

STUDY

Requested by the JURI Committee



# European Commercial Contract Law

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## **Abstract**

This study – commissioned by the Policy Department C at the request of the Committee on Legal Affairs – aims at discussing the reasons why the law chosen in commercial contracts is largely non-European and non-member state law. To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law. Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies.

This document was requested by the European Parliament's Committee on Legal Affairs.

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## LIST OF ABBREVIATIONS

<b>ABGB</b>	Austrian General Civil Code
<b>ACQP</b>	Acquis Principles
<b>Art.</b>	Article
<b>BGB</b>	German Civil Code
<b>CESL</b>	Common European Sales Law
<b>CEPEJR</b>	European judicial systems CEPEJ Evaluation Report
<b>CFR</b>	Common Frame of Reference
<b>CJEU</b>	Court of Justice of the European Union
<b>CR</b>	Clearance Rate
<b>DBS</b>	Doing Business
<b>DT</b>	Disposition Time
<b>EC</b>	European Commission
<b>EG</b>	Expert Group
<b>EU</b>	European Union
<b>ICC</b>	Italian Civil Code
<b>MS</b>	Member States
<b>SME</b>	Small and Medium-size Enterprise
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TEU</b>	Treaty on European Union
<b>UK</b>	United Kingdom

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## EXECUTIVE SUMMARY

This study aims at discussing the reasons why **the law chosen in commercial contracts is largely non-European and non-member state law**. Indeed, **absent an autonomous European contract law**, business parties often elect other, non-European jurisdictions (often common law ones), to govern their contractual agreements.

The study aims at investigating the reasons that might justify such a trend and identify possible policies to be implemented to overcome it.

To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law (Chapter 1). Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies (Chapter 2). It then provides a series of policy options (Chapter 3), European institutions could consider when attempting to alter this trend and ensure EU regulation a global role in commercial contracts too.

- (a) More specifically, the first chapter provides a broad overview of the numerous academic efforts aiming at identifying, defining and codifying European contract law. Those include the “Codice Gandolfi”, the Principles of European Contract Law, the Unidroit Principles, and the Acquis Principles. Those efforts also contributed to eliciting an intervention by the European Commission, with the proposal of a “Common Frame of Reference” and ultimately with a proposal – never to be approved – of a Common European Sales Law.
- (b) This account shows: (i) how **the international and European academic community has almost unanimously perceived the need to attempt a unification of European contract law** to reduce differences among Member States (MS) and favour – primarily even if not solely – business transactions. Indeed, the creation of a single regulatory regime would simplify international transactions, reduce costs, and favour the proliferation of the European internal market, while increasing its international appeal.
- (c) At the same time, it (ii) shows how complex such a task is, that the effort of some of the most respected European and international contract law scholars never managed to fully achieve their intended results. Contract law is, in fact, one of those domains that is most profoundly rooted in the different legal traditions of each MS. Changing those cultural and dogmatic frameworks appears most complex and certainly a task which may not simply be achieved not only through soft-law efforts, but also regulatory interventions. Indeed, doctrinal, and judicial interpretation of said concepts are as important as the wording of the norms that codify them. Therefore, **a mere legislative reform would not suffice in concretely modifying the existing framework and its application**. Moreover, which system and or solution – even with respect to a single matter – is to be preferred is anything but obvious. In fact, how an identical norm will be applied in a different legal system is very hard if not impossible to anticipate. This is the recurrent concern with legal transplant, and certainly would demand that procedural aspects (in many instances norms of civil procedure) are addressed together with substantive ones (contract law regulation) to ensure greater uniformity in court application.
- (d) Finally, it (iii) displays how **transposing such sophisticated, well-thought and refined academic efforts into regulation is even more complex a task**. The attempt with the Common European Sales Law failed due to a number of reasons, including the difficulty in

achieving a vast consensus on matters such as a general regulation of contract law (despite the instrument being limited to sales agreements).

- (e) The first chapter allows us to conclude that, despite useful and beneficial, the **unification of European contract law** appears too complex a task to be successfully pursued. Most likely more limited efforts, directly targeting business agreements could prove more achievable, while certainly not easy (see below).
- (f) The second chapter starts by considering international and European reports on the functioning of the judicial system, with a focus on commercial contracts and transactions, to demonstrate how **common law jurisdictions tend to be preferred, and perceived more efficient, despite not always being faster, and certainly not cheaper at adjudicating contractual matters**. Elements such as the existence of dedicated courts – for business-related matters – which is not common to all European MS also appears to play a relevant role.
- (g) The analysis then moves to consider various aspects of the conduct of judges in adjudicating cases revolving around business agreement that could have a bearing on the choice of the regulatory regime by sophisticated parties. Those include contractual qualification, interpretation and integration on the one hand, as well as the operation of remedies. The aspect of **legal certainty, foreseeability of the final outcome (of judicial interpretation and enforcement of the agreement), and respect of the parties' contractual freedom** are the main focus of this analysis.
- (h) There it is demonstrated how, often times, complex business agreements that do not squarely fall within a specific contractual type (and are thence atypical) are forced by judges into the regulatory framework conceived for a different contractual type. This often is the case with so called "**alien contracts**", namely contractual models developed within a different legal system, imported into another one to pursue a specific business operation.
- (i) As a result, the forcing of a different regulatory regime – conceived for a different kind of contractual agreement and set of interests –, with its **mandatory and default rules**, potentially leads to profound alterations of the contractual agreement achieved by the parties, as well as its economic balance. This causes an increase in ex ante uncertainty and unforeseeability of the judicial outcomes and discourages sophisticated parties from electing that legal system to govern their agreements.
- (j) Similarly, the case is made for the need to allow a **textualist approach** to contractual interpretation, so long as the parties so prefer, leaving them the possibility to determine the evidence the judge will be able to consider in order to adjudicate the case. While **contextualist approaches** may ensure greater protection whenever there is an informational and economic disparity between the parties (e.g. consumers and professionals, respectively), in the case of sophisticated business parties that thoroughly negotiate their agreement – often assisted by qualified experts – the possibility to exert control on what statements and documents will be considered to determine what is owed appears to be of paramount importance. This may be achieved through the enforcement of merger clauses as well as of self-imposed formal requirements, so as to exclude the relevance and validity of any statement that is not contained and/or enumerated and/or referred to within the contractual document itself.
- (k) **Contractual integration and the use of general clauses is not per se to be excluded or criticized** because, whenever correctly conceived it may achieve efficient outcomes, in the

interest of the parties, minimizing opportunistic behaviour ex post, and reducing negotiation costs ex ante. This is the case with many doctrines developed in continental Europe that may be considered specifications of **the general principle of good faith, such as the prohibition of contradicting oneself, exceptio doli, estoppel**, to name a few. However, interventions aiming at enriching the contract with the protection of interests that are not functionally connected to the contractual agreement itself (e.g. those interests that are deemed the duplication of tortious ones, such as Schutzpflichten) or those aimed at interfering and/or altering the economic balance of the agreement should be radically avoided. Those, in fact, increase ex post uncertainty of the exact content of the agreement, as well as of its economic aspects, certainly discouraging sophisticated business parties from electing the corresponding regime and jurisdiction.

- (l) It shall be stressed that none of the arguments under (i), (j) and (k) above should be intended as limiting **the possibility for policymakers and judges to sanction illicit behaviour, or the violation of mandatory provisions** that are deemed protecting prevailing interests of the legal ordering or other parties. However, within such clear boundaries, the will of the parties ought to be most respected and preserved whenever possible.
- (m) As per **remedies**, it is argued how often times those aspects would require a closer, more precise and narrow tailored regulation, aiming at clarifying the numerous aspects of uncertainty that emerge through common application of existing norms, for instance about damage calculation, the conditions to allow the cancellation of the agreement in case of breach, the regulation of precontractual liability, and many more.

Overall, the analysis is then used to lay out some **policy recommendations** that may only be broad in scope and point at one direction more than providing detailed solutions.

All efforts should aim at pursuing the **efficiency of the judiciary** on the one hand, and the **creation of a set of minimalist and – possibly – self-sufficient norms dedicated to the regulation of business contracts that prioritize legal certainty, foreseeability of the outcome, preservation of the parties will**.

As per the first aspect, the data emerging from the international reports considered suggests the need to ensure **prompt adjudication** and, in this regard, the importance of **specialized courts for business transactions**. While a competence of the European Union in the domain of civil procedure and court organization is not obvious, an argument may be grounded based on the need to pursue the intended outcome of **market unification and the proliferation of European contract law**.

As per the second aspect, determining the ideal solution for all the enumerated problems is certainly complex, and reference could be made to the numerous efforts described in chapter 1. However, proposed regulation should touch upon **contract qualification, interpretation and integration, as well as provide a detailed regulation of remedies, trying to leave as little uncertainty as possible about the consequences of breaches and failures to perform, as well as limiting if not radically excluding interventions that alter the economic balance of the agreement**.

## GENERAL OVERVIEW

It is easily observed how most often international contracts are governed by non-European law. The reasons why this occurs are up to debate and could be quite varied both in nature and relevance.

Indeed, a recent study by Singapore Academy of Law (SAL) found that 43 per cent of commercial practitioners and in-house counsel preferred English law as the governing law of the contracts<sup>1</sup>. While the validity of such a study may be questioned<sup>2</sup>, the prevalence of common law in international business transactions, emerging also from other reports and studies (see for a detailed discussion §§2.2 ff.), is one of the very reasons that led to need of performing the current analysis, and should be taken into account, so as to identify those elements that may be improved in the European and MS's regulatory framework for commercial contracts entered into by sophisticated parties.

Taking such a starting point into account does not, however, entail affirming the superiority of any legal system – including common law ones – over the European and MS's one in this domain or – much less so – overall. A legal system is too complex to be assessed in its entirety and in absolute terms, and similar judgments most often display a propagandistic purpose, and limited academic and scientific value for policies to rest upon them. Indeed, the same legal ordering, and the same domain within it, may be studied from different vantage points, taking alternative criteria into account. In fact, a given solution might increase speed in adjudication while also spiking litigation costs together with it, or even as a consequence of it. While speed might benefit some players, higher costs would certainly harm others, and potentially impair access to justice for many. Which system is to be deemed superior is thence a matter of choosing the unit of measure or, said otherwise, the criterion one wants to prevail (see §§2.2.1 and 2.2.3 below). That, in turn, most often depends on the specific context and purpose of the assessment, as well as on the intention of the policy maker in the given circumstances, and ultimately it will entail striking a balance.

At the same time, however, if a question is asked which is sufficiently narrowly defined, and a functional analysis is undertaken in order to address it – as it is the case with the current study – a comparative analysis between legal systems might help identify those elements that cause one system to be Pareto-superior to the other. In such a context – it shall be stressed – it is a second-order efficiency that is taken into account, and thence efficiency is not elevated to become the paramount criterion or sole objective pursued, rather it is the measure of how effectively an otherwise set and identified purpose or objective is achieved. The latter could, in fact, be anything, ranging from social justice<sup>3</sup> to the expedite functioning of adjudication in commercial disputes<sup>4</sup>.

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<sup>1</sup> See (SAL), *Study on Governing Law & Jurisdictional Choices in Cross-border Transactions*, Singapore, 2019, 4. The Study, which was commissioned by the SAL's International Promotion of Singapore Law Committee, reflects the views of around 500 commercial law practitioners and in-house counsel who have involvement in cross-border transactions, arising out that English law is the most frequently used governing law for cross-border transactions. On the same line see also DUROVIC-LECH, *Harmonization of Commercial Law Based on Common Law*, in *International Commercial Courts*, BREKOULAKIS-DIMITROPOULOS (edited by), Cambridge, 2022, the Authors point out that "International commercial courts opt for English law because of its widespread usage, 'certainty, stability, predictability, independence and expertise of the judiciary, the commerciality and reliability of the court decision and for the willingness of judges to endorse contractual bargain struck between commercial parties'", 204.

<sup>2</sup> The study was commissioned by a Committee whose purpose is that of promoting Singapore Law; 51% of respondents to the study were law practitioners from Singapore, and Singapore is a common law country.

<sup>3</sup> On which see HESSELINK, *Democratic contract law*, in *European Review of Contract Law*, 11, 2015, 96-97.

<sup>4</sup> On which see EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Expedited settlement of commercial disputes in the European Union - European Added Value Assessment*, Brussels, 2018, *passim*.

In such a perspective, a given solution might be deemed superior which still does neither entail affirming the superiority of the legal system it belongs to nor the need or even the possibility of achieving similar outcomes through a mere transplant. In fact, the functioning of a given rule is influenced by a number of factors, and the mere transposition of a set of rules into another legal ordering is often times doomed to fail its purpose<sup>5</sup>.

Finally, even if the superiority of a given solution were to be affirmed that would not entail embracing neither the system in its entirety – which might display more than one reasons for concern in other domains, including the respect for fundamental rights<sup>6</sup> – nor the legal history that led to its diffusion<sup>7</sup>. Indeed, so long as such concerns do not directly affect the matters to be analysed, useful insights might still be gained by taking the positive aspects of those systems and those solution into account, without any further implications.

As per the matter here at stake, it shall be stressed that some European jurisdictions differentiate between commercial and non-commercial contracts, providing dedicated provisions for both kinds. However, not all jurisdictions provide for such a distinction, and it is quite disputable that it is either necessary or beneficial. In particular, the emergence of European consumer law already today provides for quite a differentiation between business-to-business (henceforth B to B) contracts and business to consumer (henceforth B to C) contracts<sup>8</sup>.

Moreover, quite a few jurisdictions considered the distinction to be superfluous, and merged the regulation of civilian and commercial contracts into one single code, for matters of simplicity and uniformity, without much being sacrificed, and eventually inducing a commercialization of civil law<sup>9</sup>. One could, in fact, dispute that from a regulatory point of view there is not so much need to maintain different sets of rules for contracts depending on the qualification of the parties, besides dedicated interventions to ensure all the protection of the weaker contractual party in all those matters where a difference in contractual power, information, and sophistication appears to play a central role. In that respect, however, it might well be argued that European consumer protection law is sufficiently narrow targeted and effective in ensuring adequate protection, allowing for the application of general contract law rules in all other matters but those specifically regulated.

<sup>5</sup> On which see, LEGRAND, The impossibility of 'legal transplants', in *Maastricht journal of European and comparative law*, 4, 1997, 111 ff; EWALD, Comparative jurisprudence (II): the logic of legal transplants, in *The American Journal of Comparative Law*, 43, 1995, 489 ff.; COTTERRELL, Is there a logic of Legal Transplants?, in *Adapting legal cultures*, 71, 2001, 82 ff.; BERKOWITZ DANIEL-PISTOR-RICHARD, The Transplant Effect in *The American Journal of Comparative Law*, 51, 2003, 163 ff.

<sup>6</sup> To exemplify, AMNESTY INTERNATIONAL, Singapore: Unlawful and shameful drug executions continue, including of first known woman in 20 years, 28.07.2023, available at the web page: <https://www.amnesty.org/en/latest/news/2023/07/singapore-unlawful-and-shameful-drug-executions-continue-including-of-first-known-woman-in-20-years/>.

<sup>7</sup> SCHMIDHAUSER, Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems, in *International Political Science Review*, 3, 1992, 321-334.

<sup>8</sup> See ROPPO, From consumer contracts to asymmetric contracts: trend in european contract law? , in *European Review of Contract Law*, 5, 2009; LANDO, European contract law, in *Am. J. Comp. L.*, 31, 1983, 54 ff.

<sup>9</sup> See on this point FERRI, *Revisione del codice civile e autonomia del diritto commerciale*, in *Rivista diritto commerciale* 1945, the Author argued that: "(i) the unification of the codes was by then to be seen as a fait accompli, and even positively accepted for some normative changes that modernized the system of private law rules (the so-called "commercialization of private law"); (ii) unification did not, however, cause the scientific autonomy of the discipline to cease; on the contrary, since unification often took place in an artificial manner, neglecting socioeconomic differences (especially with regard to the central theme, constituted by the discipline of the enterprise), it was the task of the doctrine to make the differences neglected by the legislature re-emerge and to construct, by way of interpretation, solutions more appropriate to the underlying socioeconomic reality." (translated by the Author), at 96. See also LIBERTINI, *Diritto civile e diritto commerciale. Il metodo del diritto commerciale in Italia (II)*, in *Orizzonti del Diritto Commerciale*, 2015, 11-12.

Given the breadth of the present study, however, we shall not indulge at length on the discussion whether a commercial contract is and shall be distinct from civil contracts. Moreover, we will not focus on any member states specific and detailed regulation beyond what it is strictly necessary, being the current study not comparative in nature. Instead, it will focus more on those regulatory aspects that may play a role in disfavouing the application of European and member states contract law rules vis-à-vis other jurisdictions, in particular common law ones.

To this end, the first part of the study will provide an account of all the attempts to elaborate a common European contract law both at a doctrinal and policymaking level. The purpose being that of analysing those elements that could have prevented the emergence of a real European contract law, common to all member states.

The second part will, instead, focus on specific issues of contract law, ranging from remedies to the interpretation of the contract, as well as some procedural considerations, attempting to identify those aspects that ought to be addressed in order to revert the existing trend.



# 1. THE ATTEMPTS AT CREATING A EUROPEAN CONTRACT LAW, AND THEIR FATE

## The different academic attempts for a European contract law.

1. There have been several attempts to find a common set of rules for a European contract law (§1.1), in particular at academic level (§1.2).
2. Among these, the Code européen des contrats (Codice Gandolfi), promoted by the Pavia Group is particularly relevant (§1.3).
3. These believed that, in order to achieve the real unification of contract law, it was necessary to adopt a real 'European Contract Code' taking as legal basis the Italian Civil code and the draft 'Contract Code' promoted by the well-known Oxford jurist McGregor (§1.3).
4. Another important initiative was the Principles of European Contract Law (PECL) of the Lando Commission of which three parts were published between 1995 and 2002 (§1.4).
5. The PECL were conceived as a useful tool for national legislators for possible reforms as well as for courts for the resolution of disputes concerning cross border contracts (§1.4).
6. In continuity with the work of the Lando Commission, the 'Study Group on a European Civil Code' was set up in 1998 and was coordinated by Professor Christian Von Bar which published the Principles of European Law (PEL) (§1.4).
7. Another relevant attempt was the Unidroit Principles prepared by the 'International Institute for the Unification of Private Law' between 1994 and 2016 (§1.5).
8. These consisted of general articles and rules, accompanied by commentaries and illustrations explaining how each institution has to be applied in practice (§1.5).
9. They had a soft law nature because they can only apply whether the parties have decided to use them and represented a collection of common principles independent of a particular legal system but intended instead to reflect the rules common to all different legal traditions (§1.5).
10. In 2002, the 'Research Group on the Existing EC Private Law', headed by Professor Hans Schulte-Nölke was founded and it published the Acquis Principles (§1.6).
11. Unlike the other attempts, the Acquis Group did not use individual national laws as starting point but the European law with the aim of organise existing supranational law in an organic manner and from which deriving common principles and rules of contract law (§1.6).

## The European Commission's proposal for the CESL and the reasons for its failure.

12. In order to solve the issues resulting from the fragmentation of contract law between MS, the EC proposed the adoption of a 'Common Frame of Reference' (CFR) of which the final version was published in 2009 by the Acquis Group together with the 'Study Group on a European Civil Code' (§1.7).
13. It contained articles, general common principles and model rules representing the best solutions adopted by the MS, all accompanied by comments and notes by the authors to explain the choices made within the CFR itself (§1.7).
14. The CFR had an eminently academic value because it aimed to be a model for scholars, the European legislator, judges and Advocates General of the CJEU, on the one hand, and a starting point for an optional instrument, on the other hand (§1.7; §1.8).

15. In 2011, the European Commission proposed an official proposal for the adoption of a Regulation on 'a Common European Sales Law' (CESL) which was conceived as a 28<sup>th</sup> legal regime as well as an instrument to which the parties could freely decide to adhere (§1.9).
16. However, the CESL was strongly criticised for not effectively achieving the results that the Commission thought it would obtain (§1.10; §1.11).

## 1.1. An overview

Numerous attempts, both doctrinal and from policy makers, layered over the years to develop a European private law. This comprises the numerous legislative interventions primarily tackling the protection of consumers as weaker contractual parties<sup>10</sup>, as well as in other private-law related domains<sup>11</sup>, but also a broad yet more blurred set of principles and norms that may well be deemed belonging to a core<sup>12</sup> common to all member states (henceforth MS).

<sup>10</sup> The Commission indicated it would prioritise the evaluation whether the eight consumer law directives, the so-called consumer acquis sufficiently contributed to the enhancement of consumer and business confidence in the internal market by way of a common high level of consumer protection and by eliminating barriers to the internal market and simplifying legislation. The consumer directives under review were the following ones: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, 31 (henceforth Dir. 85/577); Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, 59, (henceforth Dir. 90/314); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, 29, (henceforth Dir. 93/13); Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, 83, (henceforth Dir. 94/47); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, 19, (henceforth Dir. 97/7); Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, 27, (henceforth Dir. 98/6); Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, 51, (henceforth Dir. 98/27); Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, 12, (henceforth Dir. 99/44). A Green Paper on the Review of the Consumer Acquis was published on 08.02.2007: Brussel, COM (2007) 744 final, Green paper's goal was to achieve a true internal market for consumers. Moreover see the Commission, 'Proposal of the Directive on consumer rights' COM (2008) 614 final, for further information on the Proposal see: HOWELLS-SCHULZE, 'Overview of the Proposed Consumer Rights Directive' in *Modernising and Harmonising Consumer Contract Law* HOWELLS-SCHULZE (edited by), Munich, 2009, 3 ff.; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, 64-88, (henceforth Dir. 11/83); Directive 11/7/EEU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, 1-10, (henceforth Dir. 11/7); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149/22, 11.06.2005, (henceforth Dir. 2005/29); HALL-HOWELLS-WATSON, "The Consumer Rights Directive - An Assessment of Its Contribution to the Development of European Consumer Contract Law" in *European Review of Contract Law*, 8, 2012, 139 ff.

<sup>11</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ No. L. 60, 28.2.2014, 34, (henceforth Dir. 14/17).

<sup>12</sup> Trento Common Core Project founded in 1994 by Professors Bussani and Mattei, BUSSANI-MATTEI, *The Common Core of European Private Law*, Place Published, 2002, f. 240; id. MATTEI, *The Common Core Approach to European Private Law*, in *Columbia Journal of European Law*, 1997, 339. Completed projects in the field of contract law include ZIMMERMANN-WHITTAKER, *Good faith in European contract law* Place Published, 2000, 720; GORDLEY, *The Enforceability of Promises in*



Indeed, despite the numerous interventions, that of private law is a domain largely regulated by national norms, developed along the centuries to form – apparently – different legal traditions. In particular, within current MS – thence leaving aside British common law as well as the US legal system – a French and a German legal family clearly differentiate, reflecting the alternative structures in their civil codes<sup>13</sup>. Other countries, such as Italy adopted intermediate solutions between the two<sup>14</sup>, others primarily adhered to one of the two models<sup>15</sup>.

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*European Contract Law*, Place Published, 2001, 478; SEFTON-GREEN, *Mistake, Fraud and Duties to Inform in European Contract Law. The Common Core of European Private Law.*, Place Published, 2005, 462; CARTWRIGHT-HESSELINK, *Precontractual Liability in European Private Law (The Common Core of European Private Law)*, Place Published, 2011, 536; HONDIUS-GRIGOLEIT, *Unexpected Circumstances in European Contract Law*, Place Published, 2011, 714. Moreover, among the many scholarly papers that have discussed the Common Core methodology and results, see, KÖTZ, *The Common Core for European Private Law: Presented at the Third General Meeting of the Trento Project*, in *Hastings International and Comparative Law Review*, 21, 1998, 803 ff.; LANDO, *The Common Core of European Private Law and the Principles of European Contract Law*, in *Hastings International and Comparative Law Review*, 21, 1998, 809 ff.; ANTONIOLLI-FIORENTINI, *A Factual Assessment of the Draft Common Frame of Reference*, Place Published, 2010, 502.

<sup>13</sup> The German Bürgerliches Gesetzbuch (BGB) (1900) has a multi-layered structure, with increasingly specific sets of rules in the law of juristic acts (in the General Part), the general law of obligations, the general law of contracts, and the law of specific 'nominate' contracts, respectively. The *Schuldrechtsmodernisierung* (2000), included four major fields of interest: sales and works contracts, integration of consumer law, breach of contract (mainly damages and rescission), and limitation. [German Civil Code BGB \(gesetze-im-internet.de\)](http://www.gesetze-im-internet.de). See MEDICUS, *Allgemeiner Teil des BGB*, Heidelberg, 2002, 518; GRUNDMANN, *Germany and the schuldrechtsmodernisierung 2002*, in *European Review of Contract Law*, 1, 2005, 129; 878; RÖTTINGER, *Towards a European Code Napoleon/ABGB/BGB? Recent EC Activities for a European Contract Law*, in *European Law Journal*, 12, 2006, 807 ff. MAGNUS, *Der Tatbestand der Pflichtverletzung*, in *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, SCHULZE-SCHULTE-NÖLKE (edited by), München, 2001, 432; D'ALFONSO, *The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and "Europeanization" of the BGB* in *European Business Law Review* 6, 2003, 689 ff.; Inspired by Domat, DOMAT, *Les lois civiles dans leur ordre naturel* Paris, 1697, and Pothier, POTHIER, *Traité des obligations*, Paris, 1761, 578, the French Code civil of 1804 listed the following four requirements for contract formation in Art 1108: consent of the party who enters an obligation; capacity to enter contracts; certainty of the object, which constitutes the content of the arrangement; and legality of the cause of the obligation. On this matters see also CARBONNIER, *Les lieux de mémoire*, in *Les lieux de mémoire*, NORA (edited by), II, Paris, 1986, n.55, 293, Carbonnier's argument that the civil code is materially a constitution because «en lui sont récapitulées les idées autour desquelles la société française s'est constituée au sortir de la Révolution et continue de se constituer de nos jours encore»; The same conclusion of CORNU, *'Un code civil n'est pas un instrument communautaire'*, in *Chroniques*, 2002, n.33,351 «La loi des Français se pense et s'écrit en français. Le code civil français forme un tout. C'est notre coutume générale. . . . Irréductible à une réglementation, le code civil est un monument du droit français parmi nos références primordiales». MICHAELS, *Code vs Code Nationalist and Internationalist Images of the Code civil in the French Resistance to a European Codification*, in *European Review of Contract Law*, 8, 2012, 277 ff. SEFTON-GREEN, *French and English crypto-nationalism and European private law: An exercise in sentiment and reason*, in *European Review of Contract Law*, 8, 2012, 260 ff.

<sup>14</sup> See BUSNELLI, *Diritto privato italiano. Radiografia di un sistema*, in *Rassegna di diritto civile*, 2002, 3, who defines the Italian code a second generation code.

<sup>15</sup> Codification after the Napoleonic era: In Belgium and Luxembourg, which had been incorporated into France under Napoleon, his codes were simply left in effect. The Netherlands, Italy, Spain, followed the French model not only by undertaking national codification but also by using the same techniques and arrangements. A good overview can be found in HEIRBAUT, *Enkele Hoofdlijnen Uit de Geschiedenis van Het Wetboek van Koophandel in België*, in *Tweehonderd Jaar Wetboek van Koophandel*, MARTYN (edited by), XXIII, Brussel, 2009, 91 ff. While, on the contrary, throughout the 19th century the German law exercised much influence in Austria, in Switzerland, in the Nordic countries, and, later, in most of eastern Europe. More in detail the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) – drafted under the influence of the German BGB – was one of the milestones of evolution of private law in Europe which has had a massive impact on legislation in Central and Eastern Europe, including Slovenia BRUS, *Die Witregelung und Ausserkraftsetzung des österreichischen bürgerlichen Gesetzbuch und des Zivilprozessrechts in Slowenien nach dem Zerfall der Habsburger Monarchie*, in *Slovenian Law Review*, 4, 2007, 41ff. Hungarian BIRÓ-LENKOVICS, *Általános tanok*, Miskolc, 1999, 220; CZIRFUSZ-KESERŐ, *Hungary in Private Law Reform*, Lavický-Hurdík, 2014, disponibile all'indirizzo Brno, 171ff.; Slovak, DULAK, *Slovakia*, in *Private Law Reform*, Lavický-Hurdík, 2014, disponibile all'indirizzo Brno, 257 ff.; Czech Republic JOSIPOVIĆ, *Private Law Codification in The Republic of Croatia in Codification in International Perspective*, WANG (edited by), Heidelberg,, 2014, 107 ff., Poland MACHNIKOWSKI, *Poland*, in *Private Law Reform*, Lavický-Hurdík, 2014, disponibile all'indirizzo Brno, 197 ff. and Croatia JOSIPOVIĆ-GLIHA-NIKŠIĆ, *Croatia*, in *Private Law Reform*, Lavický-Hurdík, 2014, disponibile all'indirizzo Brno, 111ff.

A detailed account of the differences among existing legal families within and beyond the EU exceeds the purposes of the current study and would require a very complex assessment. More often than not apparent divergences do not lead to substantially different outcomes when it comes to the concrete application of those norms. Indeed, the more correct account of a legal rule is determined by the algebraic sum of both black letter law, court application, and doctrinal interpretation<sup>16</sup>.

In such a perspective ought to be primarily seen all the relevant efforts undertaken at European and international level to determine a set of common principles in contract law, intended as one of the main bodies of private law, as well as the more relevant one for – national and international – economic exchanges. The underlying idea being that the borders of EU private law are not merely set and defined by EU mandated regulation but encompass some of the very roots of MS private law systems, in part due to the common roman law tradition<sup>17</sup>, as well as the circulation of legal models due to other reasons, including war<sup>18</sup>. Such studies have a great theoretical relevance and, in some cases, are recalled by agreements referring to them as their governing regime, within the limits of the choices entrusted to the parties by conflict of law rules. Moreover, they represent some of the most relevant efforts in the comparative law domain.

Such efforts, briefly presented below (see §1.2), then paved the way to the proposal for a regulation for the sales of goods. The latter possessed a much greater bearing, due to the fact that it could have provided for a common piece of legislation applicable across all MS (see §§1.3 ff.). However important, its scope – were it approved – would have been radically more limited than the others. Indeed, while sales contract are by far the paradigms of all economic agreements, they per se do not suffice in

<sup>16</sup> This is the very well-known theory of Rodolfo Sacco. See SACCO, Legal formants. A Dynamic Approach to Comparative Law, in *The American Journal of Comparative Law*, I, 1991, 1-34.

<sup>17</sup> See, in particular ZIMMERMANN, *Roman Law and the Harmonization of Private Law in Europe*, in *Towards a European Civil Code*, HARTKAMP-HESSELINK-HONDIUS-MAK-DU PERRON (edited by), Alphen aan den Rijn, The Netherlands, 2011, 27 ff.; id ZIMMERMANN, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today*, Oxford, 2001, 197; KOSCHAKER, *Europa und das römische Recht*, Berlin, 1947, 380; WIEACKER, *A History of Private Law in Europe*, Clarendon Press, 1996, 528; VON SAVIGNY, *Geschichte des römischen Rechts im Mittelalter*, Heidelberg, 1851, 357; STEIN, *Roman Law and English Jurisprudence Yesterday and Today: An Inaugural Lecture*, Cambridge, 1969, 31.

<sup>18</sup> Historically, the major elements of the codification movement belong to a common European inheritance: ancient and medieval Roman law, canon law, old Germanic law, feudal law, medieval municipal law, the natural law of early modern times. All these elements had their influence in different degrees on all the countries of Europe. Indeed, the great Napoleonic codifications, in particular the Code civil des Français promulgated in 1804, goes back directly or even literally to the customary and Roman law of the Middle Ages and early modern times. The influence of Roman law was even more marked in the German empire, where it was decided towards 1500 to abandon medieval customs and 'receive' (recipere) Roman law as the national law: this phenomenon is known as the reception. There is no doubt that England too was affected by the learned law, which then constituted the common law of Europe, none the less the most important element of English law, the Common Law, was developed from Germanic customary law and feudal law, quite independently of Roman law. As a result the common-law system differs fundamentally from the continental system. The difference between the English and the European approach is to be explained largely by the preponderance of case law as a source of law in England. The literature on this point is vast. See, among others, RÖTTINGER, *Towards*, cit., 807 ff.; DUGUIT, *Les transformations générales du droit privé depuis le Code Napoléon*, Paris, 1920, 206; LA PORTA-LOPEZ-DE-SILANES-SHLEIFER, *The Economic Consequences of Legal Origins*, in *Journal of Economic Literature*, 46, 2008, 285 ff.; VON SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg, 1814, 162; THIBAUT, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*, Heidelberg, 1814, 67; GRUNDMANN, *Germany*, cit., 129 ff.; ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford, 2005, 256; VALCKE, *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric*, in *Exploring Contract Law*, NEYERS-BRONAUGH-PITEL (edited by), Oxford, 2009, 77ff.; SCHMIDT, *Germany*, in *Private Law Reform*, Lavický-Hurdík, 2014, disponibile all'indirizzo Brno, 501; BROUSSEAU, *Did the Common Law Biased the Economics of Contract... and May it Change?*, in *Law and Economics in Civil Law Countries*, DEFFAINS-KIRAT (edited by), 6, Londra, 2001, 79ff.; SEFTON-GREEN, "How Far Can We Go When Using the English Language for Private Law in the EU?", in *European Review of Contract Law*, 8, 2012, 30 ff.; SMITS, *What do Nationalists Maximise? A Public Choice Perspective on the (Non-)Europeanization of Private Law*, in *European Review of Contract Law*, 8, 2012, 296 ff.; BLACKSTONE-COLERIDGE, *Commentaries on the Laws of England: In Four Books*, London, 1825, 485.

embracing all relevant issues associated with the voluntary circulation of wealth, within or across borders. Said otherwise, even that effort would have been partial, and not achieved the same outcome pursued by the very articulate theoretical efforts recalled. Most certainly, it would not have sufficed to define a common European contract law.

## 1.2. The academic attempts

Much of the efforts intended at developing a European Contract law are rooted in the comparative method, discussing differences and similarities between member states on various substantive matters. For this very reason, they are primarily doctrinal efforts, promoted by European academics.

Those include the work performed by the Committee appointed by the *Academy of European Private Lawyers*<sup>19</sup>, which led to the elaboration of *Codice Gandolfi*<sup>20</sup>, and the *Lando Commission*<sup>21</sup>, which presented the Principles of European Contract Law, as well as the Unidroit Principles elaborated by the *International Institute for the Unification of Private Law*<sup>22</sup> and the Acquis Principles by the *Research Group on the Existing EC Private Law*<sup>23</sup>. Other major works were the Draft Common Frame of Reference by the *Study Group on a European Civil Code together with the Acquis Group*<sup>24</sup>. Those largely contributed to the proposal for a Common European Sales Law<sup>25</sup> presented by the *European Commission*<sup>26</sup> (henceforth EC) in 2011.

The heterogeneity of national laws, although a source of immense cultural richness, is nevertheless one of the main obstacles to the realisation of the *European Single Market*. In order to achieve this and to promote the social and economic cohesion of the Member States, it then becomes necessary to regulate civil and, in particular, contractual relations uniformly<sup>27</sup>. The presence, in fact, of extremely different legal regimes within the Union represents a barrier to the free movement of goods<sup>28</sup>, as it

<sup>19</sup> Here is the link to the official page of the Academy of European Private Lawyers <https://www.eurcontrats.eu/acd2/general-information/>.

<sup>20</sup> From the name of the coordinator of the Pavia Group, Professor Giuseppe Gandolfi. Its official name is 'Code européen des contrats'.

<sup>21</sup> From the name of its founder, Prof. Ole Lando of the University of Copenhagen. The official name of the 'Lando Commission' is 'Commission on European Contract Law'. Here is the link to their official page: <http://www.storme.be/CECL.html>.

<sup>22</sup> Here is the official link to the Institute: <https://www.unidroit.org/>.

<sup>23</sup> They are also known as 'Acquis Group'.

<sup>24</sup> The first edition of the Draft Common Frame of Reference was published in 2007 by a group of experts from the 'Study Group on a European Civil Code' in collaboration with the 'Acquis Group'.

<sup>25</sup> It is also known as 'Optional Instrument'.

<sup>26</sup> Proposal for a Regulation on a Common European Sales Law. It was based on a 'Feasibility Study' conducted in 2010 by an EG nominated by the EC itself.

<sup>27</sup> It should be noted that the original intentions of the Community legislator were broader, since the two Parliament Resolutions of 1989 and 1994, respectively, already called for the codification of the whole of European private law. Subsequently, this objective was downgraded to contract law, for at least two reasons. On the one hand, it constitutes a subject matter that, compared to others, is less tied to the history and traditions of a certain people; on the other hand, contract law is of fundamental importance for the realisation of the single market, since it is concerned with regulating commercial relations between economic agents. See UBERTAZZI, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, 2008; SACERDOTI-FRIGO, *La convenzione Roma sul diritto applicabile ai contratti internazionali*, 1994; SIRENA, *Diritto comune europeo della vendita vs. regolamento di Roma I: quale futuro per il diritto europeo dei contratti?*, in *I contratti*, 2012, 634-638.

<sup>28</sup> This fragmentation stems from the coexistence within the European Union of systems belonging to two very different legal traditions, namely *civil law* and *common law* countries. This circumstance entails, among other things, that there are two techniques of contract drafting, now self-integration and now hetero-integration, as well as the difficulty of translating legal concepts such as, for example, 'damages' and 'reasonableness' typically belonging to *common law* into

contributes to creating a framework of legal uncertainty as to the rules applicable to the specific case, especially given the increasingly transactional nature of contracts<sup>29</sup>. For this reason, the European Union feels an increasingly pressing need to promote a 'European private law', i.e. one that can be applied uniformly across all the Member States<sup>30</sup>.

### 1.3. Code européen des contracts (Codice Gandolfi)

Among the various harmonisation instruments<sup>31</sup>, particularly significant are the attempts made by the doctrine and, among these, a fundamental role must be attributed to the work carried out by the *Pavia group* led by Professor Giuseppe Gandolfi<sup>32</sup>. These scholars believed that the only way to achieve a real

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systems of a different legal tradition. Not only that, but this fragmentary nature of contract law also depends on the extremely sectoral nature of Community interventions, so much so as to result in a regulatory framework that lacks systematicity and coherence. On this point, cf. SOMMA, *Introduzione critica al diritto europeo dei contratti*, 2007; DE RADA, *Codice civile europeo: tra necessità e rilievi critici*, in *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 2, 2013; D'ALFONSO, *The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and "Europeanization" of the BGB* in *European Business Law Review* 14, 2003, 689-726; CAGGIANO, *L'uniformazione del diritto contrattuale europeo. American and European Perspectives*, in *Contratto e impresa/Europa*, 1, 2013; HESSELINK, *Justifying Contract in Europe: Political Philosophies of European Contract Law*, Oxford, 2021; LEGRAND, *European Legal Systems are not Converging*, in *International and Comparative Law Quarterly*, 45, 1996, 52-81; ZHOU, *Harmonisation of European Contract Law: Default and Mandatory Rules*, in *Commercial Contract Law: Transatlantic Perspectives*, ROWLEY-DIMATTEO-ZHOU-SAINTIER (edited by), Cambridge, 2013, 505-528; VOGENAUER-WEATHERILL, *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Place Published, 2006, 50 ff.

<sup>29</sup> See FUNKEN, *The Best of Both Worlds - The Trend Towards Convergence of the Civil Law and the Common Law System*, in *SSRN Electronic Journal*, 2003; GUTMAN, *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, Oxford, 2014; MERRYMAN, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 1978; CAPPELLETTI, *New perspectives for a common law of Europe*, Leyden/London, 1978, 2 ff.; ALPA, *CESL, diritti fondamentali, principi generali, disciplina del contratto*, in *La nuova giurisprudenza civile commentata*, 30, 2014, 147-155; CASTRONOVO, *Armonizzazione senza codificazione. La penetrazione asfittica del diritto europeo*, in *Europa e diritto privato*, 2013, 905-926; LUCCHETTI-PETRUCCI-PONTORIERO, *Fondamenti di diritto contrattuale europeo. Dalle radici romane al Draft Common Frame of Reference*, Place Published, 2009; JANSEN, *A European Civil Code and National Private Law: Lessons from History*, in *European Review of Private Law*, 2016, 473-488.

<sup>30</sup> It must be acknowledged, however, that not everyone is in favour of a European codification. For a review of the different positions taken on the issue, see LEGRAND, *"Against a European Civil Code" in Modern Law Review*, 60, 1997, 44-63; COLLINS, *The European civil code: the way forward*, 2008; SCHMID, *(Do) We Need a European Civil Code*, in *Annual Survey of International & Comparative Law*, 18, 2012; MICKLITZ, *Failures or Ideological Preconceptions? Thoughts on Two Grand Projects: The European Constitution and the European Civil Code*, in *The Many Constitutions of Europe*, (edited by), 2016, 109-140; MARKESINIS, *Why a code is not the best way to advance the cause of European legal unity*, in *European Review of Private Law*, 1997, 519-524; COLLINS, *Why Europe Needs a Civil Code*, in *European Review of Private Law*, 2013, 907-922. For the Law and Economics approach towards the need for a European contract law, see SMITS, *What do Nationalists*, cit., 186.

<sup>31</sup> At first, conventional instruments were used, such as, for instance, the 1980 Rome Convention on Contractual Obligations, the coeval Vienna Convention on the International Sale of Goods and the 1955 Hague Convention on the International Sale of Goods. However, the preferred technique for standardising national laws was the directive, which has the undoubted advantage of leaving it to the MS to decide how and when to achieve the objectives, yes, imposed by the directive. In actual fact, this regulatory instrument has intrinsic limits, in that, on the one hand, it has allowed the Member States to procrastinate in transposing directives and, on the other, it only guarantees uniformity for general rules, but not for detailed rules, which, instead, are left to the free determination of national legislators. Thus, since the 2000s, the Union has increasingly relied on regulations, as they are of direct and immediate application. However, it must be noted that it is more applicable in areas that are not very well regulated at national level, as there is also the risk that a Member State may have to reformulate an entire sector, perhaps introducing rules or institutions that are not particularly akin to its own legal culture and tradition. On the harmonisation process, see MAK, *Full harmonization in European private law: a two-track concept*, in *European Review of Private Law*, 20, 2012; PARISI, *Harmonization of European private law: An economic analysis*, in *Minnesota Legal Studies Research Paper*, 2007; HEIRBAUT, *Enkele*, cit., 91-103; GALLO, *L'armonizzazione del diritto ed il ruolo delle corti*, in *L'armonizzazione del diritto ed il ruolo delle corti*, 2017, 121-131; ALPA, *Diritto privato europeo*, 2016; ALPA, *Il diritto privato europeo*, in *Federalismi.it Rivista di Diritto Pubblico Italiano, Comparato, Europeo*, 7, 2019, 1-18.

<sup>32</sup> This group, consisting of distinguished European jurists and academics and led by Giuseppe Gandolfi, was formed following a meeting held at the University of Pavia on 20-21 October 1990. Also in Pavia, the Academy of European Private



unification of European private law was through legislation and, for this reason, they proposed to create a true 'European contract code' as a system of specific standards and rigid rules rather than a mere collection of principles<sup>33</sup>. From a methodological point of view, the Pavia group decided to take book IV of the Italian Civil Code as the basic legal text for drafting the Code, as it was considered a good synthesis of the French and German legal traditions. Aware, however, of the coexistence within the European legal world of countries belonging to the *common law* and *civil law traditions*, in 1993 the Pavia group decided to adopt a second basic legal text, namely the draft *Contract Code* promoted by Oxford jurist Harvey McGregor<sup>34</sup>. There are two substantial differences that distinguish the work of the Pavia Academy from the other projects. Firstly, the Code has a broader scope of application because it is not limited to the regulation of contracts in general, but also takes into consideration individual contractual figures as well as non-contractual obligations and, secondly, it is presented as a codicistically structured body of rules that could offer a complete discipline of the various legal doctrines and concepts and that was suitable for acquiring the formal force of law or regulation in the MS.

Since this project hoped to replace national laws, the Pavia group, through a comparative-historical analysis, decided not to include those notions that were not common to all EU countries. It follows from this that, among others, there is no reference to 'legal transaction', a concept typical of Germanic law but unknown in French and English law; to 'consideration', a peculiarity of the Anglo-Saxon world; to 'cause', a characteristic element of the Italian legal system but completely absent in the German and English legal systems<sup>35</sup>.

Until 1994, the Academy devoted itself to the analysis of issues considered prodromal to the drafting of the Code, namely problems of method, content and style<sup>36</sup>. The actual drafting of the project began from the following year and led, in 2001, to the publication in French (together with the reports of the project coordinator) of Book One on '*contracts in general*', consisting of 173 articles divided in turn into eleven titles, namely: (i) preliminary provisions; (ii) formation of the contract; (iii) content of the contract; (iv) form of the contract; (v) interpretation of the contract; (vi) effects of the contract; (vii) performance of

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Lawyers was founded in 1992. Art. 1 of its statute states: 'its aim is to contribute, through scientific research, to the unification and the future interpretation and enforcement of private law in Europe, in the spirit of the community conventions' and also 'to promote the development of a legal culture leading to European unification'. Here is the link to the official page of the Academy of European Private Lawyers <https://www.eurcontrats.eu/acd2/general-information/>.

<sup>33</sup> Cf. FERRARI-LAGHI, *Diritto europeo dei contratti*, 2012; GANDOLFI, Una proposta di rilettura del quarto libro del codice civile nella prospettiva di una codificazione europea, in *Rivista trimestrale di diritto e procedura civile*, 1989; GANDOLFI, L'unificazione del diritto dei contratti in Europa: mediante o senza la legge?, in *Riv. dir. civ.*, 2, 1993, 149-158; RUFFINI GANDOLFI, Problèmes d'unification du droit en Europe et Code européen des contrats, in *Revue internationale de droit comparé*, 54, 2002, 1075-1103.

<sup>34</sup> This draft, finalised in 1971 for the English Law Commission, was supposed to implement the legal unification of Great Britain, a common-law country, and Scotland, closer to the civil-law legal tradition. The draft consisted of 190 articles, with the addition of glosses and explanatory comments by the author himself. Despite its importance, it was greeted with extreme mistrust by the English and Scottish worlds themselves and, therefore, was never adopted. On this point, cf. MCGREGOR, *Contract Code drawn up on behalf of the English Law Commission*, Milano-London, 1993; PATTI, *Diritto privato e codificazioni europee*, 2007, 63 ff. PORCELLI-ZHAI, *The Challenge for the Harmonization of Law*, in *Transition Studies Review*, 17, 2010, 430-455.

<sup>35</sup> With reference to 'cause', in fact, Art. 5 of the Code, on the capacity to contract and the essential elements of the contract, speaks only of: agreement of the parties; content and a special form (but only in the cases and for the purposes indicated by the Code itself).

<sup>36</sup> Cf. STEIN, *Incontro di studio su il futuro codice europeo dei contratti*, Pavia, 20-21 ottobre 1990, Place Published, 1993; STEIN, *Convegni di studio per la redazione del progetto di un codice europeo dei contratti*, Pavia, 1992-1994, Place Published, 1996, 1-266.

the contract; (viii) non-performance of the contract; (ix) assignment of the contract and relations arising therefrom; (x) termination of the contract and relations arising therefrom; (xi) other anomalies of the contract and remedies<sup>37</sup>.

Currently, the Academy is working on the drafting of the Second Book on '*Individual Contracts*', although the preliminary draft of its Title I on Sale was published in 2007.

## 1.4. Principles of European Contract Law

Another initiative that represented an important step in the process of unification of European law was the one drawn up by the *Commission on European Contract Law*, consisting of lawyers from all EU Member States and led by Professor Ole Lando of the University of Copenhagen<sup>38</sup>. The work of the 'Lando Commission' resulted in the drafting of *Principles of European Contract Law* (henceforth PECL), i.e., common principles with a view to a subsequent European code of private law. The PECL were conceived as a useful tool for national legislators for possible reforms of the codicistic subject matter<sup>39</sup>; for courts in the resolution of disputes concerning cross-border contracts as well as in the interpretation of international conventions<sup>40</sup> and, finally, for the European legislator as a basis for a future European codification.

The Commission, through a comparative historical analysis of the legal systems of some European countries, published between 1995 and 2002 the three parts into which the PECL were divided. The latter were conceived as 'general rules of contract law'<sup>41</sup> applicable for the resolution of a practical case or the settlement of a dispute. Being non-binding, the Principles only apply where 'the parties agreed to incorporate them into their contract or that their contract is to be governed by them' as well as where 'the parties have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like'<sup>42</sup>; or 'have not chosen any system or rules of law to govern their contract'<sup>43</sup>.

<sup>37</sup> In 2002, a second edition was published, revised and corrected, with an analytical-alphabetical index and full translations of the same in German, English and Spanish. A pocket edition has also been available since 2004, also further revised and corrected. Cf. ACADEMIE DES PRIVATISTES EUROPEENS, EUROPEENS, *Code européen des contrats, Avant-projet, Coordinateur Giuseppe Gandolfi, Livre premier*, Place Published, 2002; GATT, *sistema normativo e soluzioni innovative del Code Européen des Contrats, Livre I, Avant-projet, Coordinateur Giuseppe Gandolfi*, in *Europa e diritto privato*, 2002, 359-379.

<sup>38</sup> According to Lando, the presence within the Union of such different legal and linguistic systems is the primary cause of the need for harmonised European private law: 'it is precisely where there is no common legal tradition that harmonisation of the laws is called for', cit. LANDO-BEALE-LAW, *Principles of European Contract Law: Parts I and II*, 2000, 263; LANDO, *Principles of European Contract Law and Unidroit/Principles: Moving from Harmonisation to Unification?*, in *Uniform Law Review*, 8, 2003, 123-133.

<sup>39</sup> Indeed, PECL inspired the German Civil Code reforms of 2001-2002 and the French Civil Code reforms of 2016-2018. For the German reform, see ACKERMANN, *Uniform Rules as Guidelines for National Courts and Legislatures: The German Experience*, in *Uniform Rules for European Contract Law? : A Critical Assessment*, DE ELIZALDE (edited by), Oxford, 2018, 91-102. For the French experience, see FAUVARQUE-COSSON-EACUTE-EACUTE-DICTE, *National Reforms: New Instruments Towards Converging Rules within Europe? The Example of the French Contract Law Reform (2016)*, in *Uniform Rules for European Contract Law? : A Critical Assessment*, DE ELIZALDE (edited by), Oxford, 2018, 103-114.

<sup>40</sup> On the application of PECL by national courts see, among others, CERVANTES, *The Application of the Principles of European Contract Law by Spanish Courts*, in *Zeitschrift für europäisches Privatrecht*, 2008, 534-548; PERALES-VISCASILLAS, *La aplicación jurisprudencial en España de la Convención de Viena de 1980 sobre compraventa internacional, los Principios de UNIDROIT y los Principios del Derecho contractual europeo: de la mera referencia a la integración de lagunas*, in *Revista jurídica española de doctrina, jurisprudencia y bibliografía*, 2007, 1750-1761.

<sup>41</sup> Art. 1:101(1): Application of the Principles, PECL.

<sup>42</sup> Art. 1:101(1)(a): Application of the Principles, PECL.

<sup>43</sup> Art. 1:101(1)(b): Application of the Principles, PECL.

Part I, consisting of 59 articles, was published in 1995 while Part II, consisting of 73 rules, was published in 2001 together with a corrected edition of Part I. Both contain provisions on general (Chapter I); on formation (Chapter 2); on the authority of agents (Chapter 3); on validity (Chapter 4); on interpretation (Chapter 5); on content and effects (Chapter 6); on performance (Chapter 7); on non-performance and remedies in general (Chapter 8) and, finally, on remedies of a particular character in the event of non-performance (Chapter 9)<sup>44</sup>.

Part III, published by the Commission in 2002, comprises 69 articles and deals with: plurality of parties (chapter 10); assignment and claims (chapter 11); substitution of new debtor and transfer of contract (chapter 12); set-off (chapter 13); prescription (chapter 14); illegality (chapter 15); conditions (chapter 16) and, finally, capitalisation of interest (chapter 17).

Like the *Codice Gandolfi*, the PECL also represent an attempt to identify the common basis between *common law* and *civil law* systems and, in fact, do not provide for either the concept of 'consideration' typical of the former or the concept of 'cause' characteristic of the latter.

Confirming the relevance of this project, the *Study Group on a European Civil Code*, coordinated by Professor Christian Von Bar and conceived as a direct continuation of the work of the Lando Commission, was set up in 1998 following the International Conference '*Towards a European Civil Code*' held in The Hague. From the conference, in fact, the conviction emerged that the codification of European law should be entrusted exclusively to the world of academics and jurists free of any interference and influence from politics and, in particular, from Brussels.

This study group, consisting of several research centres located in different European universities, studied for years the solutions adopted by both the Member States and the Council of Europe MS. The final product, the *Principles of European Law* (henceforth PEL) broadened the scope of application of PECL to encompass the entire private property law, i.e. the sources of obligations, the banking and insurance market as well as financial intermediation<sup>45</sup>.

## 1.5. Unidroit Principles

Another academic work that undoubtedly represents a considerable step forward in the process of unification of European contract law are the *Unidroit Principles*, prepared by the *International Institute for the Unification of Private Law (Unidroit)*<sup>46</sup>. The Unidroit Principles, inspired by the *American*

<sup>44</sup> Cf. ZIMMERMANN-MACQUEEN-ZIMMERMANN, *Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea*, in *European Contract Law: Scots and South African Perspectives*, (edited by), 2006, 1-42. For the first part of PECL on performance, non-performance and remedies, see LANDO-BEALE, *Principles of European Contract Law, Part I, Performance, Non-Performance and Remedies*, prepared by the Commission of European Contract Law, Place Published, 1995,. For Part II on the conclusion, validity, interpretation and effects of the contract, see LANDO-BEALE-LAW, *Principles of European Contract Law: Parts I and II*, cit., 561.

<sup>45</sup> For an analysis of the work conducted by the Study chaired by Von Bar, see VON BAR-CLIVE-SCHULTE-NÖLKE-CODE-LAW, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, 2009; VON BAR, *Il gruppo di studio su un codice civile europeo*, in *Il codice civile europeo. Quaderni del Consiglio Nazionale Forense, materiali dei seminari 1999-2000*, ALPA-BUCCICO (edited by), 5, Milano, 2001; JANSEN-RADEMACHER, *European civil code*, in *Elgar Encyclopedia of Comparative Law, Second Edition*, (edited by), 2012; JANSEN-ZIMMERMAN, *General Introduction European Contract Laws*, in *Commentaries on European Contract Laws*, JANSEN-ZIMMERMAN (edited by), 2018; HESSELINK, *The politics of a European civil code*, in *European law journal*, 10, 2004, 675-697.

<sup>46</sup> Established in 1926 as an auxiliary body of the United Nations, today it is an independent intergovernmental organisation based in Rome. For an in-depth look at the Institute, see MATTEUCCI, *The history of Unidroit and the Methods of Unification*, in

*Restatement*, constitute a collection of principles common to the various national laws with the aim not only of providing a more organic arrangement of the already existing law, but also of promoting unification and thus overcoming the uncertainties arising from the coexistence of different national laws applicable to international transactions. They only apply to international commercial transactions and, therefore, their scope of application does not cover relations either between consumers or between consumers and professionals<sup>47</sup>.

The Unidroit Principles were first published in 1994 in English and consisted of a Preamble<sup>48</sup> where the purpose of the Principles is explained, followed by 7 chapters as follows: general provisions (chapter 1); formation (chapter 2); validity (chapter 3); interpretation (chapter 4); content (chapter 5); performance (chapter 6)<sup>49</sup>; non-performance (chapter 7)<sup>50</sup>.

In the second version, published in 2004, chapters were added on: set-off (chapter 8); assignment of rights, transfer or obligations, assignment of contracts (chapter 9)<sup>51</sup> and, finally, limitation periods (chapter 10)<sup>52</sup>.

Subsequently, the third edition of the Principles was published in 2010, which was merely an expansion rather than a revision of the earlier work, to which it added an additional chapter on the plurality of obligors and of obligees (Chapter 11)<sup>53</sup>.

The most recent edition, which dates back to 2016, presents a number of amendments and additions, among which the consideration for '*long-term contracts*', i.e., those contracts 'to be performed over a period of time and which normally involve, to a varying degree, complexity of the transaction and an ongoing relationship between the parties'<sup>54</sup> is particularly important.

Thus, following the most recent edition, the Principles have been adapted to deal also with those commercial contracts whose performance is not immediate but extended over time, such as, for example, distribution, agency and franchising contracts.

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*Law Libr. J.*, 66, 1973, 286 ff; DE RADA, *Codice civile europeo: tra necessità e rilievi critici*, cit., 323 ff; BENACCHIO, *Diritto privato della Unione Europea. Fonti, modelli, regole*, Milano, 2016, 151 ff.

<sup>47</sup> Cf. LANDO, *Principles of European*, cit., 123-133; JANSEN-ZIMMERMANN, *Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules*, in *Oxford Journal of Legal Studies*, 31, 2011; LANDO, "Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law" in *Tulane Journal of International and Comparative Law*, 3, 1995, 129-144; TWIGG-FLESNER, *UNIDROIT Principles of International Commercial Contracts*, in *Foundations of International Commercial Law*, 2021; BONELL, *An international restatement of contract law: the UNIDROIT principles of international commercial contracts*, 2009; BONELL, *Towards a legislative codification of the UNIDROIT Principles*, in *Unif. L. Rev.* ns, 12, 2007, 233.

<sup>48</sup> You can find the English version of PECL (1994) here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994/>.

<sup>49</sup> In turn divided into a Section 1 on 'performance in general' and a Section 2 on 'Hardship'.

<sup>50</sup> It contains within it rules on: 'non-performance in general' (Section 1); 'right to performance' (Section 2); 'termination' (Section 3) and 'damages' (Section 4).

<sup>51</sup> Chapter 9 is divided into three further sections: 'assignment of rights'; 'transfer of obligations' and 'assignment of contracts'.

<sup>52</sup> You can find the English version of PECL (2004) here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004/>.

<sup>53</sup> You can find the English version of PECL (2010) here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/>.

<sup>54</sup> Art. 1.11, on 'definitions' of the Unidroit Principles, 2016 version. You can find the English version of PECL (2016) here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>.



From a structural point of view, all versions of the Principles consist of articles formulated as general, abstract provisions (*'black-letter rules'*) and each is then accompanied by a commentary and, where necessary, illustrations to provide an explanation of how each norm should be applied in practice.

The Unidroit Principles represent a particularly important instrument in the context of the harmonisation of international trade law first because they have a *soft law* value, since, not having direct binding force, they depend on their persuasive value. In other words, they only apply if the parties: 'have agreed that their contract be governed by them'; or 'have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like'; or 'have not chosen any law to govern their contract'<sup>55</sup>. Moreover, they offer a collection of common principles that are completely detached from a specific legal system but seek to reflect the rules common to the main national systems.

Their most significant feature lies in their suitability to be used for different purposes. As is also stated in the Preamble, the Principles may serve as a model for national and international legislators. Very often, in fact, they have been used by various States as one of the main sources for the drafting of a contractual system in conformity with international standards (as is the case in China and the Russian Federation), but above all as a source of inspiration for legislative reforms, as was the case in the reform of the German law of obligations and in the reforms of the Dutch and Spanish civil codes.

However, in practice the Principles are used more as an aid in the drafting of international contracts. In this way it is possible to overcome language barriers resulting from the fact that the parties refer to different legal terminology: thanks to the Principles, on the other hand, the parties can rely on a "neutral language" since it is based on uniform definitions and concepts<sup>56</sup>.

From the point of view of content, the Unidroit Principles are inspired by the principles of freedom of contract, good faith, the consideration of contractual usages and favour contractus<sup>57</sup>. The principle of freedom of contract is affirmed in Art. 1.1, under the heading '*Freedom of contract*', where it is declined both in its meaning of freedom to conclude contracts with any party and to be able freely to determine the content of the contract, subject to the application of mandatory rules<sup>58</sup>. One of the most important

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<sup>55</sup> Preamble, Unidroit Principles (2016). The introduction to the 1994 edition reads: 'Efforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions, or of model laws. Since these instruments often risk remaining little more than a dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonisation of law'.

<sup>56</sup> They have been translated into five official languages (English, French, German, Italian and Spanish) as well as into other non-official languages. See MASSARI, *L'efficacia dei Principi UNIDROIT nei contratti internazionali*, in *Diritto & Diritti cartaceo*, 10, 2002; JANSEN-ZIMMERMANN, *Contract*, cit., 650 ff.

<sup>57</sup> Cf. DE CAROLIS, *I Principi UNIDROIT dei contratti commerciali internazionali: uno strumento innovativo di regolamentazione del commercio internazionale* in *Economia & Diritto*, 2014; RODRIGUEZ, *Lex Mercatoria and Harmonization of Contract Law in the EU*, Copenhagen, 2003, 145 ff.

<sup>58</sup> Art. 1.1 and 1.3 of the latest edition of the Principles (2016) respectively state: 'The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to whom they will offer their goods or services and by whom they wish to be supplied, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order' and 'With respect to the freedom to determine the content of the contract, in the first instance the Principles themselves contain provisions from which the parties may not derogate. Moreover, there are mandatory rules, whether of national, international or supra-national origin, which, if applicable in accordance with the relevant rules of private international law, prevail over the provisions contained in the Principles and from which the parties cannot derogate'. In other words, the logic of the Principles is inspired by a liberal conception of international trade, i.e. one that favours party autonomy in the belief that it will allow the achievement of maximum efficiency in international trade. For

principles on which the entire system of the Principles is based, inspired by the idea of encouraging the drafting of fair and equitable contract terms in commercial transactions, is good faith and fair dealing. This principle is stated in a general way in Art. 1.7, entitled '*Good faith and fair dealing*', and is then further specified in numerous other articles of the Principles so as to cover the entire contractual process from negotiation up to performance. Such is the importance of the principle that it is even capable of limiting freedom of contract since, pursuant to Art. 1.7(2), it is recognised as a mandatory rule and therefore, as such, not derogable by the parties<sup>59</sup>. The Principles, being intended to provide a set of rules that is easily adaptable to the constant evolution of international trade, recognise the essential character of trade usages and practices. In this sense, Art. 1.9 then provides that the parties are subject to any usage that they have expressly referred to, but also to any other usage that is widely known and used in the particular trade sector in question<sup>60</sup>. Finally, the entire system seems to be inspired by the so-called *favor contractus*, i.e., the idea that it is necessary, where possible, to avoid the nullity of the contract. An expression of this approach is certainly Art. 2.1.22, entitled '*Battle of forms*', which aims at resolving those situations, very frequent in commercial practice, in which the parties conclude a contract on the basis of general terms and conditions that differ from each other and nevertheless decide to execute it<sup>61</sup>. The question is resolved by recourse to the 'knock-out' doctrine, i.e. the contract is concluded even if there is a discrepancy between the general terms and its content is then formed by the terms agreed upon and nevertheless conforming to each other, on the one hand, and by the Principles themselves in supplementary form, on the other.

## 1.6. Acquis Principles

Academic initiatives for the unification of European private law include the *Acquis Principles* (henceforth ACQP), by a group of European scholars known as the *Research Group on the Existing EC Private Law* (the so-called *Acquis Group*). The group, led by Professor Hans Schulte-Nölke and found in 2002, aims to clarify existing European law and subsequently provide principles that can be used 'as a source for the drafting, the transposition and the interpretation of European Community law'<sup>62</sup>. Compared to other study groups, the Acquis Group uses European law as the starting point for its studies and not the substantive law of the various national legal systems<sup>63</sup>. Although originally the

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a criticism of this approach originating in French doctrine, see KESSEDJIAN, *Un exercice de rénovation des sources du droit des contrats du commerce international*, in *Revue Critique de Droit International Privé*, 1995, 641.

<sup>59</sup> Art. 1.7(2), UNIDROIT Principles (2016): 'The parties may not exclude or limit this duty'. On the principle of good faith see FARNSWORTH, *Duties of good faith and fair dealing under the UNIDROIT principles, relevant international conventions, and national laws*, in *Tul. J. Int'l & Comp. L.*, 3, 1995; HARTKAMP, *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, in *Tul. J. Int'l & Comp. L.*, 3, 1995; BONELL, *UNIDROIT Principles of International Commercial Contracts: Why What How*, in *Tul. L. Rev.*, 69, 1994, 1121.

<sup>60</sup> Unless, however, the application of such use is unreasonable (Art. 1.9, Unidroit Principles, ed. 2016).

<sup>61</sup> Art. 2.1.22 of the Principles, ed. 2016, provides as follows: 'Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract'. It should be noted that the 1994 UNIDROIT Principles were the first to provide an *ad hoc* discipline for the battle of forms.

<sup>62</sup> Art. 1:101(2), ACQP.

<sup>63</sup> SCHULZE, *European Private Law and Existing EC Law*, in *European Review of Private Law*, 2005, 3-19; SCHULZE-STUYCK, *Towards a European Contract Law*, in *Towards a European Contract Law*, REINER-JULES (edited by), Berlin, Boston, 2011, 3-8; SCHULZE-EBERS-GRIGOLEIT, *Information requirements and formation of contract in the Acquis communautaire*, 2003, 15 ff.

intent of the Acquis Group was to cover all areas of private law, it was later limited exclusively to contract law.

The ACQP are also based on the Restatement of the American Law Institute and, in fact, is drafted in three different languages (English, French and German) in the form of rules accompanied by annotations and explanations of the institutes<sup>64</sup>.

The primary objective of the group is to organise existing European law in an organic manner from which common rules and principles of contract law can then be derived. To do this, reference is first and foremost made to primary and secondary European law and, in particular, the Treaty on the Functioning of the European Union (TFEU), directives and regulations as well as the case law of the Court of Justice. However, although the main purpose of the ACQP is to present the state of European contract law in force to date, reference is also made to 'non-positive' sources such as the PECL and the Unidroit Principles of International Commercial Contracts (PICC).

According to the Acquis Group project, the final version of the ACQP will consist of three parts. The first part will consist of a statement of general principles with the aim of making the fundamentals of ACQP explicit and providing guidance for their interpretation. The second part, on the other hand, will provide general definitions of the most important terms and concepts used in the ACQP in order to construct a consistent private law terminology to eliminate inconsistencies and contradictions in the various European legal acts.

The only part of the project that has been published is the third part that includes the model rules on contract law themselves. To date, this comprises eight chapters, each dealing with a specific aspect of contract law: introductory provisions (chapter 1); pre-contractual duties (chapter 2); non-discrimination (chapter 3); formation (chapter 4); withdrawal (chapter 5); non-negotiated terms (chapter 6); performance of obligations (chapter 7) and remedies (chapter 8)<sup>65</sup>. The ACQP are drafted according to the 'Paris structure' scheme<sup>66</sup>, adopted since 2007, whereby each chapter is divided into two parts. The first part consists of the '*General Provisions*', i.e. those provisions that apply generally to the entire subject-matter of contract law regardless of their scope of application: the second part, on the other hand, includes the '*Specific Provisions*' that apply only to specific contractual matters. These provisions

<sup>64</sup> The Acquis Group is divided internally into several subgroups, each of which is concerned with specific aspects of contract law of the *acquis communautaire*, e.g., the 'Contract I' Group dealt with pre-contractual obligations, the conclusion of the contract and unfair contract terms while the 'Contract II' Group worked on general provisions, delivery of goods, package travel and payment services. The work, accompanied by commentaries and annotations, was submitted to the Redaction Committee and the Terminology Group, which reviewed the draft to be presented at the groups' bi-annual plenary meetings. At that meeting, the draft is voted on and approved by a majority.

<sup>65</sup> See ACQUIS GROUP, *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, 2007; STUDY GROUP ON A EUROPEAN CIVIL CODE-RESEARCH GROUP ON THE EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*, Place Published, 2009; JANSEN-ZIMMERMANN, *Restating the Acquis Communautaire - A Critical Examination of the Principles of the Existing EC Contract Law*, in *Modern Law Review*, 71(4), 2008, 505-534; WEATHERILL, *The 'principles of civil law' as a basis for interpreting the legislative acquis*, in *European Review of Contract Law*, 6, 2010, 74-85; TWIGG-FLESNER, *The Europeanisation of Contract Law*, London, 2008, 153 ff.

<sup>66</sup> ACQUIS-GROUP, *Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services*, Munich, 2009, p. xxvi, where it is said that 'The Paris structure may be described as a "mirror model". It does not have one general part of contract law followed by a specific part. Instead, it juxtaposes several "general parts" and corresponding "specific parts", as the above examples may have shown. This new structure is built with the aim to remain open for the permanent development of the *acquis*. New pieces of EC contract law may be easily incorporated without a permanent deconstruction of the general framework'.

are in turn divided into seven groups of hypotheses which are repeated throughout the work and each group marked with a capital letter: contracts negotiated away from business premises (part A); contracts for the delivery of goods (part B); timeshare contracts (part C); service contracts (part D); package travel contracts (part E); consumer credit contracts (part F) and payment services (part G).

## 1.7. The beginning of the policy efforts at European level: the Draft Common Frame of Reference

As early as 1989, the European Parliament had called for a 'European Civil Code'<sup>67</sup>, stating that the harmonisation of certain areas of private law was essential for the completion of the internal market. In 2000, on the basis of academic studies commissioned by the Policy Departments<sup>68</sup>, it expressively asked the Commission to draw up a study in this area<sup>69</sup>.

Responding to Parliament's requests, in 2001, the EC, determined to tackle the problems arising from the coexistence of very different legal systems, launched a public consultation on four possible solutions<sup>70</sup>. The alternatives consisted in the complete abstention of the then Community from any initiative in the matter (Option I); the elaboration of a set of common principles of contract law that would contribute to the approximation of national systems (Option II); the improvement of the *acquis communautaire* on the subject (Option III) and, finally, the adoption of comprehensive legislation at Community level (Option IV).

Taking into account the results of the consultation<sup>71</sup>, the EC presented in 2003 an 'Action Plan'<sup>72</sup> with which, on the one hand, it reaffirmed the need to maintain a sectoral approach through the adoption of directives and regulations in order to achieve full harmonisation and, on the other hand, put forward the idea of adopting a more organic instrument, i.e. the drafting of a *Common Frame of Reference* (henceforth CFR)<sup>73</sup>. This instrument was designed to increase the coherence of the *acquis*

<sup>67</sup> EUROPEAN PARLIAMENT, Resolution A2-157/89, OJ C 158, 26.6.1989, 400; EUROPEAN PARLIAMENT, Resolution A3-0329/94, OJ C 2005, 25.7.1994, 518.

<sup>68</sup> For instance, cf. LANDO-BEALE, *Principles of European Contract Law: Parts I and II*, 2000, ACADEMY OF EUROPEAN PRIVATE LAWYERS, *European Contract Code – Preliminary Draft*, University of Pavia, 2001. For an in-depth analysis of the work of the Policy Departments see the following official link: <https://www.europarl.europa.eu/committees/en/supporting-analyses/presentation>.

<sup>69</sup> EUROPEAN PARLIAMENT, Resolution B5-0228,0229-0230/2000, OJ C 377, 29.12.2000, 323.

<sup>70</sup> EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM(2001) 398 final, Brussels 2001, 7 ff.

<sup>71</sup> On this point, see TUNC, *L'unification du droit des contrats en Europe: avec ou sans loi?*, in *Revue internationale de droit comparé*, 45, 1993, 877-879; WHITTAKER, *The Optional Instrument of European Contract Law and Freedom of Contract*, in *European Review of Contract Law*, 7, 2011, 371-398; HEISS-DOWNES, *Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective*, in *European Review of Private Law*, 13, 2005; HESSELINK, *Five political ideas of European contract law*, in *European Review of Contract Law*, 7, 2011, 295-313; DEFLORIAN, *Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law - A Uniform Law?*, in *Global Jurist Frontiers*, 2, 2002, 1-43.

<sup>72</sup> EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and the Council on a more coherent European contract law, An Action Plan*, (2003/C 63/01), *Official Journal of the European Union*, 2003; VON BAR-SWANN-, *Response to the Action Plan on European Contract Law: A More Coherent European Contract Law* (COM (2003) 63), in *European Review of Private Law*, 11, 2003, 595-622; KARSTEN-SINAI, *The Action Plan on European Contract Law: Perspectives for the Future of European Contract Law and EC Consumer Law*, in *Journal of Consumer Policy*, 26, 2003, 159-195; KENNY, *The 2003 Action Plan on European Contract Law: is the Commission running wild?*, in *European Law Review*, 2003, 538-550.

<sup>73</sup> Note that it was only as a last resort that the Commission mentioned the possibility of an optional instrument as a solution for the unification of contract law. For a commentary, see FERRANTE, *Brevi note a margine del "Piano d'azione" sul diritto*

communautaire by establishing common principles and legal terminology in the area of European contract law as well as a model for the adoption of a future optional instrument for European contract law.

In 2004, the Commission adopted a further communication<sup>74</sup> constituting a work programme for the elaboration of the CFR, which, as is also stated in the communication itself, was to represent a non-binding 'toolbox'<sup>75</sup> 'to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law' and 'At the same time, it will serve the purpose of simplifying the *acquis*'<sup>76</sup>.

As early as 2005, there is a clear shrinking of the Commission's intentions in unifying European private law. In one of its communications, it is specified that the CFR is to be used to increase the quality of legislative production, for the revision of existing sectoral legislation, and for the construction of a system of fundamental principles and uniform legal rules in the Union. That is to say, it is to be regarded as a 'toolbox' exclusively functional for the revision of the *acquis* limited, however, to B2C contractual relations and not, as before, as a means to ensure large-scale harmonisation of private law or, even less, a European civil code<sup>77</sup>.

With a view to realizing the CFR, in 2005 the Commission set up the '*Joint Network on European Private Law*', also known as the '*CoPECL Network of Excellence*'<sup>78</sup>, which achieved important results. In 2007, the *Acquis Group* together with the *Study Group on a European Civil Code* published the first draft of the DCFR (*DCFR Interim Outline Edition*).

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*contrattuale europeo*, in *Contratto e impresa/Europa*, 2003, 2003, 677-698; STAUDENMAYER, *The Commission Action Plan on European Contract Law*, in *European Review of Private Law*, 11, 2003; CALLIESS, *Coherence and Consistency in European Consumer Contract Law: a Progress Report*, in *German Law Journal*, 4, 2003, 333-372.

<sup>74</sup> EUROPEAN COMMISSION, Communication from the Commission to the European Parliament and the Council on European Contract Law and the revision of the *acquis*: the way forward, COM(2004) 651 final, Brussels, 2004, 1 ff.

<sup>75</sup> COM(2004) 651 final, 2.1.3.

<sup>76</sup> COM(2004) 651 final, 2.1.1 where it continues saying that: 'The CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States' legal orders'. See FRIGNANI-TORSELLO, *Trattato di diritto commerciale e di diritto pubblico dell'economia*, Padova, 2010, 82-83.

<sup>77</sup> EUROPEAN COMMISSION, Second Progress Report on The Common Frame of Reference, COM(2007) 447 final, 2007, where it is said that: 'The Commission's considers the CFR a better regulation instrument. It is a longer-term exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified. Its scope is not a large scale harmonisation of private law or a European civil code' (11).

<sup>78</sup> EUROPEAN COMMISSION, Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (2010/233/EU), Official Journal of the European Union, 2010, 109-111. The CoPECL Network of Excellence was coordinated by Professor Hans Schulte-Nölke and chaired by the Commission itself. It consisted, among others, of the Study Group on a European Civil Code; The Research Group on the Existing EC Private Law (the *Acquis Group*); the Insurance Group, essentially focused on the reformulation of insurance contract law; the Association Henri Capitant; the Société de Législation Comparée; the Common Core Group on European Private Law; the Research Group on the Economic Assessment of Contract Law Rules; The Database Group; and the Academy of European Law (ERA). See FRIGNANI-TORSELLO, *Trattato di diritto*, cit., 80 ff.; Draft Common Frame of Reference of European Insurance Contract Law. For a commentary on them, see SCHULZE, *The Common Frame of Reference of European Insurance Contract Law*, in *Common Frame of Reference and Existing Ec Contract Law*, SCHULZE (edited by), 2009; BRÖMMELMEYER, *Principles of European Insurance Contract Law*, in 2011; BASEDOW-LAW, *Principles of European Insurance Contract Law (PEICL)*, 2009; HEISS, *The common frame of reference (CFR) of european insurance contract law*, in *EJCCL*, 1, 2009, 10 ff. It was made up of experts and researchers from universities, organisations and institutions from all MS with the special feature that regular meetings between the Network and stakeholders were planned. The Group's official website: <http://www.copecl.org/>.



In 2008, the European Parliament with its resolution welcomes the presentation of the CFR and asked the Commission to submit the final academic version by the end of the year<sup>79</sup>. It also pointed out that, when deciding on the content of the CFR, the Commission should bear in mind that it should be a tool for a better law-making and a set of non-binding guidelines to be used by the Community legislator. In particular, the European Parliament suggested that, if the form of an optional instrument is chosen, it should be limited to those areas where the Community legislator has been active, or which are closely related to contract law<sup>80</sup>.

The European Parliament communication was then followed by a second edition (*DCFR Outline Edition*) in February 2009, up to the final version published in October of the same year (*DCFR Full Edition*)<sup>81</sup>.

From a methodological point of view, the DCFR was inspired for some parts by the comparative studies adopted in the PECL, while for others it used an approach inspired by the principles of Common European Contract Law and the results achieved by the Acquis Group, whose work was aimed at identifying existing EU law and fundamental principles in the various disciplines<sup>82</sup>.

From a structural point of view, however, it contains *articles*, designed to be an aid for legislators in drafting EU legislation, both common *principles* of general application and, finally, *model rules*, i.e. non-binding 'black letter rules' representing the 'best solutions' of MS. Everything is then accompanied by comments and notes by the authors to provide an explanation of the choices made within the DCFR itself.

The work is then divided into three parts: Principles, Definitions and Model Rules. The Principles represent the generalisation of the rules contained in the Draft and are: freedom of contract, certainty of legal relations, justice and efficiency. The Definitions, on the other hand, are a list of the most important and relevant concepts found in the *acquis* among which particular relevance is given to the notions of contract and damage.

However, the heart of the work is formed by the Model Rules, i.e. specific rules that are not binding on the parties and that, unlike the Commission's original intention, are not exclusively limited to the subject matter of contracts<sup>83</sup>. It is in fact subdivided into ten Books that regulate: general provisions (Book I); contract and other judicial acts (Book II); obligations and other corresponding rights (Book III); specific contracts and the rights and obligations arising from them (Book IV); benevolent intervention in another's affairs (Book V); non-contractual liability arising out of damage caused to another (Book

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<sup>79</sup> EUROPEAN PARLIAMENT, Resolution of 3 September 2008 on the common frame of reference for European contract law, OJ C 295E, 4.12.2009, 31-32.

<sup>80</sup> Ibid, point 12.

<sup>81</sup> Cf. VON BAR-CLIVE-SCHULTE-NÖLKE, Principles, Definitions and Model Rules of European Private Law, DCFR. Outline Edition Place Published, 2009; VON BAR-CLIVE, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full Edition, Place Published, 2009, 1603.

<sup>82</sup> For example, Book III of the DCFR, entitled 'Obligations and corresponding rights', seems to be based almost exclusively on a review of the PECL. On the other hand, Book II, entitled 'contract and other judicial acts', seems to be the fruit of a methodology that makes use of both the work of the Acquis Group and the principles derived from comparative comparisons between the various national systems. However, some parts of this book (e.g., pre-contractual duties and withdrawal) are based on existing EU law.

<sup>83</sup> Art. I. - 1:101(1), outlines the scope of application of the DCFR: 'These rules are intended to be used primarily in relation to contracts and other judicial acts, contractual and non-contractual rights and obligations and related property matters'. The next paragraph, on the other hand, lists matters outside the application of the DCFR. It is clear that the DCFR has gone far beyond the original intentions of the Commission, which called for a harmonisation of contract law.

VI); unjustified enrichment (Book VII); acquisition and loss of ownership of goods (Book VIII); proprietary security rights in movable assets (Book IX) and, finally, trusts (Book X)<sup>84</sup>.

The DCFR aspires to be a vast work of systematisation and reorganisation of European law because, by means of a comparative analysis between the various European legal systems and drawing inspiration from the *acquis communautaire*, it aims to identify the best solutions in the Union and to establish common legal principles and terminology on the subject. As has been repeatedly emphasized by the authors, the DCFR has an eminently academic character<sup>85</sup>, because, on the one hand, it aims to be a reference model for scholars, the European legislator, judges and advocates-general of the CJEU and, on the other hand, to represent the starting point for a possible optional instrument<sup>86</sup>.

## 1.8. The policy effort: The Common European Sales Law

Following the publication of the DCFR, the European Council invited the Commission to reflect further on a CFR<sup>87</sup> and thus in 2010 the Commission set up an Expert Group (henceforth EG) called '*Expert Group on a Common Frame of Reference in the area of European contract law*' consisting of leading civil law experts from the various European legal experiences<sup>88</sup>. The EG, chaired by the Commission itself, had the task of assisting it in selecting the parts of the DCFR concerning contract law.

Subsequently, the Commission launched a public consultation with the 'Green Paper on policy options for progress towards a European Contract Law for consumers and business' in order to identify the best solution for the unification of European private law, which is essential to achieve maximum efficiency in the single market<sup>89</sup>.

<sup>84</sup> See GRUNDMANN, *The Structure of the DCFR – Which Approach for Today's Contract Law?*, in *European Review of Contract Law*, 4, 2008, 225-247.

<sup>85</sup> SCHULTE-NÖLKE, *Ziele und Arbeitsweisen von Study Group und Acquis Group bei der Vorbereitung des DCFR*, in *Der Gemeinsame Referenzrahmen. Entstehung, Inhalte, Anwendung*, SCHMID-KESSEL (edited by), München, 2009, p. 15, refers to: 'Rechtsvergleichenden Zugangs- und Erkenntnisfunktion'.

<sup>86</sup> The DCFR has been strongly criticised by that part of the doctrine that has observed how the work, by selecting the best solutions among those adopted by very different legal systems, can no longer be defined as a neutral instrument. Not only that, but it makes this selection on the basis of unclear and unidentified criteria. On this point, cf. WATT, *Préface*, in *Etude comparative des sanctions de l'inexécution du contrat*, LAITHIER (edited by), Paris, 2004, IX ff.

<sup>87</sup> EUROPEAN COUNCIL, *The Stockholm Programme - An open and secure Europe serving and protecting citizens (2010/C 115/01)*, Place Published, 2010, 4 ff. On the lack of consistency of the CFR, see HESSELINK, *The Consumer Rights Directive and the CFR: two worlds apart?*, in 5, 2009, 290-303.

<sup>88</sup> EUROPEAN COMMISSION, *COMMISSION DECISION OF 27 APRIL 2010 SETTING UP THE EXPERT GROUP ON A COMMON FRAME OF REFERENCE IN THE AREA OF EUROPEAN CONTRACT LAW (2010/233/EU)*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, 2010, where in Art. 2 it is written that: 'The group's task shall be to assist the Commission in the preparation of a proposal for a Common Frame of Reference in the area of European contract law, including consumer and business contract law'.

<sup>89</sup> The options identified are: publication of the work of the EG; an official toolbox for the European legislator; a Commission Recommendation on European Contract Law; a Regulation establishing an optional instrument; a Directive on European Contract Law; a Regulation establishing a Common European Contract Law and, finally, a Regulation establishing a European Civil Code. For the results of the consultation, see EUROPEAN COMMISSION, *Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses*, COM (2010) 348, 2010, where it is said that '[f]or reasons of consistency, the instrument of European Contract Law will have to complement the relevant consumer *acquis*, by integrating its requirements, including progress made on consumer protection in the internal market in the Consumer Rights Directive' (11). Cf. HOWELLS, *European Contract Law Reform and European Consumer Law - Two Related But Distinct Regimes*, in *European Review of Contract Law*, 7, 2011, 173-194; CARTWRIGHT, *Chose is good. Really?*, in *European Review of Contract Law*, 2011, 337-338; LOOS, *Scope and application of the Optional Instrument*, in *Vers un droit européen des contrats spéciaux* VOINOT-SÉNÉCHAL (edited by), Bruxelles, 2012, 117-151. KENNY, *The 2003 Action Plan on European Contract Law: is the Commission running wild?*, cit., p. 550, claims that: 'Commission's linguistic contortions should be understood as a warning: what does the Commission mean by arguing for a frame of reference and an optional

In response to the questions that emerged from the public consultation, the EG developed and published a '*Feasibility Study*' in 2011, which sought to identify the most suitable structure for a future instrument of European contract law. This study led to the publication of a text consisting of 189 articles entitled '*A European contract law for consumer and business: Publication of the result of the Feasibility Study carried out by Expert Group on European contract law for stakeholders' and legal practitioners' feedback*<sup>90</sup> which selects those parts of the *Draft Common Frame of Reference* most specifically devoted to contracts in general and attempts to coordinate them with further studies already elaborated on the subject<sup>91</sup>.

On the various options presented in the Green Paper, an *Impact Assessment* was then conducted to assess the economic and social impact of each option in order to choose the instrument best suited to the Commission's objectives<sup>92</sup>. The outcome of this study showed a preference for the adoption of a regulation.

## 1.9. Its essential characteristics

Based on the study conducted by the EG, in October 2011 the Commission submitted an official proposal for the adoption of a Regulation on a '*Common European Sales Law*' (henceforth CESL)<sup>93</sup>, as an optional instrument, i.e., adoptable exclusively at the free choice of the parties to a cross-border transaction, to the exclusion of domestic parties, unless the State has decided otherwise<sup>94</sup>.

The CESL had a more limited scope than the original intentions of the Commission, as it does not provide for the regulation of contracts in general but is limited to contracts for the sale of movable goods and the provision of digital content and collateral services concluded between a professional and a consumer or between professional parties (of which at least one SME)<sup>95</sup>. In this respect, it certainly

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instrument, yet insisting that it is not to be understood as a nascent pan-European civil law?' and at the same level also *Editorial Comments: European Contract Law: Quo Vadis?*, in *Common Market Law Review*, 2005, 3, claimed that the optional instrument is really a 'camouflage for a European Contract Code'.

<sup>90</sup> For a commentary, cf. LEHMANN, *Auf dem Weg zu einem europäischen Vertragsrecht: Die „Feasibility Study“ der Expert Group on European Contract Law*, in *Zeitschrift für Gemeinschaftsprivatrecht*, 8, 2011, 218-226.

<sup>91</sup> The part on the contract in general, i.e. the part on the conclusion, interpretation and content of the contract as well as the part on limitation periods, echoes the Lando Commission's PECL, even though this draft also includes the regulation on the sale of movable goods, services connected with the sale and the cases of restitution in the event of invalidity and dissolution of the contract. Part of the doctrine has criticised that it is an expression of the sectoral and not organic approach of Union law. On this point, see CASTRONOVO, *L'utopia della codificazione europea e l'oscura Realpolitik di Bruxelles. Dal DCFR alla proposta di regolamento di un diritto comune europeo della vendita*, in *Europa e diritto privato*, 2011, 856 ff.

<sup>92</sup> EUROPEAN COMMISSION, *Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law*, 2011) 635 final, SEC(2011) 1165 final, Brussels, 2011, 2 ff.

<sup>93</sup> EUROPEAN COMMISSION, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, 2011. For some criticism in academic circles on the introduction of a 'twenty-ninth regime' of sale of goods, see ZIMMERMANN, *Diritto privato europeo: 'Smarrimenti, disordini'*, in *Contratto e impresa/Europa*, 17, 2012, 7-36; AJANI, *Un diritto comune europeo della vendita? Nuove complessità*, in *Contratto e impresa/Europa*, 17, 2012, 71-85.

<sup>94</sup> Recital No. 15 of the Proposal: 'Traders engaging in purely domestic as well as in cross-border trade transactions may also find it useful to make use of a single uniform contract for all their transactions. Therefore, Member States should be free to decide to make the Common European Sales Law available to parties for use in an entirely domestic setting'.

<sup>95</sup> Artt. 1 and 7 of the Proposal. In point C, '*Explanation*', it is said that: '3. The CESL may be used only if the seller of goods, supplier of digital content or provider of related services is a trader. Where the buyer, user of customer is a consumer, the CESL is available irrespective of the size of the trader's enterprise. 4. Where, however, also the buyer, user or customer is a trader, the CESL may be used if at least one of those parties is an SME'. Cf. SCHULZE, *Common European Sales Law (CESL) - Commentary* -, Place Published, 2012, 53-54.



did not account for the relevant effort performed by European academics, in particular over the previous decade – as briefly summarized above (§§1.10 and 1.11).

As a result of all the amendments proposed by the European Parliament, the latest version of CESL was divided into three parts: a preliminary part which was the most strictly regulatory one, as it would have been mandatory in all its elements and directly applicable in the MS; this section was then followed by Annex I and Annex II<sup>96</sup>.

The first one was called *chapeau* and has been drawn up by the offices of the Commission and, in particular, by the Directorate – General for Justice and Consumers (JUST)<sup>97</sup>, Civil and Contract Law Unit. It consisted of 16 articles that defined and regulated some fundamental aspects of future European sales such as the optional nature of the instrument; the subjective and objective scope of application; the relationship between its provisions and pre-existing European sources on cross-border contracts for sales of goods, supply of digital content and of related services and, finally, it gave numerous general definitions.

On the contrary, Annex I was elaborated by the EG itself and it contained the text of the CESL, divided into eight Parts and two final Appendices. In Part I, '*introductory provisions*', the general principles of contract law, ranging from the principle of private autonomy to good faith and fair dealing were set out; Part II, '*making a binding contract*', contained prescriptions on pre-contractual information, right of withdrawal from distance and off-premises contracts, conclusion of the contract and defects of consent and voidability; Part III, '*assessing what is in the contract*', included rules on interpretation, content and effects of the contract, as well as the regulation of unfair terms; Part IV, '*obligations and remedies of the parties to a sales contract*', and Part V, '*obligations and remedies of the parties to a related services contract*', provided norms for non-performance, contingencies, seller's and buyer's obligations and remedies; Part VI, '*damages and interest*', Part VII, '*restitution*' and Part VIII, '*prescription*', were devoted respectively to damages and interest, restitution in case of avoidance or termination of contracts and prescription. These were then followed by *Appendix I*, which was dedicated to the Model instruction on withdrawal that the trader must provide to the consumer before the conclusion of a distance or an off-premises contract, while *Appendix II* contained a Model withdrawal form.

Finally, Annex II contained an informative form, the 'Standard Information Notice on CESL' that the trader is obliged to give to the consumer before the conclusion of an agreement regulated by the discipline in Annex I of the Proposal.

The choice in favor of an optional instrument was justified by the EC's desire not to adopt an 'exhaustive harmonisation'<sup>98</sup> replacing the domestic legislation of the MS. For this reason, the CESL established a discipline which – although limited to sales contracts – merely supplemented the national ones,

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<sup>96</sup> Cf. MELI, Proposta di Regolamento - Diritto comune europeo della vendita, in Nuove leggi civili commentate, 2012, 201 ff.; SCHULZE, Common European Sales Law (CESL), 2012; HESSELINK, How to opt into the common European sales law? Brief comments on the commission's proposal for a regulation, in European Review of Private Law, 20, 2012; LANDO, Comments and questions relating to the European Commission's proposal for a regulation on a Common European Sales Law, in European Review of Private Law, 19, 2011; RÜHL, The Common European Sales Law: 28th regime, 2nd regime or 1st regime?, in Maastricht Journal of European and Comparative Law, 19, 2012, 148-163.

<sup>97</sup> Here the link to the official website: <https://op.europa.eu/en/web/who-is-who/organization/-/organization/JUST>.

<sup>98</sup> BARNARD, The Substantive Law of the EU: The Four Freedoms, 2016, 626-632.

because it was applicable only whether the parties of that contract had expressly provided for (*opt-in*)<sup>99</sup>.

Through this mechanism, the EC tried to guarantee the respect for the principles of proportionality and subsidiarity of the Union's legislative activity in the field of contract law and, at the same time, to assure the substantial non-alteration of national disciplines and respect for the different legal traditions.

Since 2012, the Legal Affairs Committee has organised several hearings to discuss the Commission's proposal, with the participation of representatives from MS parliaments, as well as legal practitioners, business and consumer representatives. Following these discussions, in 2013 the Parliament's Impact Assessment Unit positively evaluated the Commission's assessment of the various possible impacts of the policy options, with a particular focus on the economic one<sup>100</sup>. Indeed, the assessment made a commendable attempt to quantify both the problems it sought to address – such as the negative impact of contractual law divergences on cross-border trade – and the benefits in terms of savings for businesses<sup>101</sup>. However, the Parliament expressed some concerns about the use of public opinion surveys as material for the Impact Assessment<sup>102</sup>.

In 2013, the Legal Affairs Committee (JURI) adopted its report supporting the proposal, in particular as regards the optional nature of the instrument and the form of regulation. However, it proposed to limit the applicability of the CESL to distance contracts only, to limit the scope and effects of 'good faith and fair dealing' and to amend the rules on buyer's remedies<sup>103</sup>.

In 2014, the European Parliament adopted a legislative resolution on the CESL, proposing to limit its scope of application to B2C cross-border transaction only<sup>104</sup>, but the European Council blocked the proposal due to the opposition of most of the MS. Finally, in 2019, the Conference of Presidents decided that the European Parliament should formally request the Commission to withdraw the adoption of the CESL.

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<sup>99</sup> RÜHL, *The Common European Sales Law: 28th regime, 2nd regime or 1st regime?*, cit.; GRUNDMANN, *Costs and benefits of an optional European sales law (CESL)*, in *Common Market Law Review*, 2013, 225-242.

<sup>100</sup> EUROPEAN PARLIAMENT IMPACT ASSESSMENT UNIT, *Detailed Appraisal by the EP Impact Assessment Unit of the European Commission's Impact Assessment*, 2013, where it is said that 'The Commission demonstrates convincingly some effects of the proposed measure, and that, especially in the longer term, the benefits of the proposal will be greater than the (often one-off) costs for business in using this optional instrument. According to the Commission, the CESL would bring benefits to the EU economy if a minimum of 5% of current exporters would use it<sup>77</sup>, but even if the take-up rate were lower, given the optional nature of the instrument, the situation would just be equivalent to the no EU action scenario' (29).

<sup>101</sup> EUROPEAN COMMISSION, *Impact Assessment*, 86.

<sup>102</sup> EUROPEAN PARLIAMENT IMPACT ASSESSMENT UNIT, *Detailed Appraisal*, cit., where it is said that 'Although the Commission is very transparent about the methods used and the assumptions made, Eurobarometer studies are not the best material on which to base IAs, since they usually do not give respondents sufficient time to prepare before providing their answers and usually result in general, qualitative answers. The two other surveys (SME panel survey and EBTP panel survey) openly acknowledge that the results cannot be considered representative for the whole of the EU' (28).

<sup>103</sup> COMMITTEE ON LEGAL AFFAIRS, *Report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law*, 2013, available at the following official link: [https://www.europarl.europa.eu/doceo/document/A-7-2013-0301\\_EN.html?redirect#\\_section1](https://www.europarl.europa.eu/doceo/document/A-7-2013-0301_EN.html?redirect#_section1).

<sup>104</sup> You can find the document at the following official link: [https://www.europarl.europa.eu/doceo/document/A-7-2013-0301\\_EN.html?redirect#\\_section1](https://www.europarl.europa.eu/doceo/document/A-7-2013-0301_EN.html?redirect#_section1).

## 1.10. Some criticism on its technical aspects

The rationale of the CESL was, indeed, that of easing business transactions – primarily cross-border ones – by providing a single regulatory regime that – as anticipated – is one of the paramount aspects that could favour the uptake of European regulation in this domain.

Some academics believed corporations would prefer the CESL to national legislation, because of the cost savings they would thus achieve<sup>105</sup>, both by reducing so-called “legal diversity costs”<sup>106</sup>, as well as potential “cross-border externalities”<sup>107</sup>.

Indeed, a uniform law would dramatically reduce such costs, prompting businesses to prefer European contract law as a way to avoid seeking compliance with different national regimes<sup>108</sup>, and ensure greater uniformity in litigation occurring in multiple jurisdictions on comparable, if not identical, matters (so-called inconsistency costs<sup>109</sup>). Ideally, that would help containing litigation costs, and reducing forum-shopping, and the subsequent need for businesses to compare potentially competing legal regimes<sup>110</sup>.

However, other scholars questioned the possibility for success in light of its nature as an optional instrument<sup>111</sup>. According to such a reading, the CESL would actually increase to 28 the overall number of contract law regimes, as well as potentially lead to a “split market”, for some customers would opt

<sup>105</sup> GANUZA-GOMEZ, *Optional law for firms and consumers: An economic analysis of opting into the Common European Sales Law*, in *Common Market Law Review*, 2013, 29-50. In this regard, as an example of a successful optional regime in Europe the authors refer to the case of the European Patent Convention of 1973 for which they note that: “Probably the patentability requirements under the EPC are higher than those that were in force at least in many patent systems of European countries, but this has not prevented companies from filing their applications with the European Patent Office instead of national patent authorities, due to the time and cost savings resulting from concentrating the examination and granting of the patent at a single institution” (49).

<sup>106</sup> Those entail the costs for the acquisition of knowledge about the specificities of each legal system, including those requirements associated to the production of goods and to the drafting of contracts, which vary in all jurisdictions. See GANUZA-FERNANDO, *Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law*, in *Common Market Law Review*, 50, 2013, The author says that: “Costs for the firm of operating under more than one set of legal rules that establish the minimum quality the firm’s contract should provide. We may label them legal diversity costs. The underlying idea is that producing, marketing and selling goods under more than one set of legal rules may impose costs on the firms, in addition to those of producing the targeted level of quality, and of verifying to the authorities compliance with the established level” (37). This is the case, for instance, of the legal warranties for products: if a certain country imposes a minimum legal warranty that is very different from that of another state, the operating costs the company has to bear to comply with both are greater.

<sup>107</sup> They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer’s law in business-to-consumer transactions. See GANUZA-FERNANDO, *Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law*, cit., The authors says that: “In fact, the optional nature of the rules, coupled with the ability of firms to operate under more than one set of legal rules allows, given the efficiency gains arising from having the most suitable firm serving the preferences for quality of the different national consumers, produces that the most efficient firms will serve consumers in the best feasible way” (35).

<sup>108</sup> SMITH, *The Need for a European Contract Law - Empirical and Legal Perspectives*, Groeningen, 2005, 155 ff.; GRUNDMANN, *Costs and benefits of an optional European sales law (CESL)*, cit., 225-242; RIBSTEIN-KOBAYASHI, *An Economic Analysis of Uniform State Laws*, in *The Journal of Legal Studies*, 25, 1996, 131-199.

<sup>109</sup> Meaning the costs incurred for the same purpose, in like circumstances, must be treated uniformly either as direct or indirect costs. On the point, see GRUNDMANN, *Costs and Benefits of an Optional European Sales Law (CESL) in Common Market Law Review*, 50, 2013, The author says that “there would be the advantage of having other parties, namely commercial parties, interested in always applying the same set of rules and in investing in its development (via discussion and via litigation and case law) (233).

<sup>110</sup> VOGENAUER, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, in *European Review of Private Law*, 2013, 13-78.

<sup>111</sup> POSNER, *The questionable basis of the Common European Sales Law*, 261 ff.

for it, others not<sup>112</sup>, correspondingly increasing production costs that would finally be passed onto the final customer<sup>113</sup>, at least in part.

Even the multiplicity of alternative systems is by some understood as an occasion for “efficient competition” among MS, and an opportunity to discover those regulations that better attain the intended outcome<sup>114</sup> with a lower-risk lower-conflict alternative (ensured by the diverse solutions operating simultaneously in different jurisdictions), eventually leading to spontaneous harmonization<sup>115</sup>. Others, to the contrary, believed it would lead to a “race to the bottom”, due to its large use of open-ended provisions that do not possess a common meaning at EU level<sup>116</sup>, leaving great discretion to national courts, which ensures flexibility on the one hand but leads to potentially relevant discrepancies in the application of the law on the other hand<sup>117</sup> (see §1.11 below).

The regulatory technique, and the use of elastic provisions deserves a closer scrutiny. Indeed, the tendency to resort to general clauses is typical of the general theory of contract law in all jurisdictions, including common law countries<sup>118</sup>, despite evident degrees of variation in the frequency of their use and in their interpretation and application by national courts (see §§2 ff. below).

However, certain aspects, and the regime of remedies in particular, would often benefit from increased clarity and precision in the drafting of the provisions, and in defining the conditions and modes for their application. To exemplify, the way damages are to be calculated, the kind of damages that may be compensated, and the possibility to restrict – on the one hand – or pre-define – on the other hand – their intended amount, ought to be very well laid out, without resorting to general expressions, and potentially vague formulas (see §§2.5 ff.).

Similarly, Art. 2 CESL requires the contracting parties to act with “good faith and fair dealing” stating that a breach of this standard of conduct may preclude the exercise of a right, remedy or defense that could otherwise be exercised, or may give rise to liability for any damages resulting from such a

<sup>112</sup> EIDENMULLER, What can be wrong with an option?, 69-84; MCKENDRICK, Harmonisation of European Contract Law: The State We Are In, in VOGENAUER-WEATHERILL, The Harmonisation of European Contract Law. Implications for European Private Laws, Business and Legal Practice, 2006.

<sup>113</sup> CHIRICO, The Function of European Contract Law: An Economic Analysis, in Economic Analysis of the DCFR, FILOMENA-PIERRE (edited by), Berlin, New York, 2010, 9-30.

<sup>114</sup> HAYEK, *Der Wettbewerb als Entdeckungsverfahren*, 1968, 56; WAGNER, Economic Analysis of Cross-Border Legal Uncertainty – The Example of the European Union, in Smits (ed.), The Need for a European Contract Law. Empirical and Legal Perspectives, Europa Law Publishing, Groningen, 2005, 16.

<sup>115</sup> SMITS, Convergence of Private Law in Europe: Towards a New *Ius Commune*?, in Comparative Law: A Handbook, ÖRÜCÜ-NELKEN (edited by), Oxford, 2008, 219-240.

<sup>116</sup> POSNER, The questionable basis of the Common European Sales Law: The role of an optional instrument in jurisdictional competition, in Common Market Law Review, 2013, 261-275.

<sup>117</sup> WHITTAKER, *Identifying the legal costs of operation of the Common European Sales Law*, in Common Market Law Review, 50, 2013, 85-108. In the same way the European Law Institute (ELI) suggests achieving greater clarity because “Law should be clear and predictable. It should be capable of providing normative guidance without first having recourse to the courts to interpret and explain its provisions and effect. The CESL will apply in the 27 EU Member States, each of which has a different legal culture and tradition. Its provisions are to be interpreted autonomously i.e., without reference to those legal cultures and traditions. It is of paramount importance therefore that its terms are sufficiently clear and predictable in effect, so that consumers and traders can use the CESL with confidence that it will be interpreted and applied consistently throughout the EU”. See EUROPEAN LAW INSTITUTE, Statement on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, 2012, available at the following link: [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/S-2-2012\\_Statement\\_on\\_the\\_Proposal\\_for\\_a\\_Regulation\\_on\\_a\\_Common\\_European\\_Sales\\_Law.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on_a_Common_European_Sales_Law.pdf).

<sup>118</sup> SMITS, Contract Law. A Comparative Introduction, 2021, ZIMMERMANN, Comparative Law and the Europeanization of Private Law, in The Oxford Handbook of Comparative Law, REIMANN-ZIMMERMANN (edited by), Oxford, 2019; VALCKE, Contractual, cit.; COLLINS, Methods and aims of comparative contract law, Place Published, 1991, 26 ff.

breach<sup>119</sup>. Notwithstanding the attempt of the European Parliament to further determine the scope of the clause<sup>120</sup>, several authors have maintained this concept remains too broad, and thus becomes an obstacle to the uniform application of the CESL<sup>121</sup>. The same goes for the use of “trade usage” and “commercial practice” as interpretive criteria, since such practices often do not exist at all, or are very difficult to verify on a continent-wide scale<sup>122</sup>.

Furthermore, the CESL makes extensive use of concepts with a clear Anglo-Saxon derivation, such as that of “reasonableness” introduced in Art. 5 of Annex I, and again in Art. 19, para. No. 5, whereby traders are required to provide the consumer with all the necessary information “in reasonable time”, after the conclusion of a distance contract. In such a context, the specification of said concept in individual cases would most certainly lead to potentially relevant discrepancies in its application across jurisdictions<sup>123</sup>.

Moreover, the regulation is not self-sufficient, as it is always the case with European law<sup>124</sup>, leaving potentially relevant connected concepts undefined, and thence subject to national legislation. Those encompass the definition of legal personality, the regime of invalidity of a contract arising from lack of capacity, illegality or immorality; representation; determination of the language of the contract; non-discrimination; plurality of debtors and creditors; modification of the parties; intellectual property; non-

<sup>119</sup> Art. 2, point 2, CESL.

<sup>120</sup> Indeed, the parliament adopted Amendment No. 16 in 2014, clarified the scope of this general clause by stating that: “Without preventing parties from pursuing their own interests, the general principle of good faith and fair dealing should set a standard of conduct which ensures a honest, transparent and fair relationship. While it precludes a party from exercising or relying on a right, remedy or defence which that party would otherwise have, the principle as such should not give rise to a general claim for damages. Rules of the Common European Sales Law constituting specific manifestations of the general principle of good faith and fair dealing like avoidance for fraud or the non-performance of an obligation created by an implied term can give rise to a right to damages, however only in very specific cases” (17). The text of the amendment is available at the following link: [https://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/pr/927/927290/927290en.pdf](https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/927/927290/927290en.pdf).

<sup>121</sup> HERTZELL, Increasing the legal certainty and attractiveness of CESL: UK Law Commission’s perspective, in *The proposal for a Common European Sales Law: the way forward*, 2013, 78; THOMAS-SORABJI-WENDEHORST, Statement of the European Law Institute on the Proposal for a Regulation on Common European Sales Law - 1st Supplement: Response to the EP Legislative Resolution of 26 February 2014, in available at SSRN: <https://ssrn.com/abstract=4321597>, 2023.

<sup>122</sup> BERNSTEIN, An (un)common frame of reference: An American perspective on the jurisprudence of the CESL, in *Common Market Law Review*, 2013, 169 ff.

<sup>123</sup> See fn. 118 above.

<sup>124</sup> European law always intervenes in a limited way and therefore does not provide a complete legal framework of reference, leaving uncertainty as to the qualification of certain rules and remedies, which may vary from one system to another. A paradigmatic example is given by the transposition in each MS of the Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, 29-34. This directive gives MS the choice between nullity and ineffectiveness of unfair terms. In Italy, jurists have questioned the nature of the remedy, leading to some uncertainty. Initially, it was considered that the criterion for distinguishing between nullity and voidability was quantitative, i.e. that nullity was characterised by the absence or defect of essential or constitutive requirements of the case (and therefore more serious), whereas voidability was characterised by the absence or defect of non-essential or non-constitutive requirements. Subsequently, the qualitative criterion was confirmed: the difference was due to the different nature of the interests protected, nullity being the pathology highlighted by the legislator with regard to situations adversely affecting a general, public interest of the community; annulment, on the other hand, being the pathology provided for by the legislator with regard to situations negatively affecting a particular, private interest of the individual contracting party. On the point, see FERRI, Nullità parziale e clausole vessatorie, in *Riv. dir. priv. e comm.*, 1977, 11 ff.; SACCO, Il contratto, in *Tratt. dir. civ.*, VASSALLI (edited by), Torino, 1995, 870 ff.; PAGLIANTINI, La nullità di protezione tra rilevabilità d’ufficio e convalida: lettere da Parigi e dalla Corte di Giustizia, in *Riv. dir. priv.*, 2009, 139 ff.; POLIDORI, Nullità di protezione e interesse pubblico, in *Rass. dir. civ.*, 2009, 1029 ff.; CAMARDI, Tecniche di controllo dell’autonomia contrattuale nella prospettiva del diritto europeo, in *Eur. dir. priv.*, 2008, 836 ff.



contractual liability as well as the possible competition between the latter and contractual liability<sup>125</sup>. A case could thence never be decided on the basis of the rules of the CESL alone, and parties would anyway have to resort to national law, resulting in a higher level of uncertainty and a consequent raising of costs<sup>126</sup>.

The potential gains for business transactions are also to be questioned, especially considering the constraints the optional instrument imposed upon the parties, compared to other regulatory regimes<sup>127</sup>. For instance, while the CESL's Explanatory Memorandum sets the principle of freedom of contract<sup>128</sup>, several mandatory terms set in text of the proposal restrict it. This is the case of Art. 1 which endorses this principle but only "subject to any applicable mandatory rules", as well as Art. 2 which imposes a non-renounceable duty on all parties to behave with good faith and fair dealing, notwithstanding the non-waivable obligation of cooperation – "to the extent that this can be expected for the performance of their contractual obligations" – provided for by Art. 3. Even looking at more specific rules such as those concerning late payments by traders (Artt. 168-171), as well as norms dealing with restitution on contract termination (Artt. 172-177)<sup>129</sup>, these are explicitly mandated for all traders, and not limited to B2C or SME relationships, profoundly impacting the business autonomy of the more sophisticated parties<sup>130</sup>.

Despite that angle not being the focus of the current analysis, the proposal encountered criticism also in a consumer law perspective. Indeed, it was deemed potentially an instrument of "social dumping", used by businesses in cross-border transactions to avoid higher levels of consumers protection imposed upon them by national legislation<sup>131</sup>. Since firms are the strongest party in the relationship, consumers would be forced to either take or leave the unilateral choice made by the businesses<sup>132</sup>, and thence would be discouraged from concluding a cross-border transaction, while preferring a local trader<sup>133</sup>.

It is further argued that the remedies provided to consumers in the CESL are overly broad such that they fail to afford them adequate protection. For instance, in case of defective performance of the seller,

<sup>125</sup> LANDO, Comments and questions relating to the European Commission's proposal for a regulation on a Common European Sales Law, cit., 717-728.

<sup>126</sup> WELLER-HARMS, Der Primat der Nacherfüllung im Gemeinsamen Europäischen Kaufrecht, in Zeitschrift für Gemeinschaftsprivatrecht, 9, 2012, 298 ff.; MAGNUS, Der Tatbestand der Pflichtverletzung, in Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts, SCHULZE-SCHULTE-NÖLKE (edited by), München, 2009, 67-79.

<sup>127</sup> EPSTEIN, Harmonization, heterogeneity and regulation: CESL, the lost opportunity for constructive harmonization, in Common Market Law Review, 50, 2013, where he states that: "But it is possible to criticize CESL for having set up the wrong set of optional terms, which force the following unwise trade-off: the price for uniformity in cross-border transactions is compliance with the unduly burdensome substantive provisions in the CESL, which is required under the proposed integration of the CESL with Rome I.6 At this point, the hard policy question is why this, or any other, optional code should contain a long set of mandatory provisions, mostly in business-to-consumer (B2C) contracts, thereby forcing parties to adopt the CESL in particular transactions on an all-or-nothing basis" (208).

<sup>128</sup> The CESL Explanatory Memorandum states that: "in business-to-business ("B2B") transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms" (18).

<sup>129</sup> It is said that: "in relations between a trader and a consumer the parties may not to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects".

<sup>130</sup> EPSTEIN, Harmonization, heterogeneity and regulation, cit., 210.

<sup>131</sup> RUTGERS, An Optional Instrument on Contract Law and Social Dumping Revisited, 2011, 351; COLLINS, The European Civil Code: The Way Forward, 2008, 74; HESSELINK, Common Frame of Reference & Social Justice, in 4, 2008, 184 ff.

<sup>132</sup> CARTWRIGHT, *Choise is good. Really?*, cit., 335 ff.

<sup>133</sup> Ibid.

the CESL allows the consumer to request immediate withdrawal from the contract<sup>134</sup>. In contrast, in B2B relationships, the buyer is entitled first of all to ask for the repair or replacement of the product. The latter solution is in fact more cost-efficient since it incentivizes sellers to deliver conforming goods in the market. By contrast, the one adopted in B2C relations – i.e. the immediate right of withdrawal – generates unstable and inefficient commercial transactions<sup>135</sup>. It is clear that these higher costs, caused by the uncertainty of legal relations, will be passed on from business to consumers through higher prices<sup>136</sup>.

### 1.11. Contd.: and the (possible) reasons of its (political) failure

Understanding the reasons of the failure of such an attempt is also key to understanding the constraints that any such effort faces at European level. As it may be observed from the debates occurred within the European Parliament and other EU and MS's institutions<sup>137</sup>, MS are not very willingly to surrender their competence in regulating relevant bodies of private law, in particular contracts. Those branches still reflect the peculiarities of the legal families and cultures each state belongs to, and despite aiming at solving identical problems with convergent solutions, they still expose differences that are very much historically rooted and handed down from one generation of jurists to another, in particular thanks to the predominant dogmatic approach, which characterizes the teaching of law in all major European universities.

Said otherwise, there is a strong cultural dimension in contract law, often associated with a profound belief that each one solution is somewhat superior to the alternative one elaborated by the different legal system. Indeed, determining which one is actually preferable is hard, even when maintaining a strict functional approach, which is certainly not the sole relevant one in such domain. Indeed, cultural resistance towards surrendering to another – until then perceived as competing – regulatory regime does play a role in this respect

In fact, the theory about legal transplants<sup>138</sup> teaches that an identical legal rule might be well received or not in a given legal ordering depending on a number of tightly entangled factors, including

<sup>134</sup> BAIRD, Precontractual disclosure duties under the Common European Sales Law, in *Common Market Law Review*, 2013, 297-310.

<sup>135</sup> BERNSTEIN, An (un)common frame of reference: An American perspective on the jurisprudence of the CESL, cit., 169-186; PORAT, The law and economics of mistake in European Sales Law, in *Common Market Law Review*, 2013, 127-146; BAR-GILL-BEN-SHAHAR, Regulatory techniques in consumer protection: A critique of European consumer contract law, in *Common Market Law Review*, 2013, 109-125.

<sup>136</sup> WAGNER, Termination and cure under the Common European Sales Law: Consumer protection misunderstood, in *Common Market Law Review*, 2013, 147-167; VOGENAUER-WEATHERILL, The Harmonisation, cit., 105-148.

<sup>137</sup> Some voices raise concerns about the compatibility of the CESL with proportionality requirements, see, MICKLITZ-REICH, *The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough?*, Florence, 2012, 9–11. The German Bundestag submitted a 'Reasoned Opinion to the Commission, Council and European Parliament' on 30 November 2011, pointing out that the Proposal does not comply with the principle of subsidiarity, and in particular that the Commission lacks EU regulatory competence (Deutscher Bundestag, Drucksache 17/8000; Deutscher Bundestag (2011), Plenarprotokoll 17/146, Stenografischer Bericht der 146. Sitzung der 17. Wahlperiode, 17501-17507). This position is also shared by the Austrian Federal Council, Reasoned Opinion of the Austrian Federal Council of 14.12.2011, JURI (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)) and the Reasoned opinion by the House of Commons of the United Kingdom of Great Britain and Northern Ireland on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law dated 14.12.2011, JURI(COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)). For an overall view of the process please see [EUR-Lex - 52011PC0635 - EN - EUR-Lex \(europa.eu\)](#).

<sup>138</sup> EWALD, Comparative jurisprudence (II): the logic of legal transplants, in *The American Journal of Comparative Law*, 43, 1995, 489-510; COTTERRELL, Is there a logic of Legal Transplants?, in *Adapting legal cultures*, 71, 2001, 82; WATSON, From legal

procedural norms as well as cultural and social factors. Thence, merely copying a solution from one system to another does not ensure identical results will be reached.

Moreover, a norm is never just its black-letter formulation, but entails its dogmatic and academic characterization, as well as judicial interpretation<sup>139</sup>. For this very reason, the very education of practitioners (both lawyers and judges) called to apply the norms matters, and would not ensure that the adoption of one specific solution would improve the overall outcome of how the law is ultimately administered.

Considering the overall uncertainty with respect to which solution would be preferable, and which would radically improve the functioning of each legal system, a political effort to assimilate all MS legislation in such a complex domain is doomed to fail, absent very strong political pressure and determination to adopt such a body of norms.

The attempt here discussed lost much of its momentum with the progressive reductions of its scope, and despite political in its original nature, became ever more similar to an academic effort, such as those described above.

Indeed, systematical reforms encounter strong opposition and are hardly successful, as it is witnessed by the very rare modifications of national civil codes<sup>140</sup>, often accompanied by large internal debates.

In the perspective of the optional instrument here considered, such natural opposition was further reinforced by the questionability of the purpose and scope of such an intervention. Indeed, the case in point for the application of such a tool was quite unclear. Most commonly consumers would prefer the application of the national law, accompanied by the certainty and high degree of foreseeability deriving from its legacy and systematic application by national courts over the decades.

Thence, provided the limited practical utility of a tool whose application is not mandated, the political effort to approve it, forcing internal adaptation and an increase in the overall complexity of the legal

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transplants to legal formants, in *Am. J. Comp. L.*, 43, 1995, 469. In a critical sense about the theory of legal transplants, see LEGRAND, *The impossibility of 'legal transplants'*, in *Maastricht journal of European and comparative law*, 4, 1997, 111-124.

<sup>139</sup> See fn. 16 above.

<sup>140</sup> On 1 January 2002, the German Modernization of the Law of Obligations Act entered into force – Gesetz zur Modernisierung des Schuldrechts of 26 November 2001, *Bundesgesetzblatt* 2001 I, 3138. As a result, the BGB was re-promulgated on 2 January 2002: *Bundesgesetzblatt* 2002 I, 42 –. According to ZIMMERMANN, *The New German Law*, cit., 2 “Use of the phrase ‘modernization of the law of obligations’ can be explained only in the light of the earlier reform project which was indeed supposed to cover, apart from a much wider range of matters within contract law, the law of extracontractual liability, unjustified enrichment, and negotiorum gestio”. However, later on the reform had been triggered by the need to implement the European Consumer Sales Directive and covers mainly four topics: more than by any other component of the new law, the reform process made an effort to harmonize, general contract law and consumer contract law – incorporation of a number of special statutes aimed at the protection of consumers –; liability for non-conformity in sales law in particular; remedies for non-performance (breach of duty); prescription. Among many see GRUNDMANN, *Germany*, cit., 129; CANARIS, *Schuldrechtsmodernisierung 2002*, München, 2002, 60 ff. Meanwhile on 11 February 2016 after a decade of discussion and the failure of several previous reform projects, French contract law has finally been reformed by way of an ordinance (“ordonnance”). Until the reforms, most of the articles in the Code on contract law had remained unaltered, instead the courts progressively re-interpreted the articles, however over the course of two centuries, the re-interpretation had become too extensive, therefore the objective of the reform was the simplification and modernisation of French contract law. In particular, the Reform: codifies a number of principles that have emerged in case law, introduces concepts like control of ‘unfair contract terms’, and above all the reform puts the French civil system into a new age of the binding force of contracts as the parties will be allowed to renegotiate the contract when unpredictable circumstances occur”.



system of each MS, appeared most likely disproportionate, when compared to what could have been gained in exchange.

## 2. A FUNCTIONAL ANALYSIS OF CONTRACT LAW AND ITS LIMITATIONS AT EUROPEAN LEVEL

### A General Overview.

1. The impact of EU law is not limited to narrowly defined areas and branches, for its direct and indirect influence has forever modified the traditional legal pillars of all national legal systems (§2).

### Court Performance.

2. Reports, such as the Doing Business or the European judicial systems CEPEJ Evaluation Report have shown that the time taken to settle disputes is a key factor to ensure economic growth, which correspondingly increases with faster civil justice. Indeed, they rank countries according to their capacity to adjudicate civil cases without delay and without producing a backlog (§ 2.2).
3. The World's Bank Doing Business Report defines the degree of attractiveness for investors of each legal ordering, with a focus on the capacity to enforce contracts. In this framework, the data show that the common law regulatory model appears to dominate (§2.2.1).
4. Differently, the European judicial systems CEPEJ Evaluation Report, takes into account criteria like the efficiency, quality and independence of the judicial system in each Member State, through several indicators for each of the aforementioned values.
5. The indicators for measuring the efficiency of justice developed by the European Commission for the Efficiency of Justice are: the Clearance Rate and the Disposition Time (§2.2.2).
6. The surveys such The Lord Chief Justice Report, The Commercial Court Report 2021–2022 and LCIA Arbitration and ADR worldwide 2022 Annual Casework Report, seems to demonstrate a clear preference for the British system, and for common law more broadly, as far as commercial contracts are concerned (§2.2.3).

### Legal Certainty: Identifying Applicable Law and the Doctrine of Contractual Types.

7. How judges determine the law applicable to complex business transactions that do not fall within a specific regulated contractual type is an issue of essential importance for the overall legal certainty (§2.3).
8. Some legal orderings have very detailed rules (both mandatory and default) for the most common contractual types (§2.3).
9. When faced with an atypical contract, judges can adopt two different approaches, namely i) classify the contract within one of the regulated types or ii) merely apply the general theory of contracts (§2.3).
10. "Alien contracts" are contractual agreements conceived in a different jurisdiction, rooted in a different legal culture and system, and merely translated into another language in an attempt to import a specific economic model (§2.3.1).
11. As case law has shown, forcing an alien contract into a regulated contractual type may lead to an unexpected interpretation which may produce undesirable results for the contracting parties (§2.3.2).

12. For these reasons, a different approach to regulated contractual types has been proposed. Regulated contractual types should be conceived as flexible reference frameworks and should not be invoked to disapply negotiated clauses, so long as these clauses do not conflict with the mandatory rules applicable to all contracts (§2.3.3).
13. Parties tend to avoid applying the rules of legal systems where there is a risk that what they have negotiated will be overturned by judges by enforcing the regime of regulated contractual types (§2.3.4).

**Legal certainty: contractual interpretation and integration of the legal relationship arising from an agreement.**

14. A textualist approach to interpretation allows the parties to retain control on what elements will be considered as evidence in case of litigation (§2.4.1).
15. A textualist approach may be allowed as an option to parties that so prefer, by enforcing merger clauses and the self-imposition of formalities in the agreement (written form for the validity of the contract) (§2.4.1).
16. A textualist approach does not allow for illicit behaviour of the parties, nor the overcoming of mandatory regulation and does not prevent the application of those general principles that are deemed non-negotiable, such as good faith and its applications intended to prevent opportunistic behaviour by the parties (§2.4.1).
17. Contractual integration is not so easily distinguished from interpretation. It is always possible to consider an interest that the parties failed to expressly negotiate relevant, and deserving legal protection, and thence imposing an obligation on one party to that end (or prevent a behaviour or choice of conduct) (§2.4.2).
18. The operation of general clauses does not necessarily increase overall legal uncertainty so long as it is the consequence of an attentive effort of specification primarily aimed at sanctioning opportunistic behaviour. In such a perspective, general clauses might be efficient by reducing transaction costs and ensuring ex post protection against potentially abusive behaviour of one party to the detriment of the other (§2.4.2).
19. General clauses and contractual integration in business contracts should not be used to protect interests of the parties that are not related to the functioning and purpose of the agreement itself (e.g. Schutzpflichten) (§2.4.3).

**Enforcing promises: the problem of choosing appropriate remedies**

20. Remedies are one of the most relevant aspects that should be detailly regulated to favour the foreseeability of judicial outcomes, as well as to grant the parties greater control on their business decisions regarding the contract (§2.5).
21. Arguments based on efficiency matter in the choice of the optimal remedy but may ground a case for allowing the debtor the choice to breach or the creditor to force specific performance, depending upon the kind of damages the debtor is bound to pay when he does not perform (§2.5.1).
22. This entails that the choice of the remedy ought to be narrowly regulated, differentiating all possible circumstances and conditions, to achieve a system that is much more specified overall (§2.5.2).

23. Remedies are often under regulated. Legal systems most commonly devote great attention to definitions, qualifications, and description of the conditions of validity, but do not address and solve many practical and theoretical aspects of the regulation of remedies. Neglected aspects include (but are not limited to) the exact indication of the kind of damages to be liquidated (expectation or reliance interest, disgorgement of profits, etc...), and the methodology to calculate them, which may vary in different circumstances; the conditions that allow a breach to justify the cancellation of the agreement, the kind of interest that give rise to a precontractual liability, to name a few (§2.5.3).

## 2.1. A General Overview

To analyse the limitations of the existing legal framework it is necessary to distinguish two aspects: (i) court application, and (ii) substantive law. The order of analysis might appear reversed, for typically lawyers consider substantive regulation to be what primarily defines a system, and those efforts to conceive a common European contract law deal with substantive matters entirely. This is also typical of current EU law in other domains, including consumer law, that pervasively penetrated substantive law, often remodelling existing legal categories (e.g.: invalidity).

Indeed, procedural law (here civil procedure more specifically) is often perceived as a body of national law, Europe should not be interfering with. This very conception appears quite peculiar to say the least. On the one hand, it is *per se* evident how European law is ever more extending its scope of application and capacity to influence national legal systems in many domains, above all – and intentionally-so – those market-related, among which contract law is certainly to be enumerated. For such reasons, the overall interference of European-generated norms in the field of private law has already profoundly shaped and altered original legal systems, so much so that the very teaching of law has today changed, and even the most dogmatic frameworks are today altered<sup>141</sup>. Said otherwise, we may no longer argue that the impact of EU law is limited to narrowly defined areas and branches, for its direct and indirect influence – deriving from the application of its concepts (e.g.: consumer, weaker contractual party), and from the implementation of specific policies and perspectives (e.g.: concern over information asymmetry as a ground to promote protection) – has forever modified the traditional legal and logical pillars of all national legal systems. This said, regulatory interventions in the domain of civil procedure would certainly not prove more invasive than the substantive ones already introduced, and would not limit national sovereignty to any greater extent, despite the formulation of art. 81 TFEU – focussed on mutual recognition for the purpose of easing the common internal market – being certainly narrower than that of art. 114 TFEU, allowing for the enactment of legislation aimed at ensuring the proliferation of the internal market (art. 26 TFEU). However, a functional interpretation of the former, in light of its possible impact on the latter, would possibly allow for the adoption of procedural rules that could be

<sup>141</sup> It shall suffice to consider how, with the 2001 reform of the BGB – Gesetz zur Modernisierung des Schuldrechts of 26 November 2001, Bundesgesetzblatt 2001 I, 3138. As a result, the BGB was re-promulgated on 2 January 2002: Bundesgesetzblatt 2002 I, 42 –, the notion of “consumer” was introduced in the § 13, modifying the first book, dedicated to defining all essential legal concepts. According to the § 13 of the BGB “A consumer means every natural person who enters into a legal transaction for purposes that predominantly are outside the consumer’s trade, business or profession”. See [https://dejure.org/BGBI/2001/BGBI\\_I\\_S\\_3138](https://dejure.org/BGBI/2001/BGBI_I_S_3138).

deemed aiming at ensuring the competitiveness of the European regulatory framework in the field of commercial contracts<sup>142</sup>.

On the other hand, substantive and procedural norms are so tightly intertwined that the specific scopes EU legislations aims at pursuing may only be served by taking both aspects into account. Such an awareness has now become apparent even in those domains where new regulatory interventions are taking place, namely technology regulation and AI in particular.

## 2.2. Court Performance

Quantitative surveys<sup>143</sup> have shown that the time taken to settle disputes is a key factor to ensure economic growth, which correspondingly increases with faster civil justice. Indeed, it was stated that: “Well-functioning and fully independent justice systems can have a positive impact on investment and are key for investment protection, and therefore contribute to the productivity and competitiveness. They are also important for ensuring the effective cross-border enforcement of contracts, administrative decisions and dispute resolution, essential for the functioning of the single market”<sup>144</sup>.

Numerous reports, such as the *Doing Business*<sup>145</sup> (henceforth DBR) or the European judicial systems CEPEJ Evaluation Report (henceforth CEPEJR)<sup>146</sup>, rank countries according to their capacity to adjudicate civil cases without delay and without producing a backlog. The more virtuous countries – pursuant to said criteria – are considered to possess a more efficient legal system, and subsequently appeal more greatly to foreign investors.

Such a consideration inevitably impacts both directly and indirectly the choice of law, and ultimately the decision to apply a specific contractual regime over another one. In fact, not only will businesses decide do undergo investments in one legal ordering, rather than another one, based on said criteria,

<sup>142</sup> That is, in fact, perceived as one of the main barriers to the single market, on which see POLICY DEPARTMENT FOR ECONOMIC, SCIENTIFIC AND QUALITY OF LIFE POLICIES, *Legal obstacles in Member States to Single Market rules*, 2020, 116.

<sup>143</sup> In *The judicial system and economic development across EU Member States* study, Authors has found “a strong correlation between between the length of court proceedings - a proxy for efficiency of the justice system - and MS firm performance (reduction in the length of court proceedings and the growth rate of the number of companies), and that a higher percentage – by 1% – of companies perceiving the justice system as independent correlates with higher firms’ turnover and greater productivity growth”. Please see BOVE-LEANDRO, *The judicial system and economic development across EU Member States*, Luxembourg, 2017, 5-6; another surveys have also highlighted the importance of the effectiveness of national justice systems for companies. Pursuant to the survey UNIT, *Risk and Return – Foreign Direct Investment and the Rule of Law*, 2015, 22, 93% of large companies systematically and continuously review the rule of law conditions (including court independence) in the countries they invest in.

<sup>144</sup> (CEPEJ), *The 2023 EU Justice Scoreboard*, Luxembourg, 2023, 1. Among the EU’s measurement tools, since 2012, the CEPEJ implement an annual study which constitutes one of the core sources of the “EU Justice Scoreboard”.

<sup>145</sup> “In 2003, the World Bank published the first *Doing Business* report. The report focused attention on the ways in which the legal system regulates certain typical moments in the life of an enterprise, from its establishment to its liquidation. Today, the aggregate DB ranking and the data underlying it are regularly used to assess how well a country’s regulation fosters the birth and development of businesses. In particular the DB project provides objective measures of business regulations and their enforcement across 190 economies, and selected cities at the subnational and regional level. By gathering and analysing comprehensive quantitative data to compare business regulation environments across economies and over time, DB encourages economies to compete towards more efficient regulation”. See THE WORLD BANK, *Doing Business Archive* Place Published, 2020, 149.

<sup>146</sup> ‘The Report aims to give an overview of the situation of the European judicial systems. Rather than ranking the judicial systems in Europe, which would be scientifically inaccurate, it allows comparison of comparable countries, or clusters of countries, and discerns trends’. See EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *European judicial systems - CEPEJ Evaluation Report - 2022 Evaluation cycle (2020 data)* Strasbourg, 2022, moreover the report presented a methodology and tools for collecting, analysing and comparing data on the efficiency, quality and effectiveness of European judicial systems, 11.

but also select – whenever possible – the application of a specific commercial contract regime, as well as decide to subject litigation to a given jurisdiction, deemed to be particularly efficient and competent in handling similar cases.

### 2.2.1. The World's Bank Doing Business Report

In particular, the DBR – compiled annually by the World Bank – defines the degree of attractiveness for investors of each legal ordering also in light of the efficiency of their civil justice system<sup>147</sup>, with a focus on the capacity to enforce contracts. Indeed, the “*enforcing contract*” item, specifically compares the speed at which it is possible to obtain a court decision enforcing obligations arising from commercial contracts in case of an alleged breach<sup>148</sup>. These very elements are in fact considered to directly affect the choice of entrepreneurs to invest in a given territory.

The common law regulatory model appears to dominate<sup>149</sup>, with Singapore ranking first<sup>150</sup> in this specific domain, followed by Australia (5<sup>th</sup>), New Zealand (23<sup>th</sup>), United States (17<sup>th</sup>), United Kingdom (34<sup>th</sup>), South Africa (84<sup>th</sup>), Canada (100<sup>th</sup>); while EU countries are led by Austria (10<sup>th</sup>), Germany, and France (13<sup>th</sup>; 16<sup>th</sup> respectively) with Spain (26<sup>th</sup>) Portugal (38<sup>th</sup>), and Italy (122<sup>th</sup>) following.

In particular, while a contractual claim – at first instance – needs 164 days to be settled by a court in Singapore (Best Performance 120), 216 days in New Zealand, 370 days in the US, 402 days in Australia, 437 days in the UK, 600 days in South Africa, and 910 days in Canada; they need 447 in France and 499 days in Germany, 510 days in Spain, 755 days in Portugal, and 1120 in Italy.

To the contrary, while the cost of litigation, expressed as a percentage of the overall value of the claim, amounts to 25% in Singapore, and 22.9% in the US, 27.2% in New Zealand, 23.2% in Australia, 22.3% in Canada, 33.2% in South Africa, and up to 45,7% in the UK, many European countries – namely Germany

<sup>147</sup> The DBR takes into account 12 areas of business regulation namely: (i) starting a business, (ii) dealing with construction permits, (iii) getting electricity, (iv) registering property, (v) getting credit, (vi) protecting minority investors, (vii) paying taxes, (viii) trading across borders, (ix) enforcing contracts, (x) resolving insolvency, (xi) employing workers and (xii) contracting with the government. The last two items are not included in the ease of doing business score and ranking. Please see THE WORLD BANK, *Ease of doing business score and ease of doing business ranking*, Washington, DC, 2020, 79-86. The Ease of doing business score and ease of doing business ranking clearly establishes what the score and rank intend to reflect.

<sup>148</sup> The score assigned to each State derives from the aggregation of a more complex set of numerical data concerning the judicial system of each country evaluated. In addition to the chronological length and costs of court proceedings, factors such as the greater or lesser availability of up-to-date data on the activities of national courts to the public are considered, as well as the adoption of precise techniques to ensure the expeditious settlement of cases. These techniques may include precise scheduling of individual procedural activities and the entire process, or the use of pretrial conferences between the judge and the parties involved, which is useful to estimate the time required to investigate and settle each specific dispute based on its urgency and complexity. These data, which form the 'case management index', are also accompanied by data regarding the level of process computerization ('court automation index'), the number of specialized courts or differentiated procedures for different types of disputes ('court structure and proceedings index'), and alternative dispute resolution techniques ('alternative dispute resolution index'). All these mentioned indices are thus processed, obscuring the content of the original information collected by each of them, and returning in a single score that communicates to the reader a seemingly clear message about the efficiency and quality of the civil justice system in each state. For a more detailed view of all the parameters that measure the quality and efficiency of justice and contribute to the score of the individual state in relation to the final "enforcing contract" indicator", please refer to <https://www.doingbusiness.org/en/methodology/enforcing-contracts#>.

<sup>149</sup> The DBR was criticized for promoting American common law as the legal system better suited to favour the market economy, and provide a simplistic account of its alleged superiority, for more detailed considerations see below, and fn. 151.

<sup>150</sup> Singapore also ranked second in the overall score for doing business, see <https://archive.doingbusiness.org/en/data/exploreconomies/singapore>.



(14.4%), Austria (20.6%), France (17.4%), Spain (17.2%), Portugal (17.2%) and Italy (27.6%) – appear to be substantially cheaper.

In this respect, it shall be noted that the highest component of the overall cost in the UK is represented by attorneys' fees (35%) while enforcement fees are limited to 1.2%. In the US, Singapore, Australia, Canada, New Zealand, and South Africa attorneys' fees amount to 14.4%, 20%, 18.5%, 15%, 22%, and 22.6% respectively, whereas enforcement fees to 3.5%, 2.1%, 0.2%, 2%, 3.2%, and 3% respectively. Attorneys' fees are instead substantially cheaper in Germany (6.6%), and France (10.7%), Austria (13.6%), Spain (12.7%), Portugal (10.7%) but not in Italy (19%); while enforcement fees appear overall higher in European countries, with Germany (2.4%), France (4%), and Italy (4.7%) with the exception of Austria (0.5%) and Portugal (0.5%).

Most jurisdictions, including the US and the UK, Australia, Canada, South Africa and Singapore on the one hand, and France, Germany, Austria on the other hand have dedicated courts for commercial matters, separate from small claim courts, and ensure an ample possibility to opt in favour of arbitration, in all matters that are not dealing with public order or public policy. Italy, Spain, and Portugal instead, as well as New Zealand – among Common Law countries – are an exception in as much as they do not have a dedicated court to address solely commercial matters.

**Table 1: Comparing data on the World Business Regulation**

Countries	Enforcing Contract score	Days for court settlement	Litigation cost (percentage of the overall value)	Attorneys' fees (percentage of the overall value)	Enforcement fees (percentage of the overall value)	Dedicated Court for commercial litigation (yes/no)	Dedicated small claims court (yes/no)
Singapore	84.5	164	25.8	20.9	2.1	Yes	Yes
Australia	79.0	402	23.2	18.5	0.2	Yes	Yes
New Zealand	71.5	216	27.2	22	3.2	No	Yes
USA	73.4	370	22.9	14.4	3.5	Yes	Yes
UK	68.7	437	45.7	35	1.2	Yes	Yes
South Africa	56.9	600	33.2	22.6	3	Yes	Yes
Canada	57.1	910	22.3	15	2	Yes	Yes
Germany	74.1	499	14.4	6.6	2.4	Yes	Yes
Austria	75.5	397	20.6	13.6	0.5	Yes	Yes
France	73.5	447	17.4	10.7	4	Yes	Yes
Spain	70.9	510	17.2	12.7	0	No	Yes

Countries	Enforcing Contracts score	Days for court settlement	Litigation cost (percentage of the overall value)	Attorneys' fees (percentage of the overall value)	Enforcement fees (percentage of the overall value)	Dedicated Court for commercial litigation (yes/no)	Dedicated small claims court (yes/no)
Portugal	67.9	755	17.1	10.7	0.5	No	Yes
Italy	53.1	1120	27.6	19	4.7	No	Yes

Overall, this data is often interpreted as affirming a greater efficiency of common law jurisdiction over civil law ones, such as those of European MS, and at times such an outcome is justified in light of the roman tradition those legal orderings belong to, considered to typically allow for a greater influence of the state and public authorities in the economy. Differences among legal families appear however more blurred in this respect, with the exception of the overall duration of trials on the one hand, and litigation costs on the other hand. Oversimplifying, it may be said that while litigation is faster (on average) in common law jurisdictions, it is also more expensive, primarily due to attorneys' fees.

Which alternative is to be preferred is not obvious, in particular if one system ought to be selected as overall superior compared to the other (see also §2.4.3 below). Indeed, the needs of consumers and SMEs are typically very different from those of larger and more sophisticated business actors. Should it not be possible to ensure sufficient elasticity through dedicated judicial and procedural structures reserved for sophisticated business parties, how the balance ought to be struck is certainly complex a political decision, and one that should most likely be inspired by principles of democracy also understood as easing access to justice for all. However, it is not unconceivable that a modern legal system presents a multiplicity of procedural solutions, including a dedicated court system and procedures (see also §2.2.3).

To conclude, however, it shall be pointed out how the DBR was criticized for surreptitiously promoting American common law as the legal system better suited to favour the market economy, pursuant to a simplistic account here briefly summarized. The reaction of some MS, and in particular of the French government to the strong accusations made against the Romanist tradition led to the establishment in 2006 of a *Fondation pour le droit continental*, that in 2015 produced the first study aimed at countering the results of DBR, relaunching continental law through the development of a different indicator, the *Index de la sécurité juridique*<sup>151</sup>.

<sup>151</sup> See [https://www.fondation-droitcontinental.org/fr/nos\\_actions/index-de-la-securite-juridique-isj/](https://www.fondation-droitcontinental.org/fr/nos_actions/index-de-la-securite-juridique-isj/).

## 2.2.2. The European judicial systems CEPEJ Evaluation Report

While the DBR clearly privileges the economic perspective, the CEPEJR compiled by the European Union<sup>152</sup>, takes other criteria into account, including the efficiency, quality<sup>153</sup> and independence<sup>154</sup> of the judicial system in each Member State, through different indicators for each of the aforementioned values. As per efficiency, the report mainly analyses (i) the estimated duration of proceedings<sup>155</sup> – namely the number of days necessary to settle a case before a court –; (ii) the turnover rate – defined as the capacity of a court to cope with the judicial load<sup>156</sup>–; and, finally, (iii) the number of pending cases – or the number of cases that remain to be dealt with at the end of the year<sup>157</sup>–.

These surveys mainly make use of the data collected by the European Commission for the Efficiency of Justice (CEPEJ)<sup>158</sup> – established by the Committee of Ministers of the Council of Europe – as well as of the indicators for measuring the efficiency of justice developed by the latter, namely the Clearance Rate and the Disposition Time.

The Clearance Rate (henceforth CR) is defined as “the ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage”<sup>159</sup>.

The Disposition Time (henceforth DT) is defined as “the ratio between pending cases and resolved cases (in days). It shows the theoretical duration for a court to solve all the pending cases”<sup>160</sup>.

Pursuant to the most recent data, the median CR value in 2020 remains stable, and close to 100%, in particular also for civil and commercial cases (96%), across all three levels of instances<sup>161</sup>, including the second and third one<sup>162</sup>. This data is to be interpreted in the sense that courts are not overall

<sup>152</sup> ‘The European Commission for the Efficiency of Justice (CEPEJ) was set up by the Committee of Ministers of the Council of Europe in September 2002. It is entrusted primarily with proposing concrete solutions suitable for the Council of Europe member States for: (i) promoting the effective implementation of existing Council of Europe instruments used for the organisation of justice; (ii) ensuring that public policies concerning courts take into account the justice system users; (iii) contributing to the prevention of violations of Article 6 of the European Convention on Human Rights and, thereby, contributing to reducing congestion in the European Court of Human Rights’. EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 9, wherea since 2004, the CEPEJ has undertaken a regular process for evaluating judicial systems of the Council of Europe's member states.

<sup>153</sup> On the point, see EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 123-159.

<sup>154</sup> See in this regard opinion No. 3, whereby the CCJE stated that “(i) judges should be guided in their activities by principles of professional conduct, (ii) such principles should offer judges guidelines on how to proceed, thereby enabling them to overcome the difficulties they are faced with as regards their independence and impartiality, (iii) the said principles should be drawn up by the judges themselves and be totally separate from the judges’ disciplinary system, (iv) it is desirable to establish in each country one or more bodies or persons within the judiciary to advise judges confronted with a problem related to professional ethics or compatibility of non-judicial activities with their status” (Opinion n 3 (2002) on the principles and Rules Governing Judges’ Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality, paragraph 49), EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 77.

<sup>155</sup> See European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 128-129.

<sup>156</sup> See European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 131-136.

<sup>157</sup> See European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 130.

<sup>158</sup> The two CEPEJ indicators are based on: length of civil proceedings, the number of incoming and resolved cases and the number of pending cases per unit time, see EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 125-126.

<sup>159</sup> European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 125.

<sup>160</sup> European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 126.

<sup>161</sup> European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 134.

<sup>162</sup> EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 155 on second instance courts, and <sup>159</sup> on third instance courts.

accumulating backlog during their operation, despite clear variations emerging among different MS, as better indicated in the summary offered by the Table 2 below.

**Table 2: Clearance Rate as a measure of a Justice System**

State	CR 1st Instance	CR 2nd Instance	CR 3 <sup>rd</sup> Instance
Germany	98.1%	102.9%	NA
Austria	99.8%	102.1%	103.8%
France	92.9%	105.3%	104.9%
Italy	104.0%	114.6%	89.2%
Spain	86.3%	116.9%	74.7%
Portugal	97.8%	107.6%	89.2%

The average and median DT for civil and commercial litigation in 202 amounts to 293 and 237 days respectively for first instance decisions<sup>163</sup>. The second and third instance courts instead require a median DT of 177 and 172 respectively<sup>164</sup>. However, relevant variations may be observed among MS, that are better summarised by the Table 3 below.

**Table 3: Disposition Time as a measure of a Justice System**

State	DT 1st Instance	DT 2nd Instance	DT 3 <sup>rd</sup> Instance
Germany	237	265	NA
Austria	156	77	118
France	637	607	485
Italy	674	1026	1526

<sup>163</sup> European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 134.

<sup>164</sup> European Commission for the Efficiency of Justice (CEPEJ), *CEPEJ Evaluation Report 2022*, cit., 127 and 157.

State	DT 1st Instance	DT 2nd Instance	DT 3 <sup>rd</sup> Instance
Spain	468	227	888
Portugal	280	99	126

A possible way of interpreting this briefly summarised data, for the purposes of the current analysis, is that while certainly overall functional the MS's judiciary displays room for improvement when it comes to civil and commercial litigation, in particular within specific countries, and primarily with respect to the time needed to reach a first instance decision. It may further be observed that often – even if not always (see for instance Italy, Spain and Portugal ) – those countries that do not have a dedicated court system, specialized exclusively in commercial litigation, appear to perform less well than the others.

Some of the most relevant aspects highlighted by the DBR seem thence being confirmed even by the CEPEJR, in particular as per the time component of the efficiency equation considered.

### 2.2.3. Discussion

Overall, the presented data may be interpreted in the sense that Common Law jurisdictions (primarily the US and the UK, together with Singapore) are more efficient in handling civil and commercial litigation, above all in terms of time needed to reach a first instance decision, with the exception of certain MS, such as Germany and France, who appear to score similar results. To the contrary, civil law jurisdictions – and among them the considered MS – seem to ensure more limited costs for adjudication, thence overall easing access to justice.

However, the first criterion most likely displays a greater bearing in commercial contracts and business transactions, since attorney's fees will most typically be lesser of a concern for such sophisticated parties.

If focus is placed on time-to-adjudication, the perception of greater competence of certain courts over others may thence appear to be justified.

The annual report on the state of English civil justice by the Lord Chief Justice from 2020 is coherent with this particular interpretation. By referring to the Commercial Court in London, the report points out how 75% of the work conducted before that court is of an international nature, and 50% does not involve UK-based parties<sup>165</sup>. Most often, such commercial cases are in fact general contract cases<sup>166</sup>, as parties often negotiate using standard forms with a specific provision electing English law as the governing law of the agreement, or expressly opting for English courts to resolve any disputes that may arise<sup>167</sup>.

The data so briefly summarised is further confirmed by the statistics published by the London Court of International Arbitration, whereby in 2022, 88% of parties in LCIA Arbitrations came from countries

<sup>165</sup> See LORD CHIEF JUSTICE OF ENGLAND AND WALES, *The Lord Chief Justice's Report 2020*, London 2020, 24.

<sup>166</sup> The report indicates that the largest single category was general contractual claims (166), representing 23% of new claims, see JUSTICE, *The Commercial Court Report 2021–2022*, London, 2023, 21.

<sup>167</sup> See JUSTICE, *The Commercial*, cit., 18.

other than the United Kingdom, almost 95% of its cases involved a foreign party, while 75% of cases were entirely between foreign parties<sup>168</sup>.

This seems to demonstrate a clear preference - whenever possible - for the British system, and for common law more broadly, and more specifically for its business and commercial contract regulation<sup>169</sup>.

The reason for such a preference is not necessarily to be commended as univocally positive. Indeed, the greater efficiency in adjudication of courts is most likely the consequence of the more limited number of cases decided that, in turn, might be dependent upon the greater costs in accessing justice, in particular for non-sophisticated business parties. Alternative Dispute Resolution mechanisms may be in place that successfully deflate excessive litigation from tribunals – e.g. mediation and other mechanisms – but efficiency ought not be per se be considered the most relevant criterion to be satisfied. After all, the administration of justice to all is one of the essential duties of the modern state, since the French revolution<sup>170</sup>. An in-depth analysis of all the implications of the data summarized, as well as of a debate of its potential justifications certainly falls beyond the scope of the present study<sup>171</sup>. It shall thence suffice to conclude that some of the reasons why certain courts and jurisdictions are preferred to EU ones in case of commercial contracts litigation may be rooted in the overall functioning of the judicial system, in its organization (e.g. the presence of dedicated and specialized courts for said matters), and their overall efficiency in delivering faster decisions, at least in the first instance.

## 2.3. Legal Certainty: Identifying Applicable Law and the Doctrine of Contractual Types

### 2.3.1. The “alien contract” and the alternative approaches to contract qualification

While all legal orderings will present some fully regulated contractual types as well as a general theory of contract, how a given contractual agreement will be subsequently qualified by a court called in to decide upon it varies greatly across legal cultures.

<sup>168</sup> See ARBITRATION, LCIA Arbitration and ADR worldwide 2022 Annual Casework Report London, 2022, 14.

<sup>169</sup> The same seems to be confirmed by other reports, such as the The Global Financial Centres Index 33, compiled by the Z/Yen Group, see <https://www.zyen.com/publications/public-reports/the-global-financial-centres-index-33/>. London and New York topped every single category in their index, including best business environment, the most impressive infrastructure, the most developed financial centre and the top overall reputation.

<sup>170</sup> The idea whereby access to litigation before a court ought to be deemed an extrema ratio or a tool of last resort is harshly criticized also by British scholars –ANDREWS, *The Modern Civil Process : Judicial and Alternative Forms of Dispute Resolution in England*, Tübingen, 2008, 3, who thence speaks about “courts of last resort” – who point out how English common law often ensures only a “formal right to access” that “can become empty or nugatory unless there is real and effective opportunity to gain representation for presenting skilful legal analysis and advocacy in difficult cases and where, otherwise, a litigant will not enjoy a level playing field”, see NEIL, *Accessible, Affordable, and Accurate Civil Justice – Challenges Facing the English and Other Modern Systems*, Place Published, 2013, 5.

<sup>171</sup> In particular it may not be argued in the sense of an overall superiority of Common Law systems, as otherwise maintained by LA PORTA-LOPEZ-DE-SILANES-SHLEIFER, *The Economic*, cit., 285-287, but criticized by others such as D. Berkowitz, K. Pistor, J.F. Richard in their article “The Transplant Effect”. They find that La Porta et al., ‘On the one hand, they propose a relation from legal family to quality of the law to financial market development to economic growth. On the other, they present data on the extensiveness and effectiveness of legal institutions (for which we use the shorthand “legality” in this paper) and show that legality is highly correlated with GDP. Yet, they fail to make a convincing case that legal families and legality are correlated. If legal families cannot explain legality, but legality is highly correlated with growth, we need alternative explanations for the determination of reality’. see BERKOWITZ DANIEL-PISTOR-RICHARD, *The Transplant Effect in The American Journal of Comparative Law*, 51, 2003, 167.



Some scholars defined this issue as that of the qualification of so-called “alien contracts”, by that intending contractual agreements that were conceived in a different – thence alien – jurisdiction, rooted on a different legal culture and system, then merely translated into another language in the attempt to import a specific economic model, scheme or operation. Examples of alien contracts under Italian law included, for a long time – before ad-hoc legislation was enacted – franchise agreements<sup>172</sup>, leasing contracts<sup>173</sup>, factoring<sup>174</sup> and securizations<sup>175</sup>, all developed under American common law and transplanted into Italian law in the attempt to mimic certain economic and business structures. Today share purchase agreements, and merger contracts could still be considered as such due to the lack of dedicated regulation, as well as the frequent adoption of clauses that are clearly derived from the models developed under the common law<sup>176</sup>.

When deciding a dispute concerning an alien contract or anyway a contract that does not clearly belong to the types provided for by law (within a specific legal ordering), the spontaneous attitude of judges is to identify the regulated contractual type that more closely resembles the specific agreement<sup>177</sup>, rather than resorting to the general theory of contract and thence leaving the most autonomy to parties’ decisions.

In such a perspective, the judge analyzes the elements of the contract that differ from those expressly provided for by the legal contractual type he considered *prima facie* analogous and decides whether they (i) are ancillary to the overall function pursued by the agreement or, to the opposite, (ii) are to be deemed constitutive of another regulated contractual type. Only in those cases where those elements are indeed essential as they define the function of the specific agreement, and yet they are (iii) considered not to fall under any type, the contract will be deemed atypical.

In the situation sub (i), the judge will conclude that the heterogeneous elements do not prevent the contract from falling within the regulated type<sup>178</sup>, and will thence apply that regulation fully.

<sup>172</sup> Law of May 6th 2004, n. 129, Norme per la disciplina dell'affiliazione commerciale. PARDOLESI, entry «*Distribuzione (contratti di)*», in *Digesto delle discipline privatistiche, Sezione Commerciale*, V, Torino, 1990, 1 ff.; De Nova, entry «Franchising», in *Digesto delle discipline privatistiche, Sezione Commerciale*, VI, Torino, 1991, 296 ff.; Frignani, Il “franchising” di fronte all’ordinamento italiano: spunti per un’indagine comparatistica, in *Factoring, leasing, franchising*, Torino, 1996, 203 ff.; Cian, La nuova legge sull’affiliazione commerciale, in *Le nuove leggi civili commentate*, 2004, 1153 ff.; Fici, Il Franchising, in *Commentario del Codice Civile diretto da Gabrielli, Valentino (edited by)*, Leggi collegate, Torino, 2011, 257 ff.

<sup>173</sup> Law of August 4th 2017, n. 124, Legge annuale per il mercato e la concorrenza, Art. 1(136 et seq.). Luminoso, Natura del leasing e oggetto dello scambio, in *Riv. it. leasing*, 1987, 525 ff.; De Nova, entry «Leasing», in *Digesto delle discipline privatistiche, Sezione Civile*, X, Torino, 1993, 462 ff.; Bussani, entry «Leasing» in *Digesto delle discipline privatistiche, Sezione Civile*, Torino, 2011, 588 ff.; Di Rosa, La disciplina della locazione finanziaria nella prima legge annuale per il mercato e la concorrenza, in *I Contratti*, 2, 2018, 215 ff.

<sup>174</sup> Law of February 26th 1991, n. 52, Disciplina della cessione dei crediti di impresa. De Nova, entry «Factoring», in *Digesto delle discipline privatistiche, Sezione Commerciale*, V, Torino, 1990; Clarizia, I contratti nuovi. Factoring locazione finanziaria, Torino, 1999; Bussani, *Contratti moderni. Factoring, franchising, leasing*, Torino, 2004.

<sup>175</sup> Law of April 30th 1999, n. 130, Disposizioni sulla cartolarizzazione dei crediti. Frignani, La “securitization” come strumento di smobilizzo dei crediti di massa (profili di diritto comparato europeo), in *Foro Italiano*, 118, 1995, 293 ff.; Pardolesi, La cartolarizzazione dei crediti in Italia. Commentario alla legge 30 aprile 1999, n. 130, Milano, 1999; Macario, Aspetti civilistici della cartolarizzazione dei crediti, in *Rivista di diritto privato*, 7, 2002, 5 ff.

<sup>176</sup> CORDERO MOSS, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, 2011, 37-61.

<sup>177</sup> CORDERO MOSS, *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, in *Global Jurist* 7, 2007, 1 ff.

<sup>178</sup> For example, an obligation to complete customs formalities on behalf of others would give rise to an agency contract. However, if it is accompanied by an obligation to conclude a contract of carriage, it would qualify as an ancillary performance of a shipping contract.

In the scenario sub (ii), the court, by applying the theory of prevalence, identifies the main obligation that characterizes the specific agreement subject to its decision, and applies the set of rules that belong to the contractual type that is most similar<sup>179</sup>, compared to the others.

In the scenario sub (iii), despite the atypical nature of the contract, judges nonetheless often assimilate it to one of the regulated contractual types and apply the relevant legal regime<sup>180</sup>, rather than resorting to the general theory of contract and respecting the parties' private autonomy in everything which is not expressly regulated by those norms.

Such an approach, results in the application of the legal regime of the regulated contractual types to every contract, even if the parties have wished to deviate from it, or intended to negotiate an entirely different agreement, often leading to ex ante unpredictable results, ultimately affecting legal certainty. This is particularly true for commercial transactions, for the reasons already summarized above (see §2.2 above).

### 2.3.2. A case study: a sale and purchase agreement and its warranties

To better exemplify this concept, we might take a specific case, adjudicated by the Court of Appeal of Milan on November 21<sup>st</sup> 2008<sup>181</sup>.

The case dealt with a *Sale and Purchase Agreement*<sup>182</sup>, between an Italian target company and another Italian company operating in the food sector, and was subject to Italian law.

Given the economic relevance of the operation, it is customary to determine that the overall price is to be paid in a number of subsequent instalments, upon the meeting of specific conditions or the verification of statements and representations about the target company. Indeed, merger contracts as well as purchase agreements of this kind may contain an articulated set of warranties<sup>183</sup>, often in the form of so-called representation clauses<sup>184</sup>, whereby the seller specifies the characteristics of the company sold. These warranties may relate to the characteristics of the shares (*legal warranties*) or to the assets of the company (*business warranties*), and contain a promise or statement of fact, the breach of which usually gives rise to an obligation to pay indemnities or allows the purchaser to reduce one of the residual payments of the overall price promised.

Such clauses ease transactions in as much as they allow the purchasing company the opportunity to acquire control and run the target company for some time and verify the correctness of the warranted facts and statements of the seller over time. Should the declarations of the latter be inaccurate, and the

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<sup>179</sup> For example, the catering contract contains elements of several contractual types, including the procurement contract (services) and the sales contract. Since the catering contract is therefore a mixed contract, the applicable legal regime under the theory of prevalence would be that of the contractual type – service contract or sales contract – whose elements predominate in the agreement concluded between the parties.

<sup>180</sup> For example, the parking contract is considered to be atypical, but the legal regime of either the deposit contract or the lease contract was alternatively applied to it.

<sup>181</sup> Court of Appeal of Milan, November 21<sup>st</sup> 2008, n. 3138.

<sup>182</sup> A Sale and Purchase Agreement is a common contract in international business practice whereby one party transfers a significant shareholding in a joint stock company or a limited liability company to another party. Cf. DE NOVA, *Il Sale and Purchase Agreement: un contratto commentato*, Torino, 2021, 1.

<sup>183</sup> In common law systems, warranties are promises “by the seller to take contractually specified measures in case the performance of the purchased item is bad. Such measures are typically money- back warranties, price reductions, subsequent-improvement, or replacement warranties”, cf. Wehrt, *Warranties* in *Encyclopedia of Law and Economics*, 2000, 256 ff.

<sup>184</sup> In common law systems, representations are statements “which merely assert the truth of a given state of facts and invite reliance upon it”, CHEN-WISHART, *Contract Law*, New York, 2005, 198.

target company present legal concerns or characteristics that deviate from what was ensured during negotiations and with the signing of the final agreement, the buyer will be allowed to retain part of the promised price he still is obliged to pay – after the transfer of control – or will receive a payment of a pre-determined amount.

In the case at hand, after signing the final contract, the purchasing company discovered numerous liabilities in the assets of the target company. An arbitration was thence triggered by the buyer, asking for the payment of contractual indemnities and damages pursuant to the *business warranties* contained in the agreement. Indeed, the Arbitration Committee found in favour of the claimant, and condemned the seller to the payment of the amounts due, pursuant to the recalled warranties.

However, the Court of Appeal of Milan overturned the decision reached in the arbitration and upheld the seller's defence based on the expiry of the one-year statute of limitation, provided for by Article 1495 of the Italian Civil Code (henceforth ICC). The reasoning of the court followed the scheme depicted above, and first qualified the contract at hand as a normal sales contract, for the purpose of article 1470 ICC<sup>185</sup>. Then it attempted to frame the representation clauses and other warranties offered as the legal warranties regulated under articles 1470 and ff. ICC. More specifically it maintained that representation clauses resembled the warranty for the promised qualities of the goods sold, regulated by art.1497 ICC<sup>186</sup>. Subsequently, the court applied the one-year statute of limitations set by art. 1495 ICC that bars any request for indemnity based on such kind of clauses, one year after delivery of the good sold. Statute of limitations are indeed mandated by the legislator and non-negotiable by the parties<sup>187</sup>. Thence the different and longer period of time the representation clause ensured the buyer to legitimately activate the warranty as defined in the share purchase agreement was deemed invalid as it attempted to derogate a mandatory provision in the regulation of sales contracts under Italian law.

It is obvious that the parties had originally interpreted such clauses as entirely different from those detailed by art. 1497 ICC and thence did not expect to encounter such a limitation to their autonomy in the definition of the time allowed for legitimately exercising the corresponding legal action. Had they so anticipated the interpretation of the judge, it is imaginable they would have modified the economic structure of the agreement, maybe diminishing the agreed-upon price, to account for the increase in business risks connected arising from the impossibility of clearly identifying all the potential concerns in the target company before the expiration of the one-year put forth by art. 1495 ICC.

Indeed, Business warranties are introduced to protect the buyer's position against discrepancies between the company's assets and what is stated during negotiations, since the liabilities or losses the buyer would potentially suffer as a consequence thereof, often manifest themselves years after the purchase, without that the acquiror may anticipate them. On the contrary, legal warranties provided for by Articles 1490 and 1497 ICC intend to protect the buyer against material defects in the goods existing at the time of the conclusion of the contract. The short limitation period (starting from the date of delivery) provided for in Art 1495 for legal warranties meets the need to ensure that such defects are

<sup>185</sup> On the sales contract under Italian law, see, ex multis, MACARIO, entry «Vendita (profili generali)», in Enciclopedia giuridica, Roma, 1994, 24 ff.; LUMINOSO, entry «Vendita», in Digesto delle discipline privatistiche, Sezione Civile, XIX, Torino, 1999, 679 ff.; BIANCA, entry «Vendita (Diritto vigente)», in Novissimo digesto italiano, XX, Torino, 1975, 605 ff.

<sup>186</sup> SIRACUSA, La garanzia per mancanza di qualità, in La vendita, Bin (edited by), IV, tomo I, Padova, 1996; TERRANOVA, La garanzia per vizi e difetti di qualità della cosa venduta, in I contratti di vendita, Valentino (edited by), nel Trattato dei contratti, Rescigno-Gabrielli (edited by), VII, tomo II, Torino, 2007, 1081 ff.

<sup>187</sup> On the mandatory nature of the statutory rules on limitation in general and in the sales contract in particular under Italian law, see AGOSTINIS, La garanzia per i vizi della cosa venduta. Le obbligazioni del compratore, in Comm. Schlesinger, Milano, 2012, 171.

challenged promptly, as soon as the acquiror obtains possession and is thence put in the condition to detect them through observation or use. A prolonged inactivity could, instead, be considered a form of acquiescence.

It suffices to take the legislative history of the ICC into account to unveil the radically different rationale of those dispositions, as opposed to the contractual clauses negotiated by the parties<sup>188</sup>. Yet that did not prevent the judge to undergo the theoretical analysis described above (see §2.2.1 above) and qualify the potential atypical business agreement as a typical sales contract, and further apply its regulation entirely and without adaptation, also framing those representation clauses as typical warranties and not atypical ones.

### 2.3.3. Contd.: An alternative approach

To avoid the unpredictable results of legal reasoning based on total adherence to regulated contractual types, a different approach to the qualification of alien and atypical contracts was proposed<sup>189</sup>.

The regulated contractual types should not be seen as rigid models within which every contractual agreement must be framed. The reality of commercial transactions would often make this type-fitting procedure impossible in practice, and the full application of the legal rules on contractual types could risk overriding what the parties have agreed at the end of long negotiations with high transaction costs.

For these reasons, expressly regulated contractual types should be regarded as flexible reference frameworks which could provide private parties with general indications as to the rules applicable to their agreements with regard to a specific question of interpretation or application. On the contrary, according to this approach, the legal regime of the regulated contractual types should not be invoked to disapply negotiated clauses, provided that they do not conflict with the mandatory rules applicable to all contracts.

On this basis, alien contracts, drawn up in accordance with international business practice<sup>190</sup>, may deviate from the default rules on contractual types and this should not, in principle, affect their compatibility with the legal system in which they are executed, whereas mandatory rules applicable to all contracts constitute a barrier which even alien contracts cannot overcome.

Returning to the example of *business warranties* in the light of this different approach to contractual types, these clauses would not be subject to the legal regime of sales contracts as this could in practice frustrate the function for which they are included in the *Sale and Purchase Agreement*. In any case, *business warranties* would remain subject to the mandatory rule of Art. 2946 ICC, which provides for a general standard limitation period of ten years for the exercise of rights. Indeed, this is the path that the Italian courts have subsequently followed in order to facilitate the spread of commercial contracts throughout the country<sup>191</sup>.

<sup>188</sup> Report to his Majesty the King Emperor, by the Minister Chancellor (Grandi) presented at the hearing of March 16<sup>th</sup> 1942-XX for the approval of the text of the Civil Code.

<sup>189</sup> LARENZ, *Lehrbuch des Schuldrechts*, München, 1976; LARENZ, *Methodenlehre der Rechtswissenschaft*, 1990; DE NOVA, *Il tipo contrattuale*, Padova, 1974, 121 ff.

<sup>190</sup> RABEL, *Das Recht des Warenkaufs*, Berlin, 1957, 36.

<sup>191</sup> For instance, the Italian Corte di Cassazione, July 24<sup>th</sup> 2014, n.16963, overturned the judgment n. 3138/2008 of the Court of Appeal of Milan.

### 2.3.4. Foreseeability of contractual qualification as a minimal condition for legal certainty

The qualification of contracts within the regulated contractual types is therefore a matter of interpretation, since the framing of a contract within one legal scheme rather than another is decisive for determining the applicable legal rules governing the relationship between the parties<sup>192</sup>.

This process leads to legal uncertainty, as the parties often fail to anticipate how a contract will be qualified by the courts and thus to identify the applicable rules and any terms that may be unlawful or void as contrary to the mandatory rules regulating the relevant contractual type.

In this way, the judge integrates the contract not only on the basis of the general rules on contracts (*infra* §2.4)<sup>193</sup>, but also on the basis of the specific rules governing the contractual type<sup>194</sup>.

From the drafters' perspective, this leads to an unexpected interpretation which may produce undesirable results (*supra* §2.2.2).

Indeed, this approach is capable of altering a complex economic equilibrium that has been achieved as a result of long negotiations between highly qualified parties, in the absence of any reason justifying the extensive intervention of the court in the contract. In these hypotheses, there is in fact no real need for the judicial protection of a (less sophisticated) contractual party or of a predominant public interest that is endangered by the contract.

The reasons for such a tendency are certainly dependant upon a multiplicity of factors, partly of a cultural nature, both rooted in the very training of jurists in analogical reasoning, and in the natural propensity to assimilate foreign legal concepts the interpreter is less familiar with. To some extent, they also reflect the very perception of the role of the state and society in the economy embodied by society. Said otherwise, more liberal states typically display less-interventionist judges, as opposed to those where welfare is more developed. Discussing how and to which extent those and other factors contribute to the described outcome falls beyond the purposes of the current study, and is less relevant a concern than the mere observation of the phenomenon, as well as of the understanding of the need for a change of perspective.

It is however certain that such judicial attempts to force a classification of so called "alien contracts" within the regulated contractual types reflects an inability to grasp the different functions and purposes pursued by the contracting parties, and a tendency to alter the economic equilibrium reached through negotiations. Those contracts, instead, ought only be assessed in terms of their actual legitimacy and lawfulness.

<sup>192</sup> SACCO, *Autonomia contrattuale e tipi*, in *Rivista trimestrale di diritto e procedura civile*, 1966, 800.

<sup>193</sup> On the fact that the rigid qualification within regulated contractual types does not guarantee better results in terms of legal certainty than the application of general clauses, see DE NOVA, *Il tipo contrattuale*, cit., 57.

<sup>194</sup> This attitude is generally linked to the traditional role of the judge and his degree of autonomy from the law in civil law systems as opposed to common law systems. As noted, "the common law judge is less compelled by prevailing attitudes to cram the dispute into a box built by the legislature that is his civil law counterpart (...). (He) has some measure of power to adjust the rule to the facts (...). In the civil law world (...), if the facts do not fit the (legislative) box, they must be forced out of shape in order to make them fit", MERRYMAN, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford, 1969, 54; DE NOVA, *Il tipo contrattuale*, cit., 56. More recently, see CORDERO MOSS, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, cit., 347. For a common law perspective on the traditional civil law conception of contractual types, *ex multis*, LAWSON, *A Common Lawyer Looks at the Civil Law*, Ann Arbor, 1953, 148; RYAN, *An introduction to the Civil Law*, Brisbane, 1962, 38.



This means that if it is not possible to establish the unlawfulness of a particular clause or of the agreement as a whole on the basis of its content<sup>195</sup>, judges should not attempt to impose legal rules known to them on transactions which do not really fit those rules and their rationale.

A legal culture that accepts this kind of reasoning will inevitably encourage those who may avoid the application of these rules or the jurisdiction of such courts to do so by opting for other legal systems, more respectful of private autonomy.

## 2.4. Legal certainty: contractual interpretation and integration of the legal relationship arising from an agreement

Differences in approaches to contract interpretation cause courts to reach potentially very different decisions about an identical case. This, in turn, profoundly influences the *ex ante* decision to subject a given agreement to one jurisdiction or another, as well as to one regulatory framework instead of a competing one.

Traditionally, English common law is said to be rooted in a – more – formalist approach, whereby the judge primarily aims at preserving the intention of the parties and minimize both interpretation and integration efforts and outcomes.

To the contrary, civil law countries are ever more inclined to conceiving the contractual relationship as a complex one<sup>196</sup>, the parties exert no final or ultimate control upon. The operation of general clauses ensures the possibility for the judge to specify (interpretation) or create (integration) additional duties, and obligations that might burden the parties or limit the possibility to exercise the rights emerging from the contract.

A more limited number of scholars, within the civil law tradition, also went as far as advancing a manifesto for a so-called “contractual justice”<sup>197</sup>, favouring judges’ intervention beyond mere

<sup>195</sup> BEALE-FAUVARQUE-COSSON-RUTGERS-VOGENAUER, *Cases, materials and text on contract law*, Oxford, 2019, 663 ff.

<sup>196</sup> Under German law the notion of the contractual relationship as a *Rahmenbeziehung* (a frame-like-relationship) also emerged in CANARIS, *Schutzgesetze – Verkehrspflichten – Schutzpflichten. Festschrift für Karl Larenz zum 80. Geburtstag*, München, 1983, 33 ff. and 84 ff.; LARENZ-CANARIS, *Lehrbuch des Schuldrechts. Allgemeiner Teil*, München, 1994, 359-360; HERHOLZ, *Das Schuldverhältnis als konstante Rahmenbeziehung (Ein Rechtsgrund für negative Interessenansprüche trotz Rücktritt und Wandlung)*, in *Archiv für die civilistische Praxis*, 130, 1929, 287; KRESS, *Lehrbuch des Allgemeinen Schuldrechts*, München 1929, 1 ff.; CASTRONOVO, entry «*Obblighi di protezione*», in *Enciclopedia giuridica Treccani*, XXI, Roma 1991, 1 ff.; STOLL, *Abschied von der Lehre von der positiven Vertragsverletzung: Betrachtungen zum dreissigjährigen Bestand der Lehre*, in *Archiv für die civilistische Praxis*, 136, 1932, 298-299.

<sup>197</sup> On the meaning of “contractual justice”, D’AMICO, *Giustizia contrattuale nella prospettiva del civilista*, in *Diritti lavori mercati*, 20217, 221 whereby “We can identify at least four different meanings that the expression (contractual) justice takes on in the current debate: a) justice as equality in exchange; b) justice as safeguarding the subjective equivalence of performance in the face of changing circumstances; c) justice as the bearer of values; and d) distributive justice. Within the latter we also include the reasons for efficiency. This amalgamation may seem anomalous with respect to the lexicon of current civil law literature, where we commonly speak of justice as opposed to efficiency” (translated from Italian). According to Dagan-Dorfman, *Justice in Contracts*, in *The American Journal of Jurisprudence*, 67, 2022, 1: “Contractual justice is a species of relational justice and is thus informed by the most fundamental normative underpinnings of private law in a liberal polity, namely, the maxim of reciprocal respect for self-determination and substantive equality”. HESSELINK, *Post-private Law?*, in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, PURNHAGEN-ROTT (edited by), Berlino, 2014, 40, maintains that “A core aspect of contractual justice is the refusal by the state to enforce unfair terms and contracts resulting from unfair exploitation. Private law should refrain from enforcing exploitative terms and contracts as a matter of respect for the private autonomy, the equality, and the human dignity of all contracting parties in all types of contracts. What kind of architecture contractual justice exactly requires should be a matter of constant reconsideration and deliberation with a view to periodical reviews of private law. In this context, consumer protection may sometimes turn out to be the best way of achieving contractual justice. However, it is very doubtful that ‘recasting consumer law as special law’ would be the architectural choice most congenial to improving contractual justice”. RAISER, *Il principio d’eguaglianza*



interpretation and gap-filling, to openly redetermine the economic aspects and balance of the agreement<sup>198</sup> that are typically deemed of the sole competence of the parties<sup>199</sup>.

Beyond such extremes, while it is undoubtedly true that most civil law jurisdictions are more prone to resorting to contract integration, and that doctrines revolving around general clauses are much more developed in continental Europe (see §2.4.2 below), doctrines do inevitably exist in common law jurisdictions, which display a great degree of convergence with continental European ones. After all, estoppel is not so different from *exceptio doli* or the prohibition of *venire contra factum proprium*, and both may be perceived as specifications of the principle of good faith (see §2.4.2 below).

The topics to be addressed in the current section represent some of the most relevant doctrinal as well as functional debates in the field of private law and have elicited very articulate contributions by scholars of fame and expertise. No attempt to summarize those teachings in but a few pages could ever do those discussion any justice. However, given the scope of the current study, it is necessary to touch upon those matters with a very specific angle.

Indeed, without any ambition for completeness, it is essential to stress the difference between a formalist and a contextualist approach to contractual interpretation, focussing on the possibility to restrict the scope of admissible evidence through merger clauses (see § 2.4.1 below). In fact, while there may be a relevant convergence between the two theoretical approaches to contractual interpretation, the major difference rests on the very aspect of the possibility for sophisticated parties of exerting a certain degree of control on what elements the judge will consider to determine the exact content of the contract, and ultimately the obligations residing on each one of them.

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*nel diritto privato, in Il compito del diritto privato, (edited by), Milano, 1990, 11 ff., claims that it is as hard to define a concept as the notions of "good and bad". BARCELLONA, Clausole generali e giustizia contrattuale. Equità e buona fede tra codice civile e diritto europeo, Torino, 2006, 313, emphasizes the distinction between contractual justice and social justice. Instead, MATTEI, Social Justice in European Contract Law: a Manifesto Study Group on Social Justice in European Private Law, in European Law Journal, 10, 2004, 658 sees the latter as a necessary foundation for a European contract law, together with regulatory legitimacy.*

<sup>198</sup> The movement begun with a series of decisions by the Italian Corte di Cassazione autonomously redefining as manifestly excessive a penalty default clause, expressly negotiated by the parties – see above all: Italian Corte di Cassazione, (SS.UU.) september 13<sup>th</sup> 2005, n.1812, in PESCATORE, *Riduzione d'ufficio della penale e ordine pubblico economico*, in *Obbligazioni e contratti* 2006, 415 ff.; DI MAJO, *La riduzione della penale ex officio*, in *Corriere giuridico*, 2005, 1534 ff.; SPOTO, *La clausola penale eccessiva tra ridicibilità di ufficio ed eccezione di usura*, in *Europa e diritto privato*, 2006, 353 ff. The judgment declared the competence of the court in reducing the amount of a penalty clause negotiated by the parties, absent an express request of the debtor required to pay it, so long as the court deemed the amount negotiated manifestly excessive.

<sup>199</sup> It shall suffice to consider how even how the core of EU Consumer law does not allow the judge to intervene and modify the economic (im)balance reached by the parties, which is taken as given. See the regulation of abusive clauses, Council, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, 29-34 (henceforth Dir. 93/13) that, in defining unfairness, explicitly excludes that it may be determined in light of "[...] the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language." (art. 4, par. 2). Which entails stating that even a disproportion in the reciprocal attributions of the parties is not relevant to conclude in the sense of the invalidity of a specific clause, much less so of the agreement overall. Indeed, the rationale for protecting the consumer *vis-à-vis* the professional is the difference in knowledge and information and not the disproportion in economic power, and the consumer is deemed best positioned to determine the economic convenience of the agreement, so long as no hidden legal cost is generated by his counterparty. On this matter, see VETTORI, *Autonomia privata e contratto giusto*, in *Rivista di diritto privato*, 1, 2000, 26, as well as the Italian Corte di Cassazione, november 25<sup>th</sup> 2021, n. 36740. See also SCHMIDT-KESSEL, *Europäisches Vertragsrecht*, in *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis*, Karl (edited by), Berlin, 2014, 373-394 and STÜRNER, *Die Rolle des EuGH bei der Kontrolle missbräuchlicher Klauseln in Verbraucherverträgen*, in *Deutschland und Polen in der europäischen Rechtsgemeinschaft*, Von Bar-Wudarski (edited by), München, 2012, 65 ff.

Then the issue of contractual integration will be synthetically discussed, limiting the analysis to the more meaningful doctrines – yet not the sole ones – to exemplify a tendency to extend the scope of contractual relevance to include interests that are not directly related to the contractual function, to be contrasted with the greater restraint that other doctrines ensure, preventing opportunistic behaviour and exploitation of one party over the other.

This will, in fact, put the debate in the relevant perspective of discussing potential reason for an overall disfavour of business parties for legal orderings that display an interventionist approach in defining the content of the agreement, beyond what is expressly negotiated.

#### 2.4.1. Formalist v/s Contextualist: Contract interpretation and the possibility for the parties to govern admissible evidence in a trial

A traditional law-school distinction between approaches to contractual interpretation is that between formalists and contextualists.

Formalists are deemed to attempt to reconstruct the subjective intention the parties manifested in the concluded agreement, limiting their analysis to the contractual document itself. For this very reason, the principle they abide by it is often referred to as “four-corner rule”, in as much as the relevant elements for judicial decision in adjudicating the contract are solely derived from the contractual document, within the four corners of the sheet of paper it is written upon. The rationale behind such an approach is that of preserving the original intention of the parties and the overall balance of duties, rights and obligations they have so thoroughly – and possibly rationally – negotiated. To some extent, while it may be challenged that all contractual parties are, in fact, perfectly aware of all choices made by entering into a given contractual agreement<sup>200</sup>, this may very plausibly be assumed about sophisticated business parties<sup>201</sup>.

Contextualists, instead, tend to take other aspects into account on top of and next to the contractual agreement *per se*. Such elements typically include precontractual statements like minutes, letters of intent and other documents, the behaviour of the parties *in executivis* – thence during the performance of contractual obligations –, and in some cases even after the contract expiration and/or full

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<sup>200</sup> Originally, the consumer discipline was based on the traditional economic model according to which agents are perfectly rational and capable of making decisions that always maximise their own welfare. However, this approach was strongly criticised from the 1960s-1970s by behavioural studies that demonstrated its invalidity. According to the theory of Herbert Simon, the classical model of the *homo oeconomicus* does not take into proper consideration that, in reality, human decision-making processes are mostly determined by unconscious and emotional factors. Therefore, individuals are influenced by various factors of social, environmental, and human nature. Humans are in fact subjects of a “bounded rationality” since they are limited by a whole series of biases that often lead them to behave inefficiently. For a more in-depth analysis of cognitive studies, see SIMON, *Models of bounded rationality: Empirically grounded economic reason*, 1997, 3; THALER-SUNSTEIN-BALZ, *Choice architecture*, in *The behavioral foundations of public policy*, 25, 2013, 428-439; THALER-SUNSTEIN, *Libertarian paternalism*, in *American economic review*, 93, 2003, 175 ff.; JOLLS-SUNSTEIN-THALER, *A behavioral approach to law and economics*, in *StAn. I. reV.*, 50, 1997, 1471; CARUSO, *Homo oeconomicus. Paradigma, critiche, revisioni*, 2012, 618; HASELTON-NETTLE-ANDREWS, *The evolution of cognitive bias*, in *The handbook of evolutionary psychology*, 2015, 724-746.

<sup>201</sup> Moreover, lack of rationality on the side of such parties ought not to be prized by the legislator adopting rules and approaches that favour a lack of sound business judgment. This is quite evident in the bankruptcy law, where helping inefficient and irrational businesses would only serve to increase the cost of capital for all businesses, as creditors would be less willing to lend money if they knew that was a chance that their loans would be repaid through bankruptcy. On this matter, see SCHWARTZ, *A Normative Theory of Business Bankruptcy*, in *Virginia Law Review*, 91, 2005, 1199-1265; SCHWARTZ, *Bankruptcy Related Contracting and Bankruptcy Functions*, in *Handbook on Corporate Bankruptcy*, B. Adler ed., E. Elgar Publishing, 2017, 1-58.

performance<sup>202</sup>. In such a perspective, even if a clause were clearly written, and its interpretation might appear *prima facie* plain and straightforward, taking the objective meaning of the written words into account, additional elements may be taken into considerations, inducing the interpreter to attribute a different meaning or reach a different decision about what the obligations of the parties materially are, and how they are to be understood.

To exemplify, should a contractual clause set an exact date for a recurring payment (such as in the lease of a piece of real-estate) whereby a delay in payment even by a few days may be objectively deemed a breach – leading to the liability of the debtor – the finding of a contextualist judge interpreting the clause may be such that the delay does not amount to breach, so long as the debtor demonstrated that during the execution of the contract the creditor tolerated similar delays systematically, without ever raising objections. Indeed, the court may deem that the behaviour of the parties *in executivis* has integrated the meaning of the written words, transforming what could be deemed a boiler plate clause, typical of a standard or form contract of that very kind, into a different clause that incorporates the true intention of the parties, by considering their overall behaviour. The circumstance that it may be demonstrated that the creditor tolerated systematic yet limited delays in payment induces the judge to conclude that the term for the payment was never understood by the parties as strict, leading to a breach, but that flexibility was to a certain extent tolerated, thence inducing a legitimate expectation on the side of the debtor that a reasonable delay in performance would not be sanctioned. In such a perspective, a sudden request for damages (or other potential legal consequences such as contract cancellation) due to an identical delay in payment would be considered potentially opportunistic on the side of the creditor and violating the induced reasonable reliance of the counterparty who saw identical behaviours being systematically tolerated over time<sup>203</sup>.

Typically, formalist approaches to contractual interpretation are understood as ensuring greater *ex ante* certainty and foreseeability of the judicial outcome, whereas contextualists are perceived to be more concerned with substantive justice in the single case, or even “contractual justice”, thence with the balance of interests, rights and obligations emerging from every contract<sup>204</sup>. Partly rooted in consumerism<sup>205</sup> – an interpretation of European consumer law intended to ensure protection to the weaker contractual party –, it extends the need for protection to B2B transactions<sup>206</sup>, namely in favour

<sup>202</sup> See ANDRÉ-GRIGNON-DUMONT, *Après contrat*, Levallois, 2005, 237 ff.; BINDER, *Nachsorgende Vertragspflichten? Begründung und Reichweite fortdauerender Schutzpflichten nach Leistungsaustausch in Schuldverhältnissen*, in *Archiv für die civilistische Praxis*, 2011, 587-625; SCHOPPER, *Nachvertragliche Pflichten. Das Pflichtenprogramm nach Erlöschen der vertraglichen Hauptleistungspflicht*, Wien, 2009, *passim*; please also allow reference to BERTOLINI, *Il postcontratto*, Bologna, 2018, *passim*.

<sup>203</sup> See the Italian Corte di Cassazione, June 6<sup>th</sup> 2018, n. 14508, 7, whereby “[...] The landlord's forbearance in receiving the rent beyond the stipulated period renders inoperative the express termination clause in the contract, which, however, resumes effectiveness if the creditor provides a new manifestation of willingness to recall the debtor to the exact fulfilment of its obligations” (translated from Italian). See also IMBRUGLIA, *La Clausola di Tolleranza in Persona e Mercato*, 2017, 219 ff.; DE NOVA, *Il Sale and Purchase Agreement: un contratto commentato*, cit., 272; PEEL, *The common law tradition: Application of boilerplate clauses under English law*, in *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, G (edited by), Cambridge, 2011, 129-178.

<sup>204</sup> See fn. 197 above.

<sup>205</sup> On which, see NAVARRETTA, *Il contratto “democratico” e la giustizia contrattuale in Giurisprudenza per principi e autonomia privata*, Mazzamuto-Nivarra (edited by), Torino 2016, 63.

<sup>206</sup> Norms aiming at protecting the weak(er) entrepreneur include Council, Directive 2006/123/EC of 12 December 2006 on services in the internal market OJ L 376/36, 27.12.2006, 36-68 (henceforth Dir. 06/123) where the subject to be protected is the “client”. The same applies to investment services, where the Council, Directive 2014/65/EU of 15 May 2014 on markets in financial instruments OJ L 173, 12.6.2014, 349-496 (henceforth Dir. 14/65) that divides client into three different categories and associates a distinct level of protection to each of them according to the different degree of professionalism, and allows professionals to ask for the same protection as other, non-professional, clients. Similarly, with

of those parties that, despite theoretically professional, do not possess equal economic and bargaining power, as well as a comparable level of information, expertise, and sophistication. The rationale for protecting consumers is hence generalized and extended to other weak(er) contractual parties, and protection is considered to include purely economic concerns, such as the adequacy of a penalty clause negotiated in an agreement<sup>207</sup>.

Discussing which interpretative method is to be preferred is very theoretical and abstract a debate, potentially one that may not be solved in such general terms, and certainly something that falls beyond the purposes of the current research. Indeed, while it is typically maintained that common law countries favour formalist approaches and civil law countries, in particular in continental Europe, privilege a contextualist one, both methodologies are potentially to be adopted in different circumstances.

In particular, whenever there is a difference in knowledge and contractual power between the parties so that it is plausible that only one actually was aware of the content of the agreement, or predetermined it in its entirety – allowing for a mere take-it-or-leave-it alternative for the counterparty –, taking additional elements into account, such as the behaviour of the parties *in executivis*, certainly increases the chance of both understanding the real intention of the parties when entering in the agreement and, as a consequence, offer a more balanced assessment of rights and obligations, which ultimately minimizes risks of opportunistic behaviour by the more knowledgeable and – economically – powerful party of the two. In such a perspective, it is of the outmost importance that judges abide by

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the rise of digital platforms, the European legislator has adopted, for the first time, a regulation specifically aimed at protecting business users against the power of online intermediary service providers (Council, Regulation 2019/1150/EU of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services OJ L 186, 11.7.2019, 57-79). On these matters, see ROPPO, *Regolazione del mercato e interessi di riferimento. Dalla protezione del consumatore alla protezione del cliente?*, in *Rivista di diritto privato*, 2010, 19-35; AMOROSINO, *Manuale di diritto del mercato finanziario*, 2014, 360; RINALDO, *Beyond Consumer Law – Small Enterprises, Independent Contractors and other Professional Weak Parties*, in *European Review of Contract Law*, 15, 2019, 227-250.

<sup>207</sup> Indeed, the Italian Corte di Cassazione n. 1812 cit., see fn.198 above, concluded in favour of the possibility for the courts to reduce the negotiated amount of a penalty default in the absence of a specific request of the debtor whose payment was demanded by the creditor acting on the basis of such very clause. The court argued in favour of a constitutionally-oriented understanding of private autonomy, so as to ensure an equilibrium and proportionality in the agreement. In a similar perspective, the Italian Corte di Cassazione, September 18<sup>th</sup> 2009, n. 20106 whereby the court deemed the withdrawal from a distribution agreement with about 200 small car dealers by Renault Italia abusive, despite the car manufacturer acting on the basis of the business agreement entered into with each and every such dealers. The court decided on the basis of the application of the principle of good faith and fair dealing in contracts' negotiation and performance, observing how a specific exercise of a right or legal power may be deemed causing an unjustified disproportion between the advantage of the one party and the harm suffered by the other. The judge is deemed obliged to balance the opposing interests of the parties, seeking economic equilibrium through general clauses, as required by the principle of good faith and the constitutionally-relevant principle of solidarity (see art. 2 Italian Constitution). See also Italian Corte di Cassazione, November 15<sup>th</sup> 2007, n. 23726 in VIRGADAMO, *Frazionamento del credito e divieto di abuso nel processo civile*, in *L'«interpretazione secondo costituzione» nella giurisprudenza. Crestomazia di decisioni giuridiche*, CARAPEZZA FIGLIA-PERLINGIERI (edited by), 2012, 107 ff. See also SALERNO, *Abuso del diritto, buona fede, proporzionalità: i limiti del diritto di recesso in un esempio di jus dicere «per principi»*, in *Giurisprudenza italiana*, 2010, 809 ff.; MACARIO, *Recesso ad nutum e valutazione di abusività nei contratti tra imprese: spunti da una recente sentenza della Cassazione*, in *Obbligazioni e contratti*, 2009, 1577 ff.; MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass., 20106/2009*, in *La nuova giurisprudenza civile commentata*, II, 2010, 319.

clearly defined criteria that academics may contribute to define<sup>208</sup>, so that the interpretative outcome is foreseeable and objective<sup>209</sup> (see §2.4.2 below).

To the contrary, when sophisticated parties negotiate an agreement at length it is most likely that they have well balanced opposing interests and carefully assessed reciprocal obligations, whereby opportunism may instead emerge *ex post* by that party who exploits ambiguities or the elasticity of the legal system and its general clauses to avoid its performance in part or in its entirety.

It is also certain that no system is purely formalist or contextualist, since the interpretative criteria laid out by the norms or caselaw are always sufficiently broad and elastic to accommodate very different approaches by judges.

Moreover, norms exist that allow – at least in theory – a more contextualist legal ordering to permit a formalist interpretation of a given agreement. Formalism ultimately entails allowing parties to predetermine the pieces of evidence the judge will be able to consider in order to adjudicate a potential case arising during the execution of the contractual relationship. Formalists limit themselves to considering the contract as it is written within the four corners of a sheet of paper. Parties who are aware that a judge will maintain a formalist approach in interpreting the agreement will thence have a clear incentive in thoroughly negotiating the agreement, adding all elements they intend to bear relevance *ex post* to the written document. That could entail also detailed accounts of factual elements that, otherwise could be considered by a contextualist judge.

In such a perspective, the difference between a formalist and contextualist approach to contract interpretation is not even in the elements to be taken into account *per se*, but in the possibility for the party to carefully select what is to be deemed relevant as opposed to leaving it to the independent evaluation of a third party – the judge – who may be foreign to the rationale, and the purpose the parties are trying to pursue, and who – knowingly or not – may interfere with it.

Such a possibility may be granted the parties in different ways, typically through self-selected formalities and merger clauses. Some legal orderings allow the parties to choose to submit a given agreement to voluntary formalities that are not mandated by the law.

To exemplify, art. 1352 ICC<sup>210</sup> allows the parties to add the requirement of written form to a contract that is not enumerated among those that need to be put in writing for their validity (see art. 1350

<sup>208</sup> It is the so-called technique of *Konkretisierung*, whereby by analysing and rationalizing case-law, academics might help identify and narrowly define those criteria that need to be taken into account when applying a general clause to a specific context, on the subject see WEBER, *Einige Gedanken zur Konkretisierung von Generalklauseln durch Fallgruppen*, in *Archiv für die civilistische Praxis*, 192, 1992, 516-567; CANARIS, *Schutzgesetze*, cit., 30-110, moreover, please allow reference to BERTOLINI, *Il postcontratto*, cit., 360-363.

<sup>209</sup> A so-intended approach ensures high degrees of foreseeability, the possibility for efficient contracting and the minimization of negotiating costs associated with limiting the chances for *ex-post* opportunistic behaviour, on this please allow reference to SCHWARTZ-SCOTT, *Precontractual Liability and Preliminary Agreements*, in *Harvard Law Review*, 120, 2007, 661 ff.

<sup>210</sup> Art. 1352 ICC provides that: "If the parties have agreed in writing to adopt a certain form for the future stipulation of a contract, it shall be presumed that the form was intended for the validity of the contract" (translated from Italian). In essence, the parties may stipulate – either within the contract, as a clause, or separately from it – that the contracts to be concluded between them will have a certain form or specific characteristics for their own validity, which is more severe than the legal one, see ROPPO, *Il contratto*, in *Trattato di diritto privato*, IUDICA-ZATTI (edited by), II, Milano, 2011, 247; VERDICCHIO, *Le forme convenzionali*, in *I contratti in generale*, CENDON (edited by), VII, Utet, 2000, *passim*; CERDONIO CHIAROMONTE, *Questioni irrisolte intorno ai patti sulla forma di futuri contratti*, in *Rivista di diritto civile* I, 2004, 241. On the topic the Italian Corte di Cassazione, June 24<sup>th</sup> 2002, n. 9164 states that failure to comply with such a requirement set by the parties leads to the invalidity of the agreement, which may be ascertained *ex officio*.



ICC)<sup>211</sup>. By so deciding, they implicitly determine that all other statements rendered outside the agreement, which are not expressly recalled and put in writing within the very contractual document undersigned, are to be deemed null and void, incapable of producing any effect<sup>212</sup>.

A similar effect is reached by merger clauses that expressly declare that only the statements contained in the agreement are to be considered.

In theory, however, a formalist and a contextualist approach do not differ with respect to what elements may become of relevance in the reconstruction of the meaning of the contract – and subsequently in determining the respective rights and obligations of the parties – but only on whom may be called to choose what is to be taken into examination. A formalist approach leaves the choice to the parties, who will use their negotiations and the drafting of the contractual document to carefully select what they intend to give relevance to. To the contrary a contextualist interpretative methodology will leave the choice to the judge.

While it may not be argued that one solution is always preferable to the other, it is safe to argue that sophisticated parties would prefer to retain control and be able to operate their own distinctions in such a perspective.

It shall, however, be stressed that none of the recalled approaches would ever prevent a judge to strike a clause – or even an entire agreement or portion thereof – that is deemed to be illicit, against good morals or public order, or anyway violate a mandatory provision, law or prohibition<sup>213</sup>. Moreover, even a formalist approach may allow general clauses to operate – including good-faith – to strike opportunistic behaviours the law may not enforce (see §2.4.2 below).

To conclude, the traditional dichotomy clearly distinguishing a contextualist from a textualist approach to interpretation entails an excessive degree of simplification. All legal systems, indeed, may display both aspects at the same time, and may thence be represented along a continuous line, as discrete epiphanies of a different balancing of these components (see §2.4.3 below).

#### 2.4.2. Contract integration, general clauses and the contract as a *Rahmenbeziehung*

Clearly distinguishing between interpretation and integration is hard if not impossible a task, despite traditional legal theory maintaining a rigid distinction between the two.

<sup>211</sup> According to art. 1350 ICC form is an essential element of the agreement when it required *ad substantiam*, thence, unless otherwise specified, contracts may be concluded in any form, including oral, so long as the will of the parties to be bound is clear. See PAGLIANTINI, (*commento all'articolo 1350*), in *Commentario del Codice civile. Sezione "Dei contratti in generale" diretta da Emanuela Navretta e Andrea Orestano*, GABRIELLI (edited by), Il Torino, 2011, 112. Similarly, art. I - 1:106 DCFR whereby it is stated that «a contract or other juridical act need not be concluded, made or evidenced in writing nor is it subject to any other requirement as to form», as well as art. 2:101 PECL, and art. 1.2 Unidroit Principles.

<sup>212</sup> A loophole arises whenever Courts argue that this possibility for the parties to freely determine themselves to impose a formal requirement to their agreement may be revoked informally and implicitly through their conclusive behaviour. Such a stance – which is indeed maintained by certain decisions of the Italian Corte di Cassazione, see Italian Corte di Cassazione, September 23<sup>th</sup> 2015, n.18815; Italian Corte di Cassazione, October 24<sup>th</sup> 2017, n.25194; Italian Corte di Cassazione, March 22<sup>th</sup> 2012, n. 4541; Italian Corte di Cassazione, August 22<sup>th</sup> 2003 n. 12344 –, in fact, trumps the overall utility of the norm, and in particular its possibility of bringing about certainty about the content of the agreement and about those elements that need to be considered for its interpretation. For a more detailed criticism to this position, please allow reference to BERTOLINI, *Dell'ammissibilità della revoca tacita del patto sulla forma ex art. 1352 cod. civ.*, in *La nuova giurisprudenza civile commentata*, 2013, 971-978.

<sup>213</sup> See RÖDL, *Contractual Freedom, Contractual Justice and Contract Law*, in *Law and Contemporary Problems*, 76, 2013, the author argued that: "[...] . . . Contractual freedom does not cover unfair contracts. There is no tension between the two concepts of contractual freedom and contractual justice because contractual freedom can only be exercised in voluntary agreements with fair terms. Unfair contracts cannot be claimed valid by appealing to contractual freedom" (63).



Indeed, by interpreting a contractual clause the judge may determine that it implicitly requires the debtor to perform an additional activity, which was not expressly negotiated, nor written in the agreement. To the contrary, he may deny a right because the overall interpretation of the agreement or the combined reading of multiple clauses – or, in a contextualist setting, the behaviour of the parties *in executivis* – allows for a conclusion that differs from the plain reading of the document.

Similarly, absent a specific provision on a given matter a judge, when asked by the parties, could identify a legally relevant interest deserving protection and, either through extensive or analogical reasoning, or by resorting to general clauses – such as good faith –, through a process of *konkretisierung*, could impose a non-expressly negotiated duty or obligation, or acknowledge the existence of a right to the advantage of one of the two parties.

In both cases, the hermeneutical operation has a creative nature<sup>214</sup>, enriching and to some extent modifying the content of the contract, that may not, in its consequences, clearly keep distinct a mere interpretation, from what, instead, amounts to integration. Most often, only the narrative that accompanies the decision and the language adopted will allow to differentiate a very similar if not identical logical process. Typically, when a duty is derived through interpretation, the language used by the court is often that of making explicit something the parties implied or would “normally imply or desire” in analogous circumstances. The deducted or hypothesised will is, however, that what the judge deems correct, according to a complex assessment whose merits and criteria might certainly be investigated, but very seldomly will truly correspond to the real intentions of the parties. That ultimately corresponds to a judgement that led to the integration of the agreement, when the conclusion is that a given performance may – or may not – be demanded of a party due to different circumstances taken into account by the judge, often times through the lens of a general clause. In both cases the result could be identical and only differently narrated.

While differences most certainly exist between legal systems, and it is typically said that civil law countries more largely rely on general clauses and their use than common law ones<sup>215</sup>, all allow for some degree of creative intervention on the side of the judge with respect to the content of the specific contract. In fact, short of maintaining that the absence of a specific provision excludes the possibility of providing protection to an interest that is otherwise deemed legally relevant, a methodological solution needs to be found to determine when and upon the meeting of which conditions protection ought to be offered, and how.

Said otherwise, it may not be reasonably maintained that a given legal system does not allow for some degree of creation of additional duties and obligations or, to the contrary, may not prevent the actioning of a given contractual right or obligation due to consideration that stretch beyond the mere intention of the parties.

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<sup>214</sup> In such a perspective the distinction between pure interpretation and contract integration appears faded if not merely theoretical, since the interpreter is anyway creating new obligations or prohibiting certain behaviours in light of a complex reasoning and weighing of multiple circumstances, with a clearly creative nature, on this matter see BRECCIA, *Diligenza e buona fede nell'attuazione del rapporto obbligatorio*, Milano, 1968, 116 ff.

<sup>215</sup> See *ex multis* BRIDGE, *Good Faith, the Common Law, and the CISG*, in *Uniform Law Review*, 22, 2017, where it is said that: “[...] it is a notorious fact that one of the pressure points emerging when the common law and the civil law are set against each other lies in their differing attitudes to the notion of good faith. This was a matter of some significance during the evolution of the CISG. Good faith is such a corner stone of civilian thinking, along with the dependence of the civil law upon so-called general clauses, that its absence from the core of common law thinking gives rise to a pressing need for the common law attitude to be explained, as though the common law were placed on the back foot. Consequently, and also because the majority of legal systems are civilian in nature” (1).

The – at times relevant – differences among legal systems are thence mainly related to the criteria – which at times are not clearly laid out and framed – the judge will have to take into account when deciding to intervene on the content of the contract in one way (e.g. affirming a right or admitting the existence of an obligation not expressly provided for in the agreement) or another (denying them or impeding their actioning in the specific circumstances).

Within such a framework, we may thence consider some approaches where both divergences and convergencies emerge among different legal orderings to then draw some conclusions.

One of the most influential and yet extreme uses of general clauses is that of the German doctrine of *Schutzpflichten*<sup>216</sup> whereby interests that would otherwise be protected under tort law (e.g. the bodily integrity of a person entering or exiting a public patronage) are attracted to the contract and protected pursuant to said rules. Differences arise as a consequence thereof, that favour the claimant under a number of aspects, including a different statute of limitations, and evidentiary position.

Furthermore, the theory of *Schutzpflichten* evolved, increasing the parties that are protected<sup>217</sup>, and the circumstances where protection is granted<sup>218</sup>, as well as transforming the theory of the contractual relationship into a frame (*Rahmen*) within which the interest of the creditor in performance is but one of the interests considered. Therefore, under certain conditions, one might identify an interest to protection (*Schutzpflicht*) in the absence of a contractual interest to performance<sup>219</sup>.

Such a theory evolved primarily due to peculiarities within the German law of obligations, and in particular with the general rules of torts<sup>220</sup> but was also successfully imported in other jurisdictions<sup>221</sup>. While it may be disputed that this doctrine increases *ex ante* uncertainty, given the tendency of German courts and scholars to proceed with a thorough classification and rationalization of cases in so called *Fallgruppen*<sup>222</sup>, allowing any legal expert to navigate the criteria and conditions upon meeting which a

<sup>216</sup> Understood as a specification of *Treu und Glauben* (§ 242 BGB), and later derived from §241 BGB, see LARENZ, *Lehrbuch des Schuldrechts. Allgemeiner Teil*, München, 1987, 158 ff.; CANARIS, *Schutzgesetze*, cit., 30 ff.; MEDICUS, *Zur Anwendbarkeit des Allgemeinen Schuldrechts auf Schutzpflichten*, in *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, München, 2007, 835; GRIGOLEIT, *Leistungspflichten und Schutzpflichten*, in *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, München, 2007, 275 ff.

<sup>217</sup> In some cases, *Schutzpflichten* are understood as extending their protection to subjects that are not directly part to the contract, see CANARIS, *Ansprüche wegen "positive Vertragsverletzung" und "Schutzwirkung für Dritte"*, in *Juristen Zeitung*, 1965, 478; CASTRONOVO, *Obblighi di protezione e tutela del terzo*, in *Jus*, 1976, 123 ff.

<sup>218</sup> Extending to the pre- and post-contractual phase, by the latter indicating the moment when the contract may be deemed fully performed (see above fn. 202 above), and more specifically see SCHOPPER, *Nachvertragliche Pflichten*, cit., *passim*; FINGER, *Die Verpflichtung des Herstellers zur Lieferung von Ersatzteilen*, in *Neue Juristische Wochenschrift*, 1970, 2050; RODIG, *Verpflichtung des Herstellers zur Bereithaltung von Ersatzteilen für langlebige Wirtschaftsgüter und ausgelaufene Serien*, in *Betriebs-Berater*, 1971, 854; BINDER, *Nachsorgende Vertragspflichten?*, cit., 587 ff.

<sup>219</sup> See LARENZ, *Lehrbuch des Schuldrechts*, München, 1982, according to whom "Schuldverhältnisse ohne (primäre) Leistungspflicht (...) sich zunächst in der Begründung allgemeiner Verhaltenspflichten unter bestimmten Personen erschöpfen. Durch die Verletzung einer solchen Verhaltenspflicht kann sich aus ihnen eine Schadensersatzpflicht und damit dann eine sekundäre Leistungspflicht ergeben" (13). See also CANARIS, *Schutzgesetze, Verkehrspflichten, Schutzpflichten*, in *Festschrift für Karl Larenz zum 80. Geburtstag*, München, 1983, 30-110; CASTRONOVO, *La relazione come categoria essenziale dell'obbligazione e della responsabilità contrattuale*, in *Europa e diritto privato*, 2011, 72 ff.

<sup>220</sup> On the point see DI MAJO, *Profili della responsabilità civile*, Torino, 2010, 74 ff.

<sup>221</sup> See in Italy ex multis CASTRONOVO, entry «Obblighi di protezione», in *Enciclopedia giuridica*, XXI, Bologna-Roma, 1990, 1 ff.; LAMBO, *Obblighi di protezione*, Padova, 2007, *passim*; ZACCARIA, *La natura della responsabilità per Culpa in Contrahendo secondo il punto di vista del gambero*, in *Rivista di diritto civile*, 2015, 344-358.

<sup>222</sup> See WEBER, *Einige Gedanken*, cit., 516 ff.; KRAMER, *Einleitung zu §§ 241-304*, nel *Comm. Münchener zum BGB*, München, 2007, 53 ff.

duty of protection is acknowledged, it certainly extends the notion of contract and the scope of the interests it protects largely beyond what the parties have negotiated.

Such a use of the principle of *Treu und Glauben* (good faith) may reasonably be challenged and considered truly exceeding the purpose of protecting contract-related interests against possible abuses<sup>223</sup>, as well as potentially opportunistic behaviours<sup>224</sup> related to the execution of the agreement, and to some extent to the connected interests that might reside even after full performance, cancellation or avoidance<sup>225</sup>. Moreover, it may be argued that such a doctrine is not necessary to offer complete protection to possible victims and contractual parties in case other interests, which are not immediately contract-related, are impinged upon.

However, not all uses of general clauses may encounter the same criticism, but might instead achieve efficiency by sanctioning opportunistic behaviour, favouring parties collaboration, and ultimately reducing transaction costs<sup>226</sup>.

Among such doctrines, both *exceptio doli*, the principle of *nemo contra factum proprium venire potest*, as well as estoppel amount to relevant exemplifications of how a general clause may be used to prevent opportunistic behaviour efficiently.

*Exceptio doli*<sup>227</sup> is used, among others, in the field of personal warranties independently released by an intermediary or financial institution to the creditor to ensure performance of a third party, who has entered into a distinct principal agreement with the latter<sup>228</sup>. The main obligation due is typically

<sup>223</sup> Indeed, those interests do not arise because of the contract but merely in occasion of the contract and are a mere duplication of interests that otherwise could be protected through the law of torts, see LARENZ, *Lehrbuch*, cit., 13; CASTRONOVO, *Obblighi*, cit., 3.

<sup>224</sup> Which is instead efficient per se, see SCHWARTZ-SCOTT, *Precontractual Liability and Preliminary Agreements*, cit., 661 ff.; SCHWARTZ-SEPE, *Economic Challenges for the Law of Contract*, in *Yale Journal on Regulation* 38, 2021, 679 ff.

<sup>225</sup> These include interests to secrecy, non-competition, collaboration and exchange of information, and are at times referred as postcontractual interests. See BINDER, *Nachsorgende Vertragspflichten?*, cit., 587-625; BERTOLINI, *Il postcontratto*, cit., 269 ff.

<sup>226</sup> See SCHWARTZ-SCOTT, *Precontractual Liability and Preliminary Agreements*, cit., 661-707.

<sup>227</sup> Ex multis, in Italy see MERUZZI, *L'exceptio doli nel diritto civile e commerciale*, Padova, 2005, 442 ff.; PROCCHI, *L'exceptio doli generalis e il divieto di venire contra factum proprium*, in *L'eccezione di dolo generale – Applicazioni giurisprudenziali e teoriche dottrinali*, GAROFALO (edited by), Padova, 2006, 77 ff.; DOLMETTA, *Exceptio doli generalis*, in *Banca, borsa e titoli di credito*, I, 1998, 147 ff.; TORRENTE, entry «*Eccezione di dolo*», in *Enciclopedia del diritto*, XIV, Milano, 1965, 218.; NANNI, *L'uso giurisprudenziale dell'«exceptio doli generalis»*, in *Contratto e impresa*, 1986, 197. From a European perspective, the expression “*exceptio doli generalis*” appears for the first time in the *Glossa Magna*, written by Accursius (*glossa generalis*, relating to D. 44.4.4.33). On the basis of this text the concept was introduced into the legal discourse of the European *ius commune*. The German Pandektensystem in the 19th century still mentioned *exceptio doli* but it lost its procedural significance. On account of this, during the 19th century German courts applied the *exceptio doli* as a device of substantive law. See ZIMMERMANN-WHITTAKER, *Good faith in European contract law* Cambridge, 2000, 19: “Use of the term *exceptio doli* was tantamount to a recourse to the idea of good faith except that the matter was seen, naturally enough, from the point of view of the defendant. Soon after the BGB had been adopted, a debate flared up as to whether the *exceptio doli* was still applicable, be it on the basis of § 242 BGB or as a result of – the grace of God –”; ZIMMERMANN, *Roman Law*, cit., 50 ff.; WENDT, *Die «exceptio doli generalis» im heutigen Recht oder Treu und Glauben im Recht der Schuldverhältnisse*, in *AcP*, 1906, *passim*.

<sup>228</sup> Rudolf Stammler, in Stammler, *Der Garantievertrag. Eine civilistische Abhandlung*, in *Archiv für die civilistische Praxis*, 1886, 1-35, explains the first type of independent guarantees contract. It is an atypical guarantee able to ensure the autonomy of the document from the underlying contract. It relieves creditor from the burden of evidence about the demand's validity and it relieves the bank from the obligation to assess whether there is an effective breach of the contract. In Italy, the first publications about this topic date back to the works of PORTALE, *Le garanzie bancarie internazionali*, Milano, 1989, *passim*; PORTALE, *Fideiussione e Garantievertrag nella prassi bancaria*, in *Le operazioni bancarie* PORTALE (edited by), II, Milano, 1978, 1044; PORTALE, *Nuovi sviluppi del contratto autonomo di garanzia*, in *Banca Borsa Titoli Di Credito*, I, 1985, 169 ff. See also NAVARRETTA, *Causalità e sanzioni negli abusi nel contratto autonomo di garanzia*, in *Contratto e impresa*, 1991, 285; NAVARRETTA, *Il Garantievertrag contratto alieno di impresa*, in *Osservatorio del diritto civile e commerciale*, 2, 2012, 221 ff.; CICALA, *Sul contratto autonomo di garanzia*, in *Rivista di diritto civile*, I, 1991, 143 ff; BARILLA, *Fideiussione 'a prima richiesta' e*

entirely different in nature (e.g. a duty to perform an action), and the warranty serves the purpose to reverse the risk associated with litigation and potential delays in performance of the one main debtor. Developed under German law, the *Garantievertrag* is today commonly used in other jurisdictions, because it ensures the creditor the possibility of obtaining the payment of the amount due upon simple request and without the possibility for the intermediary or financial institution to refuse it on the ground of exceptions related to the main agreement between the creditor and the debtor. However, the circumstance that the intermediary will pay upon simple request the amount agreed upon, and the claim it from the debtor, without any thorough investigation as per the merits of the request, exposes the debtor to a concrete risk of opportunistic behaviour. The creditor might, in fact, receive performance correctly and still claim the payment. Therefore, allowing the warrantor to refuse performance whenever it is clear that the request is plainly illegitimate – for the debtor may have correctly performed his main obligation, and that may be objectively proven by displaying a document – is certainly an efficient use of the principle of objective good faith and fair dealing.

Similarly, estoppel emerges as a quintessential common law doctrine, ensuring that fairness and equity are maintained in contractual relations<sup>229</sup>, by constraining parties from reneging on representations or assurances that have been relied upon by others<sup>230</sup>. Estoppel can be understood as a legal principle that prevents a party from asserting a claim or a right which contradicts what they have previously stated or implied by their conduct<sup>231</sup>. Rooted in the principles of justice and fairness, the doctrine is fundamentally aimed at ensuring that parties cannot be unjustly wronged by the inconsistency of another<sup>232</sup>.

In the context of contracts, estoppel primarily functions as a defence<sup>233</sup>. If a party has, by its actions, words, or silence, given another party a clear impression of certain facts or intentions, and that party has acted upon that belief to its detriment, the first party may be estopped from asserting a contrary position later on<sup>234</sup>.

While it does not broadly command parties to act in good faith, it zeroes in on specific representations and the reliance thereon<sup>235</sup>. In essence, estoppel ensures that contractual relationships are not just defined by the letter of the agreement but also by the actions and assurances that shape parties'

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*fideiussione 'omnibus' nella giurisprudenza del Tribunale federale tedesco*, in *Banca borsa e titoli di credito*, 58 2005, 337-344; MACARIO, *Garanzie personali*, in *Trattato di diritto civile*, SACCO (edited by), X, Torino, 2009, 688 ff.; BERTOLINI, *Il contratto autonomo di garanzia nell'evoluzione giurisprudenziale*, in *La nuova giurisprudenza civile commentata*, II, 2010, 435-448. As per the international debate, see BERTRAMS, *Bank Guarantees in International Trade: The Law and Practice of Independent (First Demand) Guarantees and Standby Letters of Credit in Civil Law and Common Law Jurisdictions*, Alphen aan den Rijn, 2013, 612; GOODE-KRONKE-MCKENDRICK, *Transnational commercial law. Text, cases and materials*, Oxford 2015, 321 ff.

<sup>229</sup> ABBOTSBURY, Thoughts on the law of equitable estoppel, in *JUDICIAL REVIEW*, 10, 2010, 37-60.

<sup>230</sup> BIEHLER, LEGITIMATE EXPECTATION—AN ODYSSEY, in *Irish Jurist* (1966-), 2013, 40-69.

<sup>231</sup> MAGGS, estoppel and Textualism, in *Am. J. Comp. L.*, 54, 2006, 167-186.

<sup>232</sup> ANENSOM, From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law, in *Lewis & Clark L. Rev.*, 11, 2007, 633-669.

<sup>233</sup> THOMPSON, From representation to expectation: estoppel as a cause of action, in *The Cambridge Law Journal*, 42, 1983, 257-278.

<sup>234</sup> See the decision in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. Also refer to WILKEN-GHALY, *The law of waiver, variation and estoppel*, 2012, 57.

<sup>235</sup> PHAM, Waning of promissory Estoppel, in *Cornell L. Rev.*, 79, 1993, 1263-1290.

expectations<sup>236</sup>, in a way that is almost identical to other civil law doctrines, such as the prohibition of *venire contra factum proprium*<sup>237</sup>.

Indeed, the prohibition to contradict oneself is used in civil law jurisdictions to trump opportunistic behaviour, and eventually overcome even the lack of formalities<sup>238</sup> or, in other cases, may be used to deem abusive the exercise of one's right whenever the previous behaviour is deemed inducing a legitimate reliance by the counterparty<sup>239</sup>.

#### 2.4.3. Discussion: legal certainty beyond regulatory and judicial paternalism

The matters addressed in the current section are deeply rooted in the juridical culture of each legal ordering, and well exemplify the theory of so-called "legal formants"<sup>240</sup>, whereby the law is not just the purport of the written text passed by the competent authority, but also of the interpretation thereof offered by courts, as well as of its systematization and conceptualization proffered by legal scholars.

The approaches to contract interpretation and integration – which certainly play a fundamental role in offering positive or negative incentive to the selection of a specific legal system by sophisticated business parties – may only partly be addressed through regulation. The role of the overall legal culture of a specific system plays as great a role as the very norms that are to be applied.

Indeed, even divergences between contextualist and textualist systems are not typically reflected in completely divergent wording in the very norms dedicated to contractual interpretation<sup>241</sup>. Moreover, in many jurisdictions rules may be found that could justify a more textualist approach as an option left to the parties' autonomy (see for instance the Italian case of art. 1352 ICC, see §2.4.1 above).

At the same time, while it is not possible to argue in the sense that one interpretative approach is always superior and preferable to the other, since both may be preferable in different circumstances, it is certain that leaving an option for the parties to choose is a superior solution. Since rules on interpretation primarily vary the evidence base a judge will be able to consider when adjudicating a case, parties should be given the possibility to ex ante determine what kind of interpretative approach they prefer the judge to maintain, and subsequently what kind of evidence he will consider. Such a choice could be granted by enforcing merger clauses or choices operated through self-imposed formal

<sup>236</sup> COOKE, Estoppel and the protection of expectations, in *Legal Studies*, 17, 1997, 258-285.

<sup>237</sup> On the point subject see ASTONE, *Venire contra factum proprium*, Napoli, 2006, passim; SCARSO, *Venire contra factum proprium e responsabilità*, in *Responsabilità civile e previdenza*, 2009, 513-537; SICCHIERO, *L'interpretazione del contratto ed il principio nemo contra factum proprium venire potest*, in *Contratto e impresa*, 2003, 507-519.

<sup>238</sup> In some cases – see Trib. Roma, 13.7.2004, in *Giust. civ.*, 2005, 1937, with a comment by MAFFEIS, *Forma ad substantiam, gestione di affari e divieto di venire contro il fatto proprio*, 1938 ss. – courts have concluded that failing to sign a contract that is required to be in writing for it to be valid may not lead to the voidance of the agreement – and the subsequent obligation to return the payments received *in executivis* – if the behaviour maintained by the party until that moment clearly and univocally demonstrates the intention to be contractually bound. In the cited case, a tenant who had failed to undersign the lease had sued the landlord after many years of living in the apartment and complying with obligations arising from the contract. The court prevented her from claiming the restitution of the sums paid during the time she lived in the apartment, despite the contract being formally void due to the absence of her signature on the written agreement.

<sup>239</sup> See Italian Corte di Cassazione, September 18<sup>th</sup> 2009, n. 20106, in PALMIERI-PARDOLESI, *Della serie «a volte ritornano»: l'abuso del diritto alla riscossa*, in *«Foro italiano»*, I, 2010, 95 ss. considered that the unilateral decision not to renew a contract after inducing reliance in the prosecution of the business relationship was abusive and illegitimate. The claimant had undergone investments on the basis of the statements of the party who then decided not to renew the agreement that had expired.

<sup>240</sup> See SACCO, *Legal formants. A Dynamic Approach to Comparative Law*, cit., 343 ff.

<sup>241</sup> When present, such as in civil law traditions, as opposed to the common law where those matters are primarily left to precedents decided by courts, see Mitchell, Catherine. *Interpretation of contracts*. Taylor & Francis, 2018, 62-89.



requirements, which allow to clearly identify and define what criteria, elements, declarations, statements, circumstances ought to be taken into account. It shall be stressed, however, as even such approaches do not prevent the operation of mandatory provisions and those principles and criteria (such as good faith in its different specifications, see §2.4.2 above) that may effectively limit opportunistic or grossly unfair behaviour.

As per the latter aspect, the brief analysis pointed out how the use of general clauses might lead to very intrusive interventions on the balance of a given agreement, including business ones (see §2.4.2 above). Indeed, certain legal cultures have developed theories that largely extend the scope of the interests protected by a contractual agreement beyond what the parties expressly negotiated, entrusting the contractual agreement with the protection of non-contractual (and/or not-contractually related) interests (e.g. *Schutzpflichten*). At the same time, certain judicial trends, backed by theoretical conceptualization by prominent academics led to the favouring of forms of judicial activism, affecting the economic balance of the agreement, as well as the exercise of rights of fundamental importance for the parties – so much so that they were expressly negotiated –, by imposing alterations to such equilibria, based on the discretionary assessment of the judge.

While the interpretation of the judge as mere *bouche de la loi* is today perceived as anachronistic, and the use of both contextualist approaches, as well as contractual integration and the use of general clauses may prove efficient to minimize opportunistic behaviour ex post and negotiation costs ex ante, the respect for the true intention of sophisticated parties, manifested through the accurate drafting of a structured business contract ought to be more radically preserved.

Interpretative practices adopted by judges should reflect attentive categorization, classification and rationalization efforts performed also by academics. Regulatory efforts in this specific domain are largely destined to be ineffective, should they deviate from the reception of a consolidated interpretative standard or approach<sup>242</sup>, and certainly may not force radical changes in a juridical culture.

However, it is certain that a great respect for the intention clearly manifested by sophisticated parties who drafted complex and structured agreements – in the absence of patent and manifest illicit and or abusive behaviour<sup>243</sup> – certainly provides a positive incentive for the election of a given legal ordering over a competing one, to govern a relevant business transaction.

To the contrary, what is perceived as radical interventionism (e.g. affecting and/or redefining the economic balance of the agreement), eventually absent a request by the interested party (see fn. 207 above) or the limitation in the exercise of an expressly negotiated and accepted right in the absence of a clear illegitimate behaviour by the creditor (see fn. 207 above), or the imposition of a broad spectrum of non-contractually-related obligations protecting the overall juridical sphere of the counterparty (see fn. 216, 217, 218 above), may certainly impair the foreseeability of the overall judicial outcome, should litigation arise, as well as of the duties the parties is subscribing to by undersigning a given agreement.

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<sup>242</sup> Indeed, one of the most relevant reforms of current European civil codes – within the matters here considered – is that of the *Schuldrechtsmodernisierung* of the BGB, which largely received the consolidated judicial and doctrinal interpretative practices and theories, in particular in the field of *Schutzpflichten*, a century after their original conceptualization. The reform transposed into norms without any substantive innovation what had already been largely accepted by the judicial and academic discourse, see CANARIS, *Schuldrechtsmodernisierung*, cit., *passim*; GRUNDMANN, *Germany*, cit., 129 ff.

<sup>243</sup> Of the kind that could be trumped by the application of relevant legal doctrines, such as *exceptio doli* (see fn. 228 above), estoppel (see fnn. 229-236 above), and the prohibition of contradicting oneself (see fn. 237-238 above) that, in turn, could enhance efficiency and protect legitimate, and contractual related interests of the parties.



This subsequently disincentivizes opting for the legal ordering that is most characterised by said interpretative and judicial practices.

## 2.5. Enforcing promises: the problem of choosing appropriate remedies

One of the most relevant aspects of contract law is that of the enforceability of promises<sup>244</sup>. Indeed, a contract is only relevant so long as it is capable of ensuring a creditor that he will be able to obtain the performance his debtor promised during negotiation, typically – but not necessarily – in exchange for a counter-performance.

The most relevant distinction between contractual remedies for failure to perform is that between damage compensation and specific performance. The former basically entrusts the debtor with the choice between complying with the contract or paying a sum of money<sup>245</sup>. The latter forces the performance of the debtor even against his will, irrespective of other considerations, ultimately leaving the choice between performance and compensation to the creditor.

Different legal systems display a preference for either one of the two, but both are always present, despite being regulated in potentially different fashions and with different criteria for the implementation of one or the other. Preferences also imply a different underlying rationale. Those systems that give priority to specific performance give preference to legal and moral justifications based on the need to hold someone responsible for their own word and choices freely made<sup>246</sup>. The others typically base their principles on their greater efficiency.

Efficiency plays certainly a relevant role in the choice of a given legal system by sophisticated business parties, and the issue needs thence to be briefly discussed (see §2.5.1 below). However, what may appear even more relevant, is how well the system of remedies is defined in all its aspects (e.g. conditions upon which specific performance may be demanded or refused, how damage needs to be quantified), leading to (increased) foreseeability of the outcomes (see §§2.5.2 and 2.5.3 below).

### 2.5.1. The efficient remedy: breach v/s performance

One of the most relevant theoretical debates opposing common law and civil law countries, lit by the law and economics movement, is that of the so-called efficient breach theory<sup>247</sup>. Pursuant to such a theory, the debtor should be free to decide to breach the contract and pay damages whenever performance is the less efficient option. To ensure that the choice made by the debtor internalizes the loss of the creditor expectation damages need to be awarded. Expectation damages are those that

<sup>244</sup> The matter is so broad and theoretically relevant that all citations would prove limited and incomplete. Essential reference may be made to FRIED, *Contract as a promise. A theory of contractual obligation*, Cambridge, 1981, *passim*; DI MAJO, *L'esecuzione del contratto*, Milano, 1967, *passim*; CRASWELL, *Contract Law, Default Rules, and the Philosophy of Promising*, in *Michigan Law Review*, 88, 1989, 489 ff.; TRIANTIS, *Contract as a promise at 30: the future of contract theory: Promissory autonomy, imperfect courts, and the immorality of the expectation damages default*, in *Suffolk University Law Review*, 45, 2012, 827 ff.; GORDLEY, *The Enforceability*, cit., *passim*.

<sup>245</sup> See HOLMES, *The Path of the Law*, in *Harvard Law Review*, 10, 1897, 462, whereby 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else'.

<sup>246</sup> See FRIED, *Contract as a promise*, cit., 17; CRASWELL, *Two Economic Theories of Enforcing Promises*, in *The Theory of Contract Law: New Essays*, BENSON (edited by), Cambridge, 2001, 19 ff.

<sup>247</sup> See BIRMINGHAM, *Breach of Contract, Damage Measures, and Economic Efficiency*, in *Rutgers Law Review*, 24, 1970, 273 ff.; CRASWELL, *Contract remedies, renegotiation, and the theory of efficient breach*, in *Southern California Law Review*, 61, 1987-1988, 629 ff.; GOETZ-SCOTT, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, in *Columbia Law Review*, 77, 1977, 554 ff.; KLASS, *Efficient Breach*, in *Philosophical Foundations of Contract Law*, KLASS-LETSAS-SAPRAI (edited by), 2014, 362 ff.

allow to place the creditor in the identical position he would find himself, were the contract fully and correctly performed.

The theory and its applications is better clarified through an example derived from case law<sup>248</sup>.

The plaintiffs owned a farm containing coal desposits, they leased the defendants for a period of 5 year. The leases established a series of obligations upon the defendants to restore the premises at the end of the lease. However, while the estimated costs of performance amounted to \$29.000 dollars, the increase in value of the land, had the restorative actions taken place, would have amounted to \$300 dollars. When the defendant failed to perform such an action, the plaintiffs sued. The Court of Appeals maintained that damages needed to be calculated not taking into account the price of performance – which would have allowed the landlord to eventually pay another contractor to perform the same task the debtor failed to perform – but the loss in value of the property due to the breach. Given that the property's value would have only increased by \$300 dollars, that was the amount to be offered in damages.

The underlying rationale of such a decision is precisely that once the debtor internalizes the loss suffered by the creditor, performance should not be inefficiently forced. Much of the law and economics scholarship favours such a principle and rationality that – to the contrary – falls squarely against the civil law approach whereby specific performance may be demanded by the creditor.<sup>249</sup>

However, more recently other law and economic scholars have shown how specific performance might be efficient a solution too. So long as the choice was left with the creditor, and the appropriate damage measure set, namely disgorgement of profits<sup>250</sup>, there is no difference in outcome to the efficient breach<sup>251</sup>.

The example the author uses is that of a sale contract where the seller (S) may be offered another contract by a third party (C), after the contract with the first buyer (B) is concluded, but before the good is delivered. If C offers an amount greater than B the efficient hypotheses would suggest S ought to breach the contract with B and pay him damages, so long as the latter (expectation damages) were less than price paid by C. However, the same result would be achieved if the choice was left with B, who would be able to force breach and obtain the disgorgement of profits, namely the price the higher offeror C was willing to pay.

A full debate of the merits of the efficient breach hypothesis, and of its succinctly presented alternative, as well as the possible – theoretical – criticism to similar approaches in a traditional, doctrinal perspective fall beyond the purposes of the current study. However, what was here briefly discussed allows us to draw some essential considerations.

Firstly, proceeding along identical lines of reasoning as those that emerged in the previous sections (see §§2.3 and 2.4), we may well conclude that sophisticated parties will seek both certainty that promises will be enforced, and to retain as much control as possible about the kind of remedy that will be allowed. In such a perspective, judicial interventions aimed at excluding or limiting the possibility

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<sup>248</sup> *Peavyhouse v. Garland Coal Mining Co.*, 382 P.2d 109 (1962).

<sup>249</sup> See fn. 246 and 247 above.

<sup>250</sup> On which see HONDIUS-JANSSEN, *Disgorgement of Profits: Gain-Based Remedies Throughout the World*, in *Disgorgement of Profits: Gain-Based Remedies throughout the World*, HONDIUS-JANSSEN (edited by), Cham, 2015, 471 ff..

<sup>251</sup> See BROOKS, *The Efficient Performance Hypothesis*, in *Yale Law Journal*, 116, 2006, 581 ff.

of resorting to pre-liquidated damages and/or penalty clauses<sup>252</sup>, as well as reducing stipulated amounts<sup>253</sup>, or limiting the possibility to terminate a contract<sup>254</sup>, certainly discourage the choice of a given jurisdiction by sophisticated business parties.

Secondly, however, certainty about what remedy is available and upon which conditions, as well as a clear indication of how damages ought to be calculated, is even more relevant an issue that often times is not sufficiently addressed by legislators designing contracts regulation (see §2.5.2 below).

### 2.5.2. The problem with underdetermination in regulating remedies

Indeed, even with optional instrument, one of the reasons why it was criticized is that it did not regulate remedies with sufficient attention<sup>255</sup>. This is also a criticism often brought about by law and economics scholars, and more broadly anyone performing functional analysis<sup>256</sup>.

While traditionally contract regulation delves into definitions, specification of essential and optional requirements and elements of the agreement, and all those elements that shape, and under certain conditions limit the individual autonomy of the parties, very relevant aspects of the discipline of remedies are ever clearly addressed. To briefly exemplify this point, we may consider one of the most relevant and theoretically debated topics in the doctrine of contracts, namely precontractual liability<sup>257</sup>. While books and treatises debate the nature of the liability rule, first conceived by a German scholar<sup>258</sup> but diffused in all other legal systems, regulation does not clarify many relevant aspects of this important discipline.

<sup>252</sup> See GARCÍA, *Enforcement of Penalty Clauses in Civil and Common Law: A puzzle to be solved by the contracting parties*, Place Published, 2012, 95 ff.

<sup>253</sup> See fn. 207 and 208 above.

<sup>254</sup> See fn. 202 and 203 above.

<sup>255</sup> See the Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM(2011) 635 final — 2011/0284 (COD) and the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to facilitate cross-border transactions in the single market' COM(2011) 636 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52012AE0800>.

<sup>256</sup> See SMITH, *The Need for a European Contract Law - Empirical and Legal Perspectives*, Groningen, 2005, 155 ff.; GRUNDMANN, *Costs and benefits of an optional European sales law (CESL)*, cit., 225-242.

<sup>257</sup> Given the theoretical relevance of the debate, it is impossible to even cite the essential literature on this matter, see MEDICUS, *Culpa in contrahendo*, in *Rivista critica del diritto privato*, 1984, 573 ff.; CANARIS, *Täterschaft und Teilnahme bei culpa in contrahendo*, in *Festschrift zum 60. Geburtstag von Hans Giger*, Berne, 1989, 91 ff.; HEINRICH, *Bemerkungen zur Culpa in Contrahendo nach der Reform - Die Tatbestände des § 311 Abs. 2 BGB* - in *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, München, 2007, 421 ff.; BENATTI, *La responsabilità precontrattuale*, Milano, 1963, *passim*; MENGONI, *Sulla natura della responsabilità precontrattuale*, in *Rivista del diritto commerciale*, 1956, 360 ff.; DI MAJO, *La culpa in contrahendo tra contratto e torto*, in *Giurisprudenza italiana*, 2016, 2565 ff.; SCHWARTZ-SCOTT, *Precontractual Liability and Preliminary Agreements*, cit., 661 ff.; SCHMIDT-SZALEWSKI, *Les accords précontractuels en droit français*, in *Les principales clauses des contrats conclus entre professionnels*, Aix-en-Provence, 1990, *passim*; CARTWRIGHT-HESSELINK, *Precontractual*, cit., and BAIRD, *Precontractual disclosure duties under the Common European Sales Law*, cit., 297 ff.; DI SABATO, *La nuova disciplina della responsabilità precontrattuale francese*, in *La riforma del Code civil: una prospettiva italo-francese*, VALENTINO (edited by), Napoli, 2018, 53-82; CALZOLAIO, *La responsabilità precontrattuale dopo la riforma del code civil francese. Profili comparatistici*, in *Rivista Trimestrale di Diritto e Procedura Civile*, LXXI, 2017, 1301-1318; SCHMIDT-SZALEWSKI, *La période précontractuelle en droit français* in *Revue internationale de droit comparé*, 42 1990, 545-566; MAZEAUD, *Mystères et paradoxes de la période précontractuelle*, in *Le contrat au début du XXIe siècle : études offertes à Jacques Ghestin*, 2001, 637; GILIKER, *Pre-contractual Liability in English and French law*, Alphen aan Den Rijn, 2002, 193.

<sup>258</sup> VON JHERING, *Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen*, 1861, 1 ff.

Indeed, those legal systems, like Italy, that among the first expressly regulated this form of liability did not detail the kind of damage that may be compensated, nor the way it is supposed to be calculated. Moreover, even the hypotheses where compensation is to be allowed are not so narrowly defined, nor are the criteria that ought to be met to establish the liability of the defendant.

Even beyond precontractual liability, a number of issues may arise with respect to damage quantification and calculation that are often left to very broad and insufficiently defined formula, such as – what is to be deemed a – consequential damage<sup>259</sup>, when non-pecuniary damages are to be admitted<sup>260</sup>, how exactly the expectation interest is to be calculated<sup>261</sup>, when, instead, damages ought to correspond to the profit of the non-compliant debtor<sup>262</sup>; when breach is sufficient to legitimize the party's request to cancel the contract, and not just damage compensation<sup>263</sup>.

Many such aspects are left to case-law as well as doctrinal elaboration that sedimented over the decades. However, it is certain those elements are both of essential relevance in governing the overall functioning of an agreement and providing clear incentives to the parties to comply, and an element of certainty, potentially increasing ex ante foreseeability of a judicial outcome, as well as more coherent and consistent decisions across judges and jurisdictions. It is true that uncertainty with respect to those elements also pertains to those legal systems that are today preferred by business parties (as described in §2.2 above) that, thence, may not be deemed more efficient or any clearer than European MS on this matter.

Nonetheless, we could safely state that, even in continental Europe – and civil law countries more broadly – which largely relies on formal, comprehensive, and codified regulation as the foundation of private law overall, and contract law in particular, remedies are most likely under-regulated. Both greater detail and specific solutions to recurring problems could be addressed through granular norms, and this in turn would provide an edge over competing, and less narrowly defined legal systems.

Indeed, while many of the default rules provided by national legislators when regulating specific contractual types address aspects that could be left to the free determination of the parties, in particular sophisticated ones, remedies are a part of the general theory of contract law that ought to be narrowly defined by policy makers themselves. Having a very clear and well defined framework of remedies would ease the parties' behaviour in the negotiation phase, as well as during enforcement,

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<sup>259</sup> See AYRES-GERTNER, Filling Gaps in Incomplete Contracts, in *The Yale Law Journal*, 1989, 87 ff.; DI MAJO, Le tutele contrattuali, Torino, 2009, passim; CARINGELLA-BUFFONI, Manuale di Diritto Civile, Roma, 2015, 671; D'ADDA, Riflessioni sul risarcimento del danno (im)prevedibile, in *Rivista di diritto civile*, 2019, 1295-1325; GNANI, La prevedibilità del danno nella sistematica della responsabilità, in *Danno e responsabilità*, 2009, 356 ff.; PINORI, La regola della cd. Causalità giuridica le conseguenze immediate e dirette e i danni prevedibili, in *Il risarcimento del danno contrattuale*, VISINTINI (edited by), Padova, 2009, 313-364; LAYCOCK, *Modern American Remedies: Cases and Materials*, Oxford 1991, passim; WADDAMS, Remedies as a Legal Subject, in *Oxford Journal of Legal Studies*, 3, 1983, 113-121; ZIMMERMANN, Remedies for Non-Performance: The revised German law of obligations, viewed against the background of the Principles of European Contract Law, in *Edinburgh Law Review*, 6, 2002, 271-314; NAVARRETTA, La complessità del rapporto fra interessi e rimedi nel diritto europeo dei contratti, in *Remedies in contract. The Common Rules for a European Law*, VETTORI (edited by), Padova, 2008, 161-178.

<sup>260</sup> See *The Recovery of Non-Pecuniary Loss in European Contract Law*, Cambridge, 2015, passim; ZLATEV, Recoverability of Damages for Non-pecuniary Losses Deriving from Breach of Contract, in *Oxford Journal of Legal Studies*, 41, 2021, 638 ff.

<sup>261</sup> See PARISI-CENINI, Interesse positivo, interesse negativo e incentivi nella responsabilità contrattuale: un'analisi economica e comparata, in *Rivista di diritto civile*, I, 2008, 219 ff.; POSNER, Economic Analysis of Contract Law after Three Decades: Success or Failure?, in *The Yale Law Journal*, 112, 2003;; EISENBERG-MCDONNELL, Expectation Damages and the Theory of Overreliance, in *Hastings Law Journal*, 54, 2003;; POSNER, Fault in Contract Law, in *Michigan Law Review*, 107, 2009.

<sup>262</sup> See fn. 250 above.

<sup>263</sup> See BELFIORE, entry «Risoluzione del contratto per inadempimento», in *Enciclopedia del diritto*, XL, Milano, 1969, 1307 ff.; NANNI-CARNEVALI-COSTANZA, Della risoluzione per inadempimento, nel *Comm. Scialoja-Branca*, Bologna-Roma, 2007, 232 ff.; MEOLI, Risoluzione per inadempimento e onere della prova, in *La nuova giurisprudenza civile commentata*, I, 2002, 349 ff.

reducing uncertainty (both ex post and ex ante), increasing foreseeability of the judicial outcome, and eventually reducing the need and cost of litigation.

### 2.5.3. Contd.: some examples

How exactly those remedies ought to be specified is too-complex a matter to be addressed in such a broad-scope study and would require an in-depth comparative analysis of European and most relevant common law legal systems on each and every possible aspect. Most likely, the perfect balance would not be achieved first attempt, but greater detail and the clear respect for the parties will on all matters that would not cross the line of unlawfulness would certainly improve the overall regime.

To exemplify, the possibility to determine penalty clauses should be granted (as it normally is), as well as the possibility for the parties to freely determine the amount to be paid in case of breach, so long as there is no evidence of unlawful behaviour in negotiation, or consent was extorted. An additional upper limit could be clearly and narrowly defined, whereby the overall amount to be paid could not exceed by more than X-fold the value of the performance owed but not left to the subjective evaluation of the judge. Indeed, the possibility for the parties to determine a penalty clause that exceeds the value of performance could reflect the strategic importance for the creditor in ensuring timely and accurate compliance, and force internalization of that risk and cost through negotiations. In fact, if the default is freely negotiated, the information the one party would reveal the other – and the judge – by fixing such an amount, would at once ease the circulation of information, induce the counterparty to request a higher fee in exchange for the service offered and, subsequently, the correct internalization of costs and risks<sup>264</sup>.

Such an approach would not be dissimilar to that today mostly maintained with interest rates, that may freely be negotiated by the parties – in writing – so long as they do not exceed that rate which is deemed – typically through a decree of a public authority, such as the ministry of economics – usurious<sup>265</sup>.

Another example, already referred to above, namely that of precontractual liability, would certainly benefit from a more accurate description of the hypotheses where it could apply, some of which are today derived from case law, but certainly lack a more accurate and precise definition. Next to the unjustified interruption of negotiations, or the conclusion of a void contract, so called incomplete vices<sup>266</sup> of consent are often referred to as a potential source of liability, whereby the unlawful conduct of one party induced the other to conclude an agreement under conditions she would not have accepted was she correctly informed.

The kind of damages that could be compensated in said cases are not always so clearly defined. Indeed, the so-called negative interest – intended as the lost chance in case a negotiated contract is finally not

<sup>264</sup> See the reasoning of AYRES-GERTNER, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, in *The Yale Law Journal*, 99, 1989, 87 ff. on default rules, and in particular 121 ff.

<sup>265</sup> Usury laws vary across legal systems, but typically sanction the agreement that imposes a usurious interest rate with the voidance of the sole interest rate, causing the lending to become gratuitous. See VENDITTI, *Della nullità della clausola contenente stipulazione di interessi usurari*, in *Giustizia civile*, I, 1955, 462 ff.; FERRI, *Interessi usurari e criterio di normalità*, in *Rivista diritto commerciale*, I, 1975, 289 ff.; QUADRI, *La nuova legge sull'usura e i suoi diversi volti*, in *Corriere giuridico*, 1996, 365 ff. and POSNER, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, in *The Journal of legal studies*, 24, 1995, 283 ff.

<sup>266</sup> See MANTOVANI, «Vizi incompleti» del contratto e rimedio risarcitorio, Torino, 1995.



concluded – is very hard to quantify and demonstrate<sup>267</sup>, in certain case might exceed expectation damages<sup>268</sup> – typically awarded when the contractual obligation is not performed – moreover, it is not so well related to other hypotheses such as the just recalled incomplete vices, where damage ought to be determined in light of the alternative agreement the party would have consented to, if it were not manipulated<sup>269</sup>.

Under certain circumstances, the termination of a contract might be allowed without the need for litigation (so-called automatic cancellation). At times, parties negotiate clauses that specify one or more obligations the violation of which determines the automatic cancellation of the agreement *ex nunc*. In some cases, however, the possibility might be granted, in the absence of a specific contractual provision, for the faithful party to demand performance through a unilateral notice – once the due date for performance uselessly expired – and threaten the automatic cancellation of the agreement in cases of further delay or lack of performance by the debtor (see art. 1454 ICC). Such a useful tool leaves, however, substantial uncertainty as per the automatic cancellation of the agreement once the due date has uselessly passed. In fact, while it is certain that all breaches justify a claim for damages, not all allow for the cancellation of the agreement<sup>270</sup>. Indeed, a judge may later find that the failed performance is not relevant enough to justify such remedy, and thence hold the creditor liable, who relied on the positive cancellation of the agreement – after sending the unilateral notice and waiting for the due date to expire – and subsequently acted accordingly, interrupting his own performance from that moment onwards. If a simplified procedure allowed for the prompt ascertainment of the positive cancellation of the contract, and certified it, the tool would become much more practical and safer to use, even in those cases where relevant economic interests are at stake. This would certainly favour legal certainty to the sacrifice – eventually to a limited extent – of the possibility of achieving justice in the single case. Such a different balancing appears, however, particularly relevant to ensure that foreseeability of the judicial outcome, and certainty in enforcement that is so essential for doing business.

Finally, to conclude the current short and necessarily incomplete excursus, damage quantification ought to be briefly addressed to clarify that distinguishing between those hypotheses where expectation damages could be awarded or, to the contrary, the disgorgement of profits should be allowed, could provide optimal incentives to the parties in deciding to breach or when demanding performance<sup>271</sup>.

While opinions by academics might diverge on these matters, as well as decisions by courts, any more detailed solution is probably to be preferred, so long as it is clearly formulated, well-defined, and narrow-tailored to specific matters and concerns which could be easily identified through a comparative analysis. Again, the issue of certainty, foreseeability and the respect for a clearly

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<sup>267</sup> See TURCO, L'interesse negativo nella culpa in contrahendo, in *Rivista di diritto civile*, I, 2007, 165 ff.; AFFERNI, Il quantum del danno nella responsabilità precontrattuale, Torino, 2008, passim.

<sup>268</sup> See PARISI-CENINI, *Interesse positivo*, cit., 219 ff.

<sup>269</sup> Such interests might be particularly relevant, and lead to substantive compensation, in cases of financial market frauds, and manipulations, please allow reference to BERTOLINI, *Risparmio tradito: una riflessione tra teoria generale del contratto e diritto dei mercati*, in *La nuova giurisprudenza civile commentata*, II, 2010, 337 ff.

<sup>270</sup> Among many see in particular AIELLO, La giurisprudenza e l'inadempimento di "non scarsa importanza". Criteri di valutazione e sfera d'incidenza dell'art. 1455 cod. civ., in *La nuova giurisprudenza civile commentata*, II, 2012, 731 ff.; GRONDONA, Non scarsa importanza dell'inadempimento e potenzialità della buona fede a difesa del contratto, in *I contratti*, 2013, 1021 ff.; NANNI, Sub art. 1455 in *Della risoluzione per inadempimento*, I, 2, Art. 1455-1459, in *Comm. Scialoja-Branca*, Bologna-Roma, NANNI-COSTANZA-CARNEVALI (edited by), I Torino, 2007, 8 ff.

<sup>271</sup> See fn. 251 above.



formulated will of the parties, who are sophisticated, and negotiated their agreement without any unlawful conduct, act or omission is of paramount importance also with respect to the correct regulation of contractual remedies.

### 3. POLICY OPTIONS

In light of the performed analysis a broad spectrum of possible initiatives and policy options may be identified that should not be deemed mutually exclusive nor truly alternative, rather that may be combined, and balanced through a necessarily articulate legal and political process.

Indeed, favouring the uptake of European and MS's law as a possible model for commercial transactions requires a multiplicity of efforts, whose overall outcome is very hard to anticipate, and yet would need to move along very different lines, taking into account the lessons learned from decades of – failed – regulatory attempts, as well as by acknowledging the peculiarities rooted in our legal traditions and legal thinking, which are very hard to modify and revert.

In this relevant and traditional domain where the very conceptions of the law and its role clash, successfully pursuing a “Brussels effect” is most likely impossible a task. In any case, efforts should be made to increase efficiency and streamline processes.

In such a perspective, the first chapter of this study highlighted how the numerous both theoretical – thence mainly academic – and regulatory efforts to conceive a European law of contracts fell short of their intended outcomes (see §§1 above). If that is certainly not the consequence of lack of thorough and meaningful analysis and theoretical debate, it still demonstrates that conceiving a new regulatory framework is neither easy nor sufficient.

In this respect, it may also be highlighted that the academic efforts as well as the initiatives associated thereto of the European Parliament here documented (see §§1.7-1.11) did not meet adequate political backing from other European institutions, such as the Council. At the same time, the Commission's proposals did not truly account for all the collected insights, including those related to fundamental procedural aspects<sup>272</sup>, despite that of commercial contracts regulation being considered as one of the main barriers to the common market (see fn. 142).

Moreover, it is not easy since the different legal families that form the European Union developed partly different solutions to address identical problems, and most are reluctant to renounce the particular approach that characterizes their legal system, consolidated over the centuries. It is not sufficient, since the law is the purport of both its interpretation by courts and academics<sup>273</sup>, and the mere adoption of new regulatory solutions does not necessarily produce a real reform or change of framework.

While this is true for any domain the EU intervenes in and regulates, contract law being one of the most traditional and possibly founding branches of each legal system, is often perceived as an essential and to some extent unrenounceable portion of each MS's legal culture. For these very reasons, even the adoption of alternative regulatory solutions may not suffice, for its interpretation and application could substantially nullify the pursued outcome, in all the numerous matters that are heavily dependent on the concrete interpretation and application of the rule, rather than its wording.

At the same time, while regulation is certainly useful, it should address many matters that fall outside the direct scope of the general theory of contracts and relate to all those aspects that could increase the overall efficiency of the system (see §2.2 above). Indeed, court's efficiency is of paramount

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<sup>272</sup> EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Expedited settlement of commercial disputes in the European Union - European Added Value Assessment*, cit., *passim*; and EUROPEAN PARLIAMENT, *European Parliament resolution of 13 December 2018 with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079(INL))*, 2018, 1 ff.

<sup>273</sup> See SACCO, *Legal formants. A Dynamic Approach to Comparative Law*, cit., 343 ff.

importance to attract sophisticated business parties, as much as – and maybe also beyond – a well-structured set of substantive rules.

To summarize, all policy measures should pursue the efficiency<sup>274</sup> of the system and foreseeability of the judicial outcome, and in particular:

**(1) Increase judicial efficiency:**

As demonstrated in §2.2.3, sophisticated business parties favour those judicial systems whose courts are most efficient in adjudicating contracts. A decision reached in a shorter period of time ensures better protection to relevant interests. The prompt execution of the decision plays a fundamental role too.

Many European countries score well on many such indexes (see §2.2.2 above), yet some common law jurisdictions appear to be more efficient. The mere transplant of procedural solutions adopted in those latter legal orderings would certainly not prove ideal a strategy.

However, some elements appear to exert a positive effect on the overall efficiency in adjudicating business contracts, primarily the existence of specialized courts. Indeed, all jurisdictions (civil or common law) that possess dedicated tribunals perform better than those which do not.

While civil procedure rests primarily in the competence of member states, that adopt quite different solutions on many relevant aspects, regulatory interventions at EU level could be considered legitimate if intended to favour the common market and competition.

This, in particular, could be argued on the basis of a functional interpretation of art. 81 TFEU, in particular let. (f), and – should Alternative Dispute Resolution measures be considered within the proposal – let (g), aimed at favouring the creation of a single market (art. 26 TFEU). Indeed, the adoption of procedural norms – even addressing the organization of the court system – could be deemed directly functional to the uniform application of substantive regulation in the field of commercial contracts, both easing the creation of the internal market and the emergence of a European contract law, to the internal and external advantage of the European industry, and to ensure the global competitiveness of the European regulatory and economic model. Moreover, and as already clarified, the adoption of a uniform contract law is considered to be one of the conditions to ensure the creation of a common European market (see §2.1).

Based on such grounds, the possibility could be explored to tackle those aspects, promoting the creation of dedicated courts to address business contract litigation, in all member states. The dedicated competence of judges and courts would certainly prove a very fundamental element to ensure greater effectiveness of possible substantive regulation enacted, as well as uniformity of judgments across Europe, also facilitating European businesses, and in particular SMEs<sup>275</sup>.

Since the current study addresses procedural aspects primarily within the scope of ensuring expedited settlement of disputes (thence reducing time to adjudication), the

<sup>274</sup> Efficiency should not be understood as merely the maximization of profits. Efficiency is the criterion according to which we may determine the most adequate and cost-effective way to achieve a desired end, on which see HESSELINK, *Democratic contract law*, in *European Review of Contract Law*, 11, 2015, 96-97.

<sup>275</sup> See the findings of EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Expedited settlement of commercial disputes in the European Union - European Added Value Assessment*, cit., 5-6.

recommendations may be shared that emerged from the study already performed by the European Parliament Research Service (see fn.275), as well as the recommendations contained in the Resolution of the European Parliament of 13 December 2018<sup>276</sup>.

Other aspects that have a bearing on substantive law discussed in this study as well as on the policy options formulated below (see 2(f) and (g) below) ought to be further investigated in a dedicated study. In particular, the focus – in light of the recalled substantive law concerns – ought to be that of preserving the possibility of the parties to control the evidence used to adjudicate the case (let. f below), allowing for a textualist option to contractual interpretation, and minimize the intervention on the economic balance of the agreement (let. g). Such measures could entail strict procedural deadlines, pre-trial disclosure as well as *fait constant* but how exactly they ought to be formulated falls beyond the scope of the current study.

## **(2) Adopting regulation:**

Regulation is the one way through which the European Union may attempt to directly influence the functioning and adjudication of business contracts, to promote the European model in this domain.

However, the regulatory attempts developed up until today in this field, have clearly failed, despite the knowledge, expertise and competence of the many internationally renowned experts involved in their conception and refinement. Most likely, however, a more streamlined and essential regulatory proposal could be explored and attempted, based on some essential ideas and criteria.

One of the fundamental ideas – if the purpose is that of incentivizing sophisticated business parties in electing EU regulation and EU jurisdiction – is that of preserving, whenever possible, the will of the parties and the negotiated agreement. Most certainly, any potentially illicit conduct or choice ought to be struck and not enforced. Moreover, traditional mechanisms and doctrines should not be altogether trumped or dismissed, even when they resort to general clauses (see §2.4 above). On the one hand, in fact, any legal ordering should only enforce those agreements that it deems respectful of its most fundamental principles and of its non-negotiable (thence mandatory) provisions. On the other hand, even those doctrines that are based on general principles – such as good faith – may prove useful and efficient in striking opportunistic behaviour that could ultimately increase transaction costs. After all, similar doctrines are not absent in those jurisdictions – most commonly common law countries such as the US and UK – that are often favoured over European ones (see §2.4.2 above).

This said, it is quite evident that those jurisdictions that are today preferred are both efficient in adjudicating cases (even if not always more efficient than European MS, see §2.5 above), and very much respectful of the parties' intention without, in-so doing, conceding to any illicit behaviour, choice or content of the agreement. Those jurisdictions too at times intervene to limit opportunistic behaviour through doctrines of a comparable nature to those diffused across most civil law jurisdictions. However, judicial interventionism, in particular of the kind that substantially alters the content of the agreement, eventually touching upon its economic equilibrium, as well as the emergence of doctrines that attribute the agreement other functions

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<sup>276</sup> EUROPEAN PARLIAMENT, *Resolution with recommendations*, cit., 5.

(e.g. social-justice, redistribution, or protection of non-contractually-related interests see §2.5.1 above) is instead much more limited and rarer an occurrence.

It may be further stressed that the circumstance that the United States and United Kingdom both ratified – after the EU – the 2019 Hague Judgments Convention<sup>277</sup>, whose primary purpose is that of easing the recognition and enforcement of foreign judgments in civil or commercial matters, may further ease the penetration of judgements originating from those systems in Europe. This, in turn, could further promote the choice of those legal systems above and beyond European ones, further increasing the relevance of the current analysis and, together with it, the need for a regulatory intervention aimed at increasing the competitiveness of the European regulatory framework. All this considered, a regulatory intervention in the field of business contracts could:

(a) Be in the form of a regulation, rather than a directive, to ensure maximum harmonization among MS.

Indeed, while directives are more respectful of the status quo of each regulatory framework, they also lead to a greater degree of divergence between MS. Since the ideal function of such an intervention would be that of harmonizing the European legal framework and favouring its election by sophisticated business parties, the normative intervention should not increase diversity and complexity of each regulatory framework at national level any further, as a directive, instead, most certainly would. Indeed, a directive would entail not the creation of a single European regulatory model for business contracts, but one different business contract regime for each MS, almost completely forfeiting its intended purpose.

(b) Be an optional instrument, businesses – and businesses alone – may expressly choose to resort to.

The proposal for a CESL received criticism because of its optional nature that, according to some (see §1.10 above), would have increased the number of alternative systems without replacing any. A regulatory intervention in the field of business contracts, however, could only be in the form of an optional tool, leaving businesses the possibility to choose it, based on its merits. Indeed, since the very discussion here carried out deals with the possible reasons why other legal systems are preferred to the European and MS's, the imposition of any new regulation would defeat the purpose, unless businesses would choose it irrespective of its compulsory nature, due to its efficiency and functioning.

The possibility to choose this optional regulation should only be granted to business parties of any size and dimension, so long as they qualify as such and they act in their business capacity.

(c) Be a self-sufficient piece of regulation.

The proposed regulation should attempt to address all the essential elements of the theory of contracts, so that it needs not rely extensively on MS's legislation, doctrines and case law, otherwise the purpose of maximum harmonization would be defeated. Indeed, contract law is one of the branches of the law where legal cultures are deeply rooted not only in the legislation but also in its interpretation and application.

(d) Maintain a minimalist approach and minimize default rules.

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<sup>277</sup> Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

Connected to sub (c) above, the proposed regulation should focus just on very essential elements, avoiding many of the complex theoretical debates that revolve around the field of contract law and are of more limited practical relevance in particular in complex business transactions.

Considering it would be an optional instrument, to be chosen by sophisticated business parties, the need for a complex set of default rules – that typically characterize the general theory of contracts – ought to be reconsidered.

Most certainly it should provide a definition of contract, centred around the notion of agreement, and its economic nature<sup>278</sup>, of its essential elements, and of the possibility for the parties to add terms and conditions, if so they wish. The focus should be on mandatory, non-negotiable provisions, that expressly limit the parties' autonomy to protect prevailing and often publicly relevant interests, whenever that is the case.

(e) Avoid regulating the details of one or more specific contractual types.

Because the regulation would be conceived to appeal to sophisticated business parties who anyway undergo complex negotiations, the need for default rules is limited. To the contrary, the risk of mis-categorization by judges, called in to adjudicate the claims, attempting to classify an agreement within one of the regulated contractual types is very relevant (see §2.3 above).

While the regulation of many different contractual types eases less-sophisticated parties, by providing boilerplate and common terms, that ease negotiations and simplify transactions, this is not the case with business parties, assisted by qualified experts.

Rather, defaults force additional negotiations whenever the parties intend to depart from them, and often generate uncertainty with respect to the outcome of negotiations. Indeed, it is not often clear what language will suffice to exclude the default provision and replace it with the intended agreement, reached by the parties (see §2.3 above).

Moreover, if the parties qualified their agreement as belonging to a certain contractual type and negotiated accordingly (allowing or excluding the application of certain default rules that are dictated for that specific contractual type), and then the contract is qualified by the judge as belonging to a different contractual type, characterized by a different set of default rules, the overall effect would be negative in a twofold sense. Firstly, it would *ex post alter* – even profoundly – the equilibrium the parties had intended to achieve and had negotiated and agreed to. Secondly, it would give rise to *ex ante* uncertainty in negotiations, increasing transaction costs, and ultimately discouraging the choice of the regulation altogether (see §2.3.4 above).

As clarified under (d) above, regulation should focus on the essential elements, as well as mandatory provisions, leaving ample room to parties' autonomy and negotiation.

(f) Address contractual interpretation and allow for a textualist option.

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<sup>278</sup> Not all legal orderings agree on focusing the definition of contract on the economic nature of the agreement. However, the specific category said rules should apply to would justify such a restriction.



Contract interpretation should be addressed, as it typically is, by referring to the parties' autonomy, and the need to reconstruct their will, as well as the possibility to resort to the objective meaning of the words, when their intention is not easily determined.

The wording adopted could also allow for contextualist approaches, yet the possibility for the parties to choose a textualist alternative should be granted.

This can be achieved both through the introduction in the agreement of merger clauses (that could be expressly regulated), that specify that all what governs and is relevant to the contractual relationship is identified and clarified within the agreement itself. A similar outcome could be achieved through self-imposed requirements of written form that would cause everything what falls outside the written document to be irrelevant and void (see §2.4 above). The possibility for such kind of formalities should be clearly regulated as well, also addressing and excluding the possibility to revoke such self-imposed requirement in any way if not in writing.

Ultimately, the textualist option allows the party to identify which elements they intend to be considered in case a need for interpretation arises. The possibility to limit relevant evidence and the elements the judge ought to consider when adjudicating the contract to what is specifically chosen does neither entail the possibility to give relevance to illicit behaviour or interests, nor to prevent the application of general clauses (see let. (g) below).

At the same time, granting the parties the possibility to opt for a textualist approach provides ex ante certainty about how the contract will be interpreted, and about what elements will be taken into account to decide the case. The parties will thence be able to exert control on what they declare, state and decide within the agreement with the certainty that those elements and those alone will be later considered.

This allows for great foreseeability of the interpretative outcome, that would still be the free and independent exercise of judicial power, yet would provide much needed certainty and control on what is deemed relevant. Such an increase in foreseeability of the interpretative outcome would most certainly be appreciated by sophisticated business parties, who would be incentivized to elect the specific regulatory regime.

(g) Allow contractual integration and the operation of general clauses.

The circumstance that the parties should be allowed to opt for a textualist approach to contractual interpretation does not exclude the possibility to allow both contractual integration and the operation of general clauses.

As per contractual integration, the possibility to deem certain behaviours and/or performances or even an omission and/or tolerance of a conduct of the counterparty demandable of the other should be expressly acknowledged. Indeed, all legal systems allow the imposition of non-negotiated obligations that are either expressly affirmed by applicable norms or derived from their interpretation and application to the specific case (see §2.4.2 above).

More specifically, as per the latter, the role of general clauses (including good faith) might allow to compare the opposing interests of the parties, or the interest of one or all of them with a prevailing public interest, and deem a given conduct, omission or act of tolerance concretely demandable in light of all relevant circumstances.

Similarly, general clauses might be invoked through the application of specific doctrines of the kind exemplified above (see §2.5 above), to prevent the opportunistic behaviour of one party to the detriment of the other.

While it is certain that such mechanisms might increase the level of *ex ante* unforeseeability of the judicial outcome in case of litigation, the following essential considerations need to be taken into account. Firstly, the legal system needs not only enforce the will of the parties. Their autonomy is limited and needs to respect and comply with prevailing public interests that may take the form not only of prohibitions but also of the requirement for certain conducts and performances.

Those conducts and performances might be demanded that, despite not clearly negotiated by the parties in the contract, or provided for by the law, are nonetheless deemed:

- (i) corresponding to a legally relevant interest of one party that
- (ii) is functionally connected to the contract, so that in the absence of the agreement that interest would not exist and/or be legally relevant (see also below when discussing *Schutzpflichten*), and
- (iii) may be deemed prevailing over the opposing interest of the counterparty, and
- (iv) whose protection requires a conduct on the side of the party that will be obliged to perform that is not excessively or unreasonably burdensome.

Said interests could exist in all phases of the contractual relationship, starting with the precontractual phase of negotiations, to extend to both the execution and postcontractual phase<sup>279</sup>, and they might include informational duties<sup>280</sup>, secrecy and non-competition duties, and cooperation duties<sup>281</sup>, as well as all other duties that satisfy the conditions laid down above. A comprehensive list is, in fact, impossible to define, due to the breadth of potentially relevant legal interests as well as the diversity among contractual agreements and the concrete functions they might pursue.

Secondly, the circumstance that a specific interest was not identified in the contract or negotiated does not *per se* automatically exclude its relevance and the need for protection. It is well known that contracts are incomplete, and that negotiating every possible scenario *ex*

<sup>279</sup> The postcontractual phase begins once the contract is fully performed, is cancelled, or declared to be void, and yet legally relevant interest persist between the former contractual parties that may be regulated by the agreement, the law or derived from the application of substantive good faith, please allow reference to BERTOLINI, *Il postcontratto*, Bologna, 2018, 34-36.

<sup>280</sup> About the transactions occurred in a banking contract, or related to investments made in the capital markets, as well as in employment agreement, on which see BUSCH, *Informationspflichten im Wettbewerbs- und Vertragsrecht*, 2008, *passim*; CIAN, *L'informazione della prestazione dei servizi di investimento: gli obblighi degli intermediari*, in *I contratti del mercato finanziario*, GABRIELLI-LENER (a cura di), nel *Trattato dei contratti*, RESCIGNO-GABRIELLI (a cura di), Torino, 2011, 213 ff; GRUNDMANN, *Information, Party Autonomy and Economic Agents in European Contract Law*, in *Common Market Law Review*, 39, 2002, 269 ff.; PERRONE, *Gli obblighi di informazione*, in *L'attuazione della MiFID in Italia*, D'APICE (a cura di), Bologna, 2010, 499 ff.; SCHULZE-EBERS-GRIGOLEIT, *Information requirements and formation of contract in the Acquis communautaire*, 2003, *passim*; also allow reference to BERTOLINI, *Il postcontratto*, cit., 209 ff.

<sup>281</sup> Also known as *Mitwirkungspflichten* they might have a very broad scope, narrowed down by the specific legal function the contractual agreement pursues. Those might entail the duty to provide spare parts – on which SCHOPPER, *Nachvertragliche Pflichten. Das Pflichtenprogramm nach Erlöschen der vertraglichen Hauptleistungspflicht*, Wien, 2009, 518, there further references also to German literature and case law – duties to monitor the behaviour of employees who might breach secrecy duties (even after their dismissal) to the detriment of a franchisor – see art. 17.3 of the ICC Model International Franchising Contract, for a comment please allow reference to BERTOLINI, *Il postcontratto*, cit., 225 – as well as a broad spectrum of duties functionally connected with the contract.

*ante* might be inefficient and prevent reaching an agreement altogether. Therefore, the absence of an express contractual provision does not per se exclude the need for the state to enforce a juridically relevant interest of one party over the other.

Thirdly, foreseeability might be achieved through a process of analysis and categorization of relevant cases arising from case-law (*konkretisierung* and the creation of *Fallgruppen*, see §2.4.2 above), that is performed by courts and academics in a constant dialogue.

Fourthly, the application of already existing doctrines rooted in general clauses such as good faith – such as *exception doli*, estoppel, and the prohibition of contradicting oneself, to name some relevant examples – might achieve efficiency, preventing opportunistic behaviour and limiting ex ante contracting costs (see §2.4.2 above).

It is, however, essential that the use of those doctrines both to justify contractual integration or to limit or prevent a given behaviour or conduct of one party (when a specific normative provision is absent) impose duties or obligations or prevent conducts and behaviours that are functionally connected to the contract. Said otherwise, the contract should not become the occasion for protecting non-contractually related interests of the parties (e.g. *Schutzpflichten*) that may be addressed through other bodies of norms in the legal ordering (e.g. tort law).

While a contract might extend to include the protection of a non-economic interest that is functionally connected with the agreement<sup>282</sup>, the protection of interests, of both an economic nature or not, that are not dependant upon the contract should be excluded. While this could be an advisable position for all contractual agreements, it is very relevant for those to be concluded between sophisticated business parties.

(h) Make it explicit that the economic matter of the agreements are for the sole parties to decide and negotiate, only preventing exploitative/abusive/illicit behaviour of one party to the detriment of the other.

In line with the traditional European approach to contract regulation, the economic aspects of the agreement should be left entirely to the free determination of the parties, and not be interfered with *ex post* by judges (see §2.5.1 above).

On the one hand, even in such cases where European regulation acknowledges the need for protection and the structural disparity between the contractual parties (namely consumer law, see §2.4.1 above), it expressly excludes the possibility to interfere with such aspects, that are left to the parties' determination.

Indeed, the parties are best positioned to assess the economic adequacy of the agreement in all its elements, including penalty clauses, pre-liquidated damages and the like.

Regulation, as clarified under (d) and (g) above, should sanction illicit behaviour, even in the form of abusive and/or exploitative behaviour in negotiations and performance, and could

<sup>282</sup> This is the case of the interest to bodily integrity with respect to a contract with a sports' instructor to learn to practice that very sport. The non-economic interest of the student to perform his class under conditions of safety to preserve his bodily integrity is absorbed by the contract whose primary object is that of exchanging a payment with the teaching of the sport itself. This entails that the sport instructor could be demanded to adopt all relevant precautions, irrespective of a detailed legal or contractual provision imposing a similar duty. To the opposite, the bodily integrity of a passersby or somebody observing the sports lesson even within the premises of the sports club would not find the reason for its protection in the contractual agreement between the instructor and the student, nor in the potential agreement the observer could decide to conclude later-on.

provide limits to certain economic sanctions and remedies (see let. (i) below). However, once no illicit behaviour was put in place during negotiations, and/or no evidence was provided to demonstrate that such behaviour took place, if the parties freely agreed to certain economic terms, those should not be modified by the judge.

In particular, no intervention by the judge should be allowed to modify and/or revise the economic aspects of the agreement in the absence of an express request of the interested party in the trial (see §2.4.2 above).

(i) Focus on a detailed and analytical regulation of remedies.

Building upon the criticism brought to the CESL proposal, as well as on the functional analysis conducted by many scholars (see §2 above), the general theory of contracts should focus more on remedies, providing more detailed provisions on a number of issues that are today under-regulated and left to the efforts of courts and academics to define and refine.

Legislation should, instead, both benefit from the debates carried out over the decades in multiple jurisdictions, and of the complex case law, and provide detailed provisions, addressing, among other things<sup>283</sup>:

- (i) Precontractual liability, specifying its hypotheses, the conditions that suffice in establishing liability, how the damage is to be defined and calculated (in the different hypotheses, since variations might occur).
- (ii) Contractual liability, with a focus on specifying upon which conditions it may be established, what consequential damages are in different scenarios, and how they may be distinguished, what language used in the contract would allow including or excluding certain damages from compensation in case of breach, specify what damage is to be compensated (expectation, reliance, disgorgement of profits) in each condition or scenario.
- (iii) Contract cancellation upon breach, what conditions justify it, eventually conceive a procedure to certify cancellation (and avoid uncertainty about its effect) if automatic cancellation options are provided for by the law.
- (iv) Pre-liquidated damages and penalty clauses, what language justifies their provision in the contract and their extension to multiple performances to be rendered in light of the same contractual agreement, what limit (if any) they might encounter, compared to the value of the corresponding obligation to be performed by the debtor.

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<sup>283</sup> Please note the list is intended as a mere example, for a more detailed discussion, still providing a very incomplete list of topics to be addressed, see §2.5 above.

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This study – commissioned by the Policy Department C at the request of the Committee on Legal Affairs – aims at discussing the reasons why the law chosen in commercial contracts is largely non-European and non-member state law. To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law. Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies.

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