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Il modello giuridico -scientifico e legislativo- italiano fuori dell'Europa

Università degli Studi di Siena – 20, 21, 22 settembre 2012

RICORDO DI FERNANDO HINESTROSA

di

Francesco Donato Busnelli

.

RICORDO DI FERNANDO HINESTROSA

"Ei fu": quando giunse, improvvisa, la notizia della scomparsa di Fernando Hinestrosa, mi venne alla mente l'accostamento con il quale Alessandro Manzoni salutò la morte di Napoleone nella celeberrima poesia del "Cinque maggio": l'accostamento tra la fredda immobilità di una "spoglia orba di tanto spiro" e il gelo di una "terra percossa e attonita – qui, la grande famiglia dei giuristi del vecchio e del nuovo continente -, muta pensando all'ultima ora dell'uom fatale": qui, evidentemente non "l'uomo fatale" che lascia ai posteri di rispondere se fu "vera gloria", ma "El ultimo caballero radical" magistralmente illustrato fin dal titolo da Miguel Méndez Camacho nel libro che il poeta e giurista proveniente dall'Universidad Externado de Colombia ha voluto dedicare al suo Rettore, Fernando Hinestrosa.

Fu vera gloria, la Sua. Ebbi modo di constatarlo personalmente quando, invitato alla solenne celebrazione del 40° anno di rettorato del Nostro – correva l'anno 2003 – mi trovai immerso in una folla di persone venute a festeggiarLo entro le accoglienti mura dell'Externado: esponenti della cultura e della politica, colleghi giuristi, allievi, amici.

Alla cultura e alla politica Fernando Hinestrosa ha reso un generoso e provvido servizio, in patria (fu ministro dell'educazione, e successivamente della giustizia) e nel mondo (fu ambasciatore a Roma della Colombia presso la Santa Sede; insignito in Francia della Legion d'onore). Méndez Camacho lo definisce come "l'ultimo liberale del radicalismo storico": un liberale intriso di cultura tradizionale, profondamente laico ma attento ai valori religiosi, aperto ai problemi della globalizzazione (il Nostro preferiva parlare di "homogeneización universal") ma cauto di fronte al vento nordamericano del liberismo economico. Pochi giorni prima di morire, il 6 febbraio scorso, richiesto da un intervistatore televisivo di sintetizzare i valori fondamentali della sua cultura politica, così li enunciò: "libertà, democrazia, autonomia, rispetto dell'altro, tolleranza".

Ma Hinestrosa fu soprattutto, e sempre, giurista: i colleghi latinoamericani ne ricordano la guida autorevole e attenta come presidente della "Union de Universidades de America Latina" (1979-86) ; i colleghi europei lo hanno ammirato per la straordinaria apertura alla dottrina dei modelli storici di civil law - facilitata da una naturale dimestichezza con le relative lingue (dal francese all'italiano al tedesco) -,

e per la savigniana consapevolezza della perdurante attualità del diritto romano. Fu, e rimane, un esempio di civilista capace di coniugare nova et vetera in una sintesi destinata a proiettarsi nel tempo e nello spazio; un giurista autenticamente colombiano e, al tempo stesso, un civilista-romanista senza frontiere. Ne è esempio significativo la relazione al Convegno internazionale sul "futuro della codificazione", organizzato a Parigi nel quadro del bicentenario del Code civil (2004), nella quale, confrontandosi con le recenti tendenze evolutive – la vicenda italiana della "età della decodificazione" e quella francese della "codification à droit constant", raccomanda "el máximo cuidado en la qualidad y oportunidad del trabajo" ammonendo a non sopravalutare "la fiducia (illusione, sogno?) che per quella via si possano superare le deficienze della codificazione ordinaria".

Agli allievi il professor Hinestrosa ha dedicato l'impegno primario di Maestro rigoroso e appassionato nell'ambito di una Scuola che, sotto la Sua guida, ha contribuito a fare dell'Externado una Università universalmente apprezzata per l'alto livello della ricerca e della didattica: una didattica sempre alimentata dal ricorso a modelli e fonti dottrinarie europee, recepite mediante una poderosa opera di traduzioni di testi, da Lui appositamente selezionati. Fa piacere constatare che tale selezione manifesta una spiccata predilezione per il diritto italiano; e personalmente conservo il grato ricordo dell'onore che Fernando mi riservò quando, con l'umiltà dei Grandi, chiese l'autorizzazione a tradurre il manuale pisano di "Diritto civile".

Fu, questa, una grande prova di amicizia nei confronti del sottoscritto e degli altri autori del manuale: Lina Bigliazzi Geri, Umberto Breccia, Ugo Natoli; un'offerta di amicizia, prontamente ricambiata, che aveva il significato e lo scopo di stringere un rapporto di collaborazione didattica e scientifica tra l'Universidad Externado e "el complejo universitario de Pisa" (così ufficialmente definito nel recente accordo tra i governi italiano e cileno sulla c.d. REUCHI, Red Universitaria Chile-Italia).

E così fu. Nel varcare la prima volta il cancello dell'Externado, Fernando mi disse, aprendosi immediatamente all'amicizia: "esa es su casa". Correvano gli anni '80. Da allora, il rapporto amicale tra Bogotà e Pisa si è progressivamente rafforzato. La Scuola Sant'Anna è diventata "casa" di Fernando Hinestrosa - che più volte è stato tra noi - e dei Suoi allievi, sempre motivati e impegnati nel "perfezionamento" fino al conseguimento del titolo dottorale che per tradizione porta questo nome. "Per il prof. Hinestrosa – mi scrive il Suo allievo e ora affermato docente dell'Externado (Edgar Cortes, brillantemente "perfezionatosi" alla Scuola Sant'Anna) – Pisa è sempre stato un punto di riferimento".

L'ultima volta (nel 2009) che il professor Hinestrosa, come sempre accompagnato dalla dolce consorte Consuelo, è venuto alla Scuola Sant'Anna per partecipare, in qualità di membro della apposita

commissione di esame, alla discussione della tesi di perfezionamento di una delle Sue ultime allieve inviate a Pisa, Milagros Koteich, Fernando – che mostrava di aver recuperato pieno vigore e rinnovato entusiasmo dopo la malattia – esortava a guardare al futuro della nostra collaborazione, inserendola nel quadro più generale, e aperto al mondo, di una "labor continuada, esmerada y responsabile, que implica il concurso de personas, organismos públicos y privados, experimentados y con autoridad scientifica".

Manzonianamente "Ei fu", dunque; e grave è la Sua perdita. Ma "Egli è", vivo e palpitante, nel messaggio che ci lascia. A noi l'arduo compito di non tradirne il profondo significato e il genuino entusiasmo.

Francesco Donato Busnelli

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Paper n. 1

THE EUROPEANISATION OF CONTRACT LAW AND THE ROLE OF COMPARATIVE LAW: THE CASE OF THE DIRECTIVE ON CONSUMER RIGHTS

by

Cristina Amato

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THE EUROPEANISATION OF CONTRACT LAW AND THE ROLE OF COMPARATIVE LAW: THE CASE OF THE DIRECTIVE ON CONSUMER RIGHTS

by

Cristina Amato♦

Abstract:

This paper shall concentrate on the revision attempts of the consumer *acquis* which are still on the European Institutions' agenda, making an effort to highlight the final goals that these attempts aim at, as well as the quality of their (prospective) rules. In particular, the Directive on Consumer Rights has redrafted and amended four directives on consumer contracts: the present paper focuses on the main contents of the Directive, with the intent of checking whether its goals and contents achieved a sustainable level of quality and harmonisation in the light of a comparative approach. The results of this enquiry are twofold: a correct use of the comparative method not only would have avoided questionable choices, but it would also have achieved a better level of harmonization without irritating MSs.

Keywords: Europeanisation; Contract Law; Comparative Law; Directive Consumer Rights.

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Part I - The Harmonisation Process: Confused paths and Goals of Community Institutions

1. Introduction

It is well known among private law scholars that several, separate official and private attempts to harmonise European Contract Law currently exist[1]. The former initiatives include EU directives, regulations, action plans, and green papers; examples of the latter include the Lando commission, the Acquis Group, and finally the Expert Group, which the Commission recently appointed to reach the goal of drafting a concise and range-restricted optional instrument (to be referred to herein as the CESL, Regulation for a Common European Sales Law)[2].

It is not possible to provide an exhaustive and coherent list of the relevant documents concerning European Contract Law, depending on whether we include or not the consumer's acquis. Most importantly, it is not clear whether the consumer acquis communautaire may be considered as the core of a European Contract Law, with the idea that such could lead to a codified European law of contract consisting of a general part/specific rules devoted to unbalanced transactions. Or - to the

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[1] For a complete account of the different projects and roles played by courts, public and academic projects in laying the groundwork of European private law, see E. HONDIUS, *Fifteen Years of European Private Law*, in *Opinio Juris in Comparatione*, 2 (2009), Paper 5; see also V. ROPPO, *Prospettive del diritto contrattuale europeo. Dal contratto del consumatore al contratto asimetrico?*, in *Corriere giuridico*, 2 (2009), 267.

[2] The *Expert Group on European Contract Law* had been appointed by the European Commission (see Decision 2010/233, 26 April 2010) in order to achieve a Proposal for a European Sales Contract 'of whatever legal form or nature'. On 11 October 2011 the European Commission has delivered the CESL (COM (2011) 635 Final), based on the 'feasibility study' issued by the Expert Group on August 19, 2011. The CESL is applicable to B2B and B2C contracts; the material scope of application covers sales contracts and service contracts associated with sales, digital contracts. See: C. CASTRONOVO, *L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles. Dal DCFR alla Proposta di Regolamento di un diritto comune europeo della vendita*, in *Europa e diritto privato*, 4 (2011), 837 ff.; H. W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" - Too Broad or Not Broad Enough?*, in *EUI Working Papers*, European University Press, 2012; W.M.HESSELINK, *How to Opt Into The Common European Sales Law? Brief Comments on the Commission's Proposal for A Regulation*, in *Centre for the Study of European Contract Law, Working Paper Series n. 2011-15*, Electronic copy available at: http://ssrn.com/abstract=1950107; ID., *The Case for a Common European Sales Law in an Age of Raising Nationalism*, Centre for the Study of European Contract Law, *Working Paper Series n. 2012.01,* Electronic copy available at: http://ssrn.com/abstract=1998174; G. LOW, *A Numbers Game- The Legal Basis for An Optional Istrument in European Contract Law*, Electronic copy available at: http://ssrn.com/abstract=1991070.

contrary - whether it is more convenient to ignore the bulk of the acquis (no matter whether dealing with B2B or B2C contracts) located in official documents, and consider them as a separate set of rules, and make way for private documents dealing with general contract law/special contracts only, as happened in the Draft on the Common Frame of Reference (from now on: DCFR), published in 2008 and again set aside in favour of a shorter and range-restricted optional instrument, the CESL)[3].

Keeping this chaotic background in mind[4], the present paper shall concentrate on the revision attempts of the consumer acquis which are still on the European Institutions' agenda, making an effort to highlight the final goals that these attempts aim at, as well as the quality of their rules. Such shall be done using a comparative method of analysis, that is balancing the knowledge of the national legal tradition with the need for a common EU legal order[5].

In this perspective, it is difficult to understand why the revision's efforts have again been fragmented, instead of aiming for a single, coherent re-statement of contract law, as initially planned by the European Commission in its 2003 Action Plan[6]. It should be remembered that this important foundational document[7] contains the original idea of a common frame of reference, which became the abovementioned DCFR 2008, having the ambitious goal of becoming the optional instrument mentioned in the Action Plan. By the same token, it is again in the 2003 Action Plan that the Commission announced the launch of a consolidation or 'recasting'[8] of existing instruments[9], which was followed by the Green Paper in 2006[10].

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[3] See recently: P. BRULEZ, *From the Academic DCFR to a Political CFR – Conference on European Contract Law*, Trier, 18-19 March 2010, in *European Revue of Private* Law, 5 (2010), 1041 ff.

[4] In the different view of a common lawyer, the inconsistency and incoherence of EC legislation does not raise the same reactions as for civil lawyers. Due to the absence of a code, the production of a fragmented and taylor-made legislation fits within the traditional view of isolated irruptions into private law: S. WHITTAKER, *A Framework of Principle for European Contract Law?* , in *Law Quarterly Review*, 125 (2009), 625.

[5] M.P. MADURO, *Interpreting European Law – Judicial Ajudication in a Context of Constitutional Pluralism*, in *Working Paper IE Law School*, Electronic copy available at: http://ssrn.com/abstract=1134503, 5.

[6] COM (2003) 68 fin.

[7] Later supported by the Communication of the European Commission of 11 October 2004: *European Contract Law and the Revision of the Acquis: the Way Forward.*

[8] Consolidating and recasting do not constitute the same action. Consolidation means 'grouping together in a single non-binding text the current provisions of a given regulatory instrument, which are divided between the first legal act and subsequent amending acts' (Action Plan 2003, footnote 55). Recasting means 'adopting a single legal act, which makes the required substantive changes, codifies them with provisions remaining unchanged from the previous act, and repeals the previous act…' (Action Plan 2003, footnote 57).

[9] See previously: COM (2001) 726 final, where the Commission indicated that 'improving the quality of legislation already in place implies first modernising existing instruments. The Commission intends to build on action already undertaken consolidating, codifying and recasting existing instruments centered on transparency and clarity. Quality of drafting could also be reviewed; presentation and terminology could become more coherent. Apart from those changes regarding the presentation of legal texts, efforts should be systematically focused on simplifying and clarifying the existing legislation. Finally, the Commission will evaluate the effects of Community legislation and will amend existing acts if necessary'.

[10] Green Paper on the Review of the Consumer Acquis COM (2006) 744 final (8 February 2007), concerning the review of 8 directives on consumer *acquis:* Dir. 85/577/EEC (contracts concluded away from business premises); Dir. 90/314/EEC (on package travel, package holidays and package tour); Dir. 93/13/EEC (on unfair terms in consumer contracts); Dir. 94/47/EC (on timesharing); Dir. 97/7/EC (on distance contracts); Dir. 98/6 (on the indication of the prices of products offered to consumers); Dir. 98/27 (on injunctions); Dir. 99/44/EC (on consumer sales and guarantees).

The project of adopting a single legal act amending and/or filling in the gaps of the previous consumer contract law seems to have been set aside without providing an adequate explanation. Recently the European Parliament and the Council have passed two new directives, one on consumer credit (2008/48)[11] and another on timesharing (2008/122). Eventually, apart from the abovementioned revisions, four directives[12] have been jointly redrafted and amended by the European Commission in the Directive on Consumer Rights (hereinafter: "DCR")[13]. According to a document issued by the European Commission – Directorate-General Justice, on 1-2 September 2010, the DCR should have become part of the optional instrument, provided that the full harmonisation option is maintained. The CESL has introduced separate special rules governing B2C contracts, thus rendering the present legislative offer in the area of consumer law even richer. Here is an initial list of difficult questions that still need to be answered: (i) why does the DCR not include from the outset the entire acquis on consumer protection? E.g.: consumer credit contracts, timesharing, travel packages, and so forth; (ii) should the CESL be considered as a second legal order for cross-border transactions, that does not replace national consumer law, but runs parallel to it, what would the relationship be between the CESL and the DCR, being some special contracts (such as contracts negotiated away from business premises, distance contracts and digital contracts) regulated in both instruments, one of which (the CESL) is an optional one?; (iii) consequently, what is the relationship between the CESL and the CISG, 1980? Should the latter be considered as superseded by the former[14], at least as concern B2b contracts[15]? ; (iv) how can an 'optional' instrument be associated with a consumer legal area that is of a mandatory nature? In truth, the CESL creates even more legal uncertainty[16].

To sum up, it seems that - notwithstanding the official statements – the European Institutions are pursuing at least two different paths: one consists of elaborating an optional instrument, certainly not exclusively devoted to consumer's v. traders negotiations, entrusting for this

[11] I did not mention Dir. 2009/22 on collective injunctions and Dir. 2006/123 on internal market services as they both only affect European contract law indirectly.
At present, the EU is studying the revision of the directive on package travel, and it is also considering the possibility of a directive concerning collective redress.

[12] Directive 85/577/EEC on contracts negotiated away from business premises and Directive 97/7/EC on distance contracts have been amended, while Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/44/EC on consumer sales and guarantees have been repealed.

[13] Dir. 2011/83/EU, 25 October 2011. The Proposal for a DCR (COM (2008) 614/3) 'non-link' with the DCFR had previously been highlighted by E. HONDIUS, *The Proposal for a European Directive on Consumer Rights: A Step Forward*, in *European Revue of Private* Law, 1 (2010), 115 ff. See also M.E. STORME, *Consumer Rights Proposal and Draft CFR*, in *European Revue of Private* Law, 1 (2010), 1 ff.

[14] See N. KORNET, *The Common European Sales Law and the Cisg. Complicating or Simpifying the Legal Environment?*, Maastricht European Private Law Institute, Working Paper 2012/4, Electronic copy available at: http://ssrn.com/abstract=2012310, where she argues that rather than simplifying the legal environment the CESL might render it even more complex.

[15] Though according to art. 7(1), the scope of application of CESL is limited to B2b contracts, that is contracts where at least one of the parties is a small or medium - size enterprise (SME), as defined by art. 7 (2).

[16] As promptly underlined by two resolutions of the UK Parliament (14.12.2011, Council Doc. 18547/11) and of the German Parliament (30.11.2011).

purpose private commissions with the difficult task of creating rules adaptable to general contract law, but whose range of application might reveil too narrow. The second path consists of reviewing the consumer acquis communautaire 'for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity' (Recital 4, DCR).

The present paper will focus on the main contents of the DCR, through the lenses of the comparative method. However, before dealing in depth with the Directive, a preliminary issue must be faced, that is, the choice between a minimum or maximum level of harmonisation.

2. In Defence of a 'Full Targeted Harmonisation'

Choosing to go down the path of minimum rather than maximum harmonisation[17] implies the adoption of a normative approach. In other words, within the parameters of the subsidiarity and proportionality principles, the EU's intervention must be qualified as necessary in order to provide adequate and equivalent levels of consumer protection. On the other hand, one could argue whether consumer law must necessarily remain an exclusively European concern, or to the contrary, whether consumer protection may be shared between member state (MS) and EU jurisdiction (as happens in the United States of America), without compromising the effectiveness of the protective rules[18].

In truth, a preference for a protective policy designed at a European rather than a national level was expressed years ago[19], and although it could be properly challenged, such a (political) choice has apparently been accepted by MS lawmakers, courts and legal scholars. It seems to view the harmonisation process brought about at a legislative level as a help to the existence of Europe.

Thus, for thirty years the European-level lawmaker has certainly encroached upon the MS' legislative competence as regards certain contracts, and consumer contracts in particular. This encroachment necessarily raises the question of to what extent we are willing to accept the EU institutions' intrusion into spheres of national private law, or - using legal rather than political terminology - the question that EU institutions are facing now is whether a maximum harmonisation process would solve the various problems raised by the minimum harmonisation approach that has been followed so far.

One of the most striking rules of the DCR is the option in favour of full harmonisation, stated in art. 4.

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[17] The problem was raised in the Green Paper 2006 (see footnote 10), considering the replies of stakeholders on this issue.

[18] See J. SMITS, *Full Harmonization or Consumer Law? A Critique of the Draft Directive on Consumer Rights,* in *European Review of Private Law,* 1 (2010), 11 ff.; C. PONGIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in *Loyola Consumer Law Revue,* 21 (2009), 367 ff.

[19] On the debate over the harmonisation of consumer contract law by the EU, see: C. AMATO, *Per un diritto europeo dei contratti con i consumatori* (Milan, 2003), 27 ff.

Striking as it may appear, it may in fact be argued that if achievable, a (very) high level of protection, and one that does not stifle European competitiveness, would obviously require full harmonisation. With this said, however, problems due to the different levels of protection provided (or permitted) to date by the different MSs and the rules' compatibility with the subsidiarity principle may still yet arise[20].

In turn, minimum harmonisation would certainly permit the survival (and even strengthening) of national peculiarities, allowing a theoretical race of protection to the top. However, the country of origin principle, if applied to the consumer, would either hinder the growth of a fully integrated internal market (the costs, especially for SMEs, would remain high) or encourage the hardening of market players in their attitudes and practices in the preparation of general contract rules. In both cases, the outcome would be inconsistent with the aims of harmonisation

On the other hand, full harmonisation implies a more politically difficult set of choices, and it would be criticised for freezing the level of protection (at either a too high or a too low one) and for frustrating national cultural legal identities[21].

Clearly, alternatives might better serve the aims of reducing internal market barriers in a legal environment characterised by a high level of consumer protection. For instance, minimum harmonisation, coupled with a very highly protective optional instrument developed by co-regulation with market players, could provide the backdrop for a constructive competitive tension, both among the MSs and among market players, in order to identify the best available set of rules suitable for a given type of transaction\market\set of stakeholder interests. Minimum sufficient harmonisation would reduce consumer worries in cross-border transactions, while the optional instrument would offer incentives to balance out the costs of a higher level of protection and the benefits of a less fragmented market.

In short, the goal of full harmonisation would not in principle lead to a 'race to the bottom', but it may actually lead to a 'race to the top', provided that it be clarified which issues are 'not completely harmonised'. In order to simplify and clarify the acquis, without annoying those MSs that already have chosen a higher level of consumer protection, it is necessary to identify the issues to be included in the full harmonisation programme, and also outline those which could be left to MS discretion under the mutual recognition clause. One criterion could be to include in the full harmonisation programme all the issues linked to the subjective and objective scope of the horizontal instrument, i.e.: consumer/professional definitions, the types of contracts and their purposes. A second criterion could be the identification of rules which by their 'neutrality' would not offend any single MS, but at the same

[20] See in particular: J. SMITS, *Full Harmonization or Consumer Law? A Critique of the Draft Directive on Consumer Rights*, in *European Review of Private Law,* 1 (2010), 5.
[21] The argument *contra* is argued by E. HONDIUS, *Fifteen Years of European Private Law*, in *Opinio Jurs in Comparatione*, 2 (2009), Paper 5, 5.

time could not significantly differ from one state to the next, without creating an incomprehensible disparity among consumers of different nationalities (e.g.: the notification of the lack of conformity).

This is in fact what a 'targeted full harmonisation' should consist of. This concept was first suggested in the Working Document issued by the European Parliament and followed up in the consolidated version of the Proposal issued on 9 June 2010, after the European Parliament comments[22]. It seemed to be the 'way out', or the correct compromise between full and minimum harmonisation policies[23], but it has now been completely modified by the abovequoted art. 4 of DCR, where the 'targeted full harmonization' has been cancelled in favour of a maximum harmonisation policy. So therefore, according to the 'new' art. 4, "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive".

As shall be argued herein, working with a comparative method would involve the contextualization of the rules and the selecting of them according to two fundamental considerations: the maintenance of the flexibility to correct the (European) rules, and the ease of adapting them to the national systems[24]. Both arguments involve, therefore, the application of the comparative method to test the main set of rules dealt with in the DCR[25]. In order to render this test more effective, references to the former Proposal 24 March 2011 of the DCR shall be made[26]. The choice for a maximum harmonisation set out in art. 4, as well as the general framework of the DCR, are therefore seriously questioned.

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22 This was the amended text of Art. 4 of the Proposal: Article 4, *Targeted* full harmonisation: "1. Save as otherwise provided by this Directive, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. *Member States shall forward the text of diverging provisions of national law to the Commission".*

23 In the Working Document 3 March 2010, rapporteur A. Schwab, we read that: 'While most Committee Members acknowledge that the legal fragmentation issue must be tackled, the general view is that the full harmonisation approach proposed by the European Commission is in fact not feasible at this stage given the nature and the scope of the Proposal. In accordance with the European Parliament's Resolution on the review of the consumer acquis, and, as already stated in the IMCO working document of 2009, Committee Members prefer a *targeted full harmonisation* approach, limited therefore to specific aspects of certain contracts, whilst maintaining high levels of consumer protection'.

24 See also V. MAK, *Review of the Consumer Acquis: Towards Maximum Harmonization?*, in *European Revue of Private* Law*,* 1 (2009), 58; J. SMITS, *Full Harmonization or Consumer Law. A Critique of the Draft Directive on Consumer Rights*, *ibidem*, 8 ff., questioning both the European consumer policy and the full harmonisation principle.

25 See also C. PONGIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in *European Revue of Private Law,* 1 (2009), 353, at 359-361, who argues that comparative private law arguments should be linked to new modes of governance, thus building bridges between private and public law following a 'hybrid method'.

26 The first draft of the Proposal for a Directive on Consumer Rightss was presented on Ocotber 10, 2008 (COM (2008) 614/3). It has been significantly reviewed on March 24, 2011: the text can be read at the European Parliament's website. For a critical approach to the Proposal, see: K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights,* in *European Review of Private Law* 3 (2009), 335; M. LOOS, *Consumer Sales Law in the Proposal for a Consumer Rights Directive*, in *European Review of Private Law,* 1 (2010), 15. For a defense of the Proposal, see: E. HONDIUS, *The Proposal for a European Directive on Consumer Rights*: *A Step Forward*, in *European Revue of Private Law*, 1 (2010), 103.

Part II: Some First Insights into Directive on Consumer Rights (25 October 2011) in Light of the comparative method

1. The Strucure of the DCR

The DCR has largely betrayed the original setting of the Proposal 2008, as it repeals two previous consumer's Directives, leaving almost untouched the other two Directives (see supra, footnote 12). As for its contents, it mainly deals with information requirements, the right of withdrawal, formal requirements and delivery (Chapters II and III). Distance and off-premises contracts have a separate discipline than other contracts to which the DCR applies; while special applications of the general regime are prescripted in art. 17 to contracts for the unlimited supply of water, gas or electricity, and to district heating or the supply of digital content not supplied on a tangible medium. Last, only a few provisions (Chapter IV) are devoted to 'other rights', concerning delivery, passing of risk, communication by telephone and payments. In truth, the structure itself is complicated, the framework confusing, and the contents excessively detailed, but lacking of the expected thickness that might have resulted should a comparative analysis be applied.

2. The Definitions of 'Consumer', 'Professional' and 'Consumer's Contracts', and Their Possible Extension

As regards the definition of 'consumer', the DCR contains a definition that certainly matches the traditional strict definition and interpretation provided, respectively, by the previous consumer Directives and by the Court of Justice[27]: thus, according to art. 2(1) DCR "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession"[28]. Nevertheless, no substantive grounds would justify the categorical distinctions adopted in certain consumer directives[29].

Notwithstanding its coherence with the previous acquis communautaire, this definition does not take into account the European debate questioning such a strict definition, and therefore raises issues concerning the relationship between "intellectual" professionals and their clients/patients, as well as the exclusion of legal persons, non-profit organizations in particular, small and medium-sized enterprises, and any other person acting for purposes to some extent on a mixed basis with his/her trade, craft or profession[30].

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[27] ECJ 20 January 2005, Case C-464/01 Gruber/Bay Wa AG [2005] ECR p. I-439.
[28] This narrow definition has also been adopted by the CESL, art. (2)(f).
[29] M. W. HESSELINK, *Towards a Sharp Distinction Between B2B and B2C Contracts. On Consumer, Commercial and General Contract Law After the Consumer Rights Directive*, in *European Revue of Private Law,* 1 (2010) 57.
[30] This is in particular present in the case most recently discussed by the ECJ: see Footnote 26, Case C-464/01 Gruber/Bay.

As regards the first issue, that is the definition of consumer and professionals, a comparative analysis would show that 'consumer' may also include a client or a patient, as happens in France[31]. Although at the outset the word 'professional' employed in the acquis would not distinguish between "intellectual" professionals and commercial traders, at this stage the acquis seems to separate traders (this is in fact the preferred definition in the DCR: art. 2(2)) from intellectual services. This is certainly true as regards medical care provided in a hospital. This kind of relationship was recently excluded from the scope of Dir. 2006/123/EU concerning the internal market services. Although the DCR also includes contracts dealing with both goods and services, in the broad definitions of 'sales contract' and 'service contracts' (arts. 2(3)-(6)), art. 3, par. 3(b), providing for the scope of the DCR, clearly exludes contracts for healthcare services, provided by health professionals to patients in accordance with Dir. 2011/24/EU, but does not clearly excludes other intellectual services.

As regards the second issue, that is, the exclusion of legal persons, small enterprises and mixed-purpose contracts, a comparative approach has highlighted the non-harmonised application of the acquis in the MSs, and the need for a broader discussion. Spain, for example, has extended the definition of consumer to legal persons, and in Germany the recent reform of the BGB (Book II, on obligations) has extended certain specific rules (especially dealing with unfair contract terms) to B2B contracts. In the UK, there is a debate within the Law Commission on the potential extension of such definition to small enterprises. One of the most controversial issues is, in fact, the extension of the revised provisions on unfair terms in contracts to small-medium businesses (that is, businesses with nine or fewer staff) [32]. Having regard to the objective scope of consumer contracts, the DCFR contains a broader notion including transactions "primarily for purposes which are not related to his or her trade, business or profession". To solve the ambiguity pertaining to the adverb 'primarily', an express indication could be given on the basis of the competence and of the distinction (already adopted in some MSs) between 'acts of the profession' and 'acts relative to the profession', in order to include the latter in the scope of consumer protection. This could provide a solution to the complex question of 'mixed use' contracts, permitting one to identify the borderline between 'consumer acts' and professional ones based on the prevailing purpose. The aim of this extension would be to include under consumer acts also mixed-purpose acts[33]. This issue is particularly important having in mind the

[31] For a comparison between France and Italy as regards the relationship between professionals and their clients see C. PERFUMI, *Disciplina consumeristica e contratto di spedalità*, in *Obbligazioni e Contratti*, 10 (2010) 685 ff.

[32] Law Commission Report, 2005 and Unfair Terms Draft Bill, 2005, following-up the 'Unfair Terms in Contracts: A Joint Consultation Paper', 2002, where those consulted were originally asked whether they agreed or not to treat 'all businesses alike in being able to benefit from the protection, allowing the courts to take into account the size of the business, and whether it makes transactions of the kind in question regularly or only occasionally, in assessing the fairness of the terms complained of'.

[33] This proceeding corresponds to the "reality of social and economic life, in which mixed situations are increasingly frequent". See M. E. STORME, *Editorial: Consumer Rights Proposal and the Draft CFR*, in *European Revue of Private Law,* 1 (2010) 2.

contractual position of digital services consumers, to which the DCR also applies [34], where it is sometimes impossibile to distinguish 'mixed' acts from 'acts outside the trade'; and where each 'consumer' may act as professional.

With this said, the scope of consumer and professional definitions should be widened to all contracting parties, either natural or legal persons, acting within an 'asymmetric contract' (including SMEs, corporate bodies acting for non-profit/not-for-profit purposes, such as foundations, associations, committees and consortiums). In this way, it should be possible to provide a clearer, more coherent definition of the 'weaker' contractual party, considering that the scope of consumer protection aims at assessing contractual equilibrium in light of the asymmetric power available to market players/operators. Based on a broader notion of 'asymmetric contracts', consumer acts should even include a special, restricted category of B2B contracts, to be qualified as 'unbalanced'[35]. This category may be inferred by considering a set of rules issued by European lawmakers and addressed not only to consumers (as narrowly defined by the acquis communautaire), but also to a business, "which for some reason is the weak party and therefore needs legal protection"[36]. This is particularly evident in supply of services contracts in which the weakness of the party is related to the fact that the recipient is subject to the supplier's control over the elements which constitute the characteristic performance of the contract[37]. We can find an initial clear-cut example of this trend in Directive 2000/31, applying to persons that "for professional ends and otherwise" use an information technology company service. In addition, the Directive on distance marketing of consumer financial services[38] seems to leave an open possibility to MSs of extending the scope of the directive to ".. non-profit organisations and persons making use of financial services in order to become entrepreneurs" (Recital 29), that is investors that they may find themselves unprepared to properly judge or consider such investments, being in the same position as that of an ordinary consumer. By the same token, the Markets in Financial Instruments Directive[39] (hereinafter 'MiFID'[40]), should be addressed to retail clients that are not necessarily consumers: the protection of financial services consumers should not disregard the

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34 See also Recital (19) DCR. A special protection shall be granted to these kinds of transactions, as their economic importance in the market is proportionally increasing in relation to the spreading of new and innovative 'mass technologies': the CESL does apply to digital service contracts, but it is still a Proposal for a Regulation.

35 C. AMATO, *Per un diritto europeo dei contratti con i consumatori*, (Milan, 2003), Ch. IX.

36 See V. ROPPO, *From Consumer Contracts to Asymmetric Contracts*, in *European Revue of Contract L*aw, 2 (2009), 339. This category includes small or micro-businesses; business parties that economically/legally depend on the other party or that are exposed to financial risks (as, for example, the risk of late payment) *vis-à-vis* the other party. The 'feasibility study' seems to have adopted this view, so far as it extends some protective rules (like the special provision against unfair terms) to B2b contracts (part III, ss. 3-5).

37 V. ROPPO, *From Consumer Contracts to Asymmetric Contracts*, in *European Revue of Contract L*aw, 2 (2009) 315.

38 Dir. 2002/65, art. 2d): "consumer means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".

39 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

40 The MiFID (Dir. 2004/39/EC) is now under review: see Proposal for a Directive of the European Parliament and of the Council on market financial instruments, repealing Dir. 2004/39/EC, COM (2011) 656 Fin

subjective characterisation of the investor based on his/her low professional, moderately professional or highly professional level of investing sophistication. The consumer purchasing financial services suffers from psychological and clear inferiority complexes in his/her contractual position, both from the points of view of information and actual freedom of choice. To sum up, consumer law legislation should review investor protection at the European level, first by including this definition in consumer protection legislation; and secondly by simplifying remedies and access to justice through the establishment of a hierarchy of remedies.[41] On the ontrary, according to Art. 3.3(d) of the DCR[42], financial services contracts are excluded from the scope of application of the Directive[43].

The number of EU directives regulating unbalanced business contracts is increasing, due to the special attention being paid to the crucial role of SMEs in the internal market. Directives on Commercial Agents (Dir. 1986/653) and on Late Payments in Commercial Transactions (Dir 2000/35) aim to regulate the weaker position of business parties that may be economically or legally dependant on the other party, or exposed to a financial risk in relation to the other party. Similarly, the Rome I Regulation considers situations in which 'contracts (are) concluded with parties regarded as being weaker', stating that 'those parties should be protected by conflict-of- law rules that are more favourable to their interests than the general rules' (Recital 23). This is, for example, the case not only in consumer contracts, but also concerning franchise and distribution agreements. It thus aims at understanding and interpreting the scope of consumer protection in a more effective "real life" sense, with the goal of assessing the contractual equilibrium in light of the asymmetric power held by market players/operators. The present DCR does contain a recital (13) allowing MSs to extend the aplication of consumer rights to legal or to natural persons who are not consumers within the strict meaning of the DCR; but this extension is delegated to MSs freedom. This is a clear example of undesired effects of the exceptions to maximum harmonisation, leading to non-harmonisation and uncertainty: as a matter of fact, the scope of application of a protective law should not be left to theMSs freedom; on the contrary, it should represent the outcome of a lively debate, conducted through a comparative approach, aiming at reaching a shared and broader definition of 'consumer'.

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[41] C. AMATO, C. PERFUMI, *Financial Investors as Consumers: Recent Italian Legislation from a European Perspective,* in M. KENNY, J. DEVENNEY (eds.) *European Consumer Protection: Theory and Practice,* (Cambridge University Press, 2012), 13 ff .

[42] Directive 2011/83/UE of the European Parliament and of the Council of 25 October 2011.

[43] The reason is clarified in Recital 32 (Dir. 2011/83): "The existing Union legislation, inter alia, relating to consumer financial services, package travel and timeshare contains *numerous rules on consumer protection.* For this reason, this Directive should not apply to contracts in those areas. With regard to financial services, Member States should be encouraged to draw inspiration from existing Union legislation in that area when legislating in areas not regulated at Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured"

3. Consumer Rights Concerning Unfair Contract Terms. The Grey and Black Lists

As regards unfair terms in contracts, the most important novelty previsoulsy introduced in the Proposal, 2011 was represented by the black list of terms, that is, terms which are considered unfair in all circumstances (art. 34 and Annex II, Proposal 2008). That novelty may be considered as a product of a comparative study: most Member States had in fact already provided a list of terms considered as unfair in all circumstances. This is the case of Italy (art. 36 Consumer Code), France (art. R132 Code de la Consommation), Germany[44]. The British Law Commission has also recommended the adoption of a double list in the 'Unfair Terms in Contracts', Report 2005 (at 3.41-3.47). For instance, some of the terms considered unfair in all circumstances as listed in Annex II of the Proposal have already been deemed as such by France[45], or by Italy and France[46]. Nevertheless, the terms contained in the Annex II were more restrictive and less protective than the lists provided by France and Italy[47]. This raised the broader question of the risks of full harmonisation in the special case of unfair terms. As highlighted by the European Parliament (Committee on the Internal Market and Consumer Protection, Rapporteur Mr. Andreas Schwab) in the Working Document of 3 March 2010, at this stage the black and grey lists should not be (fully) harmonised, in order to prevent the deletion of terms (or a strict construction of them) from the lists provided for at a national level.

In amending the Proposal the Council and the Parliament have completely removed art. 34 (that is, the former mandatory black list) from the DCR, and have added art. 8a to Dir. 93/13, according to which Member States are free to keep or adopt lists of terms, and to qualify them as unfair in all circumstances (art. 32 DCR)[48]. However, this is subject to the proviso that such national provisions shall be notified to the Commission, which shall make that information public in an accessible way. As argued above, a 'targeted full harmonization' together with a correct use of comparative law would have reached the same goal, without introducing the useless but dangerous control of the Commission over the MSs legislative prerogative.

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[44] See AGB-Gesetz, 19 December 1976, as modified by L. 19 July 1996, and now introduced into the BGB after the *Gesetz zur Modernisierung des Schuldrechts*, 26 November 2001 (in force from January 2002): § 309 in particular contains the '*schwarze Liste*', where certain clauses are considered as ineffective *juris et de jure* and despite any contrary advise by the judge (*Klauselverboten ohne wertungsmöglichkeit*). D. VANNI, *Clausole abusive nel diritto tedesco e spagnolo*, electronic copy available at: www.ratioiuris.it, vol. December 2007.

[45] This is the case of special kinds of limitations on a trader's liability related to entire agreement clauses: see lett. b) Annex II: 'limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments *subject to compliance with a particular formal requirement*. In art. R132-1 of the French Consumer Code, n. 2, one may read: 'Restreindre l'obligation pour le professionnel de respecter les engagements pris par ses préposés ou ses mandataires'. The French provision is wider and therefore more protective, as it does not restrict the scope of the unfair term to formal requirements.

[46] This is the case of terms excluding or limiting the trader's liability in case of death or physical injury of the consumer.

[47] The so-called 'surprise clauses' (listed in the French and Italian consumer codes) have been excluded from the black list in Annex II. It is worth noting that in the 'feasibility study' delivered by the Expert Group the surprising terms are listed among the unfair terms in B2B transactions.

[48] The same art. 32 DCR amends Dir. 93/13 (inserting art. 8a) under another important and controversial aspect: MS are now allowed to introduce their own provisions extending the unfairness assessment to individually negotiated contractual terms.

4. Sales Contracts and Associated Guarantees

The amendments brought by the DCR to Dir. 99/44 consists of allowing MSs to adopt more stringent provisions as regards the limitation period, also concerning second-hand goods, and the non-binding nature of contractual agreements concluded with the seller before the lack of conformity is brought to the seller's attention. As in the amendments to Dir. 93/13, this is subject to the proviso that such national provisions shall be notified to the Commission, which shall make that information public in an accessible way (art. 33, DCR). First, I shall deal briefly with the interpretation and assessment of the first amendement, concerning the limitation period (par. 4.1.). Further on I shall underline how two new rules introduced by the DCR, that is time of delivery and passing of risk, have de facto also amended Dir. 99/44, as they indirectly affect the regime of contractual remedies in the sales of goods (parr. 4.2. and 4.3.).

4.1. The limitation period

The original Proposal, 2008, had limited the seller's liability to a two-year period from the time when the risk has passed, that is, the time of delivery (art. 28(1)). However, some MSs had already provided for a longer liability period. In the Netherlands and in Finland, for example, the trader's liability period depends on the expected lifespan of the product (to be assessed by the judge on a case by case basis). In Belgium, France and Luxembourg, traders can be held liable if a hidden (major) defect is discovered by the consumer after the initial period of two years (subject to a limitation period – rather short in France, longer in Belgium) and if the consumer can prove that the defect in question already existed at the time of delivery (in this case, the consumer shall not benefit from a reversal of the burden of proof). In Italy the period of a seller's liability is set at two years from delivery. However, by adding the 2 months time limit to provide notice of defects - consumers have up to 26 months to take action. In other words, the provision set forth in art. 28(1) of the original Proposal would have seriously diminished consumers' acquired rights in most MSs. Moreover, art. 28(4) of the original Proposal, 2008, mandated a duty of notice for consumers in order to benefit from their rights: to inform traders of the lack of conformity within two months of the date on which he/she detected the lack of conformity. Thus, the original Proposal had made compulsory a duty of notice that - to the contrary - was only optional in Dir. 99/44, leaving MSs free to adopt or reject it[49]. And in fact, the period of notice suggested in art. 5(2) Dir. 99/44 was considered by most of the MSs as a useless limitation of consumer's rights. Therefore, only six states introduced this period of notice: Denmark, Finland, Italy, the Netherlands, Slovenia and Spain. Most of them chose the two months' period. The

[49] Dir. 99/44 art. 5(2). 'Member States may provide that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity'.

Netherlands implementation imposes a 'reasonable time' upon consumers, while Slovenia went even further, pressuring consumers to inform traders of the lack of conformity 'as soon as possible'.

A better use of the comparative method has highlighted the legal debate in the MSs, thus showing that imposing a strict time limit on consumers in the case of remedies cannot be considered a preferred 'better rule' in order to fully harmonise national laws[50]. In this perspective it should be read and interpreted the new discipline introduced by the DCR through the amendments to Dir. 99/44 mentioned in art. 33. Although the resulting regime on time limits should be welcome as a good novelty, once again what is questionable is the extreme freedom left to MSs, leading to the undesirable effect of non-harmonisation. As argued above, the legislative panorama of MSs has revealed possible tracks to be adopted at a European level: that is a longer limitation period, coupled with a reversal of the burden of proof in favour of consumers and with the abrogation of the duty of notice. In this case it should be evident how a 'targeted full harmonisation' perspective, supported by a comparative research, might in turn have provided the 'better rule'.

4.2. Time of delivery

Art. 18, par. 1 concerns the time for delivery: it gives traders a maximum of 30 days from the conclusion of the contract to deliver, by transferring the material possession of the goods. This can be considered as a 'neutral' provision in itself, meant to speed up the delivery process (that otherwise might create obstacles to the market, especially if connected to distance sales, out of premises sales or e-commerce sales) without affecting the traders interests (see Recital (51), DCR). At the same time, this rule affects the recourse to national contractual remedies, such as granting the trader an additional time for delivery, enforcing the performance of the contract, witholding payment, seeking damages, terminating the contrat. Therefore, the subsequent paragraphs of art. 18 contain the discipline to be applied should the trader fail to fulfil his obligation to deliver the goods within the time limit set out in par. 1 (or agreed upon with the trader). In particular, the consumer shall give the trader a reasonable additional period of time to make the delivery, after the expiry of which he shall be entitled to terminate the contract should the trader fail to deliver the goods even within that additional period of time[51]. This rule does not apply neither when the trader has unequivocally refused to deliver the goods, nor where the delivery period is essential as such, or where the consumer informs the trader that delivery on a specified date is essential.

[50] In the consolidated version of the Proposal, incorporating the Amendments by Parliament to the Commission Proposal (24 March 2011), art. 28 has been deleted and substituted with a proviso (par. 5a) having the same effects as th final version of the DCR.

[51] The same regime as for the time of delivery and termination for late delivery can be found in the CESL, arts. 95 and 115.

In truth, such a discipline is not 'neutral' in itself, as it implies the acceptance of a general principle, the preservation of the contract. It also implies a preference for the perfomance of the contract in lieu of damages: a choice that may not entirely convince the common lawyers.

On the other hand, the debated issue of the hiererchy of remedies in case of lack of conformity has not been faced by the DCR. It is well known that Dir. 99/44 had listed four different tools favouring consumers: (i) to have the goods repaired or (ii) replaced, at the traders' choice, free of charge (performing remedies); (iii) to make an appropriate reduction in price or (iv) to rescind the contract, if the performance remedies are impossible or disproportionate, or if the seller has not completed the remedy within a reasonable time or with a significant inconvenience to the consumer. The most questioned result of this provision was the so-called 'hierarchy' of remedies. There was no choice for consumers, but rather a strictly normative tool-box decided on by lawmakers, giving some minimum choice to traders. Evidence of the doubtful quality of these provisions is provided by national implementation of such, as well as the solutions provided by the DCFR and the CESL[52]. As regards national implementation, suffice it to say that five MSs did not fully accept the hierarchy: Poland, Germany, Greece, Lithuania, and Slovenia. United Kingdom and Ireland have adapted the new regime of remedies introduced by the SoGA. In particular, the rejection of goods is suspended for a reasonable time until the goods have either been repaired or replaced at the consumer's choice. In the Italian Consumer Code, implementing Dir. 99/44 (as amended by d.lgs 2007/221), the consumer may ask to have the goods repaired or replaced, at the consumer's choice. Moreover, Italian regulations offer a new set of rules – outside of the strict hierarchy, and provide a free choice to consumer - should the trader offer different remedies to consumer (art. 130 Cons.Code). As regards the DCFR (art. III-3:101(1)) and the CESL (art. 106), a creditor may resort to any of the available remedies; moreover, remedies may be cumulated if not incompatible. Even in international commercial sales, the solution provided by the CISG, 1980 is fairer for the purchaser: he/she can choose among the remedies, giving the seller first a chance to remedy non-performance at his own expense without unreasonable delay or inconvenience (art. 48(1)).

In this background, the former Proposal, 25 march 2011 at art. 26 (24 March 2011), had suggested one paragraph modifying the previous rules on remedies[53]: the new provision would have allowed MSs to adopt or maintain national laws giving consumers the right to terminate the contract (after a short period of delay within which the trader might cure his performance), or the free choice

[52] On the specific issue of the remedies available to the buyer in case of breach of the seller's obligation in the CESL, see. C. AMATO, *Proposition de Règlement pour un Instrument Optionnel (IO). Les Moyens d'action, sanction de l'inexécution de l'obligation*, Proceeding of the Conference promoted by the International Research Group on New Normativity in Europe, Paris, 28 November 28, forthcoming.

[53] See Proposal 25 March 2011, Art. 26, par. 5b. *:* 'Member States may adopt or maintain provisions of national law giving consumers, in the event of lack of conformity, the right for a short period to terminate the contract and receive a full reimbursement or a free choice from among the remedies referred to in paragraph 1, in order to ensure a higher level of consumer protection.

among the remedies listed in art. 26. This provision did take into account the European debate over the undesirable 'hierarchy of remedies', but it misteriously disappeared from the final text of the DCR.

4.3. Passing of risks

Art. 20 DCR has introduced a rule passing to consumer the risks of loss of or damages to the goods only when he/she has acquired the physical possession of the goods. It is well known that Dir. 99/44 did not take any position on the issue of passing of risks[54], on the assumption that this was too difficult a task to be dealt with by European lawmakers, as it would have encroached upon an area of private law which was intimately related to the law of property (on the one hand), and to commercial law (on the other). After several years, the Council and the European Parliament have changed their position. Art. 20 of the DCR clearly postpones the passing of risk related to supervening events. This choice has been adopted on the assumption that delivery itself is a risky moment, and that risk should be shifted to traders, not to consumers[55]. This new rule has a substantial impact on Italian contract and commercial law, as the general rule in our Civil Code (art. 1376, as specified by art. 1465, par. 1)) - derived from the French Code Napoléon - provides that risk of loss and damages passes together with the passing of title (that is, at the very moment when consent is exchanged). Notwithstanding the importance of the rules on the passing of title and risk within national systems, it cannot be stated that this rule might turn into a 'legal irritant'. In my opinion, the passing of risk can be defined as a 'neutral' rule, certainly deriving from specific national history, but not necessarily linked to general principles seriously impacting the system itself. In fact, this is exactly the case: the severance of the passing of risk from the passing of property does not upset the property or commercial rules concerning their very nature: it simply provides a protective shield to a contractual party presumed as weaker. The same would not have been true had the rules on the passing of property been changed. As a comparative approach highlights, consensual systems as opposed to tradition or delivery systems adopting the conveyance rules, are based on profoundly divergent technicalities rooted in the legal past, which cannot be changed with a simple rule contained in a European Directive[56].

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[54] See in particular Recital (14): 'Whereas the references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk'.

[55] Unless the consumer has commissioned the delivery to a carrier: in this case the risk shall pass to consumer on delivery of goods to the carrier: art. 20, second sentence.

[56] Under the consensual system, the example *par excellence* of which is French law, the contract in and of itself transfers ownership from one party to another without the need for a physical transfer of the item (*traditio*) or other requirements. In this case, the only purpose of registering the right to the real property is to be able to enforce the transfer against third parties. Under the tradition or delivery system, the most famous example being the German system, the transfer of ownership occurs, in the case of real property, pursuant to registration in the land register. The contract only gives rise to the personal obligation of the transferor to deliver the property or right *in rem*. The parties state their consent to transfer ownership by means of the so-called 'real agreements', but ownership is actually validly transferred upon registration, which can only be performed with a new formal authorisation, which is the authorisation of the party prejudiced (*i.e.* losing rights) by the registration. Effectiveness in all transfers of rights in real property is achieved in all systems by means of registration in the land register, but the possible effects of registration (declarative or constitutive) vary depending on whether the legal system is based on consensul or delivery principles. B. MCFARLANE, *The Structure of Property Law*, (Hart Publishing, 2008); E.

Evidence for this argument is provided by Regulations 2002, no. 3045, implementing Dir. 99/44 in the United Kingdom. Regulation 4 has added subsection (4) to s. 20 of the Sale of Goods Act 1979 that eventually shifts the risk[57] to the seller until delivery of goods to the consumer[58]. In other words: the abovementioned Regulations had already achieved the solution (now adopted by the DCR) by implementing Dir. 99/44, thus improving consumer protection without either misinterpreting the European Directive or conflicting with national legal systems.

By applying the comparative method to the issue at stake, that is analyzing the different national implementation approaches of Dir. 99/44 in search of a 'harmonising rule' that may be easily transplanted into different legal systems, art. 20 of the DCR appears to be an innocent and highly effective rule at the same time, as contractual remedies are at the consumer's disposal even after the occurrence of supervening events, util delivery has been accomplished.

A Few Brief Final Remarks

It becomes clear that, after this quick and limited review of some of the DCR's provisions, the correct use of comparative law is a useful tool of objective knowledge and understanding that can be used to avoid the making of 'bad law'. 'Bad law' results as such if a previous (comparative) study has not been seriously carried out (in order to clearly highlight the main objectives of European legislation, the historical background of specific provisions, and their effectiveness in each national system). Such comparative study also takes into account the role of courts and interpreters in evaluating the effects of rules.

Through recourse to this cautious methodology, it is possible to achieve that which has been defined as 'targeted full harmonisation', resulting neither in a race to the bottom (that is, a lowering of consumer protection levels), nor in the creation of dangerous 'legal irritants'.

The present version of the DCR though it is not far away from this methodology, it still suffers of (at least) two main critical aspects: the legislative technique is poor; the political choice in favour of a maximum harmonisation, coupled with some discretional powers still left to MSs, leads to the undesirable effect of uncertainty and partial harmonization. It is time for the European Institutions to stop and think seriously to the goals they want to achieve, in order to offer to lawyers and practitioners competitive rules.

FERRANTE, *Consensualismo e trascrizione*, (Cedam, 2008) ; A. GAMBARO, *Il diritto di proprietà*, Trattato di diritto civile, (Giuffré, 1995), 183-231; U. MATTEI, *La proprietà immobiliare,* (Giappichelli, 1995).
See also Recital (51) DCR

[57] Though the law is not clear on this issue, it may be inferred that the risk involves perishment of and damages to goods.

[58] As specified in s. 32(4) SoGA, delivery of goods to a carrier is not deemed to be a delivery for transmission of title should the goods be delivered to the carrier: "In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored, but if in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier is not delivery of the goods to the buyer".

Paper n. 2

ABUSE OF RIGHTS AND FREEDOM OF CONTRACT IN COMPARATIVE PERSPECTIVE: A LEGAL AND ECONOMIC ANALYSIS

by

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ABUSE OF RIGHTS AND FREEDOM OF CONTRACT IN COMPARATIVE PERSPECTIVE: A LEGAL AND ECONOMIC ANALYSIS

by

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Abstract:

After a succinct preamble about the developments of the abuse of right doctrine in historical and comparative perspective, the authors describe the main sources of Italian law in this field. Great emphasis is placed on the analysis of decision n. 20106/2009 of the Italian Supreme Court, dealing with a termination clause in a distributorship agreement.

Highlighting the relevance and impact of judicial review on the merits of a contractual relationship, also in light of the principle of certainty of law, the authors provide a comparative outlook of the solutions envisaged in other legal systems, namely in the U.K., the U.S. and France.

The abuse of right doctrine is furthermore investigated under a broader perspective, studying the always-controversial linkage between contract, market and institutions. Finally, the authors tackle the issue of contract incompleteness, especially with regard to agreements of duration, lingering upon the integrative role which judges are called on to play in the light of the system's general principles and the duty of good faith and fair dealing.

Keywords: abuse of rights; good faith, withdrawal; relational contract; Renault.

♦ University of Pavia: §§ 2, 3, 4, 5, 7.

♦♦ University " Mediterranea" of Reggio Calabria: §§ 1, 6, 8, 9.

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1) - According to a prominent Italian scholar, "allocation of rights is a choice made within a legal system among conflicting interests"[1].

The legal system guarantees enforcement of rights, in light of the complexity and unitariness of its rules and principles. However, formal recognition of entitlements[2], coupled with the owner's implied power to enforce them, does not prevent the community from the risk that the rights stemming therefrom can be abusively exercised. To such extent, the issue of how rights are *in concreto* exercised becomes of great relevance. The importance of this issue is witnessed by some early studies on property law, a field which has always been considered the cradle of subjective rights[3].

On the basis of such approach, originating from a line of French jurisprudence[4], twentieth century legal theorists fostered an idea of law construed essentially on structure rather than on substance. The law was seen as an immovable set of rules allocating powers and the grounds for their proper exercise[5] in accordance with the logic positivism method and with the idea that «the new State and its basic principles are to be respected as a 'unique source of law', free of teleological or external contaminations»[6].

The favour of continental European lawyers towards the merely structural dimension of contracts faded out in the early 1970's, when the need for a different approach, more receptive to the functional elements, began to be intensely perceived[7]. In such a context, lawyers began to pay attention to contractual practices (where the risk of abusive conduct was more likely to be detected), with a view to assessing their legal worthiness[8]. Besides, this epistemological change was urged by the increasingly

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1 S. PATTI, *Abuso del diritto*, in *Dig. Disc. Priv.*, 1987, I, p. 3.

2 The notion of "entitlement" is borrowed from G. CALABRESI & A. D. MELAMED, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harvard L. Rev.* 1089 (1972).

3 S. PATTI, *Abuso del diritto*, cit., p. 3.

4 See: analysis conducted by L. JOSSERAND, *De l'esprit des droits et de leur relativité. Théorie dite de l'abus des droits,* Paris, 1939, p. 15 ff., p. 365 ff.

5 N. BOBBIO, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto*, Roma-Bari, 2007 (reissue of Bobbio's classic work, preface by Losano).

6 G. VETTORI, *L'abuso del diritto - Distingue frequenter*, in *Obbl. contr.,* 2010, p. 166*;* M. LOSANO, *Preface*, in N. Bobbio, *op. cit.*, VI.

7 See S. PUGLIATTI, *La proprietà e le proprietà*, in *La proprietà nel nuovo diritto*, REP, Milan, 1964, p. 300.

8 See P. PERLINGIERI, *Interpretazione e qualificazione*, cit.*,* p. 31 ff., signaling the need to subject practice to a thorough legality check «in order to avoid that abusive practices may, over time, affect the culture and education of lawyers so much as to misrepresent the lawmaker's choices, hence betraying any instance of change grounded

important role played by contracts as a means of promoting rapid and effective movement of goods and rights, essential to a society founded on advanced capitalism. However, by the end of the last century, with the irretrievable passage to a post-industrial society, the strength and the appeal of 'laissez-faire' theories (claiming for «a lesser promotional role of the State and a more selective role of the market»)[9] came to a sudden decline, thus revitalising the appealing role of public *ex ante* regulation. In particular, the fundamental question shifted from *whether* the State was supposed to intervene on economy-related issues to *how* it actually should, on the assumption that the costs of individual rights are borne by the community, and hence re-distribution by law could not but «result from the application of [...] legal rules aimed at protecting the weaker parties and directing the behaviour of market players»[10].

Accordingly, with respect to the analysis of the scope and meaning of any contractual agreement, interpreters have developed awareness of the need for a methodological approach apt to lay emphasis on the functional aspects of a contractual relationship, which are the sole aspects capable of bringing forth a reliable taxonomy and hence susceptible of positive appraisal[11].

In this context, «it is crucial to focus on the parties' conduct and expected results, which were once underestimated because of the extreme value conferred to structural rules»[12]. The '*cause*' of any contract is hence to be studied *in concreto* and no longer from an abstract point of view, as «it represents the essential tool whereby the underlying interests, either economic or non-economic, may be clearly identified»[13]. It follows that the '*cause*' is to be considered illicit not only «when it conflicts with mandatory rules or it is contrary to public policy and good morals», but also every time «the contract aims at evading the law, i.e. when the parties use it to achieve a common goal contrary to the law»[14].

It was in this context that the Italian Supreme Court developed a new approach concerning the abuse of rights doctrine (as witnessed by the judgment examined below), maintaining that contracts could no longer be considered as "invincible strongholds", wholly entrusted to the parties' power and unalterable by the judge.

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on sovereignty of legally expressed consent (art. 1, s. 1, Italian Constitution)», On the importance of practice, see generally H.G. GADAMER, *Elogio della teoria*, Milan, 1989, p. 89.

[9] M. LOSANO, *op. cit.*, VI.

[10] M. LOSANO, *op. cit.*, VI (translation provided).

[11] Also, P. PERLINGIERI, *Scuole tendenze e metodi*, cit., p. 106 ff.

[12] G. VETTORI, *L'abuso del diritto,* p. 166.

[13] G. VETTORI, *L'abuso del diritto,* p. 166. Even Italian courts have changed their approach to the functional profile of contracts, highlighting: «*'cause'* is the core of the contract but it does not exclusively describe the socio-economic function of the legal instrument. It represents real interests the contract is aimed to achieve, regardless of the contractual type […]» (Cass. 8 May 2006, n. 10490, in *Corriere Giur.*, 2006, 12, p. 1718, note by ROLFI).

[14] Cass. 4 April 2003, n. 5324, in *Gius.*, 2003, p. 1826.

This essay will first analyse a judgment rendered by the Italian Supreme Court (III Civil Chamber, 18 September 2009, n. 20106), which stands as a landmark case in Italian contract law. In fact, it has decisively influenced following interpretations and behaviours on contract-related issues, as highlighted in several scholarly publications[15]. Subsequently, we will draw a parallel with common law systems, dealing with a different conception of contract fairness (as it will be seen, the main differences regard the notion of good faith)[16].

2) – The case addressed by the Italian Supreme Court regarded the exercise of the right of unilateral withdrawal in distributorship contracts. From 1992 to 1996, exploiting a contract clause, Renault Italia SPA terminated a number of distributorship agreements it had entered into with some retailers in Italy, who eventually sued the company alleging pretextual termination and seeking, amongst other things, general damages and indemnity for loss of clientele. Although the right of withdrawal was explicitly provided for by a clause in the distributorship contract – and was hence exercised in compliance with the *lex privata* –, the Supreme Court vacated the lower courts' ruling, holding that Renault had abused its right.

The Supreme Court recalled the essential role the principle of objective good faith plays in the contractual field. The abuse of right is indeed defined as an «indicium revealing a breach of the duty of good faith». In the Supreme Court's view, four fundamental conditions ought to be met in order for a conduct to be qualified as a breach of the duty of good faith: (1) a party derives from the contract a legally protected right; (2) within the contract, such a right can be exercised in multiple ways; (3) though formally complying with the contract, the right is exercised in an abusive manner; (4) such an abusive

[15] The judgment has been examined by a number of commentators. In particular: in *Nuova giur. civ.*, 2010, 3, 1, p. 231 ff., note by M.R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009; ibid*, note by C. SCOGNAMIGLIO, *Abuso del diritto, buona fede, ragionevolezza (verso una riscoperta della pretesa funzione correttiva dell`interpretazione del contratto?); ibid,* note by F. VIGLIONE, *Il giudice riscrive il contratto tra le parti: l`autonomia negoziale stretta tra giustizia, buona fede e abuso del diritto*; ibid*,* note by M. ORLANDI, *Contro l'abuso del diritto*; in *Corr. giur.*, note by di F. MACARIO, *Recesso* ad nutum *e valutazione di abusività nei contratti tra imprese: spunti da una recente sentenza della Cassazione;* in *Contratti,* 2010, p. 5*, note by* G. D'AMICO, *Recesso ad nutum, buona fede ed abuso del diritto*; in *Giur. Comm.* 2010, II, p. 834 note by L. DELLI PRISCOLI, *Abuso del diritto e mercato*; in *Foro it.*, p. 95 note by A. PALMIERI, R. PARDOLESI, *Della serie «a volte ritornano»: l`abuso del diritto alla riscossa;* in *Giur. it.*, 2010, p. 809 ff. note by F. SALERNO, *Abuso del diritto, buona fede, proporzionalità: i limiti del diritto di recesso in un esempio di jusdicere 'per principi'.*

[16] A. DE VITA, *Buona fede e* Common Law *(Attrazione non fatale nella storia del contratto)*, in *Rivista di Diritto Civile*, 2003, I, pp. 251-270, shows that, in spite of the deep differences between civil law and common law systems with regard to «the acknowledgement […] of a binding duty of good faith in contracts, […] as far as subjective good faith is concerned, both legal systems adopt similar rules aiming at protecting both the good faith purchaser and the possessor», p. 252.

exercise brings about an unfair disproportion between the benefit enjoyed by the right-holder and the counterpart's sacrifice[17].

Therefore, the abuse occurs when an act is aimed at producing effects other than those abstractly intended to be engendered through the act itself. The first two conditions pointed out by the Court signal the risk of abuse, while the blameworthy conduct is what actually constitutes an abuse, as it conflicts with a legal (or extralegal) value, eventually causing a significant disproportion between the parties' rights and duties. This is what enables us to detect a direct link between the abuse and the alteration of the contract's *equilibrium*.

The contracting parties' power, stemming from the principle of freedom of contract (Article 1322 of the Italian Civil Code) and from the individual negotiation, is not absolute. The principle of objective good faith, expression of the duty of solidarity (Article 2 of the Italian Constitution), is considered the general canon judges refer to in order to interpret and eventually integrate the content of contracts. It becomes the normative source of mutual obligations for the parties, who are moreover subject to the general (extra-contractual) principle of *neminem laedere*. The judge is hence called on to assess whether either the dominant position of one party or the economic dependency of the other party might have been «the cause of abusive conduct». In order to prevent abusive conduct, the judge should review the whole agreement, as well as the parties' behaviour, «also with a view to reconciling conflicting interests». Moreover, all means employed by the contracting parties to pursue their interests must be evaluated in light of the principle of proportionality, which is the guidance for judging any moment of the life of a contract, including the proper exercise of the right of withdrawal by one of the parties. «Ignoring the importance of the good faith principle, as well as the significance of the possible unlawful exercise of the right of withdrawal, causes *ad nutum* termination to turn into arbitrary termination, namely *ad libitum*»[18].

The judgment soon attracted the attention of most scholars as, for the first time, it attacked the "stronghold" of freedom of contract, until then one of the bearing pillars of private law[19]. Noticeably, the power entrusted by this precedent to civil judges is vast and its boundaries rather unclear: only by means of further judicial and scholarly interpretation it will be possible to identify the direction of this new avenue construed by the Supreme Court. Nevertheless, scholars – some enthusiastically, others more cautiously due to the fear for the expansive potential of this new doctrine – have devoted the

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17 See Cass., Chamber III, 18/09/2009, n. *20106*.

18 See Cass., Chamber III, 18/09/2009, n. *20106*.

19 To this respect, it could be useful to read V. ROPPO, *Giustizia contrattuale e libertà economiche: verso una revisione della teoria del contratto?*, in *Rivista Critica del Diritto Privato*, 2007, 4, pp. 599-609. In this Article the author explains that it is rightful to undermine the substantiality of the contractual basis of an economic relationship when this could mean saving a "greater good", given that the contract could have negative externalities which may affect society as a whole.

right attention to such an epochal change. Apart from the commentators' personal considerations (most likely influenced by their political beliefs regarding the role of judges within the civil process), this landmark decision invites to non-superficial reflections.

3) – The case before the Supreme Court involved, as seen, a series of long-term contracts, which could be legitimately terminated at the grantor's will, pursuant to the conditions set forth in the contracts themselves.

Under Italian contract law, it is a generally accepted rule that in any long-term contract, parties may freely exercise their right of withdrawal, subject to prior and fair notice. This precept, though not expressly provided for by any statutory provision, may be inferred from a number of normative *indicia* and is based on a public policy principle according to which perpetual, open-ended obligations are not admitted. The right of withdrawal from a permanent contract can be regarded as the expression of a general principle of contract law, which is binding unless otherwise agreed upon by the contracting parties (*e.g.*, by subjecting unilateral termination to the occurrence of an objectively justifiable reason). Therefore, in order for a contract to be righteously terminated "*ad nutum*", the withdrawing party is generally required to observe nothing but the formal procedure agreed upon (usually, a fair notice term), regardless of the reasons that led her to terminate the contract. Conversely, the judge is entitled to question the merits of the party's choice where termination has been made subject to an objectively justifiable reason, which the withdrawing party is expected to disclose, firstly, at the time of termination and, eventually, in court.

The Italian Supreme Court's judgment n. 20106/2009 specifically addressed the issue of whether Renault's *ad nutum* termination was legitimate. The Court did not focus on the modalities such a right of withdrawal was actually exercised (*e.g.*, it did not take into consideration whether the mandatory notice term had been respected, or whether the terminating party had engendered in the counterpart a reasonable expectation that the contract would not be terminated). Instead, it focused on the company's overall conduct, finding that it had abused its right by pursuing goals other than those implied in the termination clause, thus betraying the clause's original purpose.

The Court's analysis was centred upon a comparative evaluation of the parties' economic interests in this particular case. It moved from four basic principles of the Italian legal system: freedom of enterprise (art. 41 It. Const.), solidarity (art. 2 It. Const.), substantive equality (art. 3, p. 2, It. Const.) and proportionality. In addition, it recalled a number of civil code provisions witnessing the central role of the duty of good faith and fair dealing in contracts (e.g., art. 1175, 1337, 1358, 1366 and 1375 It. Civ. c.). In particular, the duty of good faith was deemed as an integrating part of any contract and source of additional burdens and obligations for the parties. To illustrate, both parties are bound to not only give effect to the obligations stemming from the contract, but also to behave in order to reduce each other's

efforts and to safeguard each other's interests. Therefore, good faith is expression of the «compulsory principle of mutual protection»[20], which requires cooperation by the contracting parties with a view to achieving the expected benefits.

The duty of good faith and fair dealing in commercial transactions is here adopted as a means to detect and sanction an abuse of right, which is mostly signalled by a tangible, supervening disproportion between the opposing interests, thus entailing a violation of the constitutional principle of proportionality. It hence becomes evident that the adoption of the aforementioned hermeneutical devices in the contractual arena undermines the generalized and generalizing idea that «*qui dit contractuel, dit juste*»[21], rooted in the liberal age.

As a final point of this brief presentation of the regulatory framework in Italy, it is noteworthy that the Civil Code does not contain any rule explicitly addressing the abuse of right doctrine. Article 7 of the preliminary draft of the Italian Civil Code stated that «no one is entitled to exercise a right in such a manner as to contradict the purpose for which such a right was recognised to him». Eventually, this draft-rule was not transposed into the final text because its wording was considered too broad. Over the last few years, special laws have been introduced in favour of the weaker contracting party, such as Article 9, Law 192/1998 (on subcontracting agreements), which deems any contract implying an abuse of economic dependence null and void.

4) - One of the most controversial issues raised by the judgment n. 20106/2009 of the Italian Supreme Court is whether such a broad power entrusted in the hands of judges in relation to contract interpretation is compatible with the principle of certainty of the law, a fundamental regulatory principle thus laboriously and proudly conquered by 19th century codifications. According to some scholars, such a profound power of interference by judges, especially with regard to termination clauses, is likely to alter, *a posteriori*, the teleological dimension of contracts, thus contravening the lawmaker's intention of setting this legal instrument free of any 'external' constraints. From this point of view, as long as the right of withdrawal is exercised in accordance with a fair notice term, the terminating party should not be required to state any reasons, because the sole requisite for *ad nutum* termination is to be found in the party's will: «The core purpose of a termination clause is hence fulfilled even where the terminating party provides no reasons: accordingly, courts are not allowed to question the merits of the party's decision»[22]. If it were not so, then the judge would add a new element

[20] P. MONTELEONE, *Clausola di recesso* ad nutum *dal contratto e abuso del diritto,* in *Giurisprudenza Italiana,* 3/2010, p. 156 ff.

[21] A. FOUILEE, *Science sociale,* p. 410, cit. in J. GHESTIN, *La formation du contrat*, in *Traité de droit civil,* Paris, 1993, p. 29.

[22] G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto,* in *I contratti,* 1/2010, p. 17.

to the contract, altering the fundamental purpose of the termination clause, envisaged by the lawmaker as independent of any underlying justification.

According to the line of scholarship in review here, such a broad power of intervention by courts, not expressly authorized by any regulation, would represent a dangerous source of uncertainty in contractual relations: in fact, parties do not have a definite standard to refer to in order to detect the boundary between proper exercise and abuse of the right of withdrawal. The actual content of the general duty of good faith is not identifiable *ex ante*: it aims at fairly reconciling conflicting interests.

Nevertheless, the Supreme Court's judgment presented above will stand not only as a warning for the drafting and implementation of future contracts, but also as a "binding" precedent for future decisionmaking. The rationale of this judgment, certainly not crystal-clear, as to the circumstances under which an abuse may be spotted, will be further interpreted by Italian judges. Therefore, if one thinks about the myriad of different interpretations that first instance judges are likely to provide in the future, the rather unclear contours of this legal doctrine will probably look even more obscure.

In the aforementioned scholar's view, «it is necessary to highlight the difference between the right of '*ad nutum*' withdrawal […] and other types of termination, where the terminating party is required to adduce reasons for the exercise of her right»[23]. Without such a distinction, the stability and predictability of the effects expected from the contract would be undermined, unduly exposing the parties to an unacceptable degree of uncertainty.

This opinion, albeit respectable, is not convincing.

To be sure, the Supreme Court resorted to the good faith parameter not only with the intention of assessing the reasonableness of the factual grounds for termination (in particular, whether the terminating party, by reason of her conduct, has engendered in her counterpart a reasonable expectation that the contract would not be terminated), but also, and most of all, as a principle by which to verify whether the contract is still fairly balanced. In so doing, the Court sought to sanction any abusive conduct brought about by the stronger contracting party at weaker party's detriment. The rationale spelled out by the Supreme Court cannot cause disconcertment. The abuse is reasonably spotted when a contracting party, though entitled to the privileged exercise of a given right, makes use of it to achieve a goal unworthy of legal protection.

Therefore, the problem is not about the existence of an entitlement (which is legally acknowledged), it rather concerns the (im)proper use of such entitlement, especially where designed with the aim of answering equity and fairness purposes within the limits imposed by the legal system, in light of the complexity and unitariness of its rules and principles.

The duty of good faith can then perform a precautionary function in favour of the weaker party, so that the contract, the core of any business relation, is not bent to the stronger party's will, who

[23] G. D'AMICO, *op. cit.,* p. 18.

presumably has an interest in imposing unequal and unfair conditions. It should not be permitted that flexibility and adaptability (characterising the contract as the modern archetype in business relations) may give ground for abuse. The exercise of rights stemming from a contract must comport with the duty of good faith and fair dealing, so that the contract, especially in a society where economic dominance is likely to interfere with genuine self determination of one of the contracting parties, may continue to discharge its original function, that is, to provide a common ground for conflicting interests. In this context, any attempt to enslave the contract to purposes disrespectful of the counterpart's interests should be barred.

Undoubtedly, if *ad nutum* termination clauses (whose *raison d'être* lies in the fact that it is not necessary for the terminating party to state any reasons for withdrawal) were excluded from the scope of application of the abuse of right doctrine, the risk of uncertainty in legal relations would be kept under control. However, the risk that the stronger contracting party may aggressively strengthen her position would be high. The irrelevance of the reasons for *ad nutum* termination does not exclude that the withdrawing party may in fact have exploited the clause to achieve benefits that the system consider unworthy of legal protection. All this being said, the recourse to the abuse of right doctrine seems to be justified within this context, for it represents a forceful tool enabling the judge to punish a particular conduct aimed at achieving abusive goals.

Besides, conscious of the sensitiveness of the problem (as emerged – in a simplified scenario – from the case decided by the Italian Supreme Court), the same scholar, who criticised most of the Supreme Court's reasoning, acknowledged that the exercise of the right of *ad nutum* termination may be ultimately questioned on good faith grounds[24]. Hence, once the "stronghold" of contractual freedom has been deprived of its strength, good faith serves as a parameter whereby it becomes possible for the judge to assess the fairness of termination. The judge's power, according to this line of scholarship, finds its legal justification in article 1375 It. Civ. cod., which mandates good faith performance of contracts.

However, this reconciling solution does not seem to be satisfactory with a view to protection of the weaker party. The duty of good faith is seen as an exclusively formal concept, which would make it impossible to condemn a conduct that, though exerting pressure on the counterpart with the intention of reaching a more favourable contractual effect, complied with the terms the contacting parties had agreed upon (for example, prior notice). In brief, the type of judicial review suggested by this author would solely focus on the contract's procedural aspects: whether the terminating party has pursued an unfair result (i.e., where the reasons provided are coherent with the foundation of the legal model) should not be a matter of judicial review.

[24] G. D'AMICO, *op. cit.,* p. 19.

This article endorses a different view. Judicial review in contracts disputes should go beyond a mere procedural/formalistic check. The abuse of right doctrine is here assumed as a substantive parameter whereby to implement proportionality and fairness in contracts. The duty of good faith and fair dealing, when infringed, allows the judge to intervene and restore the balance of a contract's overall effects.

5) – Without a doubt, the task for the Italian Supreme Court was not an easy one, for it was called on to shed light onto a legal doctrine that, in itself, was rather vague. Many authors have indeed criticized this 2009 decision in the name of the 'certainty of law' principle. However, there exists a rule, in the Italian legal system, which could help to clearly detect both a general duty of good faith in contracts and a ban on abuse of right. In the first half of the 20th century[25], a scholar found the origin of this legal doctrine in article 833 It. Civ. cod., which poses a ban on "atti emulativi" (actions «*whose aim is to cause harm to others*»). In order for this rule to be applied, two conditions need to be met: an objective element (the harmful action should bring no utility to the owner) and a subjective element (intent to harm). The Supreme Court's judgment seems to have abandoned the subjective criterion based on *animus nocendi*, favouring an objective/functional approach: a right is abused whenever its inherent function is betrayed[26].

From this perspective, it is important to mention another rule, from which we can more accurately derive a prohibition of abuse of right in the Italian legal system: it is article 1438 It. Civ. cod., which provides for annulment of the contract whenever one party, under the threat of bringing a legitimate claim to court, obtains from the other an unfair advantage[27]. In this provision, the stress is not on the exercise of a right (to sue), but rather on the threat of exercising it with the sole intention of obtaining an unjust benefit. This provision refers to a time frame in which the abuse has not occurred yet: in fact, the party owning the right to sue uses her power for the sole purpose of obtaining a contract, whose effects are deemed annullable by law. In this context, we believe that an abuse of right occurs where the party actually brings her claim to court (on the assumption that her threats have not persuaded the other party to enter into a disproportionate contract): however, the rule is silent on this point.

It is important to note that in order for a contract thus formed to be annulled, proof of abusive intent is required. The final purpose that one of the parties tries to achieve is therefore a key element

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25 M. ROTONDI, *L'abuso del diritto,* in *Riv. Dir. Civ.,* 1923, p. 105 ss.

26 P. MONTELEONE, *op. cit.*, p. 157.

27 For further analysis of Art. 1438 It. Civ. cod. on abuse of right issues, see U. NATOLI, *Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano,* in *Riv. trim. dir. proc. civ.,* 1958, p. 34 and, recently, R. SACCO, *Il diritto soggettivo. L'esercizio e l'abuso del diritto,* in *Trattato di diritto civile,* diretto da SACCO, Torino, 2001, p. 355 ff.

for the annulment of the contract. Here, the unfairness of the gain expected from the contract is to be contrasted with the (fully legitimate) advantage that the party is entitled to attain as a consequence of exercising her right of action. In brief, when one party bends the statutory function of her right of action to pursue advantages other than those permitted by the law, she is 'punished' with the annulment of the contract.

Article 1438 of the Italian civil code demonstrates, in general, that the teleological dimension of human conduct is far from irrelevant for the law and, in particular, that where it contrasts with the purposes of a doctrine or legal instrument as intended by the law, it is not worthy of legal protection. Furthermore, it should be noted that the term "threat" has a negative connotation and has to be intended as an abusive course of conduct which goes over the licit exercise of a personal right. Hence, even though this rule does not directly depicts a concrete abuse of right scenario (the abuse, in the terms specified above, is here only under threat), it unequivocally signals the legal system's aversion to conducts aimed at achieving purposes other than those conceived of by the law as inherent in the very acknowledgement of a right.

6) – It is useful, at this stage of the inquiry, to conduct a comparative analysis in order to understand how other legal systems have dealt with such a sensitive matter. As known, common law systems have developed solutions that significantly differ from those reached in continental Europe.

Despite a promising change that seemed on the point of happening during the 18th century[28], «[t]he common law has traditionally been reluctant to recognize, at least as overt doctrine, any generalized duty to act in good faith towards others in social intercourse»[29]. It is worth observing that, in the 1930's, a prominent British jurist admitted that «the theory of the abuse of rights is one which has been rejected by our law, with the result that the ancient brocard '*dura lex, sed lex*' finds its most vivid illustration in the present-day decisions of the Anglo-American Courts»[30].

It is known that, unlike the vast majority of continental European legal systems, the common law has not been influenced – at least, not as markedly – by Roman law. This specification is quite

[28] At that time, English trade and liberal political thinking had deeply developed. These reflections, seemingly insignificant, are not obvious: both phenomena are to be considered together in order to understand transformations in case law, in which they have been involved, as well as the development of *the good faith doctrine* and, therefore the lack of a *doctrine of abuse of rights*.

[29] E.M. HOLMES, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, in *University of Pittsburgh Law Review*, 1978, 3, p. 384.

[30] H.C. GUTTERIDGE, *Abuse of Rights*, in *Cambridge Law Journal*, 1933, 5, p. 22. GUTTERIDGE's writing, aside from a very instructive comparative analysis of the main continental legal systems, is criticisable under a methodological point of view: he affirmed that there existed not a *doctrine of abuse of rights* in Anglo-American law, focusing only on the English legal system,. The American legal system was not given the right importance even though it showed particular attention to problems concerning such a legal instrument as through extensive scholarly studies as through case law, as explained below.

important with regard to the analysis of the doctrine here considered, since the debate on the prohibition of the abuse of rights, which animated French and German scholarship in the 18th century, was deeply influenced by Middle-Age studies on Roman private law[31].

An exhaustive investigation on the abuse of right doctrine in Roman law and in the interpretations provided by medieval jurists[32] would take us outside the scope of this paper. Rather, it seems appropriate to focus on the 19th century scholarly debate, at the time of the great codification, especially in France[33].

We can detect two dominant theories in relation to the abuse of right doctrine. One of catholic origin and the other linked to socialist ideology. The former identifies the abuse of right with the notion of sin[34]: in this perspective, the prohibition of the abuse of right represents, above all, a "moral" remedy. The latter, on the assumption that the exercise of subjective rights is grounded on social consensus, considers unacceptable that a conduct may have anti-social connotations: thus, in prohibiting the abuse of rights, the legal system applies a "social" corrective, grounded on solidarity, which, unlike the catholic theory, is freed from moral contaminations and does not transcend the real world[35].

Not less influential were the voices of those commentators who, though recognizing the existence of such a principle, were not convinced it could – and so should – be provided with conceptual autonomy. Indeed, the rationale for considering the abuse of right a legally sanctionable

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31 See § 226 BGB (*Schikaneverbot*): «*Die Ausübungeines Rechtsistunzulässig, wennsienurden Zweckhabenkann, einemanderen Schadenzuzufügen*» which could be translated as follows: «exercising a right whose only purpose is damaging others is not allowed». It is noteworthy that such a rule is contained in the general part of the code and it is to be applied to all cases described in the following four sections.

32 G. GROSSO, *Abuso del diritto (diritto romano)*, entry, in *Enc. Dir.*, I, Milano, 1958, pp. 161-163; S. RICCOBONO, *La teoria dell'abuso di potere nella dottrina romana*, BIDR, XLVI, 1939, pp. 1-48. It is worthy to consider the similarity between this principle and the prohibition of "atto emulativo". Such a prohibition moves from an ethical necessity (its growing importance might be determined by the onset of Christianity), or, more likely, from "social" necessity (for this reason it would be important the *animus nocendi* and the futility for the subject who could behave in an "abusive" manner).

33 In Middle-Age thinking, the difference between abnormal use of a right and "atto emulativo" was quite clear. The difference consisted in the fact that it is possible to talk about abnormal exercise where two conditions arise: the existence of a protected fundamental right and the possibility to use it in order to gain personal advantages, implying a conduct not in accordance with the legal system, though not expressively forbidden by the law; otherwise, an "atto emulativo" recurs when it is possible to spot a precise *animus nocendi (seu aemulandi)* and an exercise of a right with the sole intent of damaging others. The difference is clear: objective abuse in the former subjective in the latter.

34 J. DABIN, *Le droit subjectif*, Paris, 1952. In the Author's opinion, exercise by an subject of a right authorized by the law is limited by the duties towards God.

35 In the same direction, with respect to the scholarly debate in Italy, F. CARNELUTTI (quoted in M. MESSINA, *L'abuso del diritto*, 2006, Napoli, Edizioni Scientifiche Italiane, p. 173, footnote 44) asserting that «the lack of the abuse of right is due to a violation of the duty of solidarity, as provided for by Art. 2 It. Const». See above, para 2.

violation, was based on the "exclusive" semantic value of the term "abuse" (of a right): in fact, it evoked a connection to an extra-legal area, in the sense that one could talk of abuse insofar as the limits of the "legal" had been passed[36]. For this reason, it would not make sense to talk about a conduct "abusing" a right, because at the most it would be a legal "non-conduct", namely a conduct not accounted for in the "source-power-act" formal sequence, which was the only way of granting a legal *vestimentum* to a human action[37].

This short digression on the development of the abuse of right doctrine in Europe allows us to turn now to the evolutive process which took place, about in the same period, in England and the United States.

The leading case in the law of England has long been considered that of *Mayor of Bradford v. Pickles* of 1895[38]. The defendant had dug some wells with the only aim of depriving the community of a big part of its water resources. The decision, delivered by Lord Macnaghten, thus recited: «it may be taken that [the] real object was to [show] that he was the master of the situation, and to force the [waterworks] corporation to buy him out a price satisfactory to himself»[39]. Despite this, the decision went on: «He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher… But the real answer to the claim of the corporation in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded»[40].

On the contrary, in France, not only thinkers such as Dabin, Josserand, Planiol were developing a theory on the prohibition of abuse of rights, but even courts were of the opinion that such a prohibition did exist in the *jus positum*[41]. Such a doctrine was originally considered in relation to the exercise of rights *in rem* (even though this is not strongly connected to the issue of good faith performance of contracts, it is, nonetheless, a sign of the different kinds of legal culture in the countries under examination in this section).

As regards the prohibition of the abuse of rights in contracts, such a problem was considered of no legal relevance in England, since «any right given by contract may be exercised as against the giver

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36 So M. ORLANDI, *Contro l'abuso del diritto*, cit., p. 149: «either the conduct is in accordance with law (namely, with provisions regulating the application of the legal instrument, called law) so that pre-established effects will be produced; or it is not, and no effects will be produced».

37 The expression "abuse of right" is, «[a]s a matter of pure semantic logic, […] an oxymoron», as emphasized by J. M. PERILLO, *Abuse of Rights: A Pervasive Legal Concept*, in *Pacific Law Journal*, 1995, 27, p. 47.

38 [1895] AC 587 (HL).

39 *Id.*

40 *Id.* See J. M. PERILLO, *op. cit.*, p. 41; see also H. C. GUTTERIDGE, *op. cit.*, p. 22.

41 For instance, in dealing with a case similar to *Mayor of Bradford v. Pickles,* in 1846, French judges found that the defendant (which had installed more powerful pumps on his lands in order to have more water supply than his neighbors) had abused his right, although such a right was recognized by Art. 641 of the *Code Civil*. This case is examined in J.M. PERILLO, *op. cit.*, p. 43, footnote 25.

by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right»[42].

Such a holding was a clear expression of the economic background in which 19th century *contract law* developed in England[43]: the expansion of business relations determined the ascent of contracts as the central normative instrument between the parties[44]. Moreover, the contracting parties, mostly professional businesspersons, were deemed perfectly able to understand whether a contract clause was unfair or detrimental, to fix it according to their needs, or, if amending the contract proved too costly or time consuming, to give up the negotiation.

As for the U.S. legal system, it has been noted that, starting from the age of Enlightenment, it strayed from the English model[45]. «[A] look at courts' records suggests that abuse of rights was, indeed, silently at work in English and, more significantly, in American law. […] In various areas of the Law, judges relied on "functional equivalents" of abuse of rights. In other words, the socio-legal function played by abuse of rights on the continent, (*i.e.*, limiting the amplitude of individual rights and balancing conflicting rights) was performed by a variety of "malice" tests and "reasonable user" rules that, although not integrated into a unitary category of "abuse of rights", presented a highly similar conceptual pattern»[46]. Basically, what the Anglo-American law had been missing, was a theoretical foundation for a unitary notion of abuse of right, able to assemble all corrective measures on *water law*, *nuisance, tortious interference*[47] *with contractual relations or economic expectancies* and *labour law*.

From the analysis of common law jurisprudence[48] it is possible to infer that judges and lawyers in general have never felt the need to envisage a unitary principle of the abuse of rights, because «it is

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42 Thus, Lord Wills in *Allen v. Flood* [1898] A.C. 1.

43 «The belief of private autonomy prevails. It reveals the central role of the individual and his power in developing rules concerning free market, which are, at the same time, respectful towards the community, as characterized by objectivity and sense of moderation. In case of violation, they will be restored without judges' or State's intervention», A. DE VITA, *op. cit.*, p. 261.

44 A. DE VITA, *op. cit.*, *ibidem.*

45 «[M]any aspect of our law have evolved since our separation from England. The separation took place in the era of the Enlightenment. One aspect of Enlightenment thinking was the firmly held belief in the existence of rights that are absolute. […] [t]oday hardly anyone believes in the existence of such rights.», J. M. PERILLO, *op. cit.*, pp. 48-49.

46 A. DI ROBILANT, *Abuse of Rights: The Continental Drug and the Common Law*, in 61 *Hastings L. J.* 687 (2010) at 696.

47 «It would be sufficient to think about the concept of *nuisance*, which defines the owner's abnormal conduct damaging others' property, considered as abuse of right (property right); or the tort of interference, based on the idea that a private individual is not permitted to abuse his contractual freedom in order to damage others' interests deriving from the contract», A. MASTRORILLI, *L'abuso del diritto e il terzo contratto,* in *Danno e responsabilità,* 4/2010, pp. 347-357, p. 357, footnote 26.

48 Listing and discussing even the most important cases on this subject would require more space. Evidence that the principle taken into analysis has been differently applied, especially in U.S. law, see A. DI ROBILANT, *op. cit.*, pp. 696-710; S. J. BURTON, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, in 94 *Harvard L. Rev.*369 (1980).

generally believed that such a principle would be unnecessary in a system where the duties of *fairness*, *reasonableness* and *honesty* in the exercise of contractual freedom have long represented the cornerstones of private law»[49]. In other words, common law jurists did not need to create such a doctrine, because it already existed.

In conclusion, if we look at the rules adopted by the different legal systems with a view to establishing equity and fairness in contracts, it is possible to assert that, *mutatis mutandis*, traces of the abuse of right doctrine can be found in both the common law and the civil law. And, especially in a cutting-edge field such as contract law, it is noteworthy how, in times of uncertainty and instability for human beings, the law has tried to ensure equity and justice, guided by the enlightened interpretation provided by some of its bravest jurists.

7) – The legal doctrine examined here unavoidably raises economic issues as well. Today, more than ever, trading, public institutions (which are not a merely external aspect of trading) and the market (as "normative statute") are figured as three inseparable factors of the economy[50]. That is why national and international institutions have an important role and, on the assumption that the contract and the market are closely intertwined, contract law is the main tool whereby to regulate, either directly or indirectly, the market.

In the *Renault* case, decided by the Italian Supreme Court in 2009[51], the two entrepreneurs (the litigants in that case), before being two contracting parties, were two market players, who resorted to the contractual instrument to develop business relations aimed at maximising profits. The issue brought before the Supreme Court was, hence, primarily an economic one. The judgment, ruling over a contractual issue, indirectly – but inexorably – affected the organisation of an entrepreneurial activity[52]: more precisely, in the case at issue, the defendant corporation wished to avail itself of a clause in the distributorship agreement providing for *ad nutum* termination; such a provision was functional to the organization of a distribution network[53], empowering the grantor to maintain control over the

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[49] A. DE VITA, *op. cit.*, p. 268.

[50] P. PERLINGIERI, *La contrattazione tra imprese*, in *Riv. Dir. impresa*, 2006, p. 326.

[51] See *supra*, par. 2.

[52] Strictly related to a company's acts of organization, business relations are deemed functional to the implementation of such acts. See G. AFFERINI, *Gli atti di organizzazione e la figura giuridica dell'imprenditore,* Milano, 1971, p. 282 ff.

[53] While economists have long concerned themselves with business network, Italian jurists have showed few concern about it, at least until the first EC Directive concerning network contract was enacted (Art. 3 paras 4-ter, 4-quater e 4-quinquies Decree Law 10 February 2009, n. 5, converted and modified into Law 9 April 2009, n. 33 and later modified by Law 23 July 2009, n. 99 and Art. 42, Decree Law 31 May 2010, n. 78, Converted and modified into Law 30 July 2010, n. 122). On the matter: C. CREA, *Reti contrattuali e organizzazione dell'attività di imprese*, Napoli, 2008, as well as essays collected in F. CAFAGGI, *Reti di imprese*, cit.; ID., *Corporate governance, networks e innovazione*, Padova, 2005; F. CAFAGGI - P. IAMICELI, *Reti di imprese tra crescita e innovazione organizzativa.*

distributors. It is a typical example of contractual network, aimed at developing a distribution chain. From a strictly legal point of view, the grantor's need for maintaining direction, coordination and control in the frame of a de-centralised distribution- (but also production-) chain is embodied in a series of contracts[54], which impose a number of obligations to the «subordinated»[55] companies.

From this particular angle, it becomes clear that the possibility of *ad nutum* withdrawal (denied in this case by the Supreme Court) meets the grantor's economic need to survive in a highly competitive market, by terminating a relationship that, hypothetically, has proved no more in line with the company's business strategies or, more simply, has become too costly. However, the interruption of the relations between the two traders, if it is not backed by appropriate guarantees in order to allow a decent *exit strategy*, causes a considerable damage to the addressee of the termination notice. Even though both contracting parties have benefited from enterprise integration, the interruption of the relationship, far from causing big risks to the grantor, represents a ruinous circumstance for the licensee: to be sure, disintegration causes a damage to the grantor, but the damage suffered by the distributor is far greater. In fact, while it is a relatively easy task for the grantor to find a new distributor to whom delegate a part of its business activities, the case stands quite differently for the distributor/licensee. The premature termination of the contract, caused by the dominating company's withdrawal, represents a harsh blow for the distributor, who is now faced with great difficulties in reconverting its business activity[56], let alone the massive losses in relation to the invested capital. Such a marked disparity in contractual power causes dependency in the relationship between the distributor and the grantor, and actually nullifies the weaker party's contractual freedom. On the other side, it should not be underestimated that the outsourcing of business activities to third parties represents a direct emanation of freedom of enterprise: in this respect, Renault was certainly free to create a commercial distribution network, as well as to put a termination clause to the distributorship agreements. Nevertheless, it becomes essential to clarify under what circumstances the (legitimate) exercise of the right of withdrawal turns into an abuse of dominant market power (absolute dominance) or into an abuse of economic dependency (relative dominance). In light of this, regulators have developed specific protective techniques in favour of the weaker contracting party and enacted legislation with a view to introducing new remedies against the distortive effects that similar contracts

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Riflessioni da una ricerca sul campo, Bologna, 2007; A. LOPES - F. MACARIO - P. MASTROBERARDINO, *Reti di imprese. Scenari economici e giuridici*, Torino, 2007.

54 The definition shall apply to a system aimed at integration, *marketing* and production on contractual basis, specifying that the relationship within the distribution (or production) network may be of either corporate or administrative nature: on this point, see E. ZANINOTTO, *La gestione collaborativa della funzione di distribuzione*, Milano, 1990, p. 2 ss.

55 V. P. P. FERRARO, *L'impresa dipendente*, Napoli, 2004, p. 190 ss.

56 V. SPEZIALE, *Le "esternalizzazioni" dei processi produttivi dopo il d. lgs. 276/2003: proposte di riforma*, in *RGL,* 2006, p. 5.

of distribution can cause to competition. The Italian Supreme Court's judgment perfectly fits within this normative framework, showing a genuine attitude towards application of the principles of equity ad fairness in the *lex privata.*

However, 'law and economics' theoreticians have criticized this ruling. In their opinion, the Supreme Court erred in defusing an unequivocal contract clause, while considering the case simply on economic – not legal – grounds. Besides, the judgment did not restrain the scope of application of the abuse of rights doctrine to trading involving 'weak' subjects (the main characters in the so-called "third contract"[57]), but seemed to have extended it to all contractual relations. According to some scholars, such a paternalistic approach relieves the parties of responsibilities: inequality in contractual power occurs in all economic relations. The Court, instead, derived the need of protecting the weaker party precisely from such inequality, neglecting that inequality is commonly viewed as «the motionless engine of contractual activity»[58]. Furthermore, a pre-requisite for abuse of rights is the unjustified disproportion between advantages and disadvantages of the contracting parties: such a statement, though striking an execrable misuse of power, crushes with the economic precept describing «the impracticability of comparing personal advantages»[59]. Basically, the Italian Supreme Court's judgment has been accused of having pursued a laudable aim through inappropriate means, susceptible of inconsistent and dangerously invasive applications.

Although the recourse to general clauses and standards always implies the danger of an arbitrary use, it is possible to provide a justification for the judgment even from an economic point of view (namely, on market efficiency grounds). In a market in which enterprise integration is becoming the main strategy in order for a firm to maintain high levels of competitiveness, the weaker parties are exposed to the risk of seeing their power of self-determination in contracts shrink dramatically. Without regulation or re-balancing judicial interpretations, it is likely that cooperation between companies, instead of pursuing goals of common wellness among the participants, ends up being bent to the interests of the economically dominant party. This may compromise the good functioning of the market: abusive conducts, in fact, do not give assuring messages to market players and negatively affect competition[60]. Good faith integration of contract relations, instead, restores equity and fairness, and in this framework, contractual freedom can finally express its full potential. A corrective "external" check by courts becomes, in this context, an essential condition for the genuine exercise of contractual freedom, working as an incentive, promoting utility maximization not only for the stronger party but

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[57] Cfr. AA.VV., *Il terzo contratto,* edited by G. GITTI, G. VILLA, Bologna, 2008.

[58] A. PALMIERI, R. PARDOLESI, *Della serie «a volte ritornano»: l'abuso del diritto alla riscossa,* in *Il foro italiano,* 2010, p. 97.

[59] A. PALMIERI, R. PARDOLESI, *op. cit.,* p. 98.

[60] A. MASTRORILLI, *op. cit.,* p. 357.

for the system as a whole. In fact, economic analysis shows that, in a free market economy based on perfect competition, both sides are better off as a consequence of trading[61].

Perfect competition presupposes that all types of trading are economically efficient: it is therefore important that contracts fairly account for both parties' interests and be implemented in accordance with such interests[62].

8) - The economic theory of contract law teaches that, in order to form a contract, three elements are necessary: *a)* the performances each party commits to; *b)* the modalities through which such performances may change upon variation of the so called "states of the world"; *c)* a system of remedies and sanctions to be applied where either *a)* or *b)* is not satisfied. A contract is, then, efficient when a combination of these three elements leads to maximization of earnings for all parties involved in the trading[63]. Nevertheless, efficiency may be impaired by two main obstacles: information asymmetry and parties' non-omniscience[64]. On such basis, we can venture a definition of structural completeness of a contract in these terms: *a contract is complete in its structure when, absent transaction costs, the parties manage to embed all foreseeable risks in a contract clause*[65].

The type of contract brought before the Italian Supreme Court is defined by economists – especially by those North-American authors more receptive (excessively, perhaps) to law and economics theories – as "relational contract". Such a contract shows two peculiar features: incompleteness and considerable (or undefined) duration[66]. The problem with these contracts lies in the long-lasting tie established between the parties.

The Italian legal system repudiates permanent ties (see *supra*, *sub* para. 2). For this reason, the right of withdrawing from a contract is generally recognised. But *quid juris* of *ad nutum* termination? By definition, it is the case where one of the parties foresees the possibility of a future decision, contrary to that shown and stated at the time when the contract was formed. More precisely: accepting a termination clause means that all parties acknowledge the mutual possibility to withdraw from the contract at any time. When the "state of the world" changes, the original *equilibrium* of the contract is

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61 Cfr. S. SHAVELL, *Fondamenti dell'analisi economica del diritto,* Torino, 2005, pp. 271 ff.; M. FRIEDMAN, *L'ordine del diritto. Perché l'analisi economica può servire al diritto,* Bologna, 2004, pp. 275 ff.

62 F. SCAGLIONE, *Abuso di potere contrattuale e dipendenza economica,* in *Giurisprudenza Italiana,* 3/2010, p. 360 ff.

63 G. PALUMBO, *Contratti e tutela giuridica*, in P. CIOCCA, I. MUSU (eds.), *Economia per il diritto. Saggi introduttivi*, 2006, Bollati Boringhieri, Torino, p. 142.

64 This assumption means that each party has a different knowledge background. As a correcting tool, the legal system may impose *disclosure duties* to each party in order to assure that the contract is formed on an equal basis.

65 Because of "limited rationality", of the costs required to draft a contract, and of the costs for enforcing/implementing a contract, there always are incomplete contracts, inevitably subject to restructuring. See G. PALUMBO, *op. cit.*, p. 151.

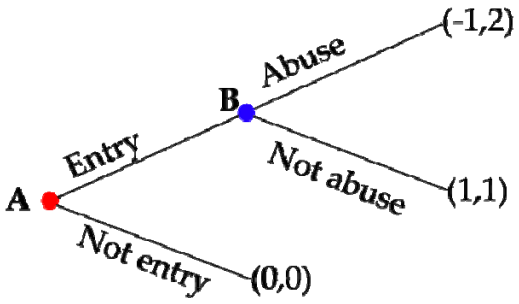
66 A. SCHWARTZ, *Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies*, in *Journal of Legal Studies*, 1992, 21, pp. 271-318.

altered. This shows that an aleatory component is automatically introduced into the contract, bringing about a gap that needs to be filled by State courts in equity[67].

However, before going to court, the parties themselves may be encouraged to think of an efficient alternative to litigation. The alternative is shown by resorting to a repetitive game based on strategic co-operation between two parties[68]. Let us assume the existence of two contracting parties, A and B, where A is the "weaker" and B is the "stronger". Both must implement a *relational contract*, on the basis of which A will make specific investments (in the instant case, A is the retailer, organising his business for the sale of Renault's goods).

The strategic interaction between the two parties consists in the fact that A must trust B in order to enter into a contractual relation with B.

Consider the interactive scheme as represented in Picture 1.



Picture 1

[67] Also confirmed by A. SCHWARTZ, *op. cit.*, p. 305 «[a] court can hold that a party lacks cause to terminate if it finds that termination is not optimal for that party or if it finds that terminations is unfair to the other party […]; finding that termination is unfair requires fairness norms», Author carries on, «that seem difficult to develop for commercial context». US jurist's contribution seems to not consider §§ 1-201 e 2-203 of *Uniform Commercial Code*: § 1-201 defines good faith as «*honesty in fact in the conduct of the transaction concerned*»; § 2-203, especially referring to seller, explains that "good faith" does not mean only «*honesty in fact in*» but also «*the observance of reasonable standards of fair dealing in the trade*». Therefore, here are the *fairness norms*.

[68] This game reconsiders and adapts the mechanism of reputational effects, as already studied in games theory. V. A. FALK, U. FISCHBACHER, *A Theory of Reciprocity*, in *Institute for Empirical Research in Economics, University of Zurich, Working Papers*, 1999, 6; E. FEHR, K. SCHMIDT, *Theories of Fairness and Reciprocity – Evidence and Economic Applications*, in *Institute for Empirical Research in Economics, University of Zurich, Working Papers*, 2001, 75. A similar approach about the relationship between companies and *stakeholders* has been adopted by L. SACCONI, *CSR come governance allargata d'impresa: un'interpretazione basata sulla teoria del contratto sociale e della reputazione*, in *LIUC Papers - Serie Etica, Diritto ed Economia*, 2004, p. 143. This contribution provided a cue for reflection about the Author's adaptation of the "contractual" subjects (even though he refers to a "social contract" inspired by Rawl's thinking).

If A trusts B, by joining in the contractual relation, B has two options: abusing or not abusing his right. In case of abuse, he selfishly obtains a bigger economic advantage; otherwise, he would obtain a lesser advantage but the aggregate value of utilities for the two parties will be higher than if B perpetrated the abuse. Furthermore, such a game has another advantage: from a "reputational" perspective, non-abuse by B guarantees a lesser advantage in the short period; in fact, supposing an infinite number of A_i, evidence about the (dis)honesty of B may be easily collected and, consequently, the probability that B ends up into the "honest" category (we are assuming that all As divide the world in only two categories: "honest" and "dishonest") will grow for every A_i that, joining in a contract with B, has not suffered any abuse. This means that, if the company B is able to build a reputation of "honest" actor, on the basis of the relations established with the first A of the series, the number of $A_{i,}$ who will decide to enter into a contract with B, will raise. This, in the long run, will guarantee B higher profits.

The present considerations are valid, however, if some additional conditions are met: *a)* possibility for the enterprise to advertise which "category" (honest/dishonest) it belongs to; *b)* capacity by all participants to "learn" the results of the single reputational games; *c*) necessary "quasi-simultaneity" of the conducts of A and B (so that the parties are allowed to know of each other's behaviours); *d)* possibility for A to access the results so that he can understand whether B has actually behaved "honestly"; *e)* communicability of the results of the game among As; *f)* absence of optimal mixed strategies: B must not be able to calculate probabilities of "non-abuse" which would make several As indifferent towards "joining in" or "not joining in": if it were so, there would be a mechanism inducing B to engage in abusive conduct, but "not too much".

Applying the game to the case at issue here, let the car retailers be A_i and Renault B. The fact that Renault has made an abusive use of the *ad nutum* termination clause has definitely implied, in the short term, maximization of benefits in compliance with corporate strategies; however, apart from the damages it has to pay as a consequence of the Italian Supreme Court's judgment, its reputation of "honest" counterpart is unquestionably undermined. This will lead new A_i to doubt the economic advantages deriving from entering into a contract with B.

Therefore, companies are better off behaving honestly and using their own rights in compliance with the principles of fairness and equity, meeting the counterpart's behavioural expectations.

9) – In conclusion, the judgment n. 20106/2009 of the Italian Supreme Court has marked an important step in the field of business contracts. Interpreters are called on to judge the parties' conduct by applying the principles of equity and fairness throughout the 'life' of a contract, with a view to guaranteeing a balanced regulation of interests. The recourse to general provisions such as the duty of good faith is definitely risky because, like all "frame-principles", they are susceptible of assuming

different operative meanings depending on the judge's discretion, thus paving the way to inconsistent interpretations. Nevertheless, they are very flexible and capable of adaptation to the newer economic-legal phenomena and also to the changing perception of reality by legal expert on the basis of particular space-time contexts. Besides, judicial review becomes necessary to "complete" some contracts that, as highlighted by law and economic theory, are "incomplete": this does not introduce an element of "uncertainty of the law"; instead, through judicial review, it ensures the achievement of fairness in each case.

The judge is conferred a very sensitive task to ensure market flexibility and, at the same time, to sanction all possible abuses that, while obstructing the free flow of competition, may distort freedom of contract.

It is important to specify that this is not a prerogative of continental legal systems: as seen, in a number of U.S. court decisions and scholarly papers, the notion of "fairness in contracts" recurs more and more frequently, witnessing the growing importance of such "frame principles" in a cross-border perspective. In fact, both the Principles of European Law, Part I, drawn up by the Lando Commission, and the UNIDROIT General Principles for International Commercial Law, have envisaged specific rules concerning this issue[69]. Thus, the theory of the abuse of rights and the duty of good faith become the foundations of the freedom of economic initiative, limiting only its pathological expressions that are aimed at piercing the boundaries of fair dealing[70]. Furthermore, based on economic analysis, this article has showed that honest and fair dealing not only is mandated by the law, but also promotes efficiency in market transactions.

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[69] In particular, Lando Commission's *Principles* provide – specifically, Art. 1.106 – that «each party exercising his rights of performing his duties […] must act in accordance with good faith and fair dealing». The commission has adopted a "subjective" interpretation of good faith, intended as «honesty and fairness in mind»; it has considered the fair dealing as «observance of fairness in fact which is an objective test». Therefore, two criteria arise: one subjective (good faith) and the other objective (fair dealing). Art. 1.7 of UNIDROIT *General Principles* provides that each contracting party has to behave «in accordance with good faith and fair dealing in International trade». On such principles, see U. BRECCIA, Principles*,* definitions *e* model rules *nel "comune quadro di riferimento europeo (*Draft Common Frame of Reference*)*, in *I contratti*, 2010, 1, p. 95. See also V. ROPPO, *Prospettive del diritto contrattuale europeo. Dal contratto del consumatore al contratto asimmetrico?*, in *Il Corriere Giuridico*, 2009, 2, pp.267-282. As for the UCC, see *supra*, footnote 46.

[70] «The widespread adoption of the good faith principle, with regards to cooperation, is no longer moved by values such as proportionality and fairness (which actually pervaded the liberal concept of abuse of right), but by economic factors deeply rooted in the dynamics of the system», A. MASTRORILLI, *op. cit.*, pp. 356-357.

Paper n. 3

THEORY AND PRACTICE OF CONSTRUCTING A COMMON CONTRACT LAW TERMINOLOGY

by

Chiara Perfumi

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THEORY AND PRACTICE OF CONSTRUCTING A COMMON CONTRACT LAW TERMINOLOGY

by

Chiara Perfumi♦

Abstract:

Multilingualism constitutes a "fundamental EU principle" aiming to uphold democracy, transparency and the right to knowledge. Transposed into the market context, it thus affects each single contract in relation to the choice of its language, as well as the language of the applicable contract law representing an inevitable inner barrier for all the participants, either businesses or consumers, and thus calling for a need of harmonisation.

Aiming to contribute to the debate on the elaboration of a European contract law, this paper moves from the assumption that the convergence of national systems largely depends on the creation of a common European terminology. Given that this statement is commonly shared in theory, it has to be verified if it is actually received in practice.

It will therefore deal with a preliminary cross-analysis of the main texts currently under the evaluation of the EU Institutions, namely the Directive on consumer rights and the Proposal for a Regulation on an optional Common European Sales Law.

Despite the fact that several difficulties still affect the use of legal terms and/or concepts at EU law level, this first and brief attempt highlights a cautious raising of a shared technical language that has been consolidating in the on-going debate on the construction of an European contract law.

Keywords: Multilingualism; common contractual terminology; consumer rights Directive; Proposal for a Regulation on an optional Common European Sales Law; draft for a common frame of reference; contract; trader; consumer; distance and off-premises contracts; comparative approach.

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1. The emerging of a European Legal Terminology in a Multilingual Context.

Multilingualism constitutes a "fundamental EU principle"[1] aiming to uphold democracy, transparency and the right to knowledge[2].

It involves the promotion and the valuing of linguistic diversity at the European level in order to foster the respect of national identities. From this principle derives the corollary according to which each language has official status and enjoys the same dignity in the EU legal order[3]. It implies, on the one hand, that each citizen can address EU Institutions in his or her own language and, on the other, that legislation must be made available in every official language[4].

Each version, additionally, is authentic and must be therefore considered in order to determine the wording of EU law[5].

Though, even where the different language versions are entirely in accord with one another[6], community law uses a peculiar terminology and legal concepts that do not necessarily have the same meaning in EU law and in the law of the various member states[7].

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[1] Art. 22 of the Chart on Fundamental Rights of the EU.

[2] See B. POZZO, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, in V. Jacometti, B. Pozzo, *Le politiche linguistiche delle Istituzioni comunitarie dopo l'allargamento*, Milan, 2006, p. 3.

[3] The first Community Regulation dealing with official languages was passed in 1958 (Regulation n. 1 deciding the languages to be used by the European Economic Community, OJ L 17, 6.10.1958, p. 385). It specified Dutch, French, German and Italian as the first official and working languages of the EU, these being the languages of the Member States at that time. Since then, as more countries have become part of the EU, the number of official and working languages has increased.

[4] According to the policy on multilingualism adopted by EU Institutions, there are two main entitlements for languages with "official and working" status: a) documents may be sent to EU institutions and a reply received in any of these languages; b) EU regulations and other legislative documents are published in the official and working languages, as is the Official Journal. See A. GAMBARO, *A proposito del plurilinguismo legislativo europeo*, in *Rivista Trimestrale di Diritto e Procedura Civile*, 2004, p. 287.

[5] Each language has an "equal authoritative status with the English original": as affirmed in a recent Notice of the EU Commission, legal translation and interpretation is «an area which deserves particular attention. Given the increasing professional and personal mobility of EU citizens between Member States, growing demand for such support is likely, as the number of cases involving persons with limited skills in the court's language increases». Communication from the Commission to the European parliament, the council, the European economic and social committee and the committee of the regions, Multilingualism: an asset for Europe and a shared commitment (COM (2008) 566 final), 18 September 2008.
See also European Parliament Resolution of 24 March 2009 on Multilingualism: an asset for Europe and a shared commitment (2008/2225(INI)).
See in the case law: Case C-152/01, 20 November 2003, *Kyocera Electronics Europe GmbH v. Hauptzollamt Krefeld*, par. 32 : "As the Court has consistently held, inter alia in Case C-296/95 EMU *Tabac and Others* [1998] ECR I-1605, paragraph 36, and Case C-257/00 *Givane and Others* [2003] ECR I-345, paragraph 36, all the linguistic versions of a Community provision must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question". Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415: "community legislation is drafted in several languages and the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions".

[6] See T. SHILLING, *Beyond Multilingualism: On Different Approaches to the Handling of Diverging Language Versions of a Community Law*, in *Eur. Law Journal*, 2010, p. 47: the Author moves from the consideration that equally authentic language versions of EU law may have different meaning even if taken on their own. The EU multilingual context entails inadequate translations and political meddling. He therefore proposes a quite radical solution consisting in the adoption of a unique authentic version and he develops his argument balancing the protection of legitimate expectation of citizens in the equal authenticity of his/her own language version with the non-discrimination principle.

[7] See *CILFIT* case, par. 19.

Moreover, it necessarily implies the terminological background proper to the Institutions' working language but it leaves sophisticated terminological issues out of consideration. Indeed, whilst national private law has a broad scope aiming to regulate the relationships between individuals in the light of general principles arising from a given constitutional legal order[8], the legislation enacted by the European Institution has been (until Lisbon) merely instrumental to the completion of the internal market through a technocratic approach. Consequently, the language there used sticks to the specific matters covered by EU polices and does not aspire to a general conceptualisation.

These circumstances concurred somehow to the creation of an autonomous set of rules whose coherence has been settled by the ECJ and that de facto have exercised a strong impact on Member States' private law.

Within the limits of the pointillist and unsystematic approach of the legislator, the Court has granted over the years a uniform interpretation of European provisions[9]. In doing so the ECJ combines the linguistic argument, considering the semantic and syntactical features of texts in comparison with the authentic language versions[10] and the teleological one[11]. The latter implies that EU law must be placed in its context and interpreted in the light of the provisions of community law as a whole, having regard to its objectives and the state of evolution at the date on which the provision in question is to be applied[12]. Moreover, since the entering into force of the EU Chart of fundamental rights, the constitutional interpretation of EU private law in the light of fundamental rights there enshrined could lead to a more coherent and harmonised construction of European private law[13].

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[8] As recalled in the Manifesto on social justice, "principles of law, though articulated in technical legal concepts, described a vision of a market society, a set of values that established the basic principles of social justice": Study GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Social Justice in European Contract Law: a Manifesto*", in *European Law Journal*, November 2004, p. 654.
M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, in *European Review of Private Law*, 2010, p. 69.

[9] According to the mechanism of preliminary ruling, national judges have the obligation to refer the ECJ when they consider that recourse to Community law is necessary to enable them to decide a case. They may instead refrain from submitting the question and take upon itself the responsibility for resolving it if convinced that the matter is equally obvious to the courts of the other member states and to the court of justice. See *CILFIT* case, par. 11 ff.

[10] This argument "is linked to semantic and syntactical features of legal language as well as to comparison of authentic language versions": E. PAUNIO, S. LINDROS-HINHEIMO, *Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law*, in *European Law Journal*, 2010, p. 400.

[11] See M. POIARES MADURO, *Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism*, Available at SSRN: http://ssrn.com/abstract=1134503 or http://dx.doi.org/10.2139/ssrn.1134503, p. 6: The Court has to "arbitrate" linguistic disputes arising from different textual interpretation depending on the appealed linguistic version while pluralism of languages and legal traditions entail translation issues: in this context, the Author argue that the teleological interpretation is "the more appropriate form of guarantying a uniform application of EU law at national level".

[12] *CILFIT* case, par. 20.

[13] A. COLOMBI CIACCHI, *The Constitutionalisation of European Contract Law*, in *European Review of Contract Law*, 2006, p. 180. See also C. MAK, *Europe-Building Through Private Law: Lessons from Constitutional Theory*, (March 13, 2012), in *European Review of Contract Law*, Vol. 2, 2012; in *Centre for the Study of European Contract Law Working Paper Series* No. 2012-02; in Amsterdam Law School Research Paper No. 2012-46; *Postnational Rulemaking Working Paper* No. 2012-01. Available at SSRN: http://ssrn.com/abstract=2023141. For a critical perspective: O. CHEREDNYCHENKO, *Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?*, in *Utrecht Law Review*, 2007, Vol. 3, No. 2, p. 1; O. CHEREDNYCHENKO, *The Harmonisation of Contract Law in Europe by Means of the Horizontal Effect of Fundamental Rights?*, in *Erasmus Law Review*, Vol. 1, No. 1, 2007. Available at SSRN: http://ssrn.com/abstract=1026206.

Notwithstanding, the appreciation of legal concepts contained in EU law is frustrated by the lack of a shared uniform terminology as it is not the expression of a common legal tradition but it rather consists in the formalisation of a political compromise according to EU competences and in the respect of subsidiarity. Multilingualism, on its side, increases legal uncertainty because of inevitable discrepancies generated by the multiplication of official languages[14].

In striking the balance between unity and diversity, a common terminology should express at the same time a shared European culture and the respect of diversity in language, culture, and traditions.

In order to achieve this objective it seems that there is no need of elaborating a detailed new vocabulary, but rather to fix the key concepts enshrined in the legal order[15] in order to obtain some "prototypes" that can standardise such general concepts[16]. All different formants actually operating in Europe should participate to this process. Beside the institutional legislator, national and European courts as well as comparatist academics should play a major role in building a truly European legal culture through a constructive dialogue leading to a common and shared terminology[17]. This process constitutes, anyhow, a concrete issue that has to be related to the broader debate on the elaboration of a common private law. Though, the building of a common terminology does not imply (or, at least, not immediately) a radical choice on the most suitable instrument to reach a European private law but rather concerns the emerging of a common legal culture as it could be incorporated in a formal act only in a further step that should find in this European legal culture its basis.

This statement will therefore be illustrated trying to make a point on the state of the art on European contract law.

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[14] It has been said that multilingualism adds to "intra-lingual uncertainty" problems of "inter-lingual" uncertainty: E. PAUNIO, S. LINDROS-HINHEIMO, *Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law*, p. 408.

[15] See on the use of legal concepts in EU private law: A. GENTILI, *I concetti nel diritto private europeo*, in *Rivista di diritto civile*, 2010, p. 761. The author recalls the theory of Scarpelli, according to which legal concepts have a "core meaning" that does not depend on the discretion of each legislator: this theory could explain "quel nucleo stabile di significato del concetto tradizionale che la normative europea sissidiaria non dà ma nonostante tutto presuppone. E poi perché il dato culturale invece che formale che pone a base di quel nucleo ha porprio la virtù di ricomporre la frattura culturale tra diritto interno e europeo" (p. 779).

[16] A. TENENBAUM, *Droit européen des contrats: mythe ou réalité? L'enjeu et les difficultés d'une terminologie commune*, in *Revue internationale de droite comparé*, 2009, p. 181. See O. MORETEAU, *Le prototype, clé de l'interprétation uniforme: la standardisation des notions floues en droit du commerce international*, in *L'interprétation des textes juridiques rédigés dans plus d'une langue*, R. Sacco (dir.), Paris, 2002, p. 183.

[17] This process should be conducted together with lawyer linguists: O. MORETEAU, *Les frontières de la langue et du droit: vers une méthodologie de la traduction juridique*, in *Revue international de droit comparé*, 2009, p. 695.

2. The Impact of Multilingualism on the Contract.

Transposed into the market context, multilingualism can become a concrete barrier to all the participants[18], either businesses or consumers, as it is one of the main obstacles hindering the smooth functioning of internal commerce[19] on two levels: as a matter of fact, it affects each single contract in relation to the choice of its language, as well as the language of the applicable contract law.

Diversity, first of all, has an effect on the party's choice of the language regime of the contract.

The consumer could thus be compelled to conclude a contract provided by the other contracting party in a foreign language.

Nevertheless, this issue has been ignored[20] until the most recent directives concerning consumer law[21] or, anyways, it has been mainly left to Member States[22], giving rise to different levels of

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[18] The promotion of a more strategic approach to multilingual communication for business is now a focus of EU Institutions. From the Commission's web-site on multilingualism (http://ec.europa.eu/education/languages/languages-of-europe/doc4015_en.htm): an EU information campaign for small businesses was recently launched (autumn 2010) to promote a wider use of foreign languages in international business, and show how this can increase business opportunities and trade prospects. Before the campaign, a survey of foreign language and communication networks available to companies was conducted: see the Report "Languages mean business. Companies work better with languages. Recommendations from the Business Forum for Multilingualism established by the European Commission" http://ec.europa.eu/education/languages/pdf/davignon_en.pdf.

[19] See B. POZZO, *Harmonisation of European Contract Law and the Need of Creating a Common terminology*, in *European Revue of Private Law*, 2003, p. 754.

[20] Certain directives, primarily the older ones, do not even mention the language issue (Dir. 85/577/EEC on contracts negotiated away from business premises, Dir. 90/314 on Package travel). Among these, Directive 93/13 requires that certain terms (Dir.,) be written "in plain intelligible language" without giving any details on language regime.

[21] More precisely, only Dir. 94/47 on timeshares contained indications on the language regime of the contract. Art. 4 provided that the contract should be drawn up "in the language or one of the languages of Member State in which the purchaser is resident or in the language or one of the languages of the Member State of which he is national which shall be an official language or official languages of the Community, at the purchaser's option. The Member State in which the purchaser is resident may, however, require that the contract be drawn up in all cases in at least its language or languages which must be an official language or official languages of the Community, and - the vendor must provide the purchaser with a certified translation of the contract in the language or one of the languages of the Member State in which the immovable property is situated which shall be an official language or official languages of the Community".
These principles have been recalled in the Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshares, long-term holiday product, resale and exchange contracts amending the oldest version. See Recital 10 of the: "Consumers should have the right, which should not be refused by traders, to be provided with pre-contractual information and the contract in a language, of their choice, with which they are familiar. In addition, in order to facilitate the execution and the enforcement of the contract, Member States should be allowed to determine that further language versions of the contract should be provided to consumers". Art. 4(3) provides that "3. Member States shall ensure that the information referred to in paragraph 1 is drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Community".
A more neutral approach is adopted in other cases, in which only the choice of language regime of the contract is provided (Dir. 2002/65 and 2000/31). Directive 2002/65 on distance marketing of consumer financial services, states at art. 3 that "in good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning (3g) in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract. However, (Recital 31) the provisions in this Directive on the supplier's choice of language should be without prejudice to provisions of national legislation, adopted in conformity with Community law governing the choice of language. Directive 2000/31 on the electronic commerce provides (art. 10) that the information "on languages offered for the conclusion of the contract" must be provided "by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service".
Directive 2008/48/EC on credit agreements for consumers, instead, does not contain explicit provisions on the language regime in the text, but only in Annex II on standard European consumer credit information disclosure. If applicable, the additional information in the case of distance marketing of financial services should indicate the language regime using the

consumer protection[23]. However, a clear convergence in this direction is detectable in the Directive on Consumer Rights[24] (hereinafter 'CRD') as well as in the Proposal for a Common European Sales Law[25] (hereinafter: 'CESL'), as they both the CRD and the CESL leave the rules on determination of the language to national law that has to be applied under relevant conflict of law rule.

Besides, national laws are rarely available in other European languages.

This frequent circumstance requires market participants to obtain a professional advice on the laws of the given legal system in which they are willing to conclude a contract for products or services[26]. But still, as we will see later, even in areas in which the EU has implemented a harmonised regime, important dissimilarities still remain at the national level, such that a mere translation does not suffice to grant a common understanding of legal concepts and terms enrooted in member states legal traditions[27].

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following formula: "Information and contractual terms will be supplied in [specific language]. With your consent, we intend to communicate in [specific language/languages] during the duration of the credit agreement".
In any case, the "undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction" is considered by the annex I (Commercial practices which are in all circumstances considered unfair) of Directive 2005/29 on Unfair commercial practices as a "Misleading commercial practice".

[22] This is the case of Dir 99/44, art. 6(4): "Within its own territory, the Member State in which the consumer goods are marketed may, in accordance with the rules of the Treaty, provide that the guarantee be drafted in one or more languages which it shall determine from among the official languages of the Community". The same approach is Directive 97/7, Recital 8: "the languages used for distance contracts are a matter for the Member States" and do not regulate the language regime.

[23] See, for example, the debate on the broad scope of application of art. 2 of the French *Loi* n° 94-665 of 4 August 1994 (on the use of the French language). The article reads as follows: «Dans la désignation, l'offre, la présentation, le mode d'emploi ou d'utilisation, la description de l'étendue et des conditions de garantie d'un bien, d'un produit ou d'un service, ainsi que dans les factures et quittances, l'emploi de la langue française est obligatoire ». See A.-M. LEROYER, *Langue française* , in *JCL. Concurrence-Consommation*, n. 872. For a critical approach on the issue: R. LIBCHABER, *Retour sur le droit de la langue française* , in *RTD civ.*, 2001, p. 709.
See also S. FEUILLERAT, *Emploi de la langue française: information des consommateurs et loyauté des transactions*, in *Rev. conc. consom.*, 1997 (12), p. 41; S. BERTOLASO, *L'utilisation de la langue française: protection réelle ou illusoire du consommateur ?*, in *Petites affiches*, 19 February 1997, p. 17.

[24] See Recital 15: "This Directive should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms".

[25] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final, Recital 27, p. 20.

[26] This way, only sophisticated parties can afford the expert legal advice that is needed for making an informed choice of law, thus overcoming the language barriers: see on this point M.W. HESSELINK, *CFR & Social Justice. A short study for the European Parliament on the values underlying the draft Common Frame of Reference for European private law: what roles for fairness and social justice?*, in *Centre for the Study of European Contract Law, Working Paper Series* No. 2008/08, p. 10.
See L. LINNAINMAA, *EU contract law as a tool for facilitating cross-border transactions: a point of view from industry*, p. 6 available at http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483.

[27] Even in case of harmonised rules, some differences will persist in their perception at national level. "The language barrier would formally remain in force because it has its roots in civil procedure and national legal culture. A EU contract law instrument, however, would create a common point of reference for litigation all over Europe – a legal source as vital as a contract law, which permeates all layers of society and economy, would help to foster a more open legal culture with respect to foreign languages. […] Furthermore, on the basis of an EU contract law instrument a common understanding with respect to legal concepts and terms could be developed which would facilitate the legal COMMUNICATION between the jurisdictions of the Member States, and the use of comparative law in the courts »: T.H. Klink, *EU contract law as a tool for facilitate cross-border transactions: a point of view from national courts*, p. 6, available at http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483.

If, therefore, the elaboration of common rules, whether optional or not, related to certain aspects of contract law could be desirable they do not automatically solve the obstacles hinted by multilingualism in the European Union context.

Moreover, these issues are strictly related to the inner quality of the terminology used by the European legislator[28] as well as to the process of translation in all the official languages[29].

3. Terminology Issues in the Existing *Acquis*.

In the last few decades, the European Union has enacted a series of sectorial rules pertaining to contract law, mainly covering consumer transactions. Since then, one of the major concerns encountered in the implementation of such rules regards the understanding of legal concepts expressed therein and their autonomous interpretation at EU level by the ECJ.

It is currently acknowledged that the existing private law *acquis* is essentially unsystematic in several respects[30], creating what has been defined as an "odd batch"[31] of rules expressed with a puzzled

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[28] Institutions have already taken some steps toward a better quality of legislation. See Declaration n. 39 on the quality of drafting of Community legislation (OJ C 340, 10 November 1997, p. 139: according to it, Council inserted in its Rules of Procedure an article underlining the importance of the quality of drafting (Council Decision 1999/385/EC).
It has been followed by the Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation of 22 December 1998 (OJ C 73, 17 March 1999, p. 1). It provides some general principles according to which drafting should be clear, precise and simple; be appropriate to the type of the act; take account of those to whim the act is intended to apply; be concise; take account of the principle of multilingualism and use a consistent terminology. See Guideline 6: "The Terminology must be consistent both internally (once a specific term has been chosen it must always be used and defined terms must be used correctly) and with acts already in force, especially in the same field. Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language".
As called for by the 1998 Agreement, the three Legal Services of EU Institutions drew up a Joint Practical Guide for persons involved in the drafting of legislation. It has to be used in conjunction with other more specific instruments, such as the Council's Manual of Precedents, the Commission's Manual on Legislative Drafting, the Interinstitutional style guide published by the Office for Official Publications of the European Communities or the models in LegisWrite.
The following Interinstitutional Agreement of 16 December 2003 on better law-making (OJ C 321, 31 December 2001, p. 1) affirms the Institutions' common commitment "to improve the quality of lawmaking and to promoting simplicity, clarity and consistency in the drafting of laws".
See also Council Decision 2009/937/EU of 1 December 2009 (OJ L 325, 11 December 2009, p. 35), art. 22, quality of drafting: "in order to assist the Council in its task of ensuring the drafting quality of the legislative acts which it adopts, the Legal Service shall be responsible for checking the drafting quality of proposals and draft acts at the appropriate stage, as well as for bringing drafting suggestions to the attention of the Council and its bodies, pursuant to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation. Throughout the legislative process, those who submit texts in connection with the Council's proceedings shall pay special attention to the quality of the drafting".
Finally, to ensure that texts published by the different EU Institutions are presented in a uniform manner to make them more accessible, the Publications Office has issued the Interinstitutional Style Guide: www.publications.europa.eu/code

[29] "Legal language is concept-based and is not centred on linguistic knowledge and exchange of terms in different languages. Translators must translate written law into the official languages of the European Union. Spoken language must be interpreted, in order to have a common understanding of official speeches within the European Union's Institutions. Translators and interpreters must translate the source language into the target language. They must resolve ambiguities and must produce language which is adequate for the purpose": V. HEUTGER, *A More Coherent Wide European Legal Language*, in *European Integration Online Papers*, vol. 8 n. 2, 2004, p. 1.

[30] M. W. HESSELINK, *The Common Frame of Reference as a Source of European Private Law*, in 3 *Tul. L. Rev.*, 2009, p. 946.

[31] R. ZIMMERMANN, *The Present State of European Private Law*, in 7 *Am. J. Comp. L.*, 2009, p. 485.

terminology. Beside, the principle of multilingualism has often lead to a "simplified, or naïve attitude" toward translation[32].

Opting for a systematic absence of definitions[33], the European legislator has engendered a terminology that often deviates from the original meaning of the working language and refers to non-technical wording[34]. When it provides some punctual definition, the question raised is whether it can be inferred at a more general level[35] and the answer relies once again on the peculiarity of the established ruled[36].

In addition, directives on consumer contracts do not distinguish between public and private law classifications, merging together civil law, commercial law, and administrative law, even if these topics are traditionally located in different legal areas at the national level[37].

Finally, the original texts drawn up in the working languages (mostly English and French) have not been uniformly translated, so that significant discrepancies exist among linguistic versions, even before the national legislators implement them[38].

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32 G. AJANI, M. EBERS, *Introduction*, in G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private L*aw, Nomos, Baden Baden 2005, p. 13-14.

33 Terms are frequently either not defined or too broadly defined, leaving large implementation discretion to the national legislators and thus leading to inconsistencies in their application. This is the case, just to quote some example that will be further analysed, of abstract legal terms such as "contract", or more specific terms like "durable medium". Thus, Institutions seem to be conscious of this puzzling situation: see already in the "Action Plan", par. 18, p. 8.

34 Quite often, the meaning of terms does not correspond to the original sense proper to the working language: a sort of "European dialect" has emerged, mostly expressed in a "European English". See S. FERRERI, *La lingua del legislatore. Modelli comunitari e attuazione negli Stati membri*, in *Rivista di diritto civile*, 2004, II, p. 562.

35 As affirmed by Advocate general Tizzano in the well known Opinion for the *Leitner* case (opinion of Advocate general Tizzano delivered on 20 September 2001, Case C-168/00, *Simone Leitner V TUI Deutschland GmbH & Co KG*), the interpretation of the term "damage" used in a directive, namely the Directive on Package travel, had to be borne out not only by the meaning therein adopted but also by the principles of interpretation of Community law as well as by the specific principle directly set forth by the EC Treaty requiring the provision of a high level of consumer protection. The advocate general founded his argumentation considering also indications provided by international treaties (par. 39) as well as developments are those provided by the legislation and case-law of the Member State (par. 40). See *Simone Leitner v TUI Deutschland GmbH & Co. KG*, 12 March 2002, C-168/00, [2002] ECR I-2631: given the important discrepancies existing at national level, the ECJ clarifies the autonomous "European meaning" of the notion of damage according to which the Directive on Package travel should grant the compensation for pecuniary and non pecuniary losses even if this head of damage was not recognised by State law (*i.e.* Austria).
See: P. ROTT, *What is the Role of the ECJ in EC Private Law? - A Comment on the ECJ judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald*, in *HanseLR*, Vol. 1 No. 1, 2005, p. 6; R. CONTI, *Corte di giustizia, danno da vacanza rovinata e viaggi "su misura". Ancora due vittorie per i consumatori*, in *Il Corriere giuridico*, 2002 p.1002; A. WIEWIÓROWSKA-DOMAGALSKA, *Compensation for Non-Material Damage under the Directive on Package Travel*, in *European Review of Private Law*, 2003 p. 91; P. MENGOZZI, *Il risarcimento del danno morale da vacanza rovinata dopo la sentenza della Corte di giustizia CE del 12 marzo 2002*, in *Contratto e impresa / Europa*, 2003, p. 589; M. FRAGOLA, *La Corte di giustizia riconosce la risarcibilità del danno morale "da vacanza rovinata" alla luce dell'ordinamento comunitario*, in *Diritto comunitario e degli scambi internazionali*, 2002 p. 287; G. FIENGO, *Dovuto l'indennizzo per il danno morale derivante dal mancato godimento di una vacanza "tutto compreso"*, in *Diritto pubblico comparato ed europeo*, 2002, p. 1149.

36 In his opinion, Tizzano compared the wording of Directive 90/314 with the Directive 85/374 arguing that "thus, the different wording chosen for each of the two directives is anything but accidental. Indeed, it is clear that where the Community legislature wished to draw a distinction, as in Directive 85/374, between damages for which the producer is to be held liable and those which are to be regulated by the Member States, has done so explicitly. On the other hand, where, in the subsequent Directive 90/314, has decided to refer in a general and non-specific manner to the concept of damage, it is to be inferred that it has done so in order to include within that concept all possible types of damage connected with the non-performance of contractual obligations, that is to say the inference must be drawn that the adoption of a broad and all-encompassing concept of damage was intentional (par. 39).

37 See C. PONCIBÒ, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform*, in 21 *Loy. Consumer L. Rev.*, 2009, p. 360.

This combining of circumstances has been made even more problematic by the minimum harmonization approach adopted by EU Directives "where concepts do not have an objective reference for the terms used" leading to results that "now appear unsatisfactory in the eyes of many"[39].

Such consciousness has lead to a more attentive consideration of linguistic issues undertaken for a prospective elaboration of a European contract law[40].

4. The Academic Contributions to the Building of a European Contract Law.

The several academic contributions to the European debate on the future of European contract law are all very well known but what we would like here to underline is their concrete influence of the actual construction of a European legal culture.

The works launched by the Commission on European Contract Law chaired by Professor Lando promoted a new approach to the European debate. The elaboration of the Principles of European Contract Law put together experts coming from the different European legal traditions with the aim of developing a common set of rules that have been recently refunded in the Draft for a Common Frame of Reference [41].

In the same path, the Academy of European Private Lawyers was formed in Pavia on 9th November 1992 by an international group of academics with the aim "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"[42].

In Trento a project founded since 1995 seeks the common core of the bulk of European private law on the basis of the Cornell approach adopted by Rudolf Schlesinger[43].

In a different perspective, the so called Acquis group created in 2002[44] has endorsed the systematic arrangement of existing Community law helping to elucidate the common structures of the emerging Community private law[45].

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[38] National legislators, for their part, do not always correct the misleading terminology used in the directive and they may even use a wrong term: see B. POZZO, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, p. 18 s.

[39] V. JACOMETTI, *European Multilingualism between Minimum Harmonisation and "A-Technical" Terminology*, in *Revista General de Derecho Publico Comparado*, 2010 (vol. 6), p. 6.

[40] The Commission has thus recently stated that the applicability of a common set of rules depends in large part on their definition: European Commission, Directorate-General Justice, Expert Group on a common frame of reference in European contract law, Synthesis of the Fourth Meeting, 1-2 September 2010.

[41] Since l982 the Commission on European Contract Law has been working to establish Principles of European Contract Law. Part I of the Principles dealing with performance, non-performance and remedies was published in 1995. Parts II was published in 1999 and Part III in 2003.

[42] ACADEMIE DES PRIVATISTES EUROPEENS, *Code européen des contrats, avant-projet. Livre premier*, G. Gandolfi (coord.), Milano, 2002.

[43] http://www.common-core.org

[44] RESEARCH GROUP ON EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munich, 2007; id., *Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services,*

Moving on these premises, the Study Group on a European Civil Code drafted common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in movables which are especially relevant for the functioning of the common market[46].

Finally, the Study Group on Social Justice in European Private Law has published a Manifesto on Social Justice in European Contract Law in 2004 drawing the attention to values on which the future of the European private should be founded. [47].

Setting aside any further consideration on the contents and objectives of these projects[48], they are here mentioned for their central role in fostering a truly European debate.

Moreover, in the last decade several reviews focusing on European private law have been published and on these same subjects international conferences have been organised all over the continent.

Very recently, the European Law Institute has been created with the mission to quest for better law-making in Europe and the enhancement of European legal integration[49].

All this deployment of efforts promotes European comparative studies contributing to the spontaneous creation of a common arena in which experts share opinions and build the future of Europe each one proposing a reasoned terminology.

Though, only a part of them has been taken into consideration in the institutional process of revision of the existing private law acquis promoted in Brussels.

5. Towards a Common Terminology?

Since 2003 the Action Plan considered the elaboration of a common frame of reference (CFR) as an important step towards the improvement of the contract law acquis, providing for best solutions in terms of common terminology and rules. The preparation of a first draft of the CFR was delegated

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Munich, 2009; R. SCHULZE, *Common Frame of Reference and Existing EC Contract Law,* Munich, 2008; R. SCHULZE, G. AJANI (ed.), *Common Principles of European Private Law: Studies of a Research Network/Gemeinsame Prinzipien des Europäischen Privatrechts: Studien eines Forschungsnetzwerks,* Baden-Baden, 2003; R. SCHULZE, *European Private Law and Existing EC Law,* in 13 *Rev. eur. dr. privé*, 2005, p. 8; N. JANSEN, R. ZIMMERMANN, *Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law'*, in *Mod. L. Rev.*, 2008, p. 505.

[45] http://www.acquis-group.org

[46] Six volumes of the series "Principles of European Law" have been published: C. VON BAR, *Benevolent Intervention in Another's Affairs*, Munich, 2006; M. W. HESSELINK, J. W. RUTGERS, O. BUENO DÍAZ, M. SCOTTON, M. VELDMAN, *Commercial Agency, Franchise and Distribution Contracts*, Munich, 2006; U. DROBNIG, *Personal Security*, Munich, 2007; M. BARENDRECHT, C. JANSEN, M. LOOS, A. PINNA, R. CASCÃO, S. VAN GULIJK, *Service Contracts*, Munich, 2007; K. LILLEHOLT et al., *Lease of Goods*, Munich, 2008; E. HONDIUS et al., *Sales*, Munich, 2008; C. VON BAR, *Non-Contractual Liability Arising Out of Damage Caused to Another*, Munich, 2009.

[47] STUDY GROUP ON SOCIAL JUSTICE IN EUROPEAN PRIVATE LAW, *Manifesto on Social Justice in European Contract Law*, in *European Law Journal*, Vol. 10, No. 6, 2004, p. 653.

[48] See recently M. BUSSANI, *Faut-il se passer du common law (européen)? Réflexions sur un code civil continental dans le droit mondialisé*, in *Revue Internationale de Droit Comparé*, 2010, p. 8.

[49] http://www.europeanlawinstitute.eu: "By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective".

to a group of researchers entrusted with the drawing up of a Draft for a common frame of Reference (DCFR) built on the basis of a revision of the Principles of European Contract Law and the Acquis principles, aiming to serve as a tool-box for the Commission for reviewing of the existing legislation[50].

Looking at the content of the DCFR, the substance of proposed definitions has been only partially distilled from the acquis whilst it has mainly been derived from the model rules[51]. This way the drafting group intended to achieve "not only a clear and coherent structure, but also a plain and clear wording"[52].

Though, even before the publication of the DCFR[53], the Commission undertook different and parallel initiatives introducing new elements in the European debate without any explicit coordination with the on-going works on the DCFR.

As a matter of fact, the Commission launched in 2007 a Green Paper on the review of the Consumer Acquis[54] and a Proposal for a Consumer Rights Directive[55] was presented in 2008, but institutional drafters did not refer to the results achieved by the DCFR group[56]. This circumstance appeared even more worthy of criticism in the terminological perspective given that the Proposal did not refer to the set of definitions contained therein, thus frustrating the very function of the DCFR[57].

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[50] It has here to be underlined that important initiatives have been promoted within the CoPECL group on terminology issues. A separate unit was devoted to the preparation of a set of definitions that have finally been annexed, even if with some difficulties, to the final version of the Draft. At the same time, an autonomous initiative was carried out by the members of the Association Henri Capitat de Amis de la culture juridique française and the Société de legislation comparée that published a volume presenting a comparative terminological analysis of a particular set of concepts to conceived as a critical tool offered to the drafters: B. FAUVARQUE-COSSON, D. MAZEAUD (dir), *Projet de Cadre commun de référence : Terminologie contractuelle commune*, Paris, 2008. See A. TENENBAUM, *Droit européen des contrats: mythe ou réalité? L'enjeu et les difficultés d'une terminologie commune*, p. 177.

[51] *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR) Outline Edition, Munich, 2009, p. 17: "Some particularly important concepts are defined for these purposes at the outset in Book I. For other defined terms DCFR I. – 1:108 provides that 'the definitions in the Annex apply for all the purposes of these rules unless the context otherwise requires.' This expressly incorporates the list of terminology in the Annex as part of the DCFR. This drafting technique, by which the definitions are set out in an appendage to the main text, was chosen in order to keep the first chapter short and to enable the list of terminology to be extended at any time without great editorial labour".
Critics have thus noticed that the DCFR provisions "are not definite enough for a court to tell how they should be applied. Nor do they provide solutions to specific legal problems that can be adopted piecemeal": L. ANTONIOLLI, F. FIORENTINI, J. GORDLEY, *A Case-Based Assessment of the Draft Common Frame of Reference*, in 58 *Am. J. Comp. L.*, 2010, p. 357.

[52] In order to fulfil this commitment, drafters consider that "being designed for the Europe of the 21st century, it should be expressed in gender neutral terms. It should be as simple as is consistent with the need to convey accurately the intended meaning": *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR) Outline Edition, Munich, 2009, p. 29.

[53] *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR) Outline Edition, Munich, 2009. A first version has been available since in 2008 on line (www.law-net.eu.) and in paper format: CHRISTIAN VON BAR ET AL. (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Munich 2008.Presented in its final edition in 2009, then DCFR should have served (at least as a tool box) for the preparation of the so-called Common frame of Reference, representing the future instrument of contract law: see par. "How the DCFR may be used as preparatory work for the CFR", p. 36.

[54] Green Paper on the Review of the Consumer *Acquis*, COM(2006) 744 final of 8 February 2007.

[55] It should serve also the parallel revision of single measures of the *acquis* that are not considered in the CRD.

[56] This circumstance is underlined in the introduction of the DCFR. The authors noted that the Proposal for a consumer rights directive did not make any explicit use of the DCFR. Moreover, terminology and drafting style were rather different: *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (DCFR), p. 37.

[57] The Proposal presented in a first draft by the Commission was considered as a "world apart" from the DCFR: M. W. HESSELINK, *The Consumer Rights Directive and the CFR: two worlds apart?*, Briefing note prepared for a European Parliament

The inconsistency was evident for those terms whose definition was clearly differing[58], as for "durable medium". Some other definitions were expressed using different terms: the "business" of the DCFR was defined "trader" in the Proposal[59]. Finally, expressions that were not precisely defined did not match up and were inconsistent in both documents[60]. Furthermore, looking at contents, the Proposal did not reflect "a really fundamental review" either[61].

Negotiations between the EU Institutions for the adoption of this text have thus been quite long and complicated: in reviewing the Proposal, the European Parliament reporter Andreas Schwab recalled that it was essential "to ensure an appropriate level of consistency between the Proposal, the Common Frame of Reference and the remainder of the consumer acquis"[62]. In this programme, he affirmed that certain of the definitions contained in the original version of the Proposal had to be reformulated so that rules could have been correctly applied to contracts. Others would have been improved in order to provide more coherence and legal certainty. Though, in the eyes of commentators, the "reaction" of the European Parliament to "what looks very much like disregard of the DCFR in preparing the new consumer directive" was not that effective[63].

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expert hearing (IMCO Committee) concerning the proposal for a directive on consumer rights, on 2 March 2009 in Brussels, SSRN-id1346981.

[58] See "durable medium", note 62. This was also the case, for example, of the definition of "producer". These examples are quoted in R. ZIMMERMANN, *The Present State of European Private Law*, p. 488.
In the DCFR the term "producer" includes, "in the case of something made, the maker or manufacturer; in the case of raw material, the person who abstracts or wins it; and in the case of something grown, bred or raised, the grower, breeder or raiser". Art. VI. – 3:204 considers the "importer" only for stating his accountability for damage caused by defective products. Art. 3(1) of the Directive 85/374/EEC on liability for defective products, instead, makes a terminological distinction between "producer" and "importer", even if the latter "shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer". According to art. 2(17) of the Proposal, the term "producer" meant "the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods". This definition had been maintained in the amended version and but it has been eliminated from the final version of the Directive as Directive 99/44 has no longer be covered by the new legislation. It is not mentioned either in the CESL.

[59] As we shall see later on, the term "trader" seems now to be generally acquainted.

[60] See on these points the examples of the expressions "rescission" and "material possession" discussed by Prof. Lilleholt in his work: K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, *European Revue of Private Law*, 2009, p. 342-343.

[61] "It attempts to consolidate, or tidy up, the existing regime by streamlining and updating, sometimes also generalizing, its rules, by removing inconsistencies and "closing unwanted gaps": R. ZIMMERMANN, *The Present State of European Private Law*, p. 489

[62] Working paper of 3 March 2010 available at
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dt/807/807372/807372en.pdf.

[63] K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, p. 342-343. The Author had confidence in "the strong tradition of respect for European private law harmonisation efforts", proper to EU Parliament, but his expectations were not fully satisfied by these first amendments. The critical use of the term "rescission" reported by Prof. Lilleholt, for example, was maintained in the amended version: Amendment 153 and 156 on art. 26 (paragraphs 1 and 4) of the Proposal. This expression was "applied but not defined" in the Proposal as the remedy for non-conformity, whilst in the DCFR it had been explicitly avoided in an "attempt to find, wherever possible, descriptive language which can be readily translated without carrying unwanted baggage with it" preferring the expression "termination": DCFR, *Introduction* (par. 48, Accessibility and intelligibility), p. 29. The DCFR used instead the equivalent expression of "termination", used also in the Feasibility study and in the CESL.
A second example was related to the expression "material possession", frequently used in the Proposal. As Prof. Lilleholt warned in the quoted article, the use of the term "possession", which was not defined in the Proposal either, could have lead to problems of interpretation, as it is a notion "loaded with generations of theoretical discussions". The Author was more sympathetic with the parallel expression "physical control", used in the DCFR in art. VIII. – 1:205 (meaning direct physical

In addition, as promoted by the Stockholm program[64], the Commission contextually set up an Expert Group for the elaboration of a user-friendly instrument of European Contract and submitted to public consultation the determination of the legal nature and the scope of this instrument in European contract law [65]. It should have had a broader scope and it was conceived as complementary to the Consumer Rights Directive in order to overcome the fragmentation of contract law[66]. The "Feasibility Study" on a future initiative on European contract law (IP/11/523) was published on the May 3 2011[67]. It has to be underlined that experts agreed to refer to all DCFR definitions, in order to set aside further incoherencies: in doing so they removed all those definitions that were no longer necessary and reconsidered the appropriate place for those remaining[68]. That was the case, for example, for the core definition of contract.

Even though, as we will see later, the solutions held in the final version of the instrument proposed by the Commission for an optional instrument in contract law still deviates in more then one case from the DCFR model.

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control or indirect physical control) in relation to goods. See K. LILLEHOLT, *Notes on the Proposal for a New Directive on Consumer Rights*, p. 343.
Notwithstanding, this controversial wording had been maintained in the EP amended version. Pursuant to article 12 (amendment 113) "material possession" constitutes the beginning of the running of the withdrawal period in distance or off-premises contracts for the delivery of goods. See also, article 17(1) on the buyer's obligation to return goods after the withdrawal "for distance or off-premises contracts for the supply of goods for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period". It had been eliminated, instead, in rules concerning the delivery and the passing of the risk, where it was preferred to use the expression "reception of goods" (amendment 178 on the Annex I – Model instructions on withdrawal).

64 The Stockholm Programme for 2010-2014 stated that the European legal area should serve to support economic activity in the internal market. The Programme invites the Commission to submit a proposal on the CFR and to further examine the issue of contract law. The Commission's Communication "Europe 2020" recognises the need to make it easier and less costly for businesses and consumers to enter into contracts with partners in other EU countries, notably by offering harmonised solutions for consumer contracts, EU model contract clauses and by making progress towards an optional European Contract Law. The Digital Agenda for Europe, the first flagship initiative adopted under the Europe 2020 strategy, aims at delivering sustainable economic and social benefits from a digital internal market by eliminating legal fragmentation. The action it proposes refers to "an optional contract law instrument to overcome the fragmentation of contract law, in particular as regards the on-line environment": "Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses", COM(2010)348 final, p. 3.

65 The options proposed by the Green Paper of July 2010 move from the mere publishing of the results of the Expert Group, which was appointed to examine policy options, up to the creation of a European Civil Code. See the Green Paper from the Commission of the 1st of July 2010 on policy options for progress towards a European Contract Law for consumers and businesses [COM (2010) 348 final]. The Green Paper contains an explicit disclaimer assessing that the terminology utilised has been taken from the DCFR, but this choice is "only indicative and it does not pre-empt either the structure or the terminology of the instrument".

66 Communication (EC) No. 245 of 19 May 2010, "A Digital Agenda", p. 13.

67 The feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback has been accessible since the 5th of May 2011. Afterwards the Commission opened a consultation on 3 May and closed on 1 July 2011 addressed to stakeholders and citizens of the Expert group's Feasibility Study was. On 8 June 2011, the European Parliament backed an optional European contract law in a plenary vote on an own-initiative report by MEP Diana Wallis (MEMO/11/236).

68 See the CFR group' reports.

Deception was even greater when the final version has been finally adopted on October 25 2011[69], just few days after the publication of the Proposal for a Common European Sales on October 11[70].

Adopting a maximum harmonisation approach, the new directive applies to any contract concluded between a trader and a consumer[71]. Therefore, definitions listed in article 2 could be, on the one side, inferred to a more general extent to European consumer law through the dynamic interpretation of the ECJ and on the other side, represent a fully harmonised terminology at national level.

Actually, their authoritative nature as a uniform linguistic model of reference for European contract law can be already tested in comparison with the Proposal for a Common European Sales law.

The Regulation in fact should introduce a parallel list of definitions pertaining to an optional instrument on contract law available to parties as a second regime alternative to national law[72] (even when implementing EU law): based on art. 114 TFEU, it aims to harmonise national laws through regulatory competition.

Compared to the traditional approach based on harmonisation trough directives, the set of rules established by the CESL is conceived as a uniform law that is directly applicable and available to qualified parties[73]. On the basis of its normative autonomy it should be interpreted and applied as such[74] by the Court of Justice as well as by national courts whose relevant decisions will be collected in

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[69] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights. The original project of Directive on consumer rights has been reduced to a less ambitious set of rules replacing only directives 97/7/EC on distance contracts and 85/577/EEC on contracts negotiated away from business premises. A large part of more controversial issues have thus been left unsolved Both terms, rescission and possession, for example, have just been eliminated as they do not enter anymore into the scope of the Directive. The definition of consumer, instead, has been once again restricted. See later.

[70] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011, COM(2011) 635 final, 2011/0284 (COD).

[71] See Recital 8: "The regulatory aspects to be harmonised should only concern contracts concluded between traders and consumers. Therefore, this Directive should not affect national law in the area of contracts relating to employment, contracts relating to succession rights, contracts relating to family law and contracts relating to the incorporation and organisation of companies or partnership agreements". As the Directive does not replace anymore Directives 93/13 on unfair contract terms and 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, some definitions have been excluded from the original list. This is the case of the controverted term "producer", see note. 40.

[72] More precisely, the CELS is applicable to cross-border transactions covering both B2C and B2B contracts involving SMEs. For a in-depth analysis of the proposed Regulation see H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, in *EUI Working Paper* LAW 2012/04, ISSN 1725-6739.

[73] The CESL is thus based on the same voluntary basis technique as the CISG.
See N. KORNET, *The Common European Sales Law and the CISG - Complicating or Simplifying the Legal Environment?*, in *Maastricht European Private Law Institute Working Paper* 2012/4, available at SSRN: http://ssrn.com/abstract=2012310 or http://dx.doi.org/10.2139/ssrn.2012310

[74] The principle of the autonomous interpretation of the CESL is settled in art. 4. It implies that those matters that are not expressly settled by the Regulation must be interpreting exclusively in accordance to principles issued by it without recourse to national law that would be applicable in the absence of an agreement to use the CESL or any other law": H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, p. 31.

a European database in order to grant an easier accessibility[75]. However, even if it is not explicitly mentioned in the text, according to the ECJ case law it would be part of the European legal order and therefore it should be interpreted in the light of Treaties and the European Chart of fundamental rights[76].

Looking at its content, the definitions introduced in the CESL are mainly based on the choices already adopted in the Feasibility study[77].

Therefore, a crossed analysis of the original English version of both texts with the DCFR could highlight, if any, the institutional consecration of converging definitions and lead to a first balance on the state of the art of the construction of a common terminology: theory and practice

6. Consolidating European Terminology: Some Examples.

If we consider consumer law as being the common area of application of the Directive on consumer rights and the Proposal for a CESL[78], it has to be firstly noticed that they mostly focus on the

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[75] See Recital 34 "In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission".

[76] The CESL does not mention the need of compliance with EU fundamental rights as it was foreseen by the DCFR. Incorporating private law into the multilevel EU constitutional system, in fact, article art. I.-1-102(2) provides that the rules "are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws". See on this point C. MAK, *Europe-Building Through Private Law: Lessons from Constitutional Theory*, (March 13, 2012), *European Review of Contract Law*, Vol. 2, 2012; Centre for the Study of European Contract Law Working Paper Series No. 2012-02; Amsterdam Law School Research Paper No. 2012-46; Postnational Rulemaking Working Paper No. 2012-01. Available at SSRN: http://ssrn.com/abstract=2023141; C. MAK, *The Constitutional Momentum of European Contract* Law (II): The DCFR and the European Constitutional Order, (September, 22 2009), in *Opinio Juris in Comparatione*, Vol. 2/2009, Paper No. 3. Available at SSRN: http://ssrn.com/abstract=1476888.
It does not include either the third paragraph of art. I.1-102 aiming to promote uniformity of application, good faith and fair dealing and legal certainty.
This choice corresponds to the pragmatic approach of the Commission that set aside theoretical issues: C. CASTRONOVO, *L'utopia della codificazione europea e l'oscura realpolitik di Bruxelles dal DCFR alla proposta di regolamento di un diritto commune della vendita*, in *Europa e diritto privato*, 2011, p. 857.

[77] If we compare the list of terms contained in the CESL and the one proposed in the Feasibility study, only a few new definitions have been introduced in the CESL and only one has been eliminated (meaning of "person"). The CESL, in fact, provides the definition of "obligation" (art. 2(y)), borrowed from the DCFR, as "a duty to perform which one party to a legal relationship owes to another party, as well as of "creditor" and "debtor" respectively meaning (art. 2(w)) "a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person" and (art. 2(x)) "a person who has an obligation, whether monetary or non-monetary, to another person, the creditor".
The last original entry of the CESL is the definition of "mandatory rules", largely used but not defined in the DCFR: art. 2(v) "mandatory rule means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary".

[78] Whilst the CRD remains a sectorial instrument, the CESL has a broader scope and deals with more general definition proper to contract law. In doing so, the Commission has mostly maintained the solution proposed in the Feasibility study that, on its turn, referred to the DCFR. This is the case, for example, of the definition of "good faith and fair dealing" (art. 2b of the CESL and art. 2(10) of the Feasibility study) as a "a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question. The definition of "Damages", instead, has been kept in the CESL with the wording used in the Feasibility study as a "sum of money to which a person may be entitled as compensation for some loss, injury of damage, but it deviates from the DCFR. The drafters, in fact, referred to "some specific type of damage" as headings of compensation.

same terms and that the set of definitions proposed seem finally to converge towards a common and shared meaning[79].

Only in some few cases both texts deviates at the same time from the DCFR[80] converging on a corresponding definition. The major innovations concern the inclusion of digital contents within their scope of application in order to adapt EU consumer legislation to changing markets [81].

In the same line they confirm the definition of "durable medium" referred to any support device, including "paper, USB sticks, CD-ROMs, DVDs, memory cards or computers' hard disks as well as e-mails"[82], able to store information personally addressed to the consumer or the trader for a period of time adequate to the purpose of the information and that allows its unchanged reproduction[83].

Finally, the definition of "loss" proposed in the CESL moves away from the Feasibility study (art. 2(12), see also the analogous definition in the DCFR) excluding "other forms of non economic-loss such as impairment of quality of life and loss of enjoyment".
We will briefly see the case of definition such as "contract" or "obligation".

[79] See, for example, the definitions of "public auction" (art. 2(13) CRD and art. 2(u) of CESL) and "commercial guarantee" (art. 2(14) CRD and art. 2(s) CESL), not contained in the Annex on definitions of the DCFR. They literally correspond with the exception of the additional explicit referral to "goods and digital content" in the CESL. On the scope of the notion of digital content see later par 3.

[80] The definition of "goods" provided by art. 2(3) of the CRD, for example, corresponds to the CELS version (with the exception of some heading of exclusion) and refers to "tangible movable items": see Articles 2(3) CRD and 2(h) of the CESL. The CRD does not consider as goods "items sold by way of execution or otherwise by authority of law" that are, instead, not mentioned in the CESL. Moreover, according to the latter, natural gas and electricity can never be considered as "goods", whilst they are admitted by the CRD when, like water and gas, they are put up for sale in a limited volume or a set quantity. This definition slightly deviates from the definition of "corporeal movables" proposed in Feasibility Study on the basis of the DCFR. The definition of the DCFR refers to "corporeal movables" including ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases but it has been proposed in a simplified version in art. 2(11) of the Feasibility study.
Besides, the Directive offers an additional definition on "goods made to the consumer's specifications" referring to "non-prefabricated goods made on the basis of an individual choice of or decision by the consumer": Art. 2(4). According to art. 16(c) this category of goods constitutes an exception from the right of withdrawal for distance and off-premises contracts. The CESL, instead, does not provide this definition but it does contain an analogous rule in art. 40(2d).

[81] Even if e-commerce had not been explicitly included in original the scope of the Proposal, the Commission had already highlighted the need to swiftly adopt the proposed Directive on Consumer Rights, "building confidence for consumers and traders in cross border purchases online". As a matter of fact, European Parliament amending the proposal affirmed that "the new EU law should cover almost all sales, whether made in a shop, by phone, by post or online. […] It will update existing rules to take account of growth in internet sales and provide better protection for online shoppers": *Better protection for online shoppers* (Plenary sessions) Press Release 20110323IPR16151. Furthermore, given the increasing importance of the flagship initiative on the "Digital Agenda for Europe", the Commission engaged an investigation on how to improve rights of consumers buying digital products, ended with a conference on the 16 November 2011 in which two independent studies were officially presented. The conference has been organised by the DG Justice "to discuss consumer problems with digital products, such as e-mail, social networks, music, films, e-books or e-learning services. Problems include incomplete or incomprehensible information, interrupted access to content and faulty products". The studies carried out on request of the European Commission aimed to provide an in-depth analysis of digital related issued and to investigate the legal situation for digital products in the Member States: Europe Economics: "Digital content services for consumers: Assessment of problems experienced by consumers" (2011) and Appendix 9 Output from the consumer survey; University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 172. Both documents are available on-line http://ec.europa.eu/justice/newsroom/consumer-marketing/events/digital_conf_en.htm.
See a general overview on the main issues in M. LOOS, N. HELBERGER, L. GUIBAULT, C. MAK, *The Regulation of Digital Content Contracts in the Optional Instrument of Contract law*, in *European Revue of Private Law*, 2011, p. 729.

[82] See Recital 23 of the CRD. The same wording was already held in the Proposal (art. 2(10)) and in its EP amended version but, according to Recital 16, these versions excluded explicitly e-mails and Internet websites.

[83] Art. 2(10) CRD and art. 2(t) CESL: "durable medium means any instrument which enables the consumer or the trader (a party, in the CESL version) to store information addressed personally to him in a way accessible for future reference for a

The core intervention is the introduction of an autonomous definition of "digital content". To achieve such a result, the major issue has been its classification. Three ways were opened the EU legislator: it could have been classified, first of all, according to the traditional distinction between goods and services or, on the basis of a second approach, just as a service or, finally, as a sui generis category[84].

In revising the Proposal for the CRD, the EP had initially adopted the first technique, suggesting a new definition of 'goods' that included "intangible item usable in a manner which can be equated with physical possession" [85]. However, this definition could only include contracts related to tangible digital items such as CDs and DVDs or memory cards, whilst computer programs, games or music burned on a tangible medium should have been excluded[86].

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period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored". See art. 2(h) of Dir. 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspect on timeshare, long-term holiday product, resale and exchange contracts: art. 3(m) of the Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers; art. 2(f) of Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services.
The same definition had been previously maintained in the Feasibility study, art. 2(9) deviating from the model of the DCFR. The latter, in fact, (art. I. – 1:106(3)) defined as a durable medium "any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information". As we will see later, in fact, the feasibility study had already taken into consideration the issue concerning digital contents. The first version proposed covered only durable medium on which digital content could be delivered but, opening the debate to external advisers in order to determine the "next steps" to take. They had already raised the question if "a European contract law instrument should cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)": *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, p. 9. The possible solutions provided in case of a positive answer on this point were: a) the modification of rules on the rules on pre-contractual information including (if appropriate) specific rules on the functionality of digital content; b) the modification of general rules on sales and remedies or, alternatively, the provision of specific rules, therefore including a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period; c) if the general rule on passing of risk should not be considered appropriated, the text could include specific rules, ensuring that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content (assuming that this notion would be sufficiently clear). As we will se later, digital contents are now included in the Proposal for the optional instrument on a common sale law and in the CRD.

[84] See the study of the University of Amsterdam, p. 172.

[85] In order to include digital contents, the EP proposed (Amendment 61 on art. 2(b)) to include the expression "any "intangible item usable in a manner which can be equated with physical possession" into the definition of "goods".
In the opinion of the Amsterdam University Study, the main advantage of this option would have been the application of "otherwise familiar legal concepts, which are essentially technology-neutral, to new types of goods and services": University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 172.

[86] As a consequence, excluding by default a large majority of new generation digital contents, it did not seem suitable for the evolving digital markets. Moreover, it still referred to the controversial notion of "physical possession" (see note 50)

Exploiting a different approach, the CRD[87] and the CELS[88] introduce an autonomous definition of digital content, without forcing the traditional definition of "goods" [89], meaning "data which are produced and supplied in digital form"[90]. As a consequence, contracts for the supply of a digital content are qualified according to their specific object, the digital content. This category, however, is not homogeneous if considering the applicable rules. The Directive, using a mixed approach[91], distinguishes between contracts for digital content supplied on a tangible medium, that are contracts for the sale of goods[92], and those not supplied on a tangible medium, which are a sui generis category as they can be defined neither as goods nor as services[93]. Thus, it is not the object of the contract that determines the applicable regime but the nature of its support[94]. A sort of third genus as a new legal concept is therefore, de facto, introduced[95].

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87 See art. 2(11) and Recital 19 "Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming".

88 Art. 2(j). The wording recalls the version proposed in the Feasibility Study (art. 2(11). Compared to the CRD, the CESL adds the condition "whether or not according to buyer's specification" as tailored made products covers an important part of the Internet market. This is, in fact, the case of quoted digital contents such as "video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software". Moreover, the definition lists excluded items such as "(i) financial services, including online banking services; (ii) legal or financial advice provided in electronic form; (iii) electronic healthcare services; (iv) electronic communications services and networks, and associated facilities and services; (v) gambling; (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users".

89 In a different way, then, in the EP amended version (see note 66), therefore, this solution does not force the concept of goods as tangible objects and, as underlined in the study of the University of Amsterdam, enable the application of the rules which govern the sale of goods to digital content providing adaptations or derogations for the specific nature of digital content: University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 178.

90 See the definition proposed in the study presented by the University of Amsterdam (Professor M.B.M. Loos): "For the purposes of the provisions on digital content contracts, 'digital content' may be described as data which is produced in digital form and which can be accessed or displayed by the consumer on the consumer's personal device or on a personalised part of a remote server". It has thus to be noticed that the definition is given in the text of the study, whilst they propose, in the basis on the DCFR scheme, an article defining "digital content contracts".
The same headings of exclusions than the CESL (excepting for point *vi*) are provided.

91 Two different options are indicated for the choice of the applicable regime: once abandoned the approach according to which digital content contracts are subdivided into contracts for the supply of digital goods and contracts for the supply of digital services, the legislator can develop a specific set of rules for digital content contracts (a) or apply the compatible rules on the sale of tangible goods to digital content contracts. See University of Amsterdam (Professor M.B.M. Loos), *Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts*, p. 178.
The authors of the study, instead, preferred and proposed to adopt the second one because, *inter alia*, it "makes use of familiar legal concepts and adapts them where necessary for digital content contracts" (p. 179).

92 Recital 19: "If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive".

93 Recital 19: "Similarly to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts".
For such contracts, the consumer should have a right of withdrawal unless he has consented to the beginning of the performance of the contract during the withdrawal period and has acknowledged that he will consequently lose the right to withdraw from the contract. In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content.

94 Using a different technique, the study presented by the University of Amsterdam suggested that "there be no explicit definition of what qualifies as a digital content contract, but rather to indicate which contracts should be considered as such contracts and which contracts should not be considered as such contracts". They therefore consider that "there is no need to distinguish between digital goods and digital services with regard to the development of specific rules for digital content contracts. The classification of digital content pursuant to consumer contract law may need to occur on a case-by-case

6.a. Definition and qualification of Contract.

The notion of contract is one of the traditional examples noted by comparatists when they warn of misleading translations[96] since, as a core concept, "it is so differently understood in each legal system"[97]. The complexity of the issue is demonstrated by the fact that no uniform definition can be gathered at the international level and in the lex mercatoria (the "law merchant"). The UNIDROIT principles, as well as the Principles of European Contracts Law, do not contain a general definition of contract. They only govern the conditions required for the existence of a contract (formation)[98].

This difficulty has not yet been overcome in EU law[99] and it has been even increased by its pointilliste approach[100] that limits the scope of application detailing each specific contract included[101]. Only Directive 90/314 proposes a definition of the term "contract", as "the agreement linking the consumer to the organiser and/or retailer": it thus reduces the very notion of contract to the agreement

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basis" (p. 172). On this premises they propose a provision regarding the scope of the provisions on digital content contracts: (Annex I - List of Recommendations for rules tailor made for digital content contracts (Based on the existing provisions of the Draft Common Frame of Reference)): IV. A. – 1:103: Digital content contracts (1) This Part of Book IV applies to contracts whereby a business undertakes to supply digital content to a consumer in exchange for a price. (2) This Chapter applies in particular to (a) contracts whereby video, audio, picture or written content is provided to the consumer in electronic form; (b) gaming contracts; (c) contracts for the provision of digital content that enables the consumer to personalise existing hardware or software; (d) software contracts; (e) contracts pertaining to the provision of digital content applications that are hosted by the business and that are made available to the consumer over a network; (f) social networking services; (g) contracts enabling the consumer to create new digital content and to moderate and review existing digital content or to otherwise interact with the creations of other consumers.

95 The study carried out by the University of Amsterdam, though, warns about "the difficulty of developing new legal concepts and thus entails the risk of legal uncertainty as to the meaning of these concepts" (p. 179).

96 R. SACCO, *Il contratto nella prospettiva comparatistica*, in *Europa e diritto privato*, 2001, p. 479.
The difference between contract and *contrat* corresponds to a conceptual difference. Instead, the situation is easier for other rules that are apparently diverging: this is for example the case of *obligation de donner* and the obligation to transfer a property that are interchangeable": R. SACCO, *Introduzione al diritto comparato*, Turin, 2003, p. 31.

97 See recently on this issue: "We know that whilst it is true that in all Member States the notion of contract encapsulates an agreement to create obligations, there are important differences, which can be illustrated by drawing on the French and English systems. In France, the analysis of a contract as an agreement of wills finds its intellectual roots in the theory of *autonomie de la volonté* (the will theory). English law, however, tends to conceptualise agreement more objectively, an approach more fitting in a legal system firmly underpinned by economic concerns and keen to further commercial certainty": L. MILLER, *The Common Frame of Reference and the feasibility of a common contract law in Europe*, in *Business Law Review*, 2007, p. 385.
However, besides the well known differences arising mainly due to the common law versus civil law concepts of contract, a recent study devoted to the a comparative terminological analysis of a particular set of concepts in EU contract law has highlighted two main approaches which partially overcome these differences. The first embraces a narrow definition, whose main element is the intention of the party taking on the obligation. The second "moves forward identifying the exchange which leads to reliance". See ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, SOCIÉTÉ DE LÉGISLATION COMPARÉE, *Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, Munich, 2008, p. 3

98 However "the use of the term "contract" in the *Acquis communautaire* and in the *Acquis International* reveals that the traditional terminological distinctions are still relevant even if the contract is not the subject of a separate definition": Association Henri Capitant des Amis de la culture juridique française, Société de législation comparée, *Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*, p. 6.

99 J. GHESTIN, *Observations de Jacques Ghestin*, in *Les Petites affiches*, 12 February 2009 no. 31, p. 5.

100 See S. WHITTAKER, *Unfair contract terms, public services and the construction of a European conception of contract*, in 116 *L.Q.R.*,2000, p. 95: Taking the complex public-private law divide as an example, he explains that, at present, since the Directive on unfair terms does not offer any definition of contract, "what might be seen in one country as a public law domain might be seen in another as private, and thus the consumer would be governed under a different legal regime".

101 See for example art. 2 of Directive 2008/122 (14 January 2009) on timeshare, long-term holiday products, resale and exchange defining respectively: (a) timeshare contract; (b) long-term holiday product contract; (c) resale contract; (d) 'exchange contract'.

binding the consumer and the professional and must be read in the context of the specific field concerned pursuant to the sectorial nature of EU consumer law.

In this context, if the actual version of the CELS would be maintained it could constitute a very important turnover as it finally provides a general definition of contract.

Following the suggestion of the Expert Group[102], drafters refer to the contract as "an agreement intended to give rise to obligations or other legal effects"[103].

The text makes use of the same wording adopted in the Feasibility Study starting from the model proposed in the DCFR reading as "an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect" [104]. During its working sessions, in fact, the experts agreed to abandon this version in order to leave out additional concepts such as "juridical act" and "legal relationship"[105] as well as any reference to the intention of the parties opting for a more precise and user-friendly definition (i.e. formulated in plain language)[106].

However, hindering the elaboration of general common concepts, the sectorial approach of EU law has mainly focused on the qualification of specific contracts determining the scope of its application assuming a dualistic distinction[107] opposing contracts for the sale of goods and contracts for the supply of services.

It has thus to be noticed that whilst great emphasis has been given to sale contracts, service contracts have been essentially conceived as a residual category[108].

According to art. 2(k) of the CELS[109] and art. 2(5) of the CRD[110] a sale contract is characterised by two corresponding obligations reflecting the essence of a sale contract consisting on the transfer of

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[102] See the document published the 2nd July 2010 by the Expert Group on a common frame of reference in European contract law (Synthesis of the Second Meeting, 24 June 2010). The Group agreed, in fact, on the inclusion of a definition of "contract" and on its possible wording.

[103] See art. 2(a) of the CESL: "'contract' means an agreement intended to give rise to obligations or other legal effects"; and art. 2(5) of the Feasibility contract: "'contract' means an agreement between two or more parties giving rise to obligations or other legal effects".

[104] II. – 1:101(1): "A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act".

[105] They did not retained the reference to legal relationship, but the text "makes reference to the fact that the contract is an agreement which gives rise to obligations, which may also have other legal effect": see the CFR group's report of 10/06/24 (Synthesis of the first Expert Group's meeting on 21st May 2010).

[106] Feasibility study of the Expert's Group, 3 May 2011. See also the previous CFR group's report of 10/07/02 (Synthesis of the Second Meeting, 24 June 2010).

[107] Even though, as we have seen, this consideration seems to be overcome by the introduction of a regime of a *tertium genus* generated by those digital content contracts that are not supplied on a tangible medium.

[108] The major importance of the regulation of sale contracts is by the way stressed by the explicit exclusion of service contracts from the Optional Instrument.

[109] 'Sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority".

[110] The same wording has been previously proposed in the Feasibility Study: see art. 2(15).

the ownership of the goods, on the one side, and the payment of the price on the other one[111]. Service contracts, instead, are defined as a residual category in the CRD (art. 2(6)) including "any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof"[112].

Whilst the exclusion of mixed contract is explicit in the CESL[113], this sharp distinction does not still adequately clarify the extent of the application of sale provisions to sale contracts having a service element and that could suffer from different qualifications at national level[114].

6.b. Consumer Contracts.

The Acquis does not define consumer contracts but they are qualified as such on the basis of their specific material and personal scope.

Only the CELS proposes a quite tautological definition of consumer sale contracts as sale contracts in which "the seller is a trader and the buyer is a consumer"[115]. The essence of this contract seems therefore to focus on its personal scope and it can be only described in the light of both definitions of trader, on the one side, and consumer on the other side.

First of all it seems now generally acquainted that the party contracting with the consumer is defined as "trader" setting aside the term "business". The CELS[116] and the CRD[117], in fact, as well as the more recent Directives[118], refer to "trader" as in the Unfair Commercial Practices Directive[119]. Like

111 The definition provided in the DCFR presents some slight differences. It includes the transfer of goods "or other assets to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time". See art. IV. A. – 1:202.

112 The wording deviates from the DCFR. Under the Draft, in fact, the definition only includes the obligation of the service provider to supply a service to the other party, the client without mentioning the payment of a price.

113 Art. 6: "The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5. 2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments".

114 See C. TWIGG-FLESNER, *Fit for purpose? The proposals on Sales*, SSRN-id1342702, Paper available at http://ssrn.com/abstract=1342702. The Author had already underlined the need to expressly mention in the definition if provisions on sales should to be applied to those mixed contracts in which the service element is dominant.

115 Art. 2(1). No analogous definition is provided in the CRD or in the DCFR.

116 Art. 2(e): "'trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession".

117 Art. 2(2): "'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive".

118 Dir. 2008/122 on Timeshare, art. 2(e): "trader means a natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession and anyone acting in the name of or on behalf of a trader"; Directive 2006/114 on Misleading and Comparative Advertising and on unfair commercial practices affecting businesses, art. 2(d) "trader means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader".

119 Dir. 2005/29, art. 2(b): "'trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader".

the DCFR[120], instead, the Expert group[121] maintained the referral to "business" but this choice was overruled in the final version of the Proposal for a common European sale law.

The new term should improve the quality of legislation and have an effect on 'better regulation' by tidying up legislation[122]: no substantial effect is expected and it only constitutes a further clarification of the existing meaning.

If then we look at the definition itself, trader means "any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession", according to the wording generally consolidated in the acquis.

The major variation introduced in the CRD is the specification, added in the DCFR, according to which publicly and privately owed legal persons are included but it has not be maintained in the CESL which has been regretted for reasons of legal certainty[123]. Secondly, only the Directive explicitly includes "any other person acting in his name or on his behalf"[124].

Therefore, the issue here is quite purely formalistic and does not explain why the expression "business to consumer" is still used to qualify consumer contracts whilst it should imply the switch from "B2C" towards "T2C".

The definition of consumer, instead, has been finally stuck to the narrow definition that has been consolidating in the existing acquis[125]: the term consumer refers to "a natural person who is acting for purposes which are outside his trade, business, craft or profession"[126].

As a consequence, the definition that is now fully harmonised by the Directive and the CESL merely refers to the consumer as a "natural person", according to the interpretation of the Court of

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120 "Business" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity. (I. –1:106(2)).

121 Feasibility Study, art. 2(1): "'business' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession".

122 This way, the proposed solution would 'tidy up' the minor differences, which are found between the Sales of Goods, Distance Selling, Doorstep Selling and Unfair contract terms. Member States would continue to have the possibility to extend the protection afforded by the Directive to certain B2B transactions since this is an issue outside the scope of the Directive": Annex p. 58.

123 H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, ,p. 12.

124 The same mention is contained in the Dir. 2008/122 on Timeshare.

125 Dir. 2008/122, art. 2(f); Dir. 2005/29, art. 2(a); Dir. 1999/44, art. 1(a); Dir. 93/13, art. 2(b); Dir. 90/314, art. 2(4); Dir. 2000/31, art. 2(e); Dir. 2008/48, art. 3(a); Dir. 2002/65, art. 2(d). Though, Directive 2002/65/EC of the European Parliament and the Council of 23 September 2002 concerning the distance marketing of consumer financial services seems to allow a broader definition including "non-profit organisations and persons making use of financial services in order to become entrepreneurs" (Recital 29). The ECJ has granted a strict interpretation of the definition, see note 106.

126 CRD, art. 2(1): "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession"; CESL, art. 2(f): "'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession". The same wording was referred to in the Feasibility study, art. 2(3).

As it has already been underlined, such a limited personal scope is the most limited the of the options suggested by the Commission in its consultation in the Green Paper and more limited than the definition in the DCFR: M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 69.

Justice[127]. Though, whilst the CESL is a uniform law that cannot be derogated, the CRD allows at least[128] to extend the application of its provisions "to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises"[129].

This inconsistency could lead to important asymmetries between the two sets of rules as the CRD would not prevent Member States from protecting a larger category of persons and could therefore intensify discrepancies at national level[130].

If we then consider the qualification of consumer's purposes, this definition rejects definitively the broader notion proposed by the DCFR regulating double purposes contracts[131] that therefore remain regulated under the ECJ statement in Gruber[132]: Recital 17 provides that "where the contract is

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127 ECJ, 22 November 2001, Joined Cases *Cape Snc v Idealservice Srl* (C-541/99) and *Idealservice MN RE Sas v OMAI Srl* (C-542/99) (ECR 2001 I-9049) concerning a preliminary question on the definition of consumer in Article 2(b) of Directive 93/13/EC on unfair terms in consumer contracts (OJ L 095, 21.04.1993 p. 29): "it is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision. 17. Accordingly, the answer to the second and third questions must be that the term consumer, as defined in Article 2(b) of the Directive, must be interpreted as referring solely to natural persons".
See also ECJ, 20 January 2005, Case C-464/01, *Johann Gruber v. Bay Wa AG*.

128 See for example the definition of "*consumidor*" provided by art. 1.2, Law of 19 July 1984, No 26/1984 (*Ley General para la Defensa de los consumidores y usuarios,* LGDCU*)*. In France, instead, the extension of some consumer rules to subjects other than physical persons has been promoted by the jurisprudential formant. See *Cour de Cassation*, *Chambre civil I*, 15 March 2005, no. 02-13285, *Bull.* 2005 I n° 135 p. 116: "Si, selon l'arrêt rendu le 22 novembre 2001 par la Cour de justice des Communautés européennes, la notion de consommateur, au sens de la directive n° 93/13/CEE du Conseil, en date du 5 avril 1993, concernant les clauses abusives dans les contrats conclus avec les consommateurs, vise exclusivement les personnes physiques, la notion distincte de non-professionnel, utilisée par le législateur français, n'exclut pas les personnes morales de la protection contre les clauses abusives. Mais, dès lors que, lorsqu'elle a conclu le contrat litigieux avec le professionnel, la personne morale a elle-même agi en qualité de professionnel, les dispositions de l'article L. 132-1 du Code de la consommation, dans sa rédaction issue de la loi n° 95-96 du 1er février 1995, ne saurait trouver application".
In the Netherlands the legislator included a new category covering those who are self-employed and that have no staff : M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 71.

129 Recital 13.

130 It has thus been underlined that this definition could lead to the "paradoxical result" that any form of extension "to contracts involving a consumer interest in the broad sense as private users or customers would probably not be possible due to its preclusionary effects on national law": H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Enough?*, p. 14.

131 The draft, in fact, inserted the adverb "primarily" including those acts that are mainly devoted to a personal purpose. DFCR, Glossary: A "consumer" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession (I. – 1:105(1)). The final version of the DCFR introduced the definition proposed by the *Acquis* Group. See app. III, p. 162-164. This definition is more flexible than Directives and ECJ decisions. "The stress on the adverb « primarily » sounds as a sort of repudiation of the ECJ's ruling in the *Gruber Case*": V. ROPPO, *From consumer contracts to asymmetric contracts*, in *European Revue of Contract Law*, 2009, p. 333.

132 This case is issued from a preliminary ruling on art. 13 of the Brussels Convention on the definition of consumer contract in relation to a purchase of tiles by a farmer for roofing a farm building used partly for private and partly for business purposes. According to the Court "a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect". To a greater extent, the Court of Justice attempted to expand this concept, considering that only a "non-negligible business purpose" prevents a person being a classed as a consumer: "to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of

concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

The choice is mainly political[133]. The limited definition, actually, endorse the stakeholders' preference expressed during the public consultation on the Green Paper[134], but is strongly criticised by those who consider that no formal or material arguments justify such a restrictive protection[135]. In a different perspective, all different contractual relationships affected by asymmetries between the supplier and recipient could be more broadly described in the light of a more general policy of 'customer protection'[136]. In this line, it has been proposed that "it might be easier to extend the notion of the consumer than to introduce a new category of "business in need of protection"" [137] as it has been done in the CESL covering contract in which at least one of contracting parties is a small or medium-sized enterprise ('SME')[138]. A broader notion would be more consistent with EU consumer policy approach and Treaties because if it is true that they do not contain any definition of "consumer" there is no justification for maintaining such a restrictive one.

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consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business", Case 464-01, *Gruber case* (par. 54).
In the previous *Di Pinto* case, the ECJ affirmed that "a trader canvassed with a view to the conclusion of an advertising contract concerning the sale of his business is not to be regarded as a consumer protected by Directive 85/577" because "the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he has been canvassed lies outside his trade or profession. Acts which are preparatory to the sale of a business are connected with the professional activity of the trader; although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than the family or personal requirements of the trader": Judgment of the Court (First Chamber) of 14 March 1991, *Criminal proceedings against Patrice Di Pinto*, Reference for a preliminary ruling: Cour d'appel de Paris, France, Consumer protection - Doorstep canvassing. Case C-361/89.

133 As it has been argued, 'the extent to which consumers are to be "protected" is part of the larger debate on how interventionist States ought to be': H. UNBERATH, A. JOHNSTON, *The Double-headed Approach of the ECJ Concerning Consumer Protection*, in *Common Market Law Review*, 2007, p. 1237.

134 This issue had already been highlighted during the consultation pursuant to the Green Paper of 2007. The Commission's working document on the outcomes refers that "the majority of stakeholders favour a restrictive definition of consumer (i.e. natural persons acting for purposes which are outside their trade, business or professions). Some of those stakeholders who favour this view consider that the definition in the Unfair Commercial Practices Directive could constitute a good model. Only some academics plead in favour of an extension of the definition of consumers to mixed use cases. Another minority group of respondents argues in favour of extending the definition of "consumer" to small businesses and non-profit organisations (in practice for an enlargement of the scope of consumer protection). They claim that such entities may be in a position of weakness which is comparable to that of consumers. However, the majority of respondents do not share this view": Commission Staff working paper, report on the outcome of the public consultation on the green paper on the review of the consumer acquis, p. 5.

135 M. HESSELINK, *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, p. 100.

136 V. ROPPO, *From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law*?, p. 304.

137 H.-W. MICKLITZ, N. REICH, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" – Too Broad or Not Broad Eno*ugh?, p. 15.

138 This category is qualified on the basis of formal requirements: Art. 7 (2), "For the purposes of this Regulation, an SME is a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for a SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country".
It has been argued that the exclusion of SMEs from the definition of consumer has creates a "social dumping": J. W. RUTGERS, *An Optional Instrument and Social Dumping Revisited,* in *European Revue of Contract Law*, 2011, p. 350.

A constructive interpretation of the definition could be therefore challenged on the basis of the Treaty of Lisbon and, more precisely, of the EU Charter of fundamental rights imposing a high level of consumer protection[139].

6.c. Distance and Off-Premises Contracts

These two specific contracts are part of the core of the acquis communautaire as they represent the potentially major "aggressive" techniques in consumer transactions[140], whose frequency has been exponentially increased in the digital era.

Highlighting this common nature, the DCFR does not treat them individually[141] but it regulates the horizontal aspects related to information requirements under the same heading reading "contracts with a consumer who is at a particular disadvantage"[142]. This notion includes "transactions that place the consumer at a significant information disadvantage because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction". It should therefore be applied to distance contracts, entered into using "direct and immediate time distance communication"[143], but probably also applies to off-premises contracts, considering the nature of the transaction, as well as to "other types of contracts the conclusion of which places the consumer at a particular disadvantage"[144]. On the same line, dealing with "particular rights of withdrawal", the DCFR refers to a broader category of "contracts negotiated away from business premises", including what is referred to in the CRD and in the CELS as "distance and off-premises contracts"[145]. Once again, this definition includes distance contracts as well as off-premises contracts[146]. The emphasis is thereby given to situations where "the consumer's offer or acceptance was expressed away from the business premises". However, the right of withdrawal does not apply to contracts concluded by means of distance communication, but which are outside of an organised distance sales or service-provision

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139 Art. 38.

140 Their denomination has thus changed through the years. The act of "door-step selling" has been lately referred to as "contracts negotiated away from business premises", and is now defined in the Proposal as "off-premises contracts".

141 This techniques corresponds to the drafters' main aim is to integrate consumer law provisions into general contract law provisions.

142 II. – 3:103: Duty to provide information when concluding contracts with a consumer who is at a particular disadvantage.

143 II. – 3:104: Information duties in real time distance communication: "Real time distance communication means direct and immediate distance communication of such a type that one party can interrupt the other in the course of the communication. It includes telephone and electronic means such as voice over internet protocol and internet related chat, but does not include communication by electronic mail".

144 This interpretation is proposed in T. Q. DE BOOYS, C. MAK, N. HESSELINK, "Comparison between the model rules of the draft Common Frame of Reference and the European Commission's proposal for a Consumer Rights Directive. How the CFR can improve the Consumer Rights Directive", p. 17, Report for the European Parliament, available on http://ssrn.com/abstract=1492660.

145 DCFR, p. 38.

146 Art. II. – 5:201: Contracts negotiated away from the business premises: (1) A consumer is entitled to withdraw from a contract under which a business supplies goods, other assets or services, including financial services, to the consumer, or is granted a personal security by the consumer, if the consumer's offer or acceptance was expressed away from the business premises.

scheme run by the supplier[147]. Other exclusions are also provided if "business has exclusively used means of distance communication for concluding the contract"[148].

However, this model has not been taken into consideration in the final version of the CRD and in the CELS either.

They are thus treated separately, as they represent peculiar forms of contracts, but together, regulating specific aspects that they both share. Their peculiarity is even more evident after the enactment of the CRD that has been merely reduced to a sort of amendment of their regime in order to make it suitable also in the evolving digital markets[149]: the new Directive introduces fully harmonised rules on consumer information and the right of withdrawal in distance and off-premises contracts.

Distance contracts are defined in the CRD as "any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded"[150].

Compared to the version of the directive 97/7, the wording referring to the description of conditions characterising distance contracts seems now acquainted and confirmed also in the CELS.

The definition insists on the absence of the "simultaneous physical presence" and the use of "exclusive means of distance communication"[151]. Moreover, the condition under which the trader has to run his activities pursuant to an organised distance sales or service-provision scheme[152] has been reintroduced[153] leaving to Member states the possibility to extend its scope to contracts not concluded

147 Art. II.-5:201(2)(e).

148 Art. II.-5:201 (3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for: (a) the supply of accommodation, transport, catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period; (b) the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1); (c) the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly; (d) the supply of audio or video recordings or computer software (i) which were unsealed by the consumer, or (ii) which can be downloaded or reproduced for permanent use, in case of supply by electronic means; (e) the supply of newspapers, periodicals and magazines; (f) gaming and lottery services.

149 See Recital 3: "this Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects". See also Recitals 4 and 5.

150 Art. 2(5). See Recital 20: this definition of distance contract "should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service- provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded".

151 The formula here adopted includes in the meaning of distance contract the definition of "means of distant communication" that was previously provided separately: art. 2(4), Dir. 97/7; art. Dir. 2002/65.

152 Recital 20 specifies that "the notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform", but it does not cover "cases where websites merely offer information on the trader, his goods and/or services and his contact details".

153 The so called "prosumer" supplying on-line products and services outside of an organised distance sales or service-provision scheme seems to be excluded consumer protection to this type of contracts. The issue is particularly relevant in the e-commerce provision of digital content services, where these types of C2C contracts play an increasing but controversial role

See Recitals 12 e13 of the original version of the Proposal for a CRD.

under an organised distance sales or service-provision scheme[154]. This change had already been announced in the EP amendment[155] and it is now also confirmed in the CELS[156].

A convergence is also joined on a broader definition of off-premises contracts meaning "any contract between the trader and the consumer"[157] that has been concluded when parties (the trader and the consumer) were simultaneously and physically present in a place which is not the business premises of the trader[158] or immediately after the consumer was "personally and individually addressed"[159] in a place which is not the business premises of the trader[160].

This definition must be read together with the definition of "business premises" given by art. 2(9) of the CRD and art. 2(r) of the CESL[161]. Compared to the previous version of the Proposal for a CRD, the wording has been challenged for a more general formula distinguishing immovable and movable retail premises[162]. The main condition required is that the activity is carried out on a usual basis: "'business premises' means: (a) any immovable retail premises where the trader carries out his activity on a permanent basis; or (b) any movable retail premises where the trader carries out his activity on a usual basis. The reference to market stalls and fair stands (art. 2(9b) of the Proposal for CRD) has been eliminated and introduced in Recital 22: market stalls and fair stands should be treated as business premises when they serve as a permanent or usual place of business for the trader.

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154 See Recital 13: "Member States may apply the provisions of this Directive to contracts that are not distance contracts within the meaning of this Directive, for example because they are not concluded under an organised distance sales or service-provision scheme".

155 See the amended art. 2(6): "distance contract" means any contract for the provision of a good or service concluded between a trader and a consumer under an organised distance sales or service-provision scheme where the trader and the consumer, for the conclusion of the contract, are not simultaneously physically present, but, rather, make exclusive use of one or more means of distance communication".

156 The Proposal approach had been maintained, instead, in art. 2(8) of the Feasibility study: "distance contract" means any sales or service contract between a business and a consumer concluded without the simultaneous physical presence of the business and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".

157 The specification of "sale and service" (see art. 2(8) of the Proposal for a CRD and art. 2(13) of the Feasibility Study) contracts has been eliminated, as this dualism seems to have been challenged by the contracts for the supply of digital contents.

158 Art. 2(8a), CRD; art. 2(q*i*), CESL. Referring to the trader, the latter expressly includes the natural person representing the trader (when it is a legal person) modifying the wording "anyone acting in the name or on behalf of the business" proposed in art. 2(13) of the Feasibility study.
This condition is applicable also to offers made by the consumer in the same circumstances: art. 2(b).

159 The previous version merely referred contracts "negotiated away from business premises" (art. 2(8b) of the Proposal for a CRD). This expression aims to describe the conditions under which negotiations have been conducted. Such a variation had already been proposed in art. 2(13) of the Feasibility study.

160 The scope of the Doorstep Selling Directive was basically limited to contracts concluded and to binding / non-binding offers made by a consumer in two situations: during an excursion organised by the trader away from his business premises or during an "unsolicited visit" by the trader to the consumer's home or to that of another consumer or to the consumer's place of work. See art. 1, Dir. 85/577.

161 "Business premises means: (a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or (b) where the trader carries on his activity on a regular or temporary basis".

162 The reference to market stalls and fair stands (art. 2(9b) of the Proposal for CRD) has been eliminated and introduced in Recital 22: market stalls and fair stands should be treated as business premises when they serve as a permanent or usual place of business for the trader. Correspondingly, the same condition applies to retail premises where the trader carries out his activity on a seasonal basis.

The new version includes also contracts "concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer"[163]. The difference between solicited and unsolicited visits is no longer relevant[164].

7. Conclusions.

Awaiting for the final version of the optional instrument on contract law, the CRD may represent, at present, the sole measure that seeks to introduce a specific "European contract law terminology" related to consumer contracts.

If we then compare the (too) short list[165] of definitions there provided, the raising of the consolidation of certain meanings can be highlighted: article 2 of the CRD constitutes, de facto, the first (even if very limited) core of established notions that seems to be shared by Institutions as well as by the academic community and stakeholders. This consensus is proved by a convergence of the different versions that have been discussed and confronted in the European debate.

Though, this sort of common terminology acquainted in both instruments does not always constituting a constructive evolution as the linguistic choices adopted are still quite far from representing a satisfying result.

For example: looking at the term "consumer", the definition still sticks to the narrowest and criticised meaning resorting by the acquis communautaire, whilst it should be challenged towards a broader notion of costumer and contain a clearer characterisation of relevant purposes.

The use of new legal concepts like "digital content" has, instead, still to be tested according to its possible concrete applications.

More general considerations must be, furthermore, addressed for a coherent construction of a European common terminology in contract law.

In order to truly improve the market, the core of the established definitions should be expanded, covering a larger range of terms applicable to the entire acquis. It should be therefore of the utmost importance to adopt a common and shared linguistic strategy, in order to grant the consolidation of a coherent and clear contractual terminology.

Likewise, it should not be forgotten that a European "common terminology" should be available in each official language[166].

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163 The CESL extends expressly this condition to the supplying of digital content or related services to the consumer (art. 2q*iii*).

164 See art. 1 of Dir. 85/577/EEC. It had already been eliminated in the Proposal for a CRD as well as in the Feasibility study.

165 The technique of creating a list with definitions has been defined as a "burden for the reader". Definitions, or at least most of them, should be placed in chapter where they belong: O. LANDO, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, in *European Revue of Private Law*, 2011, p. 722.

166 It has already been noted that "while it is proposed (and must be fully supported) that the OI would be available in all EU languages, differences among the different versions are unavoidable. Do the parties choose the seller's or the buyer's version? What about the interpretation? The best solution would be the same interpretation throughout the whole EU, but

In doing so, the opportunity to refine the in-depth comparative analysis of existing contract law should not be wasted in the meanwhile[167]: a genuine European doctrine capable of expressing a common legal terminology[168] which respects and thus promotes Europe's rich linguistic and cultural diversity must be forged step by step[169].

This approach could have important effect in the political and social debate[170].

It could lead to what has been defined as a "dilatory effect" on the legislative process[171]. Reasoning through the extent of abstract common rules should be preceded by a thorough and insightful analysis of legal concepts retained in order to identify their correct translation and foster their understanding at every level. Thus, this method has been adopted, or, at least, in word promoted by the Institutions but, as we have seen, the results are still not satisfactory.

Moreover, it could avoid recurring querelles by using a comparative method that is suitable for analysing the feasibility of a proposed definition[172]: the critical notion of contract is the emblematic example of a definition that has always been used by European legislators, even though it is not easily traceable to a single unified concept.

Finally, it has to be considered that the concrete evolution and development of a genuine common terminology at a European level could only be granted by the hermeneutic role of the Court of Justice, referring to such a common European legal background[173].

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this is very difficult to achieve. In fact, it is possible that even three national versions of the OI and three different interpretations can be taken into account (in case of two parties from different Member States settling their dispute in the courts of yet a third Member States). Again, one can wonder whether such a conflict can be a priori solved, but it certainly needs some deliberations": M. JAGIELSKA, *Issues of private international law linked with the adoption of an optional EU instrument in the field of contract law*, p. 12, available at http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483

[167] This perspective is promoted by the Common core group members: "Yet there is no sufficient body of scholarship on European law that they could have used in the way that the drafters of the French and German codes used the scholarship of Domat and Pothier or of Windscheid. That scholarship, if it had existed, would have attempted the formidable task of comparing different national solutions and considering the merits of each. Absent that scholarship, one can hardly expect the authors of the DCFR to make up the deficit". See L. ANTONIOLLI, F. FIORENTINI, J. GORDLEY, *A Case-Based Assessment of the Draft Common Frame of Reference*, in 58 *Am. J. Comp. L.*, 2010, p. 358.

[168] M. ROSARIA FERRARESE, "Interpretazione e traduzione", in E. Ioriatti Ferrari, *Interpretazione e traduzione del diritto*, Padua, 2008, p. 35: besides all the insurmountable obstacles and differences, the convergence among legal systems can open up new possibilities, under the terminological approach, by way of linguistic contamination and the use of neologisms.
This process is intensified by the increasing exchanges by students and teachers in exchange programmes: S. VAN ERP, *Linguistic Diversity and a European Legal Discourse*, in *EJCL*, Vol. 7.3, September 2003. According to the Author, EU Institutions should promote such channels for the creation of a "European legal discourse" before any attempt of harmonisation of private law.

[169] "The language barrier would formally remain in force because it has its roots in civil procedure and national legal culture. A EU contract law instrument, however, would create a common point of reference for litigation all over Europe – a legal source as vital as a contract law which permeates all layers of society and economy would help to foster a more open legal culture with respect to foreign languages. […] Furthermore, on the basis of an EU contract law instrument a common understanding with respect to legal concepts and terms could be developed which would facilitate the legal communication between the jurisdictions of the Member States, and the use of comparative law in the courts": T.H. KLINK, *EU contract law as a tool for facilitatine cross-border transactions: a point of view from national courts*, p. 6, available at http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483.

[170] It must not be forgotten that, first of all, any Institutional decision pertains to the political realm, not to the technical one.

[171] Cfr. X. LAGARDE, *Du bon usage de la terminologie contractuelle commune*, in *LPA*, 29 June 2009, no. 128, p. 11.

[172] See H. MUIR WATT, *La fonction subversive du droit comparé*, in *Revue internationale de droit comparé*, 2000, p. 503.

[173] B. Pozzo, *Multilinguismo, Terminologie giuridiche e problemi di armonizzazione del diritto privato europeo*, p. 26.

At the same time, a comprehensive comparative study of European legal systems should be promoted at universities level for a better understanding of a common legal culture and the creation of European lawyers[174].

These first practical considerations lead us to argue that any attempt to create a set of common definitions is deemed to fail when it is the result of an artificial legislative exercise that does not correspond to an established terminology that is shared and accepted as such at the institutional level as well at the one represented by the European legal community[175]: until this terminologie contractuelle commune is reached, the mere imposition of common rules would seem to be made quite in vain[176].

It has already be recalled that "the Court of Justice of the European Communities […] has not always been able to unambiguously express the criteria that should govern the interpretation of Community law": V. Jacometti, *European Multilingualism between Minimum Harmonisation and "A-Technical" Terminology*, p. 4.

174 M. BUSSANI, *Faut-il se passer du common law (européen) ? Réflexions sur un code civil continental dans le droit mondialisé*, p. 16; M. 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*, 2012, p. 195.

175 B. POZZO, *Harmonisation of European Contract Law and the Need of Creating a Common terminology*, p. 754.
See G. AJANI, M. EBERS, *Introduction* in G. Ajani, M. Ebers (eds.), *Uniform Terminology for European Private Law*, Baden Baden, 2005, p. 15: "Considering this background, Europe's challenges become clear: further harmonisation can only be attained through the creation of a uniform terminology for European Private Law".
It is worth noting that, the search for clarity and accessibility is one of the "concrete" issues invoked by consumers, as well as by businesses, which must not be ignored. This aspect is especially highlighted by legal practitioners and businesses upon whom the future success of any kind of European instrument depends, as they will ideally be the decision-makers for contracting parties that "will learn to trust it and opt to use it": L. LINNAINMAA, *EU contract law as a tool for facilitating cross-border transactions: a point of view from industry*, p. 6; M. FRILET, *Could an* Heutger *optional instrument on EU contract law increase legal certainty and foster cross-border trade? A view from the legal practice*, p, 17. These papers are available at http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483.

176 «L'existence même d'une terminologie contractuelle commune à plusieurs espaces géographiques, qu'ils soient de dimension nationale, international ou européenne suppose une recherche sur le sens commun de différents termes contractuels mis ainsi en comparaison»: J.-S. BERGE, *Terminologie contractuelle commune et droit européen: les mots de la comparaison*, in *Revue des contrats*, 2008, p. 1352.

Conference Proceedings

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november 25-26th, 2011
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Alternative Dispute Resolution Models
in China and Western Countries Practice

Friday november 25th, 2011

8.30 Registration
9.00 Greetings and introduction
(Prof. Maria Chiara Carrozza, *Director of Scuola Superiore Sant'Anna*;
Prof. Giovanni Comandé, *Coordinator of Lider Lab, Scuola Superiore Sant'Anna*)

SESSION I (9.30-13.30)
Circular circulation of legal solutions: roots and characteristics of contemporary ADR models
Chair: Prof. Vincenzo Varano (Università di Firenze)

Mediation in China from the Xizhou dynasty to the People's Mediation System and Court-Performed Mediation
Prof. Chen Zhonglin (Chongqing University)

Inverted fluxes: the impact of online ADR
Prof. Hans Micklitz (European University Institute)

The legal and cultural roots of mediation and ADR
Prof. Robert A. Baruch Bush - Judith A. Saul (Hofstra Law School)

11.00-11.30 Break

Is arbitration still a part of ADR? Is the answer the same in China and elsewhere?
Prof. Gabriele Crespi Reghizzi (Università di Pavia)

Mediating Commercial Cases in US Municipal Courts
Jody B. Miller (Hofstra Law School)

Some features and trends of Chinese ADR in a western perspective
Prof. Renzo Cavalieri (Università Cà Foscari, Venezia)

13.30-14.30 Lunch

SESSION II (14.30-19.30)
Chinese and European issues in ADR today
Chair: Prof. Marina Timoteo (Università di Bologna)

Review and analysis of the arbitration practice in China in the perspective of legal culture
Prof. Fei Anling (China University of Political Science and Law)

ADR in specific areas in China
Prof. Yang Chunping (Chongqing University)

The role of lawyers in European ADR
Prof. Maria Angela Zumpano (Università di Pisa)

16.30-17.30 Break

Relationship between state courts and arbitration: support or hostility?
Prof. Luca Radicati di Brozolo (Università Cattolica del Sacro Cuore, Milano)

Mediation and state civil justice
Prof. Remo Caponi (Università di Firenze)

Saturday november 26th, 2011

SESSION III (9.00-13.00)
Inverted fluxes: international arbitration
Chair: Prof. Giovanni Comandé (Scuola Superiore Sant'Anna)

What is pro-arbitration today? Remarks on a cross-cultural motto
Prof. Tibor Várady (Central European University)

Mediation and international arbitration in China: cohabitation or cross-contamination?
Prof. Shen Sibao (UIBE Law School - Shanghai University Law School)

WTO dispute resolution mechanisms and China
Prof. Jacques Bourgeois (College of Europe)

10.30-11.00 Break

Investment arbitration and China: investor or host state?
Prof. Yang Shudong (Chongqing University)

Strengthening commercial long term relationships with the help of ADR
Prof. Paola Lucarelli (Università di Firenze)

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INTERNATIONAL WORKSHOP

Alternative Dispute Resolution Models in China and Western countries practice

WORKING PAPERS SERIES

In this Issue, Opinio Juris in Comparatione is pleased to public the second part of the series of Working Papers[1] presented in the International Workshop *"Alternative Dispute Resolution Models in China and Western Countries Practice"* held in Italy, on November 25 and 26 2011 at Scuola Superiore S. Anna, Pisa.

As stated in the Conference Announcement previously released, legal transplants and legal model circulation are widely studied processes. Nowadays, they have reached momentum as fundamental tools for defining and shaping the most attractive legal system for doing business.

These phenomena are often understood as patterns moving from the so-called western legal tradition towards countries belonging to the so-called oriental legal tradition. This is mostly the case also with reference to ADR. Yet, despite the fact that in recent times China has adopted western like solutions, due - for instance - to the adhesion to the WTO, it is clear that ADR are culturally embedded in the Chinese tradition with autonomous developments. The interdisciplinary workshop intended to study, among else, the historical origins of ADR systems, their actual roots in the oriental legal tradition and the possibility of discovering crossed fluxes of legal transplants in a largely globalized world, with a particular emphasis on the interaction between western arbitration models and oriental mediation experiences.

For this reason, the workshop has involved as speakers experts and practitioners in comparative law and other social sciences coming from the Italian and the Chinese experiences, as well as distinguished international experts in the field of ADR and international arbitration.

[1] Please notice that these Working Papers, unlike the ones included in *Articles* and *Essays* sections, have not been submitted to a peer-review evaluation.

Paper n. 4

BETWEEN JUSTICE AND HARMONY: SOME FEATURES AND TRENDS OF CHINESE ADR FROM A WESTERN PERSPECTIVE

by

Renzo Cavalieri

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BETWEEN JUSTICE AND HARMONY: SOME FEATURES AND TRENDS OF CHINESE ADR FROM A WESTERN PERSPECTIVE

by

Renzo Cavalieri♦

Abstract:

For the last couple of years, many people, in China and abroad, have reported a change of attitude in the communist leadership of the PRC towards the law and legal policy.

The emphasis on the "government by the law" or *fazhi* that had characterized Chinese political communication since the mid-nineties seems to have been abandoned in favour of a more traditional discourse on the principle of the "government of man" or *renzhi*.

ADR, and mediation in particular, is a perfect litmus test of this phenomenon. Since the early 2000, the entire legal system has been directed with great determination and consistency towards the ADR through regulatory and policy documents, propaganda bombardment, judicial incentive policies, but when necessary also by informal conditioning methods and coercion on individual cases.

The trend of the leadership of over-emphasizing harmony and putting it even before the law raises many concerns. As it is very well known, ADR practices may be easily used to weaken people's insistence on subjective rights and to reduce the annoyances arising from a strict adherence to the principle of legality.

The strengthening of the ADR system in China can be seen as part of a new strategy of social control which, by slowing down the *fazhi* may also slow down the protection of rights and legitimate interests of the weakest parts of Chinese society, so difficultly acquired in the last decades.

Keywords: Mediation; State Civil Justice.

♦ Università di Venezia "Ca' Foscari"

For the last couple of years, many people, in China and abroad, have reported a change of attitude in the communist leadership of the PRC towards the law and legal policy.

The emphasis on the construction of the "rule by law" or *fazhi* [1], that had characterized both Chinese institutional developments and political communication since the mid-nineties, has been abandoned in favour of a more traditional discourse on the harmonious governance of the society.

China seems somehow to be "escaping from the law", from its technicality and its rhetorical celebration, and if such escape has not assumed the tone of a real reversal, however it demonstrates the willingness of the leadership to try a new cocktail of social control, where the law could be reduced to a use even more marginal and functional than in the past and the old-styled, indigenous, *renzhi* – the "rule of man" (or rule of politics) - regains its central role.

The title of a recent article by Carl Minzner appeared in the latest issue of the American Journal of Comparative Law - "China's Turn Against Law" [2] – is strong but particularly meaningful. Also many Chinese scholars have remarked this phenomenon and even a pillar of Chinese legal reform as the Emeritus of Zhengfa Daxue, prof. Jiang Ping came to say in the press that "China's rule of law is in full retreat." [3].

Apparently, the Chinese government has decided to set stricter limits not only to the autonomy granted to legal subjects, which had grown exponentially in the last decades, but in general to the affirmation of the principle of legality, perceived as too problematic and risky for the stability of power. No claim for rights and no legal technicality whatsoever can be used to elude or undermine party's and governmental policies or to endanger the stability of the state and society: law-makers, judges and legal practitioners are undoubtedly encouraged to establish and operate a legal system more and more sophisticated, but they are expected to use their technique to serve the party's interests, not to make the law a tool of political disruption.

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[1] In this context it is not important that *fazhi* is translated as rule by law or rule of law, because it is mostly the use of the techniques of law itself - functional or not as the case may be - that have generated and protected the extraordinary growth of the individual subjects' autonomies that has characterised recent Chinese social history.

[2] C.MINZNER, *China's Turn Against the Law*, in *American Journal of Comparative Law*, Vol.59, IV, Fall 2011, pp.935-984. Let me acknowledge that the in-depth research done by Carl Minzner on the most recent trends of Chinese judicial work stands at the basis of several of the ideas expressed in this paper.

[3] This is the title of the English translation of a speech delivered by Jiang Ping in February 2010, available at http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jiang-ping-chinas-rule-of-law-is-in-full-retreat.html. Prof. Jiang tackled the topic in several occasions and he was particularly explicit in the immediate aftermath of the arrest of the Nobel prize winner Liu Xiaobo's: http://www.chinesepen.org/Article/201002/Article_20100223005941.shtml. For another colorful expression of concern on the destiny of the rule of law in China see WILLY WO-LAP LAN, *The Rule of Law is Dead. Killed by the 'Harmonious Society'*, at http://www.asianews.it/news-en/The-rule-of-law-is-dead.-Killed-by-the-harmonious-society-21920.html. Recently, also some official media have reported similar expressions, albeit usually for criticizing the "Western" viewpoint. See for instance the English language newspaper *China Daily* of January 30, 2012 on http://www.chinadaily.com.cn/cndy/2012-01/30/content_14502312.htm.

This change in Chinese legal policy is perceivable in many sectors, not only in the most sensitive and notorious fields of criminal law - where practicing lawyers are often prosecuted just for their insistence in demanding a stricter enforcement of the law - but also in administrative, commercial and civil law and practice. Even in quite unexpected areas, like foreign investment operations, spaces of private autonomy are slowing down their expansion and the public administration regains room of discretion [4].

The trend has a deep impact also - as we will observe later - in the institutional approach to dispute resolution. And it is especially evident in the language and tones of propaganda and political communication.

Let me try to better point out some of the features of this new course.

The coexistence between the *fazhi* and a Leninist political system has never been easy. Conditioned by the weight of the party's leadership and democratic centralism, legal reforms introduced in the last three decades have only partially been able to respond to the growing demand of justice in Chinese society. The areas of discretion of governmental officials and agencies are still extremely wide, the judiciary has remained backward and crushed under political (and economic) powers and private legal professions have not been given room to develop, except in certain specific and limited areas of business law.

In a constitutional system based on the supremacy of the party's line and the principle of unity of state powers, where judges and procurators are subject to the formal control of the executive and to the informal control of the party, political interferences in the legal sphere create enormous difficulties in obtaining and enforcing fair judgments and undermine both the efficiency and the credibility of the legal system. And this is particularly true in less developed geographic areas and social sectors, where, unsurprisingly, there are also serious deficiencies concerning the people's legal consciousness and access to justice.

Uncertainties in the law and the gap between the 'law in the books' and 'law in action' have created an increasingly sharp divide between law and society. The people's courts, which in the past twenty years had seemed to be capable of eventually becoming a reliable and authoritative reference point for the protection of individual rights, have shown all their weakness, particularly in dealing with cases involving governmental agencies or officials.

People should be very careful in demanding too loudly the application of the law and the protection of their rights, because if their insistence is considered excessive the government does not hesitate to use barely legal and even illegal forms of repression to stop it. Recent reports of arrest of

[4] Several examples of this trend can be found in recent central and local legislation as well in dispute resolution practice. See for instance the restrictive regulations on special-purpose vehicles for investing in joint ventures in China (http://xbma.org/forum/chinese-update-the-most-recent-challenges-to-the-vie-structure-for-foreign-investment-in-china/; http://www.isinolaw.com/CMS/forum/Posted_en.jsp?forumid=100054).

some of the most assertive 'right-defending lawyers' (weiquan lüshi) provide the clearest example of how strictly those limits are fixed and how flexibly the law may be interpreted for political ends [5].

Citizens (and lawyers as well) are so driven to turn to look out of the legal sphere for the protection of their rights, and to make use of the traditional set of tools of recourse to the benevolence of officials, particularly, personal guanxi and - quite often - corruption. Also the system of informal petitions to the local "letters and visits" (xingfang) offices, the historical system of filing citizens' complaints, is increasingly preferred to an untrustworthy administrative procedure [6].

Then, in most extreme cases, people react to the loopholes and to the scarce or unfair enforcement of the law with riots, strikes and other forms of spontaneous and sometimes violent dissent [7].

The communist leadership knows that the legal system's capability to answer properly to the people's need for justice is pivotal for maintaining social stability, but it is also well aware of the system's loopholes. Many leaders are convinced that some legalistic excesses of the last decade – which, in their view, have been too often uncritically imitated from the West - should be abandoned for a more balanced, flexible and adaptable approach, where the rule of man - the dear old *renzhi* re-interpreted in a post-communist and patriotic fashion - plays a fundamental role.

Here, in the grey area between the rule of law and the rule of man, the institution of mediation (which for the purposes of this paper I consider to be the central component of the whole ADR system) stands as a perfect litmus test of the phenomenon under way.

In fact, also in the realm of dispute resolution the problems experienced in the first two decades of reform in the establishment and functioning of a modern adjudicatory system have prompted the Chinese authorities to revise their previous legalistic attitude, by downsizing the technical judicial recognition of rights in favour of a more informal conciliatory approach.

The latter indeed appears more consistent with the now prevailing Confucian and post-communist ideal of a social harmony induced from top to bottom. In this perspective, the trend to emphasize the positive aspects of mediation and push it as the most efficient and politically correct

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[5] In the last three years, dozens of cases of unjustified detention and conviction of most active criminal lawyers have been reported throughout China, particularly during the recurring anti-crime campaigns. Recently the case of a Chongqing lawyer, Li Zhuang, raised a massive wave of criticism both in China and abroad. Li was unjustly charged with fabricating testimony in favor of his client and his trial ended to become for many observers an indicator of where the rule of law is heading in China (see http://www.nytimes.com/2011/04/20/world/asia/20china.html). Several Chinese and foreign leading legal scholars like He Weifang (http://blog.sina.com.cn/s/blog_4886632001017xy0.html), Jiang Ping (http://cmp.hku.hk/2011/04/28/11898/) and Jerome Alan Cohen (http://www.usasialaw.org/?p=4091) have published frustrated comments on the case.

[6] On the figures of the competition between the 'letters and visits' system and the administrative procedure see B. LIEBMAN, "*A Populist Threat to China's Courts?*", in Margaret Y.K.Woo, Mary E. Gallagher, *Chinese Justice: Civil Dispute Resolution in Contemporary China*, Cambridge, Cambridge University Press, 2011, p.269-313, in particular at p.277.

[7] On the subject see e.g. K. O'BRIAN (ed.), *Popular Protest in China*, Cambridge (Mass.), Harvard University Press, 2008 and CAI YONGSHUN, *Collective Resistance in China: Why Popular Protests Succeed or Fail*, Stanford, Stanford University Press, 2010.

dispute resolution method must be considered just a part of a more general attitude of the government towards the establishment of what the present Chinese administration calls an "harmonious society" (hexie shehui) [8].

As China's Chief Justice Wang Shengjun pointed out in a recent seminar for senior judges: "Upholding the priority of mediation tallies fully with the original spirit behind China's law-making; it is also a development of legal culture traditions such as 'valuing harmony' and 'playing down litigation and ending conflict'" [9].

Also the risk that a rigorous and formal adherence to the rule by law could end allowing too much room for political dissent - as it is partially happening - has certainly contributed to reduce the appeal that a strict implementation of the principle of legality and its corollaries exerts towards the communist leadership.

The first signs of this ideological revamping of mediation and the ADR after the legalistic exaltation of the Nineties had already been felt in the early 2000s, particularly since September 2002, with the party's definition of the new pro-mediation policy [10] and the simultaneous issuance by the Supreme Court and the Ministry of Justice of a set of regulations commonly referred to as the "Three documents" [11], with which mediation gained more effectiveness, particularly through a greater clarity about the nature and legal effects of the settlement agreement.

Since that time, the whole Chinese legal system has begun to be directed with strong determination and consistency towards the ADR through regulatory and policy documents, propaganda bombardment, judicial incentive policies and, if necessary, also by informal conditioning methods and coercion on individual cases.

By a normative viewpoint, the two peaks that deserve to be mentioned in this process are: the Opinion on Further Increasing the Positive Role of Judicial Mediation in Building up Socialism and a Harmonious Society (March 6, 2007) and the Opinion on Establishing and Improving a Dispute Resolution System and Linking Litigation and Alternative Dispute Resolution Mechanism (July 24,

[8] The official position is that even a harmonious society shows contradictions ("within the people", as in Mao's theorization) and that the law should be considered a useful tool for the resolution of those contradictions which cannot be solved otherwise. Such position has been restated by the Chinese authorities in several occasions. See e.g. this article of the *Guangming Ribao*: "*Hexie shehui shouxian shi minzhu fazhide shihui*" ("*The Harmonious Society is Primarily a Democratic Society Ruled by Law"*), in http://news.xinhuanet.com/misc/2006-03/14/content_4300015.htm.

[9] See W. LAM, *CCP Tightens Control over Courts, China Brief*, XI, 11, June 17, 2011, p.2.

[10] In particular with a top level meeting of officials of the Supreme Court and the Ministry of Justice which set out the guidelines of the reform of mediation: "Tiaojie: Yue lai yue zhuliu" ("Mediation: More and More Important"), in *Nanfang Zhoumo*, 2011-04-30, http://www.infzm.com/content/58517.

[11] The three documents were a Judicial Interpretation on Hearing Civil Cases Involving People's Mediation Agreements of the Supreme Court, the Provisions Regarding the Work of People's Mediation of the Ministry of Justice and a joint document of the two bodies called Opinions of the Supreme People's Court and the Ministry of Justice on Further Enhancing People's Mediation in the New Era. See A. HALEGUA, *Reforming the People's Mediation System in Urban China,* in *Hong Kong Law Journal*, 35, 2005, p.724.

2009), both issued by the Supreme Court [12]. With these two documents the priority given to mediation among dispute resolution methods and the tightening of political control over the courts were officially sanctioned.

All the forms of mediation were affected by this political and legislative trend.

Above all, the system of civil mediation held by the People's mediation committees was substantially improved. A new law of August 28, 2010 - expressly enacted to the purpose of "maintaining social harmony and stability" (art.1) [13] - provides for a reassessment and an increase of the role of the mediation committees at various levels and contains the express invitation to judges to instruct the parties of the opportunity of solving their dispute through mediation (art.18). The law also provides for an unprecedented unambiguous recognition of the binding nature of the settlement agreement (art.32).

Given the absence of a true political dialogue and of a really reliable administrative litigation system, also administrative ad hoc mediation, informally managed by grassroots organizations and not formally regulated, became a favourite ADR tool, particularly for the resolution of most sensitive collective disputes. With these so called "big mediations", which often have the nature of political conferences of all the involved social players, the communist party attempts to reconcile conflicting social interests, particularly in cases of environmental litigation, major corporate restructuring, and urban planning dislocations.

But the form of ADR which in the last few years took an even greater importance than in the past is undoubtedly judicial mediation, with the whole system pushing the courts to mediate the largest possible number of cases, either directly or by delegating the resolution of the dispute to administrative authorities, people's mediation committees, civil and commercial mediation organisations and the like, "with the consent of the parties, or when the court thinks fit "[14].

In this context, political pressure for mediation is supported by a massive use of incentive instruments - economic, political, professional - for the most appreciative judges. Among the most important goals that a civil judge must achieve there is the highest possible percentage of mediation in the cases submitted to him or her: since the achievement of these objectives has a direct impact on the career and income of the official, it is clear that this becomes a major factor in determining the policy of the courts.

[12]Texts (in Chinese) on http://www.chinabaike.com/law/zy/sf/fy/1338426.html and http://www.yczc.org.cn/NewsShow.asp?d_id=279.
[13] English and Chinese versions on http://www.leggicinesi.it/view_doc.asp?docID=682.
[14] Art. 15, Supreme People's Court Opinion on Establishing and Improving a Dispute Resolution System and Linking Litigation and Alternative Dispute Resolution Mechanism (2009).

In the legislative documents as in all official propaganda, the professionalization of the judiciary is no longer considered the main priority: the techniques of conflict resolution change and a new (as well as old-styled) image of the judge-mediator, able to balance all the interests at stake, stands out [15].

The trend of the leadership of over-emphasizing harmony and putting it even before the formality of the law raises many concerns. In several cases, the will to find a compromise between conflicting interests has led to unsustainable pressures on the judges or even to the denial of justice, often to the detriment of most vulnerable people, such as in a well-known case of mass poisoning of milk with melamine [16]. If a judge suggests a certain settlement to the parties, the party that does not accept it risks to find itself in a very unfavourable position.

On the other hand, those judges who dare not to follow the doctrine of harmony and do not get good results in the management of litigation in their jurisdictions are held personally responsible for such bad results and therefore usually prefer to direct their code of practice accordingly. Being the judiciary so sensitive to political influences, also the risk of what has been called a 'populist threat' (according to Ben Liebman's definition) to Chinese courts must be taken into account: there have been several examples of criminal investigations and trials where prosecutors and judges' work was substantially influenced by the public opinion and by the activism of the 'netizens', under the tacit approval of the party [17].

As we all know, over the past twenty years the politics and rhetoric of ADR have grown fast also in the West, but in China it has been something slightly different. This trend was not the more or less spontaneous effect of the inefficiencies or delays of the civil trial, and it was not originated from

[15] In his work Carl Minzner investigates the difference between the propaganda campaigns affecting the judiciary of the Nineties, which emphasised the adherence to the law by model-judges, and those in recent years, in which the capability to inspire harmony and prevent conflicts prevails, and tells us the instructive story of judge Chen Yanping, whose success in keeping order and harmony is grounded on the fact that "she relies not on law, but on morality and human sentiment". So much for a 'country ruled by law'. C. MINZNER (2011), p.951 note 61.

[16] In 2008 and 2009, in several provinces throughout China, thousands of infants fell sick for consuming powdered milk tainted with melamine produced by one of the country's largest diary firms. Many needed hospitalization and at least a dozen of them died. All the attempts of their parents to obtain compensation through individual civil actions were unsuccesful: in the largest part of cases local courts refused to accept the claims. Some of the leading activists and lawyers of involved NGOs were even charged and sentenced for inciting social disorder. A strong pressure was put on claimants to mediate with manufacturers and distributors. Two years later, thousands of families had already accepted out of court settlements with producers and distributors, probably because they could not get a fair judgment in the courts. Western literature on the incident is extensive on the subject: for an overview see L. SEMPI, *ADR and Consumers between Europe and China*, in *Opinio Juris in Comparatione*, Vol.2/11, paper n.5, p.11.

[17] The most notorious case was probably the one of Deng Yujiao, a Hubei masseuse who, on May 10, 2009, killed a local party official attempting to rape her. Charged with voluntary murder, Deng was generally regarded – first by the bloggers and netizens and then also by the most independent mass media - as another victim of the power's arrogance. Under public pressure, prosecutors and judges withdrew from their position, recognized the legitimate defense and eventually released the girl. Greeted by many observers as a demonstration of the new role played by the civil society in scrutinizing judicial activity, it should instead be considered a substantial defeat of the rule of law in China. See R. CAVALIERI, *Germogli di legalità*, in R. Cavalieri and I. Franceschini (eds), *Germogli di società civile in Cina*, Milano, Francesco Brioschi Editore, 2010. On the influence of media on judicial independence in general see B. LIEBMAN, *The Media and the Courts: Toward Competitive Supervision*, in *China Quarterly*, 208/2011, p.833-850; see also the explicit words of prof. Shao Jian of Nanjing Xiaochuan University as quoted in http://news.ifeng.com/opinion/200910/1024_23_1402864.shtml.

the parties or their lawyers and from the growing presence of private, independent institutions for mediation in the legal market, but from a specific decision of the political leadership, followed by institutional reforms. This makes it similar to many other legal policies in China: from consumerism to environmental protection, from the corporate social responsibility to the right to privacy. In all these cases it has been a central political decision to trigger huge legal and social transformations.

This trend is accompanied by an ideological recovery of the national legal tradition, that throughout history has extensively experienced the flexibility and efficiency of mediation and other non judicial dispute resolution methods, assigned to a mediator whose role – unlike what happens in the Western tradition – is not only to a facilitate the spontaneous settlement of the parties, but to play a quasi-adjudicative role.

However, by another viewpoint, the close link between social order, ADR and the weakening of the adversarial process in China is not likely to be judged so differently from how some law scholars and legal anthropologists consider the similar phenomenon in the West, namely a method of dispute resolution which structurally favours the strongest party and in which the need to find an harmonious settlement prevails on the will to assess the parties' rights.

I do not wish to enter into the merits of this debate here, as it is very complex as well as highly political, but again I can quote directly from Laura Nader and Ugo Mattei a sentence which I consider perfectly suitable to the Chinese present environment. They write: "ADR practices may be used to suppress people's resistance, by socializing them toward conformity by means of consensus, cooperation passivity and docility (...) " [18].

In the Western legal tradition, a right is a subjective interest characterized by its justiciability: there could be no rights without the formal protection provided by an independent judge according to the law.

No doubt that ADR practices, especially if accompanied by the rhetorical use of vague notions like that of 'harmony', may be used by the government (by all governments) to weaken people's insistence on rights and to reduce the annoyances arising from a strict adherence to the principle of legality.

The strengthening of the ADR system in China can be seen as part of a new strategy of social control which, by slowing down the *fazhi* may also – more or less consciously - slow down the protection of rights of the weakest parts of Chinese society, so difficultly acquired in the last decades. And this is particularly true when the ADR is not at all 'alternative' nor 'amicable', but the only viable way of defending a citizen's rights and legitimate interests.

[18] L. NADER, U. MATTEI, *Plunder: When the Rule of Law is Illegal*, Oxford UK, Blackwell Publishing, 2008, p.77. Talking about mediation and harmony, it is worth to mention the revealing coincidence between the title of one of Nader's most classic works (*Harmony Ideology: Justice and Control in a Zapotec Mountain Village*, Stanford, Stanford University Press, 1990) and the current Chinese rhetoric of the *hexie shehui*.

Paper n. 5

STRENGTHENING COMMERCIAL LONG TERM RELATIONSHIP WITH THE HELP OF THE ADR

by

Paola Lucarelli

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STRENGTHENING COMMERCIAL LONG TERM RELATIONSHIP WITH THE HELP OF THE ADR

by

Paola Lucarelli ♦

Abstract:

The companies tend to pursue the goal of maximizing efficiency. They are ready to implement alternative models of problem solving where these prove more efficient than traditional ones. The international trade agreements are by nature prepared for such dispute settlement type: alternative, voluntary, amicable. However, it seems that this still happens sporadically or at least not fully detectable in reality. One might well wonder which is the reason why a management tool of the commercial crisis evidently characterized by a strong bond with the relationship in crisis, in terms of adaptability, creative potential, satisfaction of expectations, is not publicly perceived as the standard management litigation in the long term commercial agreements. The paper faces arbitration and mediation from the business growth point of view and privileges for this purpose the client's interest oriented.

Keywords: Arbitration; Mediation; Business Relationship; Long Term Commercial Contracts.

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Summary: ***1****. The crisis of the business relationship: the ambivalence of the arbitration method. -* ***2****. Long term commercial contracts and mediation. -* ***3****. Beyond the solution: the practice of mediation as a lever for the expansion of economic relationships through the responsible and productive behavior. -* ***4****. Arbitration or mediation? A client's interest oriented answer.*

1. The crisis of the business relationship: the ambivalence of the arbitration method.

It is rare to read an international agreement in which there is no arbitration clause that involve any future dispute between the parties. It's mainly a question of being able to choose the judges: the arbitrators are appointed, in fact, by the parties; the companies choose the arbitration because of the speed of the procedure, compared to the time of the courts[1], the resolution of the problem of the *sprachrisiko* and of the mandatory rules.

However, there are doubts about the real efficacy of the arbitration process. First of all, the certainty of the judges does not mean legal certainty: even in case of an applicable law clause, in fact, any gap or profile that is not covered, will attract the application of private international law or, more easily and understandably, the *lex mercatoria*. Moreover, speed is not guaranteed: there are procedures that are complex enough to take a long time, sometimes not less than two years; the cost of the procedures is very high; contesting the arbitration award or execution requires qualified professional competence.

Given these plausible arguments, especially in the U.S. experience, somebody is talking about the "flight of U.S. firms by arbitration in favor of ADR".

While there is no doubt about the good fortune of the arbitration procedures in commercial and international trade, one cannot forget that companies always pursue the goal of utility maximization. Every company is therefore ready to implement alternative models of conflict resolution where these are more efficient than traditional ones.

The arbitration procedures are, for the reasons described above, a good alternative to the ordinary jurisdiction, and - at the same time - a weak response to the need of speed, punctuality, efficiency. Compared to a trial in front of a court arbitration is usually to be preferred, but this is not always the case: the same reasons that make it more attractive, direct companies toward other method of dispute resolution where those are better able to comply with economic interest and are more efficient[2].

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[1] In Italy, see M. BIANCO, S. GIACOMELLI, G. GIORGIANTONIO, G. PALUMBO, B. SZEGO, *La durata (eccessiva) dei procedimenti civili in Italia: offerta, domanda o rito?*, in *Rivista di politica economica*, IX-X, 2007.

[2] We must not forget, M. CAPPELLETTI e B. GARTH, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report,* in M. CAPPELLETTI (ed.), *Access to Justice*, 1978, vol. I, p. 3.

The amicable management of the disputes, that does not contemplate the delegation of power to decide to the arbitrators, is particularly desirable in international trade, as the business relationship is, given the nature of the involved interests, congenial to alternative voluntary conciliation.

International companies face issues related to the language, the distance, the choice of applicable law, the guarantees for performance, the highly specific investments. The business relationship relies on a common language, a mostly electronic communication, a content of the contract to be drawn up in detail and according to the enterprises' actual needs (tailor made), the usages, customs, general principles, standard terms, guarantee payment instruments whose common discipline is recalled by the contract (see the Uniform Customs and Practice for Documentary Credits and Standby Letters of Credit).

The relation relies, as it is natural and appropriate, in an experience in which the construction of an agreement is tailored to the interests of companies. Mutual trust (confidence), openness and courage, dynamism, are very intensive needs. In particular, what drives the companies towards internationalization is the interest in the business, but also the ability to overcome the legal dimension as well as the local economy in which and from which the companies feel safe.

We can immediately realize that these same elements are also the elective profiles in the mediation experience. It's not a mere coincidence, in fact, that a tailor-made agreement matches the ability to face negotiations without delegation to the law, while the attitude of trust and collaboration show the ability to dialogue, to manage the long term relationship and changing circumstances together with adding flexibility.

All these are qualities that show a sensitivity toward solutions which are not derived from the protection of the right by the law, but from the relation itself and from the awareness about the reasons of the conflict and that rely less on legal logic and more on the economic one[3].

Unlike litigation, where typical remedies are used in all the diverse areas of conflict, the mediation process solutions are as broad and atypical as it is the extension of the will of the people involved. So wide is the area of possible remedies to the crisis of the relation, as wide is the fantasy in negotiation and entrepreneurial creativity.

If the ADR models are certainly compatible with the international dimension of the relationship, they are even more suitable for the interests of the parties. The practice of mediation is surely influenced by the nature of the relationship at the origin of the conflict, since the process is in continuity with it and aims at using tools and answers that are able to satisfy the interests involved in the relationship.

[3] We already know that justice and economy are considered to much far on a high ground of problems, see M. BIANCO-S. ROSSI, *Giustizia ed economia: due mondi separati*, in *S. Rossi, Controtempo. L'Italia nella crisi mondiale*, Laterza, 2009.

However, it seems that the use of mediation, which is to say the technique of direct management of the conflict, is still sporadic, or at least not fully detectable in reality. One might well wonder what is the reason why it is not publicly received as a standard model of litigation management in long term commercial agreements, even if it is clearly characterized by a strong bond with the relationship in crisis, in terms of adaptability, creative potentials, satisfaction of expectations. Maybe because lawyers are still used in designing dispute resolution as a judicial and administered procedure, maybe because other tools still conquer priority in practice, the habit to choose a neutral third party model does not seem to exploit all its potentials.

2. Long term commercial contracts and mediation.

Adaptation and flexibility in the relationship over time becomes an essential responsibility and ability of the parties. Due to the changes in market conditions, the inadequacy of the performance as agreed, the replacement of the persons involved in the contractual relationship, the opportunistic behavior, it is common that the contract enters into a phase of a more or less serious crisis.

The tradition of civil law systems conceived the contract as an instrument of control and governance of the relationship as it presents itself at the time of the closing. Recently, a more conscious openness towards the clauses of renegotiation and adaptation of the original agreement presents a new approach to the problem, a more appropriate culture of the crisis management, based on the ability to understand the causes of the conflict, the way to transform, where possible and desired , the business relationship[4].

Companies and, more specifically, their consultants and lawyers, will need to become aware that trade agreements create relationships exposed to changes, and that the landscape of tools available to them for making flexible contracts - and the relation ready to change - is broader and more varied: if the traditional work on the contract concerns the renegotiation clauses, i.e. the provision of mechanisms for balance, control and contract management, the new frontier becomes that of assisted negotiation or mediation. A plan of business continuity that contemplate a relationship that evolve as time passes[5].

After the emergence of the conflict, in fact, conciliation and other sophisticated tools, not only alternative, but functionally and ontologically far away from court trial, are efficient tools in both situations: in case of a particular interest in the conservation of the contractual relationship, looking for a new balance that will allow the continuation of the relationship where it is really wanted; in case of a solution to close the relation that can be less wasteful.

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[4] F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, 1996; F. MACARIO, *I diritti oltre la legge. Principi e regole nel nuovo diritto dei contratti*, in *Dem. dir.*, 1997, 1, p. 149; V. ROPPO, *From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?*, in *Eur. Rev. Contract Law*, 2009, p. 304.

[5] These issues are treated in a forthcoming book, P. LUCARELLI-L. RISTORI, *Il governo del cambiamento nei contratti commerciali di durata. Crisi di cooperazione e metodi negoziali di soluzione.*

In both cases the amicable approach has an intrinsic value that comes out as follows: a reflection that does not end in the evaluation of the legal case, which gives no guarantee to the economic interests, but tries to aim at the needs of the enterprise. The area of possible solutions in the field of amicable remedies to contractual crisis, is as vast as the ability to invent the solution and not at all limited to the typical judicial remedies[6].

3. Beyond the solution: the practice of mediation as a lever for the expansion of economic relationships through the responsible and productive behavior.

The parties, instead of delegating to others the solution of the problem, maintain in mediation an active role; either in case they decide to destroy the relationship, or to rebuilt it with a new agreement. The solution really belongs to the parties, they shape it themselves in order to satisfy their needs; if found, it is therefore a solution that is much more likely to be respected by them.

It seems important, however, to emphasize an aspect regardless of the outcome of mediation. Even if they do not settle the dispute, the parties derive benefits from a serious and deep confrontation, aware about the problems of the relationship. A mediation of high quality, in fact, allows the parties to acquire the skills, even if the conflict proves to be not apt to amicable settlement.

The first result that can be achieved with the help of the mediator is the ability to analyze the conflict and the role of the parties in it. By sitting at the mediation table, in fact, parties are obliged to face their dispute having explored the reasons, evaluated the relationship, identified the terms of a continuation or of a closure. Such an obviously reflective approach is clearly distant from a passive attitude pending the decision of heteronomous court. The practice of mediation then moves the business practices and behaviors toward conscious decisions which are thought out in relation to the causes and effects of the crisis. At the same time, and this, for the reasons mentioned above, is of particular interests in the context of international trade relationships, this method, is giving companies the instruments for overcoming conflicts, especially in long-term relationships, and reduces the problems that arises with the application of the contractual clause of applicable law to the business agreements: as a matter of fact, law becomes the last resort, the residual rule in case the path of negotiation turns out to be sterile and inadequate.

The second skill that can be enhanced with the help of mediation is the opportunity for rethinking about procedures, internal organization, management of litigation. Facilitating a mature and conscious management of the conflict both within and outside the company, can only promote a process of gradual empowerment within the organization: a constructive dialogue about the responsibilities within the company, the practice of anticipation and prevention of possible causes of the crisis.

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[6] F.P. LUISO, *La conciliazione nel quadro della tutela dei diritti*, in *Riv. trim. dir. proc. civ.,* 2004, p. 1203.

It seems adequate to define the ability as a *relational intelligence:* manage the autonomy, the differences of views, needs and interests in relation to partners and stakeholders. Mature and ready entrepreneurs thus become able to take initiatives not relying only to the state as a sort of legal guardian and protector[7]. Relational intelligence means the ability to manage the business relationship, but also the possible crisis of the same, leading the company in international relations and in its own growth.

4. Arbitration or mediation? A client's interest oriented answer.

Though the practice of mediation enhances the business management, as a leverage and growth of firms, the providers of alternative dispute resolution run a very low number of disputes arising from international trade (except for special cases, see the contracts on e-bay), even if they are providers which handle a large number of domestic conciliation (see U.S. agencies).

We try to read that practice from a different point of view, companies are not very interested in administered mediation procedures: companies know and practice ADR, but they usually do not settle cross-border disputes with the help of ADR. We could suggest the following reasons: the number of international disputes is very low; the majority of trade disputes aren't solved by public or private providers through mediation services; international disputes are handled mainly by arbitration and national courts; disputes not handled by national courts and arbitration panels are solved privately or by *ad hoc* procedures. The first explanation is improbable, the second and the third are obvious, the fourth is plausible.

Private negotiation - with the help of a neutral - is one of the two ADR procedures that was the object of a new regulation by the International Chamber of Commerce: the new *Arbitration and ADR Rules.* The ICC is now linking its arbitration and mediation practices, described in the introduction as "two discrete but complementary dispute resolution procedures"[8]. The Appendix XIV of the Rules (Case Management Techniques) expresses very clearly that complementarity:

"The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.
b) Identifying issues can be resolved by agreement between the parties or their experts.

(…)

[7] See, V. G. COSI, *Invece di giudicare. Scritti sulla mediazione*, Milano, 2007, p. 2.
[8] See also "*Principles of Transnational Civil Procedure*", *American Law Institute* and *Unidroit* (2006).

h) Settlement of Disputes:
(i) Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules;
(Ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the disputes, provided that every effort is made to ensure that any subsequent award is enforceable at law".

The text of the Rules clearly indicates the intent to encourage companies to choose mediation, assigning to the arbitration panel the task to move the parties toward an informed choice. The benefits that companies can draw from independent and friendly accommodation of the dispute are, thus, ***inside*** the procedure of arbitration, the one that is traditionally recognized as the most appropriate remedy to cross-border trade disputes. Arbitrators who wonder about the preservation of their role and give the companies the option for a different type of settlement, mediation, can only contribute to the development of relational intelligence, that brings to the growth of enterprises.
This assumes, however, that arbitrators must be ready to have a different approach to their role as conflict professionals, and to enlarge their expertise with knowledge about different methods of dispute resolution to adequately inform and assist the parties. A behavior which is first of all oriented to the enterprises' interest, the development of their autonomy and relational intelligence.
An uphill climb, perhaps, to a new culture of conflict management, but it's about time[9].

[9] Using the same words, in a very interesting blog, Michael McIlwrath, General Electric Company, *Anti-Arbitration: It's Not Hard to Mediate During Arbitral Proceedings*, at the page http://kluwerarbitrationblog.com/blog/2011/09/13/anti-arbitration-it%e2%80%99s-not-hard-to-mediate-during-arbitral-proceedings/

Paper n. 6

MEDIATING COMMERCIAL CASES IN U.S. MUNICIPAL COURTS: A CASE FOR TRANSFORMATIVE MEDIATION

by

Jody B. Miller

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MEDIATING COMMERCIAL CASES IN U.S. MUNICIPAL COURTS: A CASE FOR TRANSFORMATIVE MEDIATION

by

Jody B. Miller ♦

Abstract:

Transformative mediation for commercial disputes provides courts, attorneys and parties a process that most closely follows self-determination, a core principle of mediation. It also provides unique benefits for stakeholders that include a process that is efficient and effective since it allows attorneys and parties to address the most salient issues of the conflict in the order that they choose to, while supporting their conversation. For courts, transformative mediation offers the chance for sustainable solutions and when no solution is found, the issues before the court are narrower because the parties are clearer and more focused, which increases efficiency in the court process. Lastly, transformative mediation does not get in the way of access to justice because parties may choose to go directly to court because they decide that they need the court to make a decision. Because transformative mediation's goals are to help people become clearer, more decisive and consider the other party's perspective, it does not divorce the interaction from the specific issues before the court. Rather it fosters a conversation that leads to benefits for all involved.

Keywords: Mediation, alternative dispute resolution, commercial dispute resolution, transformative mediation.

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Do all courts have this?

Commercial court mediation participant after a transformative mediation

Mediation, specifically transformative mediation, in court connected commercial cases offers enormous benefits for courts, attorneys and parties that remain consistent with the core principle of mediation – self-determination. At the same time it offers opportunities for sustainable solutions and reducing access to justice barriers. Despite the differing goals of courts, such as administrative efficiency and settlement, and those of transformative mediation, namely helping parties change the way they relate to each other, transformative mediation offers clear benefits over other models of mediation because it maintains the integrity and intention of self-determination, the core principle of mediation, while providing a true alternative dispute resolution process.

One criticism of mediation has been that models such as evaluative and facilitative mediation, common in the commercial context, are not much different than the adjudication process; therefore they do not provide a genuinely different process at all. Mediation can seem just like the court process when mediators focus on settlement; there isn't any difference in the experience of the parties at all. By contrast, transformative mediation is very likely to benefit and meet the various goals of all involved: courts, attorneys and parties. Recognizing that key stakeholders do have distinct goals, and identifying how mediation is likely to meet these different goals, strengthens the case for transformative mediation.

Lastly, transformative mediation reduces access to justice barriers in commercial cases by allowing parties, with their attorneys, to decide whether or not their goals have been reached and if not, to proceed directly to the judge. One of the criticisms of the growth of mediation in the court context is that it reduces the ability for parties to access court because cases are referred directly to mediation or other alternative dispute resolution processes. The inclusion of mediation in the court context reduces, if not altogether removes parties' choices about whether or not they want the court to hear the case, all for the purpose of efficiency and settlement. Today, the Mediation Center of Dutchess County, a community mediation center that solely provides mediation from the transformative framework, has grappled with and successfully addressed these very issues over the past 10 years as it offers commercial mediation in 13 town, village, and city courts.

What Commercial Parties Want

First, transformative mediation maintains the purpose of mediation, to be an altogether different process than that of the court, where self-determination is front and center. This is as important in commercial cases as any other. A common view most mediators adhere to when describing their mediation practice (regardless of model) is that mediation allows parties to come to their own self-determined solutions. However, research of mediators' actual practices has shown a

much different picture, one in which the foundational value of party self-determination was largely being ignored in favor of settlement [1]. One study found that in most mediation arenas mediators wanted to find a

> "substantive outcome that would result in a deal. They orient their activities toward concrete problem solving and frequently make suggestions on matters of substance…using their expertise as the touchstone of their efforts at persuasion and influence. [They] are strongly inclined to believe that without their substantive and procedural know-how, the parties would flounder and settlement would be elusive." [2]

This very experience was born out in commercial mediation cases at the Mediation Center of Dutchess County and was a key factor in the Center's change to transformative mediation. Mediators assessed the strengths and weaknesses of cases, shutting down communication between parties, focusing on settlements while saying they were allowing for self -determination and choice. Although mediators said they were impartial, their practices in the mediation room were heavily focused on making decisions for the parties about the topics for discussion, including what was relevant and what wasn't. Discussions were shaped for a settlement outcome effectively taking choices away from parties.[3] Choice is central to self-determination.

Why is self-determination important in commercial cases at all? A common view of commercial mediation is that the money or the dollar amount is the most important element of the case, privileging it over anything else. However, this assumption is incorrect, because the dollar amount of the case cannot be divorced from the social interaction of the conflict that brought it to court.[4] Self-determination allows parties and their attorneys to decide not only the outcome, but the content and process that shapes the outcome. Because transformative mediation supports parties as they deliberate, make choices and consider other perspectives, they themselves determine what to prioritize and discuss. More often than not, they discuss the situation that brought them to court, the way in which they were affected and how that relates to the dollar amount of the claim. In essence they are completely in charge of the mediation session's content and process. The Mediation Center's experience consistently bears out that the conflict and negative interaction – even between parties who have no other existing relationship than a brief commercial one – is integral to the way that the case unfolds, including whether or not it settles.

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[1] ROBERT A. BARUCH BUSH, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades,* in *North Dakota Law Review*, Vol. 20, 2009, 124-126.

[2] DEBORAH KOLB & KENNETH KRESSEL, *Conclusion: The Realities of Making Talk Work,* in *When Talk Works: Profiles Of Mediators* 459, 468-470.

[3] JODY B. MILLER, *Choosing to Change: Transitioning to the Transformative Model in a Community Mediation Center* in *Transformative Mediation: A Sourcebook, Resources for Conflict Intervention Practitioners and Programs*, 189 (J. Folger, R. Bush, & D. Della Noce, eds., 2010).

[4] ROBERT A. BARUCH BUSH, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades, North Dakota Law Review* Vol. 20, 2009, 143.

Litigated commercial cases begin as other types of cases do, with an unresolved conflict that escalates to one of the few resolution options available to parties: action in court. Although in the context of a business dispute that lands in a specific court due to the type and amount of the claim, the interaction between parties has likely become negative and destructive; despite one or both parties' attempts to address the issue by talking or writing to the other, each alone was not able to come to decisions that would fully address the situation. How the parties relate to each other is central to a commercial dispute; when anger, distrust, confusion, fear, and suspicion –typical conflict experiences – enter into the situation, it is likely that without one or both of the parties moving out of those states of being, they will be unable to reach a resolution. The venue of court does not erase the parties' experience of the conflict, which without interactional change can further entrench them. People cannot be forced to think more clearly, make decisions or communicate more effectively -- key behaviors in productive social interaction.[5]

Transformative mediation is well suited for commercial cases since it affords parties a forum to move out of the negative, deconstructive experience that led to the escalation of the conflict, providing them with the ability to articulate the experience and its relation to the claim before the court. The idea that commercial cases are best addressed with a focus on the dollar amount misunderstands why cases make their way to court in the first place: because conflict has become negative and destructive, affecting the way the parties relate to each other, and leaving them few if any other options to resolve it.

What Courts Want

The courts goals, along with those of attorneys, although different from transformative mediation's goals, are not mutually exclusive. Attorneys gain a more expansive understanding of their client's situation and can attend to the most salient issues that they believe need to be addressed. [6]

> *Two attorneys and their clients were in court disputing the final bill for plumbing services provided to a restaurant. Despite several attempts to fix the drainage lines at the restaurant, the owners ultimately had to hire another plumber to complete the job. The plumber explained his assessment of the problem and his good faith attempts to repair it. The respondent's attorney, speaking to the complainant and his attorney, explained the depth of the problem that the complainant was unable to fix. The system was fixed with no further problem when his client hired and paid another plumber. The attorney, clearly surprised by how the mediation unfolded, ended with, "This is the most information I've ever heard in a mediation." The complainant's attorney, after*

[5] BUSH AND FOLGER, *North Dakota Law Review.*

[6] PETER MILLER & ROBERT A. BARUCH BUSH, *Transformative Mediation and Lawyers: Insights from Practice and Theory*, in *Transformative Mediation: A Sourcebook, Resources For Conflict Intervention Practitioners And Programs*, 211,(J. Folger, R. Bush, & D. Della Noce, eds., 2010).

listening to his own client and the respondent's client understood the case differently than before the conversation, and invited the other attorney to go outside, certain they could work something out.

For courts, transformative mediation provides unique benefits. First, because parties are able to articulate their experience for themselves and to each other, the result is often clearer decision-making that leads to more sustainable settlements. [7] When mediators focus on communication, deliberation and decision making without the agenda for settlement, parties and their attorneys are free to set their own agenda -- which may in fact be settlement – and the mediator can help them achieve that goal. Because it is their goal and not the mediator's, solutions found belong to the parties alone, increasing the likelihood that they are authentic and therefore sustainable. Although courts seek settlements and may not have the same interest in sustainability per se, if a settlement breaks down or is breached, it is likely that parties will again need court intervention to enter and enforce a judgment, once again reiterating the importance of a true process of self-determination.

Additionally, courts often report that even when a settlement is not reached, the remaining issues before the court are narrower than in those cases where no mediation has been held. Parties themselves have sorted through and addressed not only the tangible issues before the court, but also the interaction between them as they discuss what has taken place. Mediation within this context provides another opportunity for the interaction to change to more positive and constructive, even when they continue to disagree. As a result of being clearer about the meaning of the conflict for themselves[8] and understanding the other party's position, both parties know "where they stand" within the conflict, which translates into a more streamlined case for the court. Lastly, settlements are reached in almost as many cases as in other models of mediation, therefore still effectively meeting the court's primary goals that include processing of cases efficiently.

A complex commercial case pending in Federal court that had been in litigation for 8 years was referred to mediation. The plaintiff and his attorney were in New York as was the defendant's attorney, while the defendants were in California. All had agreed to mediate prior to the next step in the case, which was to file motions and appear in court in California. At the mediation, the attorneys discussed the status of the case at the time, including each of their strategies going forward…the plaintiff attended but did not speak. During the conversation, crucial new information was revealed, surprising the plaintiff's attorney, almost immediately making a difference in his strategy. The significance of this new information led to discussion with his client, a call to the defendant's client in California and within 2 hours they had a settlement.

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[7] JOSEPH P. FOLGER, *Transformative Mediation and the Courts: A Glimpse at Programs and Practice* in *Transformative Mediation: A Sourcebook, Resources for Conflict Intervention Practitioners and Programs*, 173, (J. Folger, R. Bush, & D. Della Noce, eds.,2010).

[8] JOSEPH P. FOLGER, *Transformative Mediation and the Courts: A Glimpse at Programs and Practice* in *Transformative Mediation: A Sourcebook, Resources For Conflict Intervention Practitioners And Programs*, 173, (J. Folger, R. Bush, & D. Della Noce, eds.,2010).

Making the Choice of ADR More of a Choice

Lastly, transformative mediation in commercial cases increases choice for parties about whether or not to access the court process. With the increase of alternative dispute resolution in the court context and the patchwork of statutes that regulate it from state to state, the likelihood that a case will be referred to an ADR process is high. Because courts have a stake in efficiently settling cases, choice to participate in an ADR process is reduced if available at all. This may be the area where there is the most tension between the court's goals and transformative mediation's goals. Keeping choices in the parties' hands is paramount, including whether or not to participate as well as choices about how the conversation unfolds in the room. Although mediation is voluntary in New York community centers, the needs of the court weigh heavily on parties and on centers that provide mediation. Parties rarely feel as though they have a choice when a judge refers them to mediation; the voluntariness of the process is squarely on the mediators' shoulders to convey to parties. And there have been many times that parties want to go directly to court, without having any conversation with each other at all. It is not uncommon for parties to believe they have met their obligation to mediation by meeting with the mediators for a brief overview of the process, and decide not to move ahead – only to be sent back by the court to "try harder" to reach a resolution.

One way that the Mediation Center has balanced the requirements of the courts with party choice is to make very clear how the mediation process works with commercial mediation in court. Explaining that the judge refers all cases to mediation to encourage parties to try the process; that it is up to the parties to decide if and how they want to engage in mediation and that their case is still pending in court, helps to mitigate the tension between these two worlds. Ensuring parties can access the court, along with referral to mediation or other ADR process, removes the concern that ADR is encroaching on the ability of parties to access justice.

Conclusion

Transformative mediation for commercial cases ultimately provides the benefits that courts, attorneys and clients seek when they engage in a mediation process. It provides a context for parties to address the conflict that is tied to the dollar amount of the claim. It also reduces concerns about access to justice since it allows for parties to make choices, even when those choices are limited, within the court context. Transformative mediation provides attorneys an opportunity to represent their clients in the way that they both deem appropriate. This can allow for as much or as little information to be shared, with the potential to learn more about the situation and represent their clients more effectively. For courts, it can produce sustainable settlements that do not need further court intervention through enforcement because parties themselves have reached decisions without coercive tactics. Furthermore, when no settlement is reached, the issues before the court are narrower thereby reducing the scope and

time necessary to address the case. Preserving the core value of self-determination, as well as providing a multitude of advantages for all stakeholders involved, makes transformative mediation well suited for litigated commercial cases.

Paper n. 7

THE RELATION BETWEEN COURTS AND ARBITRATION: SUPPORT OR HOSTILITY

by

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THE RELATION BETWEEN COURTS AND ARBITRATION: SUPPORT OR HOSTILITY

by

Luca G. Radicati di Brozolo♦

Abstract:

In an ideal world mediation is almost invariably the preferable method for the settlement of disputes, even compared to arbitration. However, there are many situations where a settlement, whether as a result of mediation, of negotiations or by whatever other means, is simply not possible for a variety of objective or subjective reasons, and recourse to a traditional dispute settlement mechanism becomes unavoidable. Whatever the problems of arbitration in the vast majority of cases it is still the only viable dispute settlement mechanism for international transactions. The differences in State attitudes toward arbitration may lead States and their courts to engage in behaviors that other States, as well as practitioners and commentators who follow the more prevalent views on the law and practice of arbitration, may view as unjustified interferences with the arbitral process. Despite the crucial role of the New York Convention, arbitration is still not subject to a far reaching mandatory harmonization and remains unregulated at the international level. States accordingly retain a broad freedom to favor it but, conversely, also to treat it with distrust. This could leave arbitration in a state of anarchy. Nonetheless, over the past decades there has been a spontaneous evolution towards shared values and approaches in a large number of States. This has led to the emergence of a sort of common law of arbitration.

Keywords: Arbitration; national laws; New York Convention.

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Unlike most other presentations at this conference[1], this one will not focus on mediation or other alternative dispute resolution methods, but on arbitration. In an ideal world mediation is almost invariably the preferable method for the settlement of disputes, even compared to arbitration. It is cheaper, faster and especially less contentious than court litigation and arbitration and can have significant benefits for the relation between the parties. Today there is an increasing understanding of the advantages of mediation and a move towards it, in some systems even supported by the legislation.

However, there are many situations where a settlement, whether as a result of mediation, of negotiations or by whatever other means, is simply not possible for a variety of objective or subjective reasons, and recourse to a traditional dispute settlement mechanism becomes unavoidable. Whatever the problems of arbitration (increasing complexity, contentiousness, duration, costs etc), in the vast majority of cases it is still the only viable dispute settlement mechanism for international transactions. In contrast to court litigation, that is almost without exception heavily influenced by national peculiarities difficult to understand or to deal with for foreigners, arbitration provides a more neutral venue than national courts, allows parties to tailor the proceedings to their needs and operates with rules and procedures that are now to a large extent harmonized.

Of course arbitration is not suited for all kinds of disputes, in particular small disputes, and in some cases its comparative advantages over court litigation may be less significant, such as in straightforward disputes in a domestic context or even when the parties come from homogeneous legal environments or have sufficient familiarity with and trust in the court system that will ultimately exercise jurisdiction. Save in these situations, and in those where a party has sufficient bargaining power to impose its own courts (and has a relative certainty that such a forum selection will be enforceable), will generally be the dispute settlement mechanism that should be very seriously considered by anybody engaging in international business transactions, including those involving China.

Arbitration has now become almost a transnational system of justice. This is not only because private parties systematically have recourse to it, but also because States recognize the importance of arbitration in the interests of promoting international business transactions and to a greater or lesser extent tend to favor it, as is witnessed by the almost universal acceptance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 9, 1958.

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[1] This paper is a revised version of a presentation given at the conference on "Alternative Dispute Resolution Models in China and Western Countries Practice" organized in Pisa by Scuola Superiore Anna on November 25-26, 2011. For a more extensive discussion by this author of the issues addressed in this paper (with comprehensive references) see L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference with international arbitration by national courts of the seat in the aftermath of* Saipem v. Bangladesh, in *Liber Amicorum B. Cremades*, La Ley, 2010, p. 993; L.G. RADICATI DI BROZOLO, *The impact of national law and courts on international commercial arbitration: mythology, physiology, pathology, remedies and trends*, (2011) *Paris J. of Int'l Arbitration/Cahiers de l'Arbitrage* 663; L.G. RADICATI DI BROZOLO, *Arbitration and the draft revised Brussels I Regulation: Seeds of home country control and of harmonization?*, (2011) *J. of Private Int'l Law* 423; L.G. RADICATI DI BROZOLO, *The control system of arbitral awards: A pro-arbitration critique of Michael Reisman's 'Normative architecture of international commercial arbitration'*, *ICCA Congress Series No. 16, Proceedings of the ICCA 50 Conference, Geneva, May 2011*, forthcoming.

There remains nonetheless a tension between arbitration and domestic legal systems. Non-experts frequently misjudge the nature of the relation between international arbitration and national law. The role of national law and of national courts, particularly those of the seat of the arbitration, in relation to many important aspects of the arbitration is often underestimated, and even disregarded altogether or, instead, overestimated. In many circumstances the influence of national systems is perfectly normal and to be expected, and at times even to be welcomed, whilst at other times it may appear unwarranted and disruptive. An understanding of these aspects is useful to assess the scope of party autonomy in this field and how best parties to an international arbitration can take advantage of it, and at the same time to identify to some of the pitfalls and to the possible consequences and remedies.

Although a favorable and liberal attitude towards arbitration is now widespread, it is by no means universal. There remain States that still adopt fairly restrictive approaches and even interfere with the process in various ways. These include some that are parties to the New York Convention.

The differences in State attitudes towards arbitration are not of themselves surprising. They are a consequence of the lack of harmonization of the law of arbitration at the international level. The New York Convention, which is the basis of the system of international arbitration, governs only two, albeit crucial, elements of arbitration, i.e. the enforcement of arbitration agreements and of arbitral awards (in the latter case when they circulate beyond the frontiers of the State of the arbitral seat). Even in relation to these two aspects the Convention is very far from imposing a harmonized regime, since many of the concepts which are crucial to its application are not spelled out in detail and remain susceptible to different interpretations and applications. Additionally, the Convention does not provide for a judicial or other mechanism capable of guaranteeing its harmonized application.

All other matters not touched by the New York Convention, from the appointment of the arbitral tribunal and standards of arbitrator independence to the grounds for setting aside and the nature of the review of arbitral awards, not to mention more abstruse issues like the binding effect of the arbitration agreement to non-signatories or its effects in relation to multiple contracts, are therefore completely unharmonized at international level. Consequently States are free to govern all those matters as they please. The main instrument which attempts to bring about a certain level of harmonization is the Uncitral Model Law on International Arbitration, which however is not binding and moreover is silent on many matters.

In spite of its limited scope and of the fact that that was not its purpose, the Convention has had an extremely significant impact on the development and harmonization of the law of arbitration in the Contracting States. These have been essentially the product of the competition between legal systems unleashed by the Convention. The obligation imposed on Contracting States to recognize agreements for arbitration abroad in combination with the obligation to enforce foreign awards has a

very powerful effect. It allows parties to commercial transactions to opt out of a given legal system and to opt into the arbitration system of their choice simply by designating the seat of the arbitration, whilst at the same time allowing them to obtain the desired effects within the legal system they opted out of by means of the guaranteed recognition of the ensuing award.

It is largely as a consequence of this that many States that initially adopted a restrictive and interventionist stance in matters of arbitration have been induced to evolve towards more liberalized regimes. This has resulted in a broad convergence between the arbitration regimes of many diverse legal systems, and to the very broad acceptance of the role of party autonomy and of the wisdom of limiting court control over arbitral proceedings and awards. As a byproduct, most States now consider the seat of the arbitration as the connecting factor between an arbitration and their legal systems and recognize the freedom of the parties to make this choice.

This has not sufficed to bring about a complete harmonization. There still exist divergences, at times significant ones, between different legal systems even as to how they apply apparently similar rules, including those of the New York Convention, as well as in their overall attitude towards arbitration. Differences exist also amongst countries considered to have the most arbitration-friendly regimes.

As mentioned, certain countries have remained unaffected by the evolution of arbitration law. Those countries sometimes adopt behaviors perceived as prejudicial to arbitration and at odds with mainstream solutions and which sometimes are, or appear to be, in violation of the New York Convention. Regrettable as it may be, the fact that some countries are less favorable to arbitration, and at times are hostile to it, is understandable. After all, in many now arbitration-friendly countries the approach was less open in the recent past. Progress in this direction has required a change in culture and more often than not the intervention of the legislator and an open attitude of the courts, coupled with an understanding of the advantages that furthering arbitration can bring to the development of business relations and, even more selfishly, to the local legal services industry. These factors do not always occur at the same time in all countries, and the differences in local culture, traditions, economy and exposure to international transactions easily explain why some countries have been reluctant or slower to embrace the prevailing trends. However, it is encouraging that, given the right climate, progress can occur fast. A case in point is obviously Latin America and, foremost amongst Latin American countries, Brazil, which until not long ago was perceived as hostile to arbitration but has readily adopted a completely different attitude. Similar examples exist in Asia.

The differences in State attitudes toward arbitration may lead States and their courts to engage in behaviors that other States, as well as practitioners and commentators who follow the more prevalent views on the law and practice of arbitration, may view as unjustified interferences with the

arbitral process. Depending on the circumstances and the perspective, almost any type of intervention by national courts in relation to arbitration may be seen as an interference.

This is the case when a court dismisses an arbitration exception and exercises jurisdiction on the merits of a dispute alleged to be covered by an arbitration agreement on grounds relating to the existence, validity or form of the arbitration agreement or to its effects in the case at hand or to the arbitrability of the subject matter. This is also the case when a court issues an injunction against the parties or the arbitrators prohibiting the holding or the continuation of the proceedings or adopts a measure removing the arbitrators or when it declares an award null and void or inexistent. It is also the case when a court refuses to recognize or enforce an award.

Such decisions can obviously be based on a variety of reasons, such as the inexistence or invalidity of the arbitration agreement, the malfunctioning of the proceedings, arbitrator bias, conflict with fundamental interests of the State whose court issues the measures and so on, violation of due process, violation of public policy and so on. The reason why in some circumstances they may be considered unwarranted is that they rest on interpretations and applications of the relevant notions which depart from more broadly accepted ones. However, while they may be viewed by some as inappropriately interfering with arbitration, and can give rise to problematic situations, such decisions are not necessarily attributable to a preconceived anti-arbitration attitude or characterized as illegal.

Given the lack of harmonization of arbitration law, of generally accepted rules on the allocation between States and their courts of jurisdiction in relation to arbitration and to arbitration related disputes and of an international or supervisory jurisdiction in such matters, it is to some extent inevitable that there may be different outcomes, and conflicting assessments as to the acceptability of any given solution, between the courts of different States, between courts and arbitrators or between courts and arbitral institutions. These differences can be the product of genuine divergences of views.

There will also unavoidably be occasions where State courts exploit their prerogatives in relation to an arbitration in ways and for reasons that are not widely shared and that may even be difficult to classify as bona fide. Likewise, given the opportunity, litigants will attempt to leverage on these divergences tactically by seeking to obtain from State courts measures favorable to them, even if they appear to run counter to what could be viewed as arbitration orthodoxy.

In the face of such differing attitudes, the question is therefore what the courts, the parties and the arbitrators may or should do when faced with potential conflicts between court proceedings and arbitration or more simply with the prospect of a perceived interference or acceptable decision. The answer is very much influenced by the lack of overarching international obligations (save the two laid down by the New York Convention) and of mechanisms capable of ensuring a uniform and coordinated application of the rules and, more generally, of an international control system of international arbitration. As a result of this, States are largely free to deal with arbitration as they wish.

Consequently, at the end of the day the parties and the arbitrators will be guided essentially by considerations pertaining to whether their actions may be upheld or hampered by the legal systems that are relevant from time to time.

Courts have no international obligation to defer to the decisions of the courts of other countries, including those of the seat, in matters of arbitration, be they relating to the functioning of the arbitration or even to to the validity of the award. No such obligation derives from general international law or from the New York Convention or, normally, from multilateral or bilateral conventions. Even within the European Union there is no such obligation, since Regulation (EC) 41/2001 (the Brussels I Regulation) does not apply to decisions relating to arbitration.

Even in relation to the decisions of courts relating to awards, as I have discussed in some depth elsewhere[2], the position according to which States should refuse to enforce awards annulled at the seat is not supported by any legal or policy reason, and is not contradicted by Article V(1)(e) of the New York Convention.

There are weighty grounds to hold that States ought to recognize foreign annulments, and thereby refuse to enforce awards vacated abroad, only when the grounds for the annulment are in line with those for refusal of recognition of Article V of the New York Convention, obviously excluding Article V(1)(e), or at most with those foreseen by the law of the enforcing State. There is particular merit in not recognizing foreign annulments that are the result of untoward actions in the country of the annulment. In this vein it has been convincingly argued that courts other than those of the seat have a free-standing obligation under the New York Convention to assess issues of validity and scope of arbitration agreements and to resolve these issues consistently with the Convention, irrespective of the determinations of the court of the seat, which would have to be disregarded if they are incorrect, or at least blatantly incorrect.

The same approach applies to other foreign decisions that the courts of a given State may view as unjustifiably interfering with arbitration. It can also be used to uphold the legitimacy of other types of counter-interventions by State courts aimed at reacting against interferences with arbitration by the courts of other States, such as anti-suit injunctions in support of arbitration.

Arbitrators too may on some occasions (usually with the support of at least one of the parties) view as unjustified certain decisions or orders of State courts, such as those seeking to revoke their authority or in some way attempting to hinder the normal course of the arbitration. In such circumstances arbitrators may well feel that they are acting in line with the will of the parties, perhaps with the decisions of the institution running the arbitration, and with generally accepted principles governing international arbitrations. In other words, they will tend to consider that they have nothing to reproach themselves for and that it is the court that is failing to act correctly.

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2 See L.G. RADICATI DI BROZOLO, *The control system of arbitral awards*, *op. cit.*

Since, unlike courts, arbitrators are not the organs of any State, they owe their primary allegiance to the parties from whom they have received the mandate to settle their dispute and who would normally expect them to go on with their task regardless of the pressure of the State that recourse to arbitration was presumably intended to avoid in the first place. From a purely practical point of view, in many cases arbitrators may be in a position to disregard the orders of the court which they view as unjustified or outright illegal. The question thus is whether they should do so.

The answer may be partly different depending on whether the courts from which the allegedly illegal interference emanates are those of the place of arbitration or of another country. If the interference comes from the courts of a country other than the seat of the arbitration, there seems to be no cogent reason why the arbitrators should take it into consideration, save for the practical matters alluded to below. Although there is no generally applicable rule granting supervisory jurisdiction over arbitration only to the courts of the seat, this principle is by now very consistently followed by States, and attempts by other States to exercise their jurisdiction in respect of arbitrations are viewed with serious skepticism.

The situation is more complex when the interference comes from the courts of the seat. Although, as mentioned, arbitrators are not the organs of any State, including the one of the seat, it could be said that in addition to their allegiance to the will of the parties they owe a certain allegiance also to the law of the seat. Under normal circumstances, the legal system of the seat is the one that is considered to provide the framework of the arbitration and the one whose courts have supervisory jurisdiction over it. And indeed it is fairly generally accepted that, when the courts of that country operate within the "normal" boundaries of their powers, the arbitrators should abide by their decisions. This is also often the expectation of the parties.

One could thus say that the arbitrators' power to disregard decisions of the courts of the arbitral seat should not lightly be presumed. The problem is obviously whether this deference should be maintained also when the intervention of the courts exceeds the boundaries of "normality", in other words when it is illegal, or perceived as such. The answer to this question should in principle be negative. The difficulty, however, lies in establishing the standards according to which the intervention of the State court is to be characterized as illegal.

The first source to look to in matters of arbitration, the will of the parties, will usually be of scarce assistance because the parties will not be in agreement, given that the court's intervention is likely to have been provoked by one of them to the detriment of the other. The other beacon, i.e. the law of the seat, will be equally unavailing because according to that law the intervention will by definition be legal. Not much can probably be made of the expectations of the parties in choosing the

seat.[3] It is implausible that the choice of a given seat can be interpreted as a full acceptance of whatever decision of the local courts, irrespective of its terms and of its impact on the arbitration[4].

One is hence left with what could be termed general principles of international arbitration. The point is that such principles are not easy to identify with certainty, given the above-mentioned disparity of approaches to this subject matter. Moreover, whatever principles might be held to exist could be classified as simply the expression of the most arbitration-friendly cultures, and thus of one of the possible conceptions of arbitration, and therefore not susceptible of universal recognition[5]. Equally delicate is the question of who has the power to decide that the decisions of the national court are illegal under whatever standard is utilized.

In this situation the arbitrators are left largely to their own devices. As mentioned above, they should of course not lightly disregard the decisions of the courts of the seat. On the other hand, neither need they supinely bow to any order or injunction coming from such courts if, by some reasonable standard, they consider it unacceptable. Not surprisingly, there is by now a considerable body of practice that shows that in certain situations arbitrators are prepared to disregard "illegal" or otherwise unacceptable interferences of State courts and to proceed with the arbitration. Amongst the best known cases are Salini v. Ethiopia, Himpurna v. Indonesia, Saipem v. Petrobangla, Hubko v. Wapda, Copel v. UEG and National Grid v. Argentina[6], the first three of which were cases in which the interferences stemmed from the courts of the seat, whilst in the other cases they came from the courts of other countries. In such cases the tribunals invoked a variety of principles and considerations, foremost amongst which the need to accord proper deference to the will of the parties and the need for the arbitrators to fulfill their mandate, as well as the obligations deriving from the New York Convention.

There are, however, also practical considerations. Arbitrators faced with a court order they may consider unwarranted will have to take carefully into account its actual consequences and territorial and personal reach, regardless of whether the interference comes from the courts of the seat or from those of another country. In some cases, continuing with the arbitration or otherwise disregarding the orders of the courts can come at a cost. The arbitrators or their assets or their families may be, or may risk becoming in the future, subject to the jurisdiction of the State whose courts issue the measures. Proceeding in contempt of the measures could have dire consequences for the arbitrators, or indeed for some of the parties or their counsel. Moreover, the practical functioning of the arbitration may prove

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3 For a discussion of the relevance of party expectation in this context see L.G. RADICATI DI BROZOLO, *The control system of arbitral awards*, *op. cit.*.

4 See note **Errore. Il segnalibro non è definito.** below and corresponding text. and L.G. RADICATI DI BROZOLO, *The control system of arbitral awards*, *op. cit.*, Section D.4(c).

5 For a discussion of this point see L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference*, *op. cit.*, § 32 seq.

6 For a discussion of these cases see E. GAILLARD, *Legal Theory of International Arbitration*, Martinus Nijhoff, 2010, p. 71 seq. and L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference*, *op. cit.*, § 5 seq.

difficult or even impossible, if the tribunal is truncated or if there are obstacles to hearing witnesses or experts, carrying out inspections or collecting the evidence, if some of these actions have to be performed on the territory of the State that issues the measures.

Disregarding the orders of the court can also impact on the fate of the award. This will certainly be unenforceable in the country whose courts are responsible for the interferences. Moreover, if the seat of the arbitration is in that country, the award is likely to be set aside or declared inexistent by its courts, with possible further consequences on its unenforceability in those countries which still adhere to the classic view on the unenforceability of annulled awards.

This in itself need not be a bar to the continuation of the proceedings, because the parties, or at least one of them, may have an interest in an award even if it is unenforceable, for instance simply because of its declaratory effects. Furthermore, although traditionalists may raises eyebrows, the award might be enforceable in other countries despite its annulment. As argued above, where the annulment is "unjustified", this may actually in certain circumstances be the preferable solution.

Arbitrators will therefore have to balance all these elements with care. They should not presume that they are free to act completely outside the boundaries of State law. On the other hand, they are entitled to exercise a measure of good judgment and to depart from court orders that appear seriously flawed when assessed according to sound standards and at odds with the reasonable expectations of the parties and with broadly accepted practices. On yet another plane, the arbitrators cannot be expected to adopt a course of action that creates particular hazards for themselves or for others.

Nowadays perhaps the majority of legal systems tend to favor arbitration and therefore exercise their legislative, adjudicatory and enforcement jurisdiction over international arbitrations in ways which do not unduly interfere with them and are actually supportive of them, although undeniably to different degrees.

In most cases the parties can achieve the full benefit of this evolution by means of a well reflected choice of the seat of the arbitration. That allows them to choose an efficient and arbitration-friendly regime that ideally leaves them all the freedom they need or want, while at the same time being available to provide the necessary support and oversight when needed. If the arbitration only has contacts with countries that subscribe to a liberal vision of arbitration few problems are to be feared.

There are, however, States whose legislation or court practice do not favor arbitration and interfere with the arbitral process in ways which may seem undesirable or even unwarranted. Of course, there is no straight line between acceptable and unacceptable State interventions, since State attitudes in this field are dictated by different visions of arbitration that are for the most part permissible in the absence of internationally mandatory harmonization. Nonetheless, very significant departures of State practice from generally accepted standards can be considered detrimental to the interests of the participants in international business and of international commerce.

As discussed above, a first remedy lies in a type of self-help by other States and by the parties and arbitrators which consists in countering the perceived anti-arbitration measures by disregarding them and not granting them international recognition, as they are entitled to do owing to the lack of any mandatory obligation to recognize foreign decisions in matters of arbitration. Obviously this solution is viable only in limited circumstances. The question, therefore, is what can be done to change this state of things and to bring about a greater level of arbitration friendliness on the part of those countries, in Asia and elsewhere, that are still hostile to arbitration.

In addressing this issue it is worth bearing in mind that what may be perceived as anti-arbitration attitudes do not necessarily stem from an actual anti-arbitration bias. More often than not they are the product of a lack of knowledge of the evolution of the law and practice of arbitration at the international level as well as of a failure to understand the potential benefits of a greater acceptance of arbitration to international commerce. Based on the experience of those countries that now adopt a modern vision of it in their law and practice, the majority of which were far less liberal in their approach to it until not long ago, it is realistic to expect that an evolution towards more pro-arbitration attitudes on the part of States that have not yet embraced such attitudes can occur equally spontaneously. Such a development can be spurred simply by the imitation of foreign models, the emergence of a more sophisticated "culture" of arbitration and the perception that a more open attitude towards arbitration can bring concrete benefits or usefully complement the liberalization of the economy. In this context a very significant role can be played simply by raising the awareness of the importance and benefits of arbitration by means of appropriate educational programs for the judiciary and the legal profession, as well as of the potential users of arbitration.

A further stimulus toward greater respect for arbitration may come from the role of international courts and tribunals. Although, as mentioned above, the underpinnings of the law of arbitration in international law are relatively limited in scope, the case-law from different sources contains interesting threads that may raise the awareness of States of the need to respect arbitration[7]. All the decisions are inspired by the assumption that States are under some form of obligation to respect arbitration, the violation of which may entail international responsibility. The sources of such an obligation are varied, including the protection of private property and the prohibition of expropriation, which flow from the recognition that the right to arbitration has an economic content. Nevertheless, the principal source is naturally the New York Convention. Not even the precise contours of the obligation are easy to apprehend, and presumably only in rare circumstances will it be possible to draw concrete consequences from its violation.

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7 For an analysis of this case law see L.G. RADICATI DI BROZOLO, *The impact of National Law and Courts on International Arbitration*, op. cit. p. 688 ff.

This is also because, owing to the lack of a dispute settlement provision in the New York Convention, essentially the only international venue in which a claim for violation of the New York Convention can be brought is in the context of a dispute based on a bilateral investment treaty and falling under the jurisdiction of the 1965 Washington Convention providing for the International Center for the Settlement of Investment Disputes. However, even in such cases it will not necessarily be easy to show the existence of a violation, since that will usually require proof of an expropriation or of denial of justice, with the added complication that denial of justice is often held to presuppose the exhaustion of local remedies.

Yet, the realization that the obligations flowing from the New York Convention and from other international sources are amenable to a particularly constructive interpretation, and that in some, although limited, circumstances there may even be a form of control of their respect, may have far-reaching implications in terms of furthering the respect for arbitration. In the shorter or longer term it can lead to the development of a broadly shared core of values and principles which will increasingly transcend national peculiarities.

To conclude, despite the crucial role of the New York Convention, arbitration is still not subject to a far reaching mandatory harmonization and remains unregulated at the international level. States accordingly retain a broad freedom to favor it but, conversely, also to treat it with distrust. This could leave arbitration in a state of anarchy. Nonetheless, over the past decades there has been a spontaneous evolution towards shared values and approaches in a large number of States. This has led to the emergence of a sort of common law of arbitration.

To the extent that States adhere to such common values, they will tend to respect each other's decisions on arbitration-related matters, thus giving rise to a seamless regime for arbitration.

However, in most parts of the world there are still States that for various reasons have not followed this path and therefore do not fully share the prevalent views on the respect to be accorded to arbitration agreements and awards, and more generally to the arbitral process. Arbitrations affected by their legal and judiciary systems may suffer from the actions of those States.

To some extent the anti-arbitration attitudes of those States can be neutralized by ad hoc measures by the courts of other countries and by arbitrators, sometimes simply by disregarding them. In other circumstances it may be possible to have recourse to international adjudication to obtain a finding of violation of internationally binding standards and possibly enforcement. In principle the States party to the New York Convention that feel that the Convention is not properly applied by other contracting parties could take the matter up at intergovernmental level to push for better compliance.

Admittedly, save in relatively limited circumstances, this "stick" is not of itself a very powerful incentive to induce States that do not yet embrace arbitration to its full extent to refrain from such behaviors and, more generally, to adopt a more arbitration-friendly stance. For the time being the

parties to international arbitrations will therefore continue to encounter, and to have to live with, interferences which may run counter to their expectations.

The prospects of an evolution towards such a stance are probably greater if the stick is use in conjunction with a "carrot". This consists in persuading recalcitrant States that such an evolution is in their own self-interest in that it is instrumental to opening their economies and facilitating the participation of their businesses in international commerce.

If an unfavorable attitude towards arbitration largely prevalent until not long ago has been abandoned by States that have come to perceive the benefits of embracing arbitration, there is no reason why also the attitude of the holdouts of the more ancient mentality should not evolve in the same direction. It is well possible that, as a result of the combination of these factors, over time certain behaviors of States which appear unacceptable according to the more broadly shared visions of arbitration law and good practice will tend to fade away, if for no other reason, because they will increasingly be considered to be not "good form" or, more aptly, simply counter-productive and at odds with the participation in the New York Convention.

ESSENTIAL BIBLIOGRAPHY:

E. GAILLARD, *Legal Theory of International Arbitration*, Martinus Nijhoff, 2010,

J.-F. POUDRET, S. BESSON, *Comparative Law of International Arbitration*, 2nd ed. London, 2007

G. BORN, *International Commercial Arbitration*, 2 vols., Kluwer, 2009

J. LEW, L. MISTELIS, S. KROLL, *Comparative international commercial arbitration*, Kluwer, 2003

L.G. RADICATI DI BROZOLO, *Arbitrage commercial international et lois de police: autonomie de la volonté et conflits de juridictions*, in Collected Courses of the Hague Academy of International Law (2005, vol. 315, pp. 269-494)

L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference with international arbitration by national courts of the seat in the aftermath of Saipem v. Bangladesh*, in Liber Amicorum B. Cremades, La Ley, 2010, p. 993;

L.G. RADICATI DI BROZOLO, *The impact of national law and courts on international commercial arbitration: mythology, physiology, pathology, remedies and trends*, (2011) Paris J. of Int'l Arbitration/Cahiers de l'Arbitrage 663;

L.G. RADICATI DI BROZOLO, *The control system of arbitral awards: A pro-arbitration critique of Michael Reisman's 'Normative architecture of international commercial arbitration'* , ICCA Congress Series No. 16, Proceedings of the ICCA 50 Conference, Geneva, May 2011, forthcoming.

L.G. RADICATI DI BROZOLO, *Arbitration and competition law: the position of the courts and of arbitrators, Arbitration International,* 2011, p. 1 ff.

Paper n. 8

THE LEGAL AND CULTURAL ROOTS OF MEDIATION IN THE UNITED STATES

by

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THE LEGAL AND CULTURAL ROOTS OF MEDIATION IN THE UNITED STATES

by

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Abstract:

Mediation developed in response to labor unrest in the early twentieth century and social unrest mid-century. Courts began using it in the 1970s to manage crowded dockets. Court and community-based programs evolved and expanded during the 1980s and 1990s. They offered mediation as an alternative to the courts that allowed party self-determination, creative solutions and a quicker response. Research into the mediation process raised questions about the extent to which the reality of mediation matched the claims its proponents made. It revealed that mediators focused on solving problems and getting agreements often did so at the expense of party self-determination. In response to this critique, new models of mediation developed that focused on interaction instead of transaction. One such model, transformative mediation, brings rhetoric and reality together. It understands conflict as a crisis in human interaction and focuses not on conflict resolution but on conflict transformation. It trains mediators to support party decision-making and inter-party perspective-taking. The mediation field will do best in the future by accepting its diversity and supporting the different models of mediation that have evolved.

Keywords: US mediation history; transformative mediation.

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Mediation is well-established in the United States. This paper will explore its roots and how it came to be widely used by both the courts and communities. It will then describe research into mediators' activities and the resulting critique. It will describe the new models of mediation that emerged and the recent willingness of the field to acknowledge its own diversity. A closer look at one of those new models, transformative mediation, will clarify the differences offered by these new models. Finally, the paper will take a brief look at one possible future of the mediation field.

Mediation Emerges in Response to Labor and Social Unrest

The formal use of mediation in the US is linked to the labor unrest that occurred during the 1800s and early 1900s. Workers unions demanded higher wages and better working conditions. The companies resisted. The resulting unrest disrupted business. Strikes by workers were sometimes met with violence. One result was the development of collective bargaining, with mediation as the primary process used. Probably the first "professional" mediators were the "Commissioners of Conciliation" appointed by the Secretary of Labor in 1913. In 1935, the US Congress passed the National Labor Relations Act, instituting collective bargaining in labor-management conflicts. The Federal Mediation and Conciliation Service was formed in 1946, providing a staff of full-time mediators ready to facilitate negotiations between unions and management. The mediation done in collective bargaining was between groups, with appointed or elected representatives negotiating on behalf of workers and management. The process itself was intervener-directed and solution-focused.

The next major development in the history of mediation was tied to the civil unrest of the 1960s. During this period, cities throughout the country experienced tension over race and discrimination, particularly as it related to education and housing. Detroit, Los Angeles and Boston were among those cities where the police response to demonstrations led to further conflict and, in some cases, to riots. In response to this wide-spread civil unrest, some community activists and labor mediators thought of applying the methods used in collective bargaining to restore calm by bringing groups together to talk. The public and private sectors provided support and created new organizations to respond to this need. In 1964, the US Department of Justice created the Community Relation Service to provide these services. National foundations, especially the Ford Foundation, and the American Arbitration Association, already an established ADR (alternative dispute resolution) provider started the National Center for Dispute Settlement in Washington, DC and the Center for Dispute Settlement in Rochester, NY. Meanwhile a prominent labor mediator began the Institute of Mediation & Conflict Resolution in New York City. Mediation was still being used primarily between groups, but here it was used as an alternative to the streets.

Court-Based and Community Mediation Programs Develop

Around the same time, courts found themselves dealing with a large number of minor criminal cases that seemed ill-suited to legal intervention. These cases were between relatives, acquaintances and neighbors. They often involved harassment, minor assaults or payment disputes. The increased mobility and urbanization that marked this period meant that many people couldn't turn to family members or other traditional resources to resolve these conflicts. So people turned to the courts with situations that were not easily resolved by judicial intervention. These disputes tended to involve strong emotion and situations where it was difficult to determine the truth. Even when the courts dealt with these cases, a verdict of guilty or innocent rarely resolved the situation. In fact, many situations were on-going, leading to continued conflict and return appearances in court.

In response, the courts experimented with alternative ways to handle these cases. In 1969, the city prosecutor in Columbus, Ohio developed a program that offered mediation as an alternative to a judicial hearing, creating the first court-based mediation program. The mediation was provided initially by law professors and then by law school students. The program succeeded in diverting many of these cases from the courts and in allowing people to deal with the disputes between them in ways that seemed most appropriate to them. As this program proved successful, other courts began developing mediation programs. The already established centers in Washington DC, New York City and Rochester began taking such cases from the courts as well.

In 1977, in response to interest in these court-based mediation programs, the Department of Justice started three Neighborhood Justice Centers in Atlanta, Kansas City and Los Angeles. These built on the idea of a "multi-door courthouse," where situations would be evaluated and sent to the most appropriate forum rather than simply being sent to a prosecutor or judge. These programs were evaluated in detail and proved successful. Though only the one in Atlanta continued past the original grant, they served as models for community mediation programs.

In the late 1970s and early 1980s, mediation programs grew rapidly. The community mediation field benefited initially from federal funding through the Law Enforcement Assistance Initiative. State and local governments also made funding available. Foundations were joined by private organizations like the American Bar Association and the American Arbitration Association in supporting community mediation programs. Over 200 programs were begun between the mid-1970s and the mid-1990s. Some courts established programs during this period, but the major growth was in the community mediation field.

The cases handled by all mediation programs expanded beyond the original misdemeanor cases to include small claims cases, custody and visitation cases, juvenile delinquency and status offense cases, and victim-offender cases. Private practitioners emerged during this period as significant providers, especially in divorce cases, though this area of growth is outside the scope of this paper.

Community-based centers differentiated themselves from court-based programs in several significant ways. They expanded their areas of practice to include cases that would never go to court, like roommate disputes and conflicts in schools between students. They also supported collaborative community relationships by offering facilitation of intergroup conflicts in neighborhoods. Unlike court-based programs, community centers were committed to the availability of mediation at any stage of a conflict. They were also committed to building capacity in local communities so they recruited and trained community members to be their volunteer mediators. By training volunteers and educating community members as well as by offering mediation and facilitation in response to a wide range of situations, the community mediation centers sought positive systemic change in their communities.

As community mediation programs expanded, accepting the kinds of court cases described above, the higher courts took notice. With increasing backlogs, they saw alternative dispute resolution methods as a possible remedy. In 1988, Florida passed a law authorizing civil court judges, at their discretion, to order any case on their dockets to mediation. In 1990, the US Congress passed the Civil Justice Reform Act, requiring every federal district court to develop a case management plan. It recommended the use of ADR processes as one possible remedy to the backlogs. This spurred the development of pilots of court-ordered and court-referred mediation programs, as well as programs that used other ADR processes. By the end of the 1990s, over half of the 94 federal court districts offered or required mediation. It gradually became the primary ADR model used by the courts, outpacing the previous front-runner, arbitration. Mediation made sense to the courts since it produced settlements. And since most courts created rosters of mediators, they defined the qualifications of their mediators. Many courts required that mediators be lawyers or other professionals with content expertise. They usually required mediation training as well, though sometimes for only a minimal number of hours.

Research Critiques the Mediation Process

At this point in its development, mediation was well established in court-based and community programs as an alternative to traditional court processes. The differences between the two kinds of programs were most evident in the level of cases handled and in who the programs used as mediators. Though community centers had the explicit goal of handling many kinds of disputes from many different sources, the reality was that in these programs, as in court-based programs, most cases came from the justice system. Though in one sense the mediation field was doing well, some mediation practitioners & scholars were discouraged by what was happening.

To understand this disappointment, it will be useful to take a step back and consider the mediation process and what it offered. Mediation is generally considered to be the first place on the

continuum of alternative dispute resolution processes where a third party in involved. But it is still a process that leaves decision-making in the hands of the parties.

Figure 1 (below) – The ADR Continuum

It offers a less formal process than those "higher" on the continuum, allowing direct engagement between the parties.

As described above, mediation was developed to provide an alternative, first to the unrest in communities and then to the clogged case processing system of the courts. Though almost all mediation was affected by the shadow of the law, it promised new ways to deal with conflict that had party self-determination at its core. As part of that promise, both court-based and community programs articulated a specific set of benefits. By using cooperative problem-solving and supporting a non-adversarial approach, they promised creative solutions and win-win agreements. By moving family conflicts like divorce, custody and visitation from courts to mediation, programs promised enhanced communication and better ways to deal with strong emotions. By providing easy access to mediation, either through referral or parties' own choice, they promised faster, easier access to resolutions. Community mediation centers claimed additional benefits. By training volunteers, they sought to build capacity for people to handle their own disputes. By accepting conflicts not involved with courts, community centers sought to strengthen neighborhoods.

But this rhetoric was not consistent with the practice of mediation. And this was true of community programs as well as court-connected programs. Research done in the 1980s noted this gap between the rhetoric and the reality. The reality this research demonstrated was that mediation did not realize its articulated goals because the process employed by mediators was not sufficiently different from the process used by interveners higher on the dispute resolution process continuum. Mediators were oriented toward settling cases and, in the process, they often strayed from the idea of party self-determination.

This gap was especially stark as researchers looked at what mediators actually did, not just what they promised. And the gap was present across programs, for volunteer mediators and attorney mediators, though to a different degree. Researchers found that mediators' practice generally involved controlling the "process" of mediation. Most mediators used a stage model, guiding parties through a series of steps that structured how parties talked to each other. While this, in and of itself, had the effect of controlling content, most mediators were more overt in limiting what parties talked about. By being selective rather than inclusive in what they responded to, mediators shaped the conversation in a direction that, in their opinion, increased the chances of solving the problem. They tended to prioritize concrete topics over emotional content. They contained conflict through the use of ground rules and

caucuses. Since mediators were actively involved as problem-solvers, they had to understand the situation so they asked lots of questions, made suggestions and used their position to influence or persuade the parties. Other mediators, practicing what is now called evaluative mediation, went even farther. In many court-based programs, mediators were expected to have content expertise so that they could evaluate the strength of each side's arguments and predict likely court outcomes. Thus mediators subtly or not-so-subtly offered advice as a way to ensure that any agreement reached met either their own sense of what was right or fair or the court's standards.

The practice of mediation developed in this way because mediators were focused on problem-solving or transactional bargains. With programs dependent on the courts for cases, their interest in pleasing the courts outweighed their commitment to party control. The practices described above made sense because their goal was to solve the problem and/or resolve the case. Research revealed not only increased mediator directiveness but sometimes activities that bordered on coercion of the parties. Because of the process' informality, there were little or no legal protections for parties.

Though mediation always struggled with differentiating itself from the courts, it was in danger of losing its way as an alternative. The attempts made over the decades to demonstrate mediation as a fundamentally different process were not being realized. Instead, party control and party choice were diminished. Communication between parties was restricted. Emotions were contained. Mutual problem-solving was replaced by mediator-led problem-solving. Mediators overtly or subtly evaluated the "facts" of the case. Creativity was stifled as mediators sought to ensure that courts would approve of any agreement reached during the process. While mediators maintained that they were facilitating a process that was very different than other ADR processes, experience and research did not support that claim. Instead, mediation had shifted its focus to the production of agreements at the expense of its own "first principle," party self-determination. As a result, parties failed to see mediation as fundamentally different and rarely sought out mediation on their own initiative. Researchers and social justice advocates critiqued process as being dangerous for women, racial minorities and others who were apt to be less aware of their rights and in less powerful positions.

The Mediation Field Responds to the Critique

So mediation was at a crossroads in the early 1990s. On the one hand, it was well-established, used widely by the courts either through court-based programs or by referral to community mediation centers. But on the other hand, it was in danger of losing its uniqueness. The largest growth was occurring in the most directive end of the process, with attorney mediators beginning to overwhelm mediators without professional degrees. And as mediators became more directive, what was actually happening in the mediation room didn't feel all that different to the parties.

The response of the field to this critique varied. Some, especially courts that were disposing of large numbers of cases through mediation and the attorney-mediators who served them, were satisfied. Others considered the critique and began to develop new forms of practice in an attempt to to re-establish the uniqueness of mediation. What emerged at this time were communication-focused practices. These stood in contrast to the settlement-focused practices that were most prevalent. Those developing these new forms of practice also worked to break the hegemony of the mediation field, asserting that these were not just different techniques or styles but new models of practice.

These communication-based mediation models defined new goals in an attempt to return to what was unique and valuable in mediation. They reasserted the value of party self-determination. They focused not on transaction but on interaction. The major new models were transformative mediation, narrative mediation, insight mediation and understanding-based mediation. Though there are significant differences between them, their shared focus on interaction yielded a set of common ideas. One is that for mediation to be a unique process that yields sustainable agreements, a mediator needs to focus on something other than, or at least something in addition to, settlement. Instead, they posited interactional change as key. And these models agreed that this interactional change could not be generated by top-down, mediator-driven interventions.

This development led to an expansion of the ADR continuum referenced earlier. Mediation processes could now be differentiated based on the degree to which parties are in control versus the degree to which the mediator is in control.

Figure 2 (below) – Expanded ADR Continuum

A Closer Look at One Response - Transformative Mediation

Taking a closer look at one model that focuses on interaction, transformative mediation, will help to make this important development more concrete. Transformative mediation brings rhetoric and reality together. It aims at conflict transformation not conflict resolution. It takes seriously the notion that parties should be the ones in control, not only of content but also of process. Transformative practice is based on a different understanding of conflict. Most transactional mediators, whether facilitative, problem-solving or evaluative, understand conflict as a clash of power, rights or interests. Transformative mediators, in contrast, understand conflict as a crisis in human interaction. Thus the mediator's focus is on interaction.

It is important to define clearly the difference between resolving conflict and transforming it. Resolution is about reaching an agreement, hopefully a good one, whether by good one means just, fair or win-win. Transformation is about something else. It's about a change in the quality of the

interaction between the parties. This change in interaction comes about as a result of a shift in each person's sense of their ability to deal with the situation they face and their ability to consider the perspective of the other. It is important to emphasize that what is talked about here is transforming conflict interaction - not people. Both resolution and transformation can happen and often do. Parties in transformative mediation sessions reach agreements at about the same rate as those involved in other mediation processes. And parties in problem-solving or even evaluative mediation may leave the mediation with the ability to communicate more effectively. But while parties may accomplish both, research indicates that mediators must choose. It is not possible to focus on these two different ends since each requires different practices.

Transformative mediation has a different definition of the mediation process: "mediation is a process where a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they discuss and explore various topics and possibilities for resolution." The goals of a transformative mediator are to support party decision-making and inter-party perspective-taking. They reflect the reorientation of the mediator from transaction to interaction, from conflict resolution to conflict transformation.

A hallmark of transformative mediation is a clear connection between purpose and practice. Transformative mediators have a clear sense of what they are trying to accomplish with each intervention. They make no distinction between process and content because from a communication perspective, the two are not separate. Choices about process affect content so parties are the ones to decide how to have their conversation. Transformative mediators attend to the moment to moment interaction between the parties not the problem and its potential solution. They follow rather than lead, never using manipulation or pressure. They avoid leading because doing so assumes that the mediator, not the parties, knows what is best in a given situation.

Other ADR processes focus on resolution without attending to conflict transformation. This is one reason people seek alternatives to court. Getting an agreement may solve a problem. A court verdict may settle a case. But the conflict between the parties may not end, leaving people caught in negative, destructive interaction. Resolution without conflict transformation is also a problem for the courts since agreements reached that leave parties in conflict are less likely to be implemented and/or to be sustainable.

Though resolution may be court's focus, research indicates that what parties care most about is conflict transformation. The process of conflict transformation allows parties to reconnect with the best in themselves and then to re-establish positive connection with others. Interaction shifts to become more positive and constructive. Agreements that result from such improved interaction are often more sustainable. But more importantly, future interactions tend to be more positive and less conflictual.

Even this brief overview makes clear that transformative mediation, like other interaction-focused models of mediation, presents a clear choice. The process is very different than the process parties experience in court. It is also different than models of mediation that focus on transaction, on getting an agreement. Because any parties involved in conflict are interaction, it is appropriate for all kinds of disputes, not just those where parties have on-going relationship.

Mediation's Future

It is useful now to go back to mediation's roots and on to its branches. Mediation developed as an alternative way to respond to conflicts. At first, the field considered mediation as monolithic, generally asserting that there was a single, universally-used mediation process. This hid the real differences in the way that mediation was practiced. Over the past decade, the mediation field has gotten clearer about its own diversity and has become pluralistic. Different mediation models are acknowledged and co-exist. It is important to continue to clearly define models so that the differences between them are better understood. Mediator qualifications, training and standards of practice need to be tailored to fit different models. There also need to be different ways to evaluate success.

Mediation rests on the principle of self-determination, honoring the right of parties to make choices for themselves. Choice is good for the mediation field as well. The field will do well to consider the possibility that diversity is key to its success. By clarifying the differences between mediation models, the field offers clear choices to parties involved in conflict, to courts referring cases and to those interested in being trained as mediators.

BIBLIOGRAPHY

ABEL, RICHARD L, editor; *The Politics of Informal Justice,* Volume 1: The American Experience (1982)

ALFINI, JAMES J., *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"*, 19 *Florida State University Law Review* (1991)

ALFINI, JAMES J; S.B. PRESS, J.R. STERNLIGHT & J.B. STULBERG, *Mediation Theory and Practice* (2006)

BUSH, ROBERT A. BARUCH, *Efficiency and Protection or Empowerment and Recognition: The Mediator's Role and Ethical Standards in Mediation*, 41 *Florida Law Review* (1989)

BUSH, ROBERT A. BARUCH & J.P. FOLGER, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1994)

BUSH, ROBERT A. BARUCH & J.P. FOLGER, *The Promise of Mediation: the Transformative Approach to Conflict* (2005)

DELLA NOCE, D.J., BUSH, R.A.B. & FOLGER, J.P., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 Pepperdine Dispute Resolution Law Journal (2002)

FISHER, ROGER & W. URY, *Getting to Yes: Negotiating Agreement Without Giving In* (1980)

FOLBERG, JAY & A. TAYLOR, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (1984)

FOLGER, JOSEPH, R.A.B. BUSH & D.J. DELLA NOCE, editors; *Transformative Mediation: A Sourcebook* (2010)

GRILLO, TRINA, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale Law Journal* (1991)

KRESSEL, KENNETH ET.AL., editors, *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (1989)

MCGILLIS, DANIEL; *Community Mediation Programs: Developments & Challenges*; National Institute of Justice (1997)

MENKEL-MEADOW, CARRIE, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *Negotiation Journal* (1995).

WELSH, NANCY A., *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 *Washington University Law Quarterly* (2001)

FIGURE ONE:

The ADR Continuum

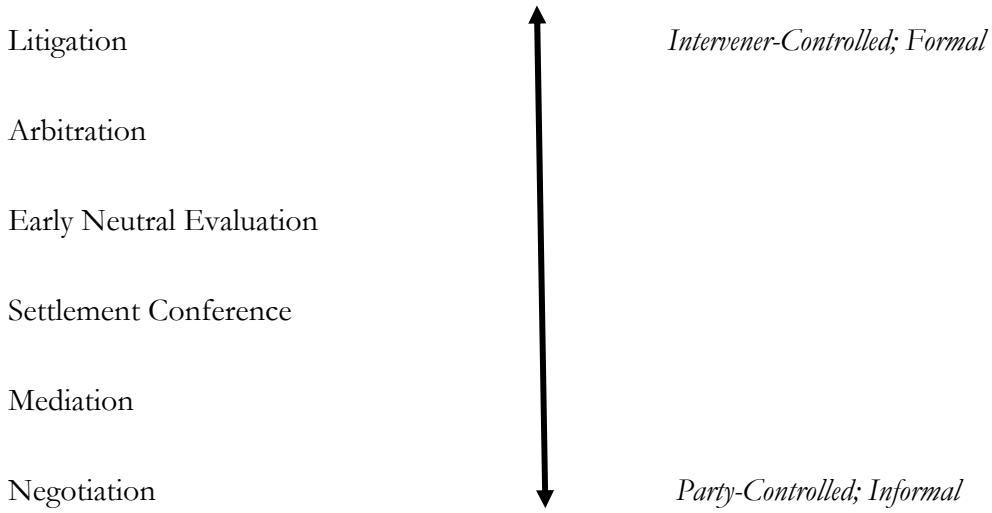
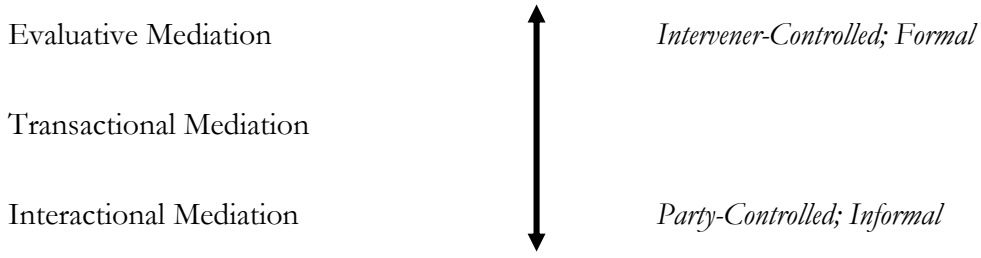


FIGURE TWO

Expanded ADR Continuum



Paper n. 9

THE CHARACTERISTICS OF BUSINESS MEDIATION SYSTEM IN CHINA

by

Sibao Shen
Jian Shen

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THE CHARACTERISTICS OF BUSINESS MEDIATION SYSTEM IN CHINA

-from the perspective of an international mediation case Personally involved-

by

Sibao Shen♦ and Jian Shen♦♦

Abstract:

Mediation is not only the core component of ADR but also a very important method in China to settle the social disputes and conflicts which is commenced and developed gradually in its long historical process. It originate from an effective method that the citizens depending on themselves to solve the social disputes. This article is trying to analyze and see the common and different characteristics of the mediation in ADR in western countries and the mediation in Chinese traditional style and whether the gaps between them could be reconciled.

Keywords: ADR; Mediation; social disputes.

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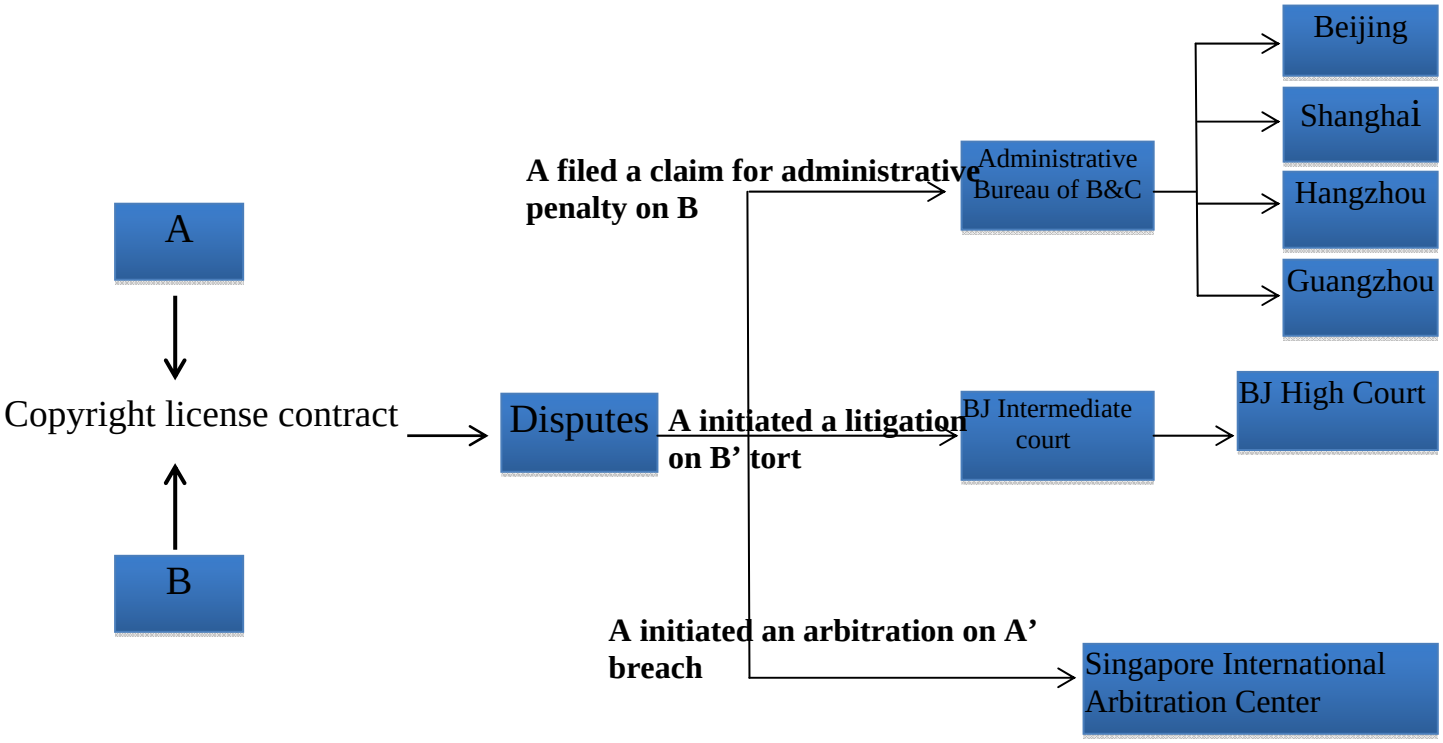
♦♦ Lecturer in the Law School of Central University of Finance and Economics in China.

Part I: Basic facts

An American company (Hereinafter referred to as Company A) and an equity joint venture in a city of China (Hereinafter referred to as Company B) signed an exclusive license agreement on A's patented products and related music CDs .Under the agreement, company A had the copyright on the patented products and licensed B to use in the television station in a number of years. In the course of the execution of the agreement, Company A accused Company B of piracy and torts which resulted in serious infringement of copyright, therefore initiated an litigation in the Beijing Intermediate Court. What's more, Company A complained the torts of Company B in Administrative Bureau for Industry & Commerce as well, in the cities of Beijing, Guangzhou, Wuhan, and Hangzhou. In return, company B accused company A of a violation of the exclusive license agreement and breach of the contract, which resulted in the early termination of the agreement in fact.Under the agreement, Company B initiated an arbitration in the Singapore International Arbitration Center .The following chart briefly summarized the main disputes of intellectual property rights arising out of the contract.



After Singapore International Arbitration Center accepted the case, company A selected Ms. Sally Harpole ,who is a senior international arbitration from UAS, as its arbitrator and company B selected Prof. Shen Sibao as its arbitrator in accordance with its arbitration rules.Considering the

complexity of the case raised by IP infringement and breach of contract, and the high costs for both parties, Ms. Sally Harpole proposed that if it is possible for both partied to settle their disputes through mediation before the formation of the arbitral tribunal and submit the package of disputes to the Mediation Committee Organization affiliated by Beijing Arbitration Commission Professor Shen fully supported her proposal and persuaded company B to make positive responses.Soon, A and B agreed the proposal one by one and reached agreement on the following described:

First, the mediation tribunal was composed by Ms. Harpole and Professor Shen Sibao

Second, during the mediation, both parties shall suspend all ongoing administrative claim for penalty in four cities and appeal activities in Beijing Higher People's Court and arbitration procedures in Singapore International Arbitration center as well.

Third, the mediation commission sent a full-time secretary to mediation tribunal for support.

Finally, the costs of the mediation for two days transferred not to the account of mediation commission but directly into the accounts of the mediators respectively.

In this way, from August 2009 onwards, both parties began the mediation under the mediation commission affiliated by the Beijing arbitration commission. After hard negotiation, both parties come into face to face mediation on December 1, 2009 and reached a preliminary intent of settlement agreement on December 2.In late December 2009 through April 2010, under the continuing work of the secretary, both parties entered into the mediation agreement finally , and the good news is the mediation agreement implemented eventually and the mediation came into a satisfactory end. As such, all the proceedings of arbitration litigation and administrative claim for penalty had been terminated totally, which saved a lot of time and costs , what's more , both parties could hold hands cheerfully.

Part two: Process of mediation

1. Identifying the key issues

In the process of mediation, after studying the case materials and inquiring the parties separately and jointly, two mediators reached consensus on the key issues of the case and found the direction for final resolution jointly. Through two mediators' consultations, both reached the following agreements: company A breached the license agreement and caused economic losses to company B.

However, in practice, company B infringed the copyright of company A, if not stop, it was very likely to spread around and would definitely cause significant losses to company A

2. Analyzing the core interests of both parties

The common interests for both company A and B were the reputation in the market of China, however, as a foreign company on the process of opening Chinese market, company A cared more on its reputation in China. A's breach caused the real loss of company B and was a big blow for a limited- sized company like B. The most urgent request of Company A was the stop of infringement immediately by company B and company B promise no similar cases would be happen again. (B's infringement would cause losses to company A in the future in the event that it could not be prohibited.)

After the above analysis, two mediators and the sectary made the consensus that, in order to reach the conciliation, we should not focus on which party is wrong and which party is right, nor should we emphasize too much or even mention A' breach and B's tort. on the contrary, we should try to persuade company A to terminate the contract and make a certain amount of compensation for company B, meanwhile, try to persuade company B to accept company A's resolution for the dispute of infringement and the methods of preventing infringement in the future. After a half day's repeatedly leading and persuading by the two mediators, both disputants agree to negotiate the disputes on the above basis and draft the settlement agreement.

3. The characteristics of the mediation agreement

Therefore, at the very beginning, the purpose of mediation was highly focused. After a half-day's mediation, the case finally focused on the amount of compensation of company A to company B and how to draft agreement of settlement.

At this moment, two mediators contacted frequently with their party. During this process, the conciliation of mediators played a significant role , and after another day's mediation, both sides reached a conciliation agreement in principle finally through hard bargain. The most satisfactory clauses of agreement, or the clauses which reflect the mutual interests of both parties is the disclaimer as follows:

"on the basis that neither party is at fault nor recognize its fault, for the purpose of conciliation, both parties reach the following agreement. The agreement and any other negotiations, documents and discussions in connection with the agreement, shall not be interpreted as or deemed to be the recognition of any party to any liabilities or wrongdoings. On the basis, the mediation agreement

further stressed that, "both parties give up in any countries or regions the application operation ,participation or in any other ways, to initiate or execute, or assert any defense, offset or cross-claim or through any litigation or judicial activities (including but not limited to apply for arbitration under the " Arbitration Rules of International Chamber of Commerce ") to claim or defense or seek relief."

Both parties make further commitments: neither party shall discredit the reputation of the other party in its own name or the name of a third party. Nor shall any party on its name or on the name of a third party, make any comments or use any word to defame or discredit the reputation of the company B or its subsidiaries, affiliates (and their associated subsidiary), managers, owners, members, directors , employees or any products or services of company B in any forms of negotiation with a third party. The mutual commitment concerning the reputation by both parties formed the essential content of the mediation agreement and had become a good foundation for future cooperation. On this basis, in the issue of compensation, company A nearly satisfied all the requirement of company B and made a certain amount of compensation to Company B. Meanwhile, company B accepted several measures proposed by company A to eliminate the infringement.

Finally, both parties withdrew the claims for administrative penalty in four cities and the litigation in Beijing court and the arbitration in Singapore International Arbitration Center.
The mediation ended in one and half days with the help of two mediators, while large number of rest work, including the final performance of mediation agreement was conducted by the sectary from Beijing Mediation Commission affiliated by Beijing Arbitration Commission.

Part three: the Features of mediation for commercial disputes in China

From this successful case, we could find the main characteristic of commercial mediation in China as follows:

1. the mediation in China is mainly of Institutional Mediation

Institutional mediation committee is divided into people's mediation committee and mediation committee for commercial disputes in China now.
The law in China does not prohibit folk or non-government mediation like Ad hoc in arbitration .All mediation activities of this case were conducted under the Beijing Mediation Commission set up

by the Beijing Arbitration CommissionThe procedure was conducted on the basis of its rules, including the procedure of filing, appointment of mediator, hearing and charging.

According to statistics, there are 205 arbitration committee in mainland Chinese totally, of which more than 50% has established mediation commission especially for the settlement of commercial disputes . The advantage of this design is for a better combination of mediation and arbitration.On many circumstances, the mediation agreement both parties reached could be transformed into a formal arbitral award upon both disputants agree. The other advantage of institutional arbitration is that the institution could help to supervise and help the enforcement of the mediation agreement. Usually ,the institution has the panel of arbitrators, which would help mediation institution choose an arbitrator with prior successful corporation experience to mediate the case.

Besides, the mediation commission would provide a professional, responsible and upright sectary for the mediator or mediation tribunal.The sectaries are full-time , well-educated and impartial. They could conduct its work in fully accordance with mediation procedure, which is indispensable to mediators.

2. The approach of commercial mediation in China is generally on joint mediation.

The commercial mediation especially the international commercial mediation is generally conducted in the mode of joint mediation in China.The joint mediation is usually defined as a mode, of which both parties to a dispute would select a mediator respectively on the voluntary basis, and the mediators selected by both parties form a joint mediation group to settle the disputes collectively.

The joint mediation mode in China is commonly a mode by two mediators, which is connected with the Chinese historical tradition that the strength of a group or a team is generally stronger than that of an individual.

The practice tells us, if the mediators have common understandings on the issue of a dispute, than generally, it would have the effect of 1 Plus 1 are greater than two. Nevertheless, if there is no common understandings on the issue of a dispute or if one or two mediators are partial , then the effect would be 1 plus 1 are less than two.

In this case, two mediators could mutually understand well on most of issues of this case because they have had a long and successful cooperation experience in mediation and arbitration in Beijing

Arbitration Commission and CIETAC, besides, they have common social experience, social responsibility and mentally mature as well.

Another reason to settle this case smoothly is that, both of them are very familiar of the culture traditions, values and the requirements of interest of its party who appointed them, all of which are the basic conditions for a quick, effective and complete successful mediation.
As we know, the mediation is a continuation and facilitation of negotiation, in which a third party (mediator) joins as an organizer.
So it is very essential that the mediator should be impartial, capable to keep balance and could be well understood by both parties during the mediation process. They are able to find the key issues of the disputes and the joint and respective interests of both parties (bottom line) meanwhile put forward brainstorming ways of to settle the disputes but still leave room to comprise for both parties . Select the best options and try to persuade each party respectively to accept them.

The future of mediation in China would be far-reaching and it has been popularizing in large scale. The philosophy principles as " harmony is most precious" and "harmony could bring fortune" are always used as the guideline in mediation for the purpose of "dropping suit".

3. A major characteristic of mediation system in China is the combination of arbitration and mediation.

Practically, the ways for the combination of arbitration and mediation are principally as follows:

I. When the application for arbitration has been submitted by the claimant, under the persuasion by its arbitrator or legal counsels , a party to the dispute may firstly accept the advice for mediation; In this case, the claimant has applied for arbitration in SIAC but the arbitral procedure has not yet started, the arbitrators selected by both parties propose for mediation and was accepted by both parties.

II. During the arbitral proceedings including at the stage of hearing, the tribunal could also suggest for mediation if both parties agree.

III. At the stage when the hearing is basically finished, tribunal could also recommend for mediation and persuade the parties to the dispute to accept the proposal.

IV. Even in the process of enforcement after the arbitral award was issued , with the help and coordination of the original arbitral tribunal or the legal counsel of both parties ,negotiation for mediation is also possible to make.

Special explanation for the above four ways of arb-mediation combination is as follows:

a. The role and significance of mediation in all of the above four ways of combination is always highlighted from beginning through end on the voluntary basis of both parties.

b. In the above four ways from one to three, if the mediation agreement could be reached, then the agreement is generally transformed into a binding award by tribunal. Of course, it shall also on the voluntary basis of both parties as well.

c. Once both parties agree to mediate, the arbitral proceeding would be suspended automatically and immediately.

Each party to the dispute has the chance or we could say is entitled for both parties to select its mediator respectively. They could appoint the original arbitrator or other mediators as its mediator. While in practice, the mediation is generally conducted under the original tribunal .

Finally, within the approaches for the resolutions of commercial dispute in China, mediation and arbitration are mutually cohabitant rather than mutually exclusive, they could be transformed into each other following the will of the parties and combined together to play a better role.

Mediation in china is non-profitable at this stage

Currently, mediation institutions in China are not commercial organs for profits. Due to the historical reasons and for the development of mediation, the payment of mediators is comparatively low, the purpose of which is to reduce the mediation costs and enlarge and promote the influence of ADR in China. Take this case for an example, the administrative fees charged by Beijing Mediation Commission and its secretariat was 1000 US dollars totally, while the total fees of the two mediators for the work of reading materials, hearing and mediation is only 3000 US dollars respectively. That is to say, the total cost of the case is less than USD 10,000, which is even lower than the filing fee in ICC Compared to the fees would be charged in the four administrative claims for penalty and two litigations in court plus one international arbitration; it was simply on drop in the ocean. In this sense, the two mediators who has already selected as arbitrators by both parties, would rather give up the opportunity of arbitration but try to facilitate mediation could be said to taking a kind of

social responsibility. The number of mediators who would like to take such social responsibility is quite large in China, only those who are already on the panel of mediators in each mediation commission are nearly tens of thousands of people .Because even without any payment ,we could still see their great efforts in the mediation. They know the mediation job they are undertaking is for the stability and harmony of the society, thus the mediators in China are well respected and generally enjoy good reputation. China is a country with thousands years of ancient civilizations and cultural traditions, the unique mode for social management was formed in its long history of development.

Currently, in order to achieve the goal of building a harmonious society, fully display the role of mediation, has a special significance at this moment. If we could say ADR is introduced from foreign countries as a "Exotic goods", then the core part of the ADR, negotiation and mediation, has already developed gradually and matured in China in its long history of development. Among them, the most representative and well-known old sayings are "Harmony is most precious" , "Harmony brings wealth" □ "dropping suit" and "more friends ,more opportunities; more enemies, more fields of fighting". They disclosed the historical continuity of dispute settlement through mediation in China from the perspective of objectives, methods and standards of mediation. Besides, they fully demonstrated the wisdom of the Chinese people!

Of course, if the ancient tradition and modern experience in China and the ADR in the Western modernization could be influenced□ promoted and learned mutually, we believe it would has a more positive impact on the harmony development and common prosperity for China and the world.

REFERENCES:

1. SIBAO SHEN, JIAN SHEN, *The characteristics and innovation of commercial arbitration in China*, legal science, Vol.12, 2010.

2. SIBAO SHEN, *Mediation in commercial dispute resolution, citizen and law*, vol. 9, 2010.

3.SIBAO SHEN, YUAN XUE, *Positioning and reform of commercial arbitration in China, legal science*, Vol. 4, 2006.

4. SIBAO SHEN, JIAN SHEN, *The basic outlook on the construction of foreign trade law in China since the opening up*, Heibei law science, October, 2008.

5. SIBAO SHEN, JIAN SHEN, *Economic globalization and the latest trend of legal construction and development in China*, Journal of Heibei University of economics and business, June, 2008.

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sotto gli auspici dell'Accademia nazionale dei Lincei

Il modello giuridico - scientifico e legislativo – italiano fuori dell'Europa

Università degli Studi di Siena,
20-21-22 settembre 2012

Aula Magna della
Facoltà di Scienze Politiche
via P.A. Mattioli 10

GIOVEDÌ, 20 SETTEMBRE 2012

RELAZIONE INTRODUTTIVA

15:00 Rodolfo Sacco

MEDIO ORIENTE E AFRICA

15:30 **Israele** - Pietro Sirena - Yehuda Adar
16:00 **Turchia** - Paolo Pittaro
16:20 **Libano** - **Afghanistan** - **Libia** - Massimo Papa
17:00 **Pausa**
17:30 **Marocco** - **Tunisia** - Roberta Aluffi Beck Peccoz
17:50 **Egitto** - Gian Maria Piccinelli
18:10 **Somalia** - Rodolfo Sacco
18:30 **Sud Africa** - Salvatore Mancuso
18:50 **Discussione e interventi**
19:15 **In attesa della cena: riunione dei clubs**

VENERDÌ, 21 SETTEMBRE 2012

AMERICA DEL NORD

9:30 **Stati Uniti d'America** - Paolo Carozza
10:00 **Canada** - Eleonora Ceccherini

AMERICA LATINA

I SINGOLI PAESI

10:30 **Argentina** - Emanuele Lucchini Guastalla
10:50 **Il nuovo progetto di codice argentino** - David Esborraz
11:10 **Colombia** - Edgar Cortés
11:30 **Pausa**
12:00 **Brasile** - Cristiano de Sousa Zanetti - Maria Cristina De Cicco - Alfredo Calderale

13:00 **Colazione**
15:00 **Venezuela** - Sheraldine Pinto
15:20 **Perú** - Gastón Fernandez Cruz - Leysser Léon

I SINGOLI TEMI

15:40 **Il modello italiano del tentativo** - Giorgio Licci
16:10 **La tutela del consumatore** - Sabrina Lanni
16:40 **Pausa**
17:10 **Lo scudo fiscale** - Roberto Succio
17:30 **L'impronta lasciata dai giuristi italiani** - Mario Losano

PER UNA SINTESI

18:00 **Una veduta d'insieme** - Sandro Schipani
18:40 **Discussione e interventi**
19:00 **In attesa della cena: riunione delle sezioni regionali**

SABATO, 22 SETTEMBRE 2012

ASIA

9:30 **Cina** - Zhang Li-Hong - Marina Timoteo
10:20 **Giappone** - Andrea Ortolani
10:45 **Pausa**
11:15 **India** - Domenico Francavilla
11:40 **Indocina** - Andrea Serafino
12:05 **Discussione e interventi**

RELAZIONE DI CHIUSURA

12:20 **Riflessioni conclusive** - Antonio Gambaro
13:00 **Colazione**
15:00 Seduta del Consiglio Direttivo
15:20 Relazione del Presidente, modifiche dello Statuto, discussione e interventi
16:00 Seduta del Consiglio Direttivo
16:15 Assemblea: Indirizzo del Presidente ai Soci

Il convegno è stato realizzato con il patrocinio di

EDISON

CE.DI.P
CENTRO INTERDIPARTIMENTALE
PER LO STUDIO DEL DIRITTO PRIVATO

MVLTA PAVCIS AG GIUFFRÈ EDITORE

e con il contributo finanziario dell'Università degli Studi di Siena e del Ministero per l'Istruzione, l'Università e la Ricerca (P.R.I.N. 2010), coordinatore locale Prof. Stefano Pagliantini, coordinatore nazionale Prof. Giuseppe Vettori, e della Camera civile degli Avvocati di Siena, presieduta dall'Avv. Fabio Pisillo

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