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

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Marco Farina
Demetrio Maltese

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

by

Marco Farina[♦] and Demetrio Maltese^{♦♦}

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 entitlements², 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 rights³.

On the basis of such approach, originating from a line of French jurisprudence⁴, 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 exercise⁵ 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 perceived⁷. 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 worthiness⁸. Besides, this epistemological change was urged by the increasingly

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 appraisal¹¹.

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.

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 publications¹⁵. 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 «inducium 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 sacrifice¹⁷.

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 law¹⁹. 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

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. FOULEE, *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 grounds²⁴. 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 century²⁵, 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 betrayed²⁶.

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 advantage²⁷. 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 annulable 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

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 century²⁸, «[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 law³¹.

An exhaustive investigation on the abuse of right doctrine in Roman law and in the interpretations provided by medieval jurists³² 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 France³³.

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 sin³⁴: 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 world³⁵.

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

³¹ See § 226 BGB (*Schikaneverbot*): «Die Ausübung eines Rechts ist unzulässig, wenn sie nur den Zweck haben kann, einem anderen Schaden zuzufügen» 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 expressly 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 passed³⁶. 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 action³⁷.

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 1895³⁸. 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

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 England⁴³: the expansion of business relations determined the ascent of contracts as the central normative instrument between the parties⁴⁴. 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 model⁴⁵. «[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 jurisprudence⁴⁸ 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

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 economy⁵⁰. 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 2009⁵¹, 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 activity⁵²: 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 network⁵³, empowering the grantor to maintain control over the

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 contracts⁵⁴, 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 activity⁵⁶, 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

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 and 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 competition⁶⁰. 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

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 trading⁶¹.

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 interests⁶².

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 trading⁶³. Nevertheless, efficiency may be impaired by two main obstacles: information asymmetry and parties' non-omniscience⁶⁴. 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) duration⁶⁶. 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

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.

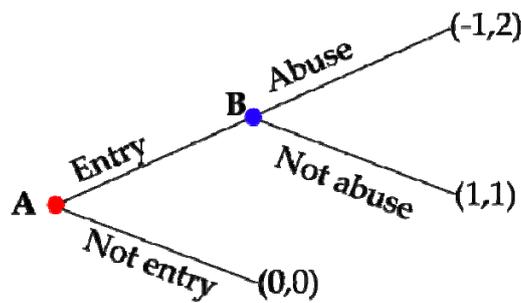
⁶⁶ A. SCHWARTZ, *Relational Contracts In The Courts: An Analysis Of Incomplete Agreements And Judicial Strategies*, in *Journal of Legal Studies*, 1992, 21, pp. 271-318.

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 equity⁶⁷.

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 parties⁶⁸. 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 «*bonesty in fact in the conduct of the transaction concerned*»; § 2-203, especially referring to seller, explains that “good faith” does not mean only «*bonesty 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 A_i 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 A_i ; *f*) absence of optimal mixed strategies: B must not be able to calculate probabilities of “non-abuse” which would make several A_i 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 issue⁶⁹. 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 dealing⁷⁰. 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.

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.