipiche. Queste si caratterizzano per la comune attitudine ad esprimere, in un solo quadro sinottico, la logica collaborativa per la più efficace gestione della crisi ed eventuale riorganizzazione delle imprese interessate che rivela, sì, una matrice pattizia, che poi confluisce nella formalizzazione di un vero e proprio documento programmatico sull'azione della procedura» [47] . Sempre la dottrina citata, inoltre, nell'osservare che «le fattispecie in esame si caratterizzano per determinare l'effetto di sostituire e/o integrare il contenuto di un atto autoritativo, generando così un curioso mix di norme inderogabili ed esercizio di autonomia negoziale, di cui non sempre è facile individuare i rispettivi confini», con riferimento alla natura giuridica degli *insolvency protocols*, propone un'interessante analogia con la figura degli "accordi fra pubbliche amministrazioni", di cui all'art. 15 l. n. 241/1991, attraverso i quali tali autorità disciplinano «lo svolgimento in collaborazione di attività di interesse comune» ed ai quali, ove non diversamente previsto, si applicano «i principi del codice civile in materia di obbligazioni e contratti in quanto compatibili»[48].

Adattando questa impostazione alla fattispecie dell'impegno *ex* art. 36, si potrebbe ritenere che, dal punto di vista soggettivo, mentre i *protocols* (così come gli accordi tra amministratori *ex* art. 66 Reg. n. 2015/848) intercorrono tra organi delle procedure, quindi presentano punti di contatto con la fattispecie degli accordi tra pubbliche amministrazioni *ex* art. 15 l. n. 241/90, gli impegni, conclusi invece tra amministratore della procedura principale e creditori locali, potrebbero essere assimilati agli impegni previsti dalla disciplina antitrust, e soprattutto, ai c.d. accordi integrativi o sostitutivi del procedimento, disciplinati dall' art. 11 della stessa legge sul procedimento amministrativo, anche essi contratti tra amministrazione e privati[49].

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[46] Vedi *supra* paragrafo 2.

[47] Vattermoli, Pasquariello, Tedeschi, *Insolvency protocols: a cooperative tool for managing crossborder group insolvency* in *Transnational protocols: a cooperative tool for managing crossborder insolvency,* trad. it. In https://www.project-top.eu/wp-content/uploads/2022/02/Italian-E-book.pdf, p. 140.

[48] Vattermoli, *Gli insolvency protocols nelle operazioni di ristrutturazione del gruppo di imprese in crisi,* cit., p.33.

[49] Per una sistematica in materia vedi per tutti Sandulli, voce Il *procedimento,* in *Trattato di diritto amministrativo,* Cassese S. (a cura di), Milano, 2000, pp. 1170 e ss.

Si tratta di accordi, conclusi esclusivamente nell'esercizio di potestà amministrative[50], che si inseriscono in una fase procedimentale già avviata e presuppongono l'esercizio consensuale del potere pubblico[51], al fine di determinare il contenuto discrezionale di provvedimenti, ovvero per sostituirli. Anche l'impegno *ex* art. 36 è un accordo che si inserisce all'interno di una procedura di insolvenza già aperta, la procedura principale, al fine di sostituire il provvedimento giurisdizionale di apertura della procedura secondaria. Inoltre, come per gli accordi integrativi o sostitutivi, il potere di iniziativa circa la conclusione dell'impegno è riservato all'amministratore del procedimento. Come gli accordi sostitutivi, anche gli impegni sembrano essere figure negoziali contrassegnate da diverse peculiarità e, in particolare, da un vincolo di scopo[52], che l'amministrazione può utilizzare in ragione del principio della generale sostituibilità o alternatività tra strumenti di diritto pubblico (atti unilaterali) e strumenti di diritto comune (atti consensuali) nell'esercizio dell'azione amministrativa e del principio di funzionalizzazione al pubblico interesse anche degli strumenti di diritto comune utilizzati dall'amministrazione[53] ai fini dello svolgimento dell'azione amministrativa[54]. Per entrambe le fattispecie, poi, non solo è richiesta la forma scritta, ma si prevede un potere di impugnazione, quale rimedio avverso alla violazione dell'accordo (per l'impegno, come già visto, disciplinato dal par. 7 dell'art. 36 Reg. n. 2015/848).

Siffatta similitudine potrebbe poi consentire di applicare agli impegni i principi del codice civile in materia di obbligazioni e contratti, richiamati, in quanto compatibili, dalla disciplina degli accordi integrativi o sostitutivi tra pubbliche amministrazioni: il che consentirebbe, ad esempio, di assoggettare alla disciplina della responsabilità per inadempimento quella prevista, a carico dell'amministratore che abbia violato l'impegno, dall'art. 36, par. 10.

Quanto alla disciplina antitrust, come è noto, il legislatore europeo prima (art. 9 Reg. UE n. 2003/1) e quello italiano poi (art. 14 *ter* l. n. 289/90) qualificano come *impegno* un accordo che intercorre tra una o più imprese e la Commissione (o l'autorità nazionale garante della concorrenza), in forza del quale le prime si impegnano a cessare determinate condotte o a compiere determinati atti, al fine di fugare il dubbio di una condotta anticoncorrenziale.

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[50] Damonte, *Atti, accordi, convenzioni nella giustizia amministrativa*, Padova, 2002, pp. 145 e ss.

[51] Nigro, Relazione introduttiva, in Trimarchi (a cura di), *Il procedimento amministrativo fra riforme legislative e trasformazioni dell'amministrazione. Atti del Convegno. Messina-Taormina, 25-26 febbraio 1988*, Milano, 1990, p.9. All'A., presidente di una commissione governativa (nota come "Commissione Nigro") di riforma del procedimento amministrativo, i cui lavori portarono successivamente all'approvazione della l. n. 241/1990 sull'attività amministrativa, si deve il concepimento e l'introduzione del nostro ordinamento degli istituti in esame come espressione di un'attività amministrativa di tipo convenzionale.

[52] Manfredi, *Accordi e azione amministrativa*, Torino, 2001, p. 122.

[53] Sul tema per tutti vedi Nigro, *Il nodo della partecipazione*, in *Riv. trim. dir. proc. civ.,* 1980.

[54] Monni, *Gli accordi tra le pubbliche amministrazioni, con particolare riguardo all'ordinamento degli enti locali,* in *Lex Italia* 11/2003. In questo saggio l'autore specifica che: "Per "attività" si intende generalmente qualsiasi tipo di attività giuridica, sia essa amministrativa di diritto pubblico sia essa amministrativa di diritto privato, cioè attività funzionalizzata, in quanto immediatamente intesa al perseguimento di interessi pubblici, sia essa, infine, attività di diritto comune, relativamente ai rapporti patrimoniali e alle acquisizioni di beni e di servizi strumentali allo svolgimento delle attività finali della amministrazione, nonché attività materiale (prestazioni)".

L'istituto in esame, analogamente all'impegno nelle procedure secondarie virtuali, configura una fattispecie di natura negoziale[55], che intercorre tra amministrazione e privati e che integra o sostituisce un atto autoritativo dell'amministrazione stessa (nel caso di specie dell'Autorità Garante della Concorrenza e del Mercato). Inoltre, anche l'impegno antitrust si colloca all'interno di un procedimento già avviato, poiché, ai sensi della legge, la richiesta di conclusione dell'impegno deve essere presentata nella fase istruttoria. Altra caratteristica comune ai due istituti è l'ampio potere discrezionale dell'amministrazione parte dell'impegno[56], che in un caso può decidere se proporre o meno l'impegno basandosi su valutazioni di convenienza e opportunità per l'efficiente gestione delle procedure di insolvenza, nell'altro può optare liberamente tra la conclusione dell'impegno (accettando con la sua decisione la proposta negoziale delle imprese coinvolte) o la conclusione dell'istruttoria e la conseguente applicazione di sanzioni alle imprese per le condotte anticoncorrenziali.

Non possono tuttavia sottacersi le differenze tra l'impegno *ex* art. 36 e gli impegni previsti in materia antitrust[57]. Nella disciplina degli impegni antitrust, non solo il potere di iniziativa spetta ai privati e non all'amministratore del procedimento, ma è sui primi che gravano gli obblighi che ne derivano, e, conseguentemente, le sanzioni previste in caso di inosservanza dell'impegno[58], senza contare che l'impegno in questione si perfeziona con la decisione dell'autorità amministrativa e solo così diventa vincolante[59].

Più in generale poi, confrontando entrambi i tipi di impegno in esame con la figura degli accordi di cui all'art. 11 della l. n. 241/90, può notarsi che mentre gli impegni delle procedure secondarie virtuali si configurano più propriamente come accordi *sostitutivi*, in cui attraverso un esercizio consensuale del potere pubblico si sostituisce il provvedimento finale, mantenendo inalterato l'effetto tipico, al contrario gli impegni antitrust si prestano ad essere considerati piuttosto in termini di accordi *integrativi* del provvedimento amministrativo[60], in quanto volti a determinare il contenuto discrezionale del successivo provvedimento finale. Insomma, la conclusione dell'impegno *ex* art. 36, modifica soltanto lo strumento utilizzato, in quanto l'impegno sostituisce il provvedimento di apertura della

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55 Gitti, *Gli accordi con le Autorità indipendenti*, in *20 anni di diritto antitrust, l'evoluzione dell'Autorità garante della concorrenza e del mercato*, a cura di Rabitti – Barucci, tomo I, Torino, 2010, pp. 1122 e ss.

56 Sul tema in generale vedi per tutti D'alberti, *Poteri pubblici, mercati e globalizzazione,* Bologna, 2008.

57 Un ulteriore istituto che potrebbe presentare gli stessi elementi essenziali delle fattispecie qui nominate è previsto nel disegno di legge (c.d. D.D.L. Capitali), che dispone "interventi a sostegno della competitività dei capitali e delega al Governo per la riforma organica delle disposizioni in materia di mercati dei capitali recate dal testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, e delle disposizioni in materia di società di capitali contenute nel codice civile applicabili anche agli emittenti". In particolare, con riferimento alle norme in materia di attività di intermediazione e consulenza finanziaria, il disegno di legge in esame reca alcune modifiche alla disciplina dei poteri sanzionatori della Consob, proponendo di integrare il d.lgs. n.58/1998 con l'art. 196- *ter,* contenente la disciplina di una nuova fattispecie di impegni, articolata sulla falsariga di quella degli impegni antitrust.

58 L'art.14 *ter* della l. n. 287/90.

59 Libertini, *Le decisioni di chiusura dei procedimenti per illeciti antitrust a seguito di impegni delle imprese interessate*, in *I nuovi strumenti di tutela antitrust, misure cautelari, impegni e programmi di clemenza,* Cintioli - Olivieri (a cura di), Milano, 2007 p. 14.

60 In senso contrario vedi Cintioli, *Le nuove misure riparatorie del danno alla concorrenza impegni e misure cautelari*, in *Giur. Comm.,* 2008 p.33 ma anche Lalli, *sub art. 14 ter alla l. n. 287/90*, in *Codice commentato della concorrenza e del mercato*, Catricalà, Troiano (curr.), 2010.

procedura secondaria, ma non l'effetto, che resta il medesimo in quanto l'impegno garantisce il trattamento dei creditori locali "come se" la procedura secondaria fosse stata aperta. Nella disciplina antitrust, invece, la conclusione e, soprattutto, il rispetto dell'impegno modifica lo stesso esito del procedimento[61], impedendo l'accertamento di un illecito anticoncorrenziale, fermo restando che, anche in tal caso, l'effetto ultimo, cioè la mancata alterazione del gioco della concorrenza, è comunque rispettato.

IV. LE PROCEDURE SECONDARIE VIRTUALI NEL COORDINAMENTO CON LE NORME DEI SINGOLI ORDINAMENTI NAZIONALI

L'introduzione nell'ordinamento europeo della disciplina della procedura secondaria virtuale pone poi una serie di questioni ulteriori relative alla sua applicazione nei diversi sistemi nazionali, di cui, in questa sede, ci si limiterà a dare un breve accenno.

L'istituto della procedura secondaria virtuale, pur essendo volto ad evitare l'apertura di una procedura secondaria vera e propria, e i costi relativi, non preclude integralmente l'insorgere delle esigenze di coordinamento con le norme dei singoli ordinamenti nazionali.

Infatti, può notarsi che, tra gli effetti prodotti dall'approvazione dell'impegno vi è, come detto, quello di sottoporre eccezionalmente alla *lex concursus* locale alcune fasi della procedura unitaria, in particolare, quelle che coinvolgono la posizione dei creditori locali, tra cui la determinazione della maggioranza necessaria all'approvazione dell'impegno[62]: ma la *lex concursus* locale potrebbe prevedere più di una disciplina relativa all'approvazione dei diversi strumenti di regolazione concordata della crisi, trattandosi allora di individuare quale di esse vada applicata ai fini della determinazione della maggioranza per l'approvazione dell'impegno[63]. Del resto, non sarà semplice individuare preventivamente, ai fini dell'impegno, i creditori locali ai quali sottoporne l'approvazione, così come non sarà agevole individuare i beni coinvolti, sulla cui localizzazione o riguardo alla determinazione del loro valore[64]. Oppure si consideri il caso in cui il debitore abbia dipendenze in diversi Stati membri dalle quali derivano crediti locali soggetti a normative tra loro diverse. E ancora, si potrebbero determinare problemi di compatibilità tra la *lex concursus* locale e quella principale in materia di diritti di prelazione dei creditori sui beni, come relativamente alla ripartizione dell'attivo o ancora al coordinamento in materia di tutela dei diritti reali o alla disciplina degli atti pregiudizievoli ai creditori[65].

Proprio al fine di risolvere, almeno in parte, i problemi di coordinamento tra l'istituto, inedito, dell'impegno e gli ordinamenti giuridici degli Stati membri, in alcuni di essi, ma

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61 Police, *Il potere discrezionale dell'Autorità garante della concorrenza e del mercato*, in *20 anni di diritto antitrust, l'evoluzione dell'Autorità garante della concorrenza e del mercato*, a cura di Rabitti– Barucci, tomo I, Torino, 2010, pp. 374 e ss.

62 In tal senso vedi Leandro, *op. cit.,* p. 125.

63 Sul tema, si veda De Cesari Montella, *op. cit.,* p. 108, in cui l'autrice sostiene che per piani di ristrutturazione si deve intendere una nozione autonoma "riferita a ciascuna procedura che nei singoli Stati membri abbia per finalità la ristrutturazione dell'impresa del debitore, quale ne sia la denominazione locale; qualora, poi, l'ordinamento del dato Stato conosca più procedure di ristrutturazione, con diverse modalità di approvazione da parte dei creditori, si dovrà, si suppone, far riferimento a quella che è la procedura di ristrutturazione più frequentata e tipica. Così pensiamo di non sbagliare suggerendo che nel diritto italiano il riferimento corretto sia il concordato preventivo".

64 Leandro, *op. cit*., p. 133.

65 Ivi, p. 126 e ss.

non nel nostro, sono state emanate, e non solo con riferimento alla fattispecie dell'impegno, disposizioni di attuazione del Regolamento o comunque volte a favorire il coordinamento tra quest'ultimo e la disciplina interna. Per esempio, in Francia è stata emanata l'*Ordonnance* n. 1519/2017, che, a questo fine, modifica alcune disposizioni del *Code de Commerce* anche con riferimento alla fattispecie dell'impegno. Nel Regno Unito è stato promulgato l'*Insolvency Amendment (EU 2015/848) Regulations 2017*, "che ha comportato l'introduzione di disposizioni di attuazione e di coordinamento con il Regolamento 848 relativamente, oltre al resto, agli obblighi di specificazione del carattere "principale", "secondario", o "territoriale" della procedura, alla modifica delle condizioni per la conversione delle procedure, ai procedimenti per l'approvazione dell'impegno unilaterale che – ai sensi dell'art. 36 del Regolamento n. 848 – esclude l'apertura di una procedura secondaria, agli accordi sulla giurisdizione unica in caso di procedure di coordinamento delle procedure di insolvenza aperte a carico di società facenti parte del medesimo gruppo"[66].

In questo senso, e con specifico riferimento all'attuazione e al coordinamento delle norme di diritto interno con quelle europee in materia di procedura secondaria virtuale, doveva leggersi anche la norma di cui all'art. 14 *bis* contenuta nella bozza del Codice della crisi e dell'insolvenza, redatta nell'ottobre del 2018 dalla c.d. Commissione Rordorf, che aveva cura di precisare, al comma 2, che l'approvazione dell'impegno dovesse ritenersi soggetta alle regole in materia di voto e maggioranze previste per il concordato preventivo. Allo stesso modo, si prescriveva che l'iniziativa, da parte di un amministratore della procedura principale aperta in Italia, di presentazione della proposta di impegno ai creditori locali dello Stato della dipendenza fosse soggetta all'autorizzazione del giudice delegato (art. 14 *bis* c. 4), mentre spettava al Tribunale decidere delle istanze dei creditori locali *ex* art. 36 parr. 7 e 8 (art. 14 *bi*s c. 5).

La citata norma di cui all'art. 14 *bis* non è stata però riprodotta nella versione finale del Codice della crisi e dell'insolvenza. Il legislatore italiano sembra aver perso un'importante occasione per introdurre disposizioni di attuazione e di coordinamento con il sistema giuridico interno delle norme in materia di procedura secondaria virtuale disciplinate dal Regolamento n. 848. Come è noto, da una parte, non si può dubitare dell'effettiva ed immediata cogenza nel nostro ordinamento delle norme in materia di insolvenza *crossborder* come disciplinate dal Regolamento, in quanto queste promanano da un atto normativo comunitario avente portata generale, obbligatorio in tutti i suoi elementi e direttamente applicabile negli ordinamenti degli Stati membri: tale atto normativo si pone, peraltro, nell'ordine delle fonti del nostro ordinamento, tra quelle di rango comunitario e, pertanto, gerarchicamente superiore a quelle di diritto interno. Dall'altra, però, la totale assenza nel nostro ordinamento di norme di attuazione e coordinamento con la disciplina comunitaria in materia di procedura secondaria virtuale aggrava una serie di questioni interpretative, a partire da quelle in materia di impegno, le uniche alle quali si avrà attenzione in questa sede. In particolare, si avrà specifico riguardo a quelle sollevate dalla presentazione e approvazione, in una procedura principale straniera, dell'impegno volto ad evitare

[66] Pasquariello, *op. cit.,* nota 38.

l'apertura di una procedura secondaria reale a carico della dipendenza ubicata in Italia, senza entrare nel merito degli ulteriori problemi derivanti dalla gestione (e dal coordinamento delle leggi applicabili alle diverse fasi) della procedura unitaria una volta che l'impegno sia stato approvato, in modo da circoscrivere il campo di indagine ai problemi di coordinamento tra la legge europea e il diritto italiano della crisi.

In questo senso, un primo ordine di problemi si pone rispetto all'individuazione dei creditori a cui sottoporre l'approvazione dell'impegno e delle maggioranze a tal fine richieste.

A questo proposito, occorre far riferimento ancora una volta alla norma di cui al paragrafo 5 dell'art. 36 del Regolamento, secondo il quale devono considerarsi applicabili ai fini dell'approvazione dell'impegno "le regole in materia di maggioranza qualificata e di voto che si applicano per l'adozione dei piani di ristrutturazione", secondo la legge dello Stato membro in cui si sarebbe potuta aprire la procedura secondaria di insolvenza. Inoltre, ai sensi del Considerando n. 44, laddove il diritto nazionale preveda diverse procedure per l'approvazione dei piani di ristrutturazione, sono le norme degli Stati membri a dover indicare la specifica procedura pertinente ai fini dell'adozione dell'impegno.

Se si considera che l'espressione piani di ristrutturazione corrisponde a quella, successivamente accolta della c.d. direttiva *Insolvency*, di quadri di ristrutturazione, e che a quest'ultima è stata data attuazione in Italia nell'ambito della disciplina del concordato preventivo, non resta che fare riferimento alle maggioranze previste per l'approvazione della relativa proposta, come del resto già previsto nella bozza Rordorf dal citato art. 14 *bis*.

Occorrerà, inoltre, considerare che l'ordinamento italiano prevede maggioranze diverse, a seconda che si tratti di concordato liquidatorio o in continuità aziendale[67]. Come è noto, ai sensi dell'articolo 109 CCII, nel primo caso si richiede il voto favorevole della maggioranza dei crediti ammessi al voto, e, "ove siano previste diverse classi di creditori, il concordato è approvato se la maggioranza dei crediti ammessi al voto è raggiunta inoltre nel maggior numero di classi", mentre nel secondo, dove la suddivisione in classi è in ogni caso obbligatoria (art. 85 c. 3, CCII), si richiede inoltre il voto favorevole della maggioranza di tutte le classi.

Si consideri, tuttavia, che, ai fini dell'approvazione dell'impegno, una suddivisione in classi dei creditori locali sembra doversi escludere in linea di principio, per la ragione che l'oggetto della relativa proposta è per definizione unico ed omogeneo per tutti i creditori, esaurendosi nella scelta se rinunciare o meno all'apertura di una procedura secondaria reale in Italia.

Ne deriva, allora, che ai fini dell'approvazione dell'impegno, deve ritenersi richiesto il voto favorevole dei creditori locali che rappresentano la maggioranza assoluta dei crediti ammessi al voto, come previsto dall'art. 109 comma 1 CCII, per l'ipotesi di concordato liquidatorio senza suddivisione dei creditori in classi: saranno inoltre applicabili sia la norma che, nel caso in cui un unico creditore (locale) sia titolare di crediti in misura

[67] Secondo l'opinione di un'autorevole dottrina la differenza in questione "testimonia il favor del legislatore nei confronti del concordato in continuità aziendale ancor più evidente nel quadro dell'attuazione della direttiva n. 2019/1023" Nigro, Vattermoli, *Diritto della crisi delle imprese. Le procedure concorsuali*, VI ed., Bologna, 2023, p. 437.

superiore alla maggioranza dei crediti ammessi al voto, l'impegno potrà dirsi approvato solo se, oltre a quello della maggioranza dei crediti, abbia riportato inoltre il voto favorevole della maggioranza per teste dei voti espressi dai creditori (locali) ammessi al voto, sia quella dettata dall'ultimo periodo del comma 6 dell'art. 109 CCII, nella parte in cui il legislatore specifica che "sono inoltre esclusi dal voto e dal computo delle maggioranze i creditori in conflitto d'interessi".

Nella totale assenza di norme di attuazione occorre anche individuare preventivamente, ai fini dell'impegno, quali siano i creditori locali_legittimati ad esprimere il voto per l'approvazione dell'impegno secondo la legge italiana. Nel par. 5 dell'art. 36 Reg. n. 2015/848 è previsto che: "l'impegno è approvato dai creditori locali conosciuti". Inoltre, sempre il Regolamento, al Considerando n. 44, specifica che "se a norma del diritto nazionale le regole di voto per l'adozione di un piano di ristrutturazione richiedono la previa verifica dei crediti, questi crediti dovrebbero considerarsi approvati ai fini del voto sull'impegno".

Se l'impegno sul quale i creditori sono chiamati ad esprimersi, come detto, ha ad oggetto unicamente la scelta della nazionalità del giudice competente a regolare gli interessi dei creditori locali in base alla legge della dipendenza e prende le mosse da una proposta dell'autorità che gestisce la procedura principale, con la conseguenza che la sua approvazione comporta il medesimo effetto nei confronti di tutti i creditori, allora appare ragionevole riconoscere la legittimazione al voto a tutti i creditori locali che abbiano rapporti con la dipendenza, cioè ai titolari di crediti sorti nell'ambito dell'attività di quest'ultima, senza che rilevi tra essi alcuna distinzione di rango.

In questo senso, per analogia, sempre con riferimento alla disciplina del concordato preventivo, in materia di legittimazione al voto per l'approvazione dell'impegno, si potrebbero ritenere adattabili la norma di cui all'art. 107 comma 3, ultimo periodo, CCII in attuazione del par. 5 dell'art. 36 Reg. n. 2015/848, e la norma di cui all'art. 108 comma 1. Appare del resto opportuno prevedere espressamente che l'amministratore della procedura principale alleghi alla comunicazione obbligatoria ai creditori locali, cui è tenuto circa l'impegno, un elenco dei creditori legittimati al voto con indicazione dell'ammontare per cui sono ammessi, e precisare che eventuali crediti locali contestati o non ancora verificati si ritengano ammessi al voto limitatamente all'impegno.

Quanto invece alle maggioranze richieste ai fini dell'approvazione dell'impegno, dovrebbero trovare applicazione le norme sulla maggioranza senza classi di cui all'art. 109 comma 1 a tutti i creditori locali.

Alla luce di quanto esposto finora, in una prospettiva *de iure condendo* al fine di dare piena attuazione alle disposizioni in materia di procedure secondarie sintetiche, potrebbe essere opportuno introdurre un'espressa disposizione volta a disciplinare le regole di maggioranza e di legittimazione al voto per l'approvazione dell'impegno, come previsto dalla bozza iniziale del nuovo Codice della crisi d'impresa, al fine di adattare alla disciplina dell'approvazione dell'impegno, come già detto, il combinato disposto di cui agli artt. 107 comma 3, ultimo periodo, e 108 comma 1 CCII per ciò che concerne le regole in materia di legittimazione al voto, con esclusione delle distinzioni di rango dei creditori, e di estendere all'impegno la disciplina delle regole di maggioranza di cui ai commi 1 e 6, ultimo

periodo, dell'art. 109 CCII, con esclusione della parte riferita alla suddivisione dei creditori in classi, in quanto non compatibile con l'oggetto dell'impegno.

Attenzione meriterebbero, infine, i problemi di coordinamento derivanti dalla presentazione di una domanda di apertura di una procedura secondaria in Italia, successiva o precedente alla presentazione dell'impegno. Come già parzialmente anticipato nei paragrafi precedenti e alla luce dell'interpretazione delle norme del Regolamento in materia, la presentazione dell'impegno_da parte dell'amministratore della procedura principale, *ex* artt. 36 e 37 Reg. n. 2015/848, può intervenire tanto in un momento in cui una domanda di apertura di una procedura secondaria non sia stata ancora presentata da parte dei creditori locali di una dipendenza, quanto nel periodo intercorrente tra la presentazione di una domanda siffatta e l'apertura della relativa procedura. Entrambe queste ipotesi necessiterebbero di norme di attuazione nel nostro ordinamento.

Nel primo caso, cioè quello della presentazione di una domanda di apertura di una procedura secondaria successivamente all'approvazione di un impegno, il Regolamento, all'art. 38 par. 2 (ma anche al già citato Considerando n. 42), prevede una sorta di giudizio di omologazione dell'impegno da parte del giudice adito per l'apertura della procedura secondaria, disponendo, come già visto, che laddove sia stato contratto un impegno il giudice competente non apre la procedura secondaria di insolvenza se ritiene che l'impegno tuteli adeguatamente gli interessi dei creditori locali. In questo caso, in una prospettiva *de iure condendo*, sarebbe opportuna una norma interna che, analogamente a quanto previsto dall'art. 49, comma 5 CCII, impedisse, in presenza di un impegno approvato, l'apertura della procedura secondaria, disponendo che, pur in presenza dei relativi presupposti, il giudice non possa dichiarare l'apertura della procedura secondaria se l'impegno tuteli adeguatamente gli interessi dei creditori della dipendenza italiana, al fine di garantire l'efficiente gestione delle procedure[68].

Nel secondo caso invece, ovvero quando l'impegno sia presentato successivamente alla istanza di apertura della procedura secondaria, il Regolamento, proprio allo scopo di permettere all'amministratore della procedura principale la possibilità di eccepire l'impegno, già prevede l'obbligo del giudice adito per l'apertura della procedura secondaria di informare l'amministratore delle procedure di insolvenza o il debitore non spossessato della procedura principale di insolvenza al fine di permettere loro di essere sentiti (art. 38, par. 1) e consente a costoro di chiedere la sospensione del procedimento, al fine di evitare che l'avvenuta apertura della procedura secondaria finisca per precludere definitivamente la possibilità di presentazione dell'impegno (art. 38, par. 3).

Allo scopo di dare concreta attuazione a queste norme si tratterebbe allora di introdurre una norma espressa, che definisca i termini entro i quali presentare l'impegno, equiparando la proposizione dell'impegno alla proposta di concordato in pendenza di una procedura di liquidazione giudiziale, *ex* art. 40, comma 10, CCII, e prevedendo la possibilità di sospendere l'istruttoria per l'apertura della procedura secondaria vera e propria, al fine di rendere concretamente realizzabile l'approvazione dell'impegno nel medesimo procedimento istruttorio, entro la data della prima udienza dello stesso, a pena di decadenza, e fatta salva la possibilità di chiedere al giudice adito la sospensione

[68] In questo senso, in commento alla norma di cui all'art. 49 c. 5 CCII vedi Nigro, Vattermoli, *op. cit.*, p. 127.

dell'apertura della procedura secondaria, per un periodo non superiore a tre mesi, in attuazione della norma di cui al par. 3 dell'art. 38 Reg. n. 2015/848.

In conclusione, per quanto sarà la prassi applicativa ad individuare i principali problemi sollevati dall'istituto della procedura secondaria virtuale e ad orientarne la soluzione, certo è che la sua efficacia, quantomeno sotto il profilo della certezza del diritto, rischia di essere seriamente indebolita, quanto in particolare al nostro ordinamento, dall'assenza di norme attuative e di coordinamento della disciplina comunitaria: ma l'auspicio che, almeno in sede di correttivo, il legislatore ponesse rimedio a tale lacuna sembra restato vano.