



## COMPARATIVE ANALYSIS OF THE EVOLUTION OF THE TERMINATION OF CONTRACT

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ABSTRACT: The analysis emphasizes the interpretative difficulties that arise out of the mere terminological translation of the expressions evocative of termination forms; therefore it's necessary to rebuild a common terminology in European contract law. The purpose of this research is point out that in the North American experience, unlike in the English one, there are several classifications which describe the different hypotheses of fundamental breach, such as, by way of an example, the one of "pure" impossibility and the frustration. Furthermore, revising the German law after the *Gesetz zur Modernisierung des Schuldrechts*, the study wants to describe the supervening impossibility remains like only one of the expressions of the *Pflichtverletzung* (i.e. breach of obligation) – to which the new BGB provisions dedicate particular attention – but gains primary importance in the whole discipline of the termination of contract, in accordance with the main orientation expressed by the new sources of European private law.

SUMMARY: 1. Introduction to the problems pertaining to the plurality of forms of termination of the contractual relationship. - 2. Discharge of contract and Termination. - 3. Frustration of contract. - 4. Crumbling of the univocal notion of supervening impossibility and epiphany of a new notion of contractual breach.

1. In the European panorama a new trend, concerning, in the light of the reference legal order, case and statute law, is observed. It displays a proliferation of the forms of contractual termination and, at the same time, a convergence of them where it is acknowledged that the reason is the protection of reliance, either the attention is addressed to Civil Law countries, or to Common Law ones.

The purpose, therefore, is to point out how the profound dissonances that characterized English law from the law of the United States in the past have smoothed out, but also the standardization of the types of termination of contract we are witnessing in civil law legal systems, especially in the light of the reform of German law of obligation.

At any rate, the analysis of any form of termination must be accomplished with the awareness of the fact that to the expressions commonly used to describe the types of dissolution of the contract do not correspond definite meanings and forms of protection univocally interpreted in different legal orders. In fact, the matter of the



termination of the contractual relationship is one of the many clear exemplifications of the problem of “languages”; nevertheless, the same *contratto* cannot be translated with the term “contract” if we consider that, for instance, the *donazione* is not a contract but a “deed” in English law. Anyway, each expression in range of the same order often presents different meanings according to the matters in question, without considering how the settlement of the same idiom in territories representative of different cultures could determinate the use of the same expression to describe dissimilar legal situations<sup>1</sup>, or, vice versa, how for the same juridical phenomenon different terms are used without a reasonable reason<sup>2</sup>. It is thereby necessary to conduct a semantic analysis of the terms and try to find a conceptual equivalence in so far as, beyond the rare hypotheses in which a new term is coined, more frequently, it has a specific national origin and when it is eradicated from its own territory, it often acquires uncertain and contrasting meanings. However, notwithstanding the efforts of several academics, it turns out to be almost impossible to express in a common norm identical operational rules considering the difficulties of expressing the same legal institute in the juridical taxonomy of the single legal order.

This analysis also emphasizes the necessity of rebuilding a common terminology in European contract law, that either serves as a basis for the law-making – expressive of a reduction of the asymmetry between the European legal orders – or as a bridge for a dialogue with overseas experiences<sup>3</sup>.

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<sup>1</sup> Globalization, as well as the same new way of conceiving European law, has induced several scholars to intensify their researches on the problems related to language and law. In the past, this aspect used to be of interest to international organizations in particular, as well as to mixed legal systems, where a linguistic and conceptual coordination of *civil law* and *common law* traditions has been necessary. Today, instead, it has become an aspect that cannot be disregarded by any legal practitioner, even should he move in a strictly local area. Cf. G. DANNEMANN, S. FERRERI, M. GRAZIADEI, *The Contribution of the Terminology Group*, in *Principles of Existing European Contract Law*, Contract, I, Sellier Monaco 2008, p. XXXIII *et seq.*; B. POZZO (edited by), *Europa e linguaggi giuridici*, Milano, 2008, *passim*; B. PASA, *Old Terms for New Concepts in Consumer Contracts?*, in *European Legal Integration: The New Italian Scholarship*, Jean Monnet Working Paper, 9, 2007, pp. 1- 29; B. PASA, P. ROSSI, M. WEITENBERG, *Il diritto contrattuale europeo tra Direttive comunitarie e trasposizioni nazionali*, Torino, 2007, *passim*; P. ROSSI, *Il diritto europeo nella comparazione tra sistemi giuridici nazionali: analisi linguistica e contesti interpretativi*, Torino, 2006, *passim*; S. FERRERI, *La lingua del legislatore: Modelli comunitari e attuazione negli Stati membri*, in *Rivista di diritto civile*, 2004, P. I, pp. 561-579; P. ROSSI, C. VOGEL, *Terms and Concepts: Towards a Syllabus for European Private Law*, in *European Review of Private Law*, 2004, 12, pp. 293 *et seq.* B. POZZO, *Harmonisation of European Contract Law and the Need of Creating a Common Terminology*, in *European Review of Private Law*, 2003, 11, p. 755 *et seq.*; R. SACCO, *Traduzione giuridica*, in *Digesto*, sez. Civ., *Aggiornamento*, 1, Torino, 2000, p. 722 *et seq.* R. SACCO, *Langue et droit*, in R. SACCO- L. CASTELLANI, *Les Multiples langues du droit*, L'Harmattan Italia, Torino, 1999.

<sup>2</sup> Note in this context that in the English legislation the withdrawal from consumer contracts is defined with the term “withdrawal” when concerning co-ownership, whereas it is described as “right of renunciation” when concerning contracts transacted out of commercial premises.

<sup>3</sup> This requirement is represented in the European field, for instance, by the realization of the DCFR, which can be seen as an “academic exercise” that does not claim to replace the political discussion on



When the attention is placed on common law systems, it is possible from the outset to report that the profound divergences between the English and the U.S. legal systems have softened over the course of time, being the contrast between the rigid interpretation of the principle of *pacta sunt servanda* – typical of the English legal system – and the one of the principle which states that *impossibilium nulla obligatio est* – present in the Italian legal system as well as in the U.S. one – not current any longer.

However, in the U.S. legal model, as opposed to the English model, an increasingly penetrating intervention of the judge in the heart of the contract is found, to such an extent as to entirely replace the contracting parties. As a matter of fact, while in the English law the Courts mainly play a “certificatory” and “declaratory” role, not productive of constitutive effects, in the U.S. law judges play a particularly active role not only in the determination of compensation – for which a judicial activity of English judges as well as of those of the most traditional civil law countries is found – but also in the redefinition of the contents of the contract following the supervening event which, nevertheless, does not render the performance utterly impossible. The intervention of the judge in order to redefine the terms of the contract in response of different contractual circumstances is requested by the doctrine which sees the judge as the most competent authority in a position to accomplish an equitable allocation of contingency costs, going as far as to rewrite the contract, entirely replacing the contractual parties<sup>4</sup>.

The study of the termination of contract, especially if consequent upon “supervening events”, in civil law and common law systems must proceed from an old assumption that in some ways has been brought into question over the years; it is the assertion according to which in common law systems the contract is a “pure” agreement, a consensus of minds, whereat the contractual liabilities of each party have their own independence. Thus, the impossibility of the performance of a contracting party could not affect the other autonomous promise, especially if the latter is expressed in a sum of money, as it turns out to be difficult to permit the discharge from the contract also for the other contracting party (that is, the

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the improvement of the European market – on which, in any way, lots of expectations are based – but rather to officially enable the interpreter to intervene not only after the drafting of a legal text, but also in the previous stage of it.

The US experience merged into the *1980 United Nations Convention on Contracts for the International Sale of Goods* may be emulated where at art. 79 it is not utilized the expression impossibility, frustration or force majeure, but rather “failure to perform [...] due to an impediment beyond his control”. On the topic, see P. J. MAZZACANO, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, in *Nordic Journal of Commercial Law*, issue 2011#2.

<sup>4</sup> Moreover, it is interesting to observe how the particular judicial decision activity with regard to the contents of the contract is integrated in an adversary system where the litigants play a decisive role in the discovery.



termination of the contractual relationship) due to impossibility of performance. But the leading theory of consideration has overcome the incontestability of this assumption giving interdependence to the promises. However, what is legally material today is the “perception” of the other contracting party, that is, what is recognized from the outside first and foremost by the counterpart; the relevance of the protection of reliance ensures that the contract is evaluated from an objective perspective. Moreover, in English law the assumption of the obligation is not in principle tied to the “possibility” of the promise, in fact, the principle of *pacta sunt servanda* was vigorously imposed in the past. In general, the obligor is always required to perform, also in a way that can be considered “equivalent”, and, as an alternative, to compensate; whereas the “aggrieved party”, which is the one subjected to breach, is entitled to terminate the contract.

In civil law legal systems, instead, where any analysis on the vices of consent is linked to the exchange relationship between the parties, “consent” and “object” (i.e. subject matter of the contract) are of substantial importance in terminating the contract. Therefore, the contingent impossibility of performance releases the obligor, entailing, as a consequence, the termination of the contract.

On the contrary, in English law the reflection is based on the objective fact that the contract cannot be performed due to frustration, namely due to the impossibility to fulfill the contractual purposes.

Regarding the causes of impossibility of performance, U.S. law structure differs, as we will see, from the Anglo-Saxon one if we notice the distinction between hypotheses of commercial impracticability (where the distortion of the contractual balance is caused by “material” impossibility) and cases of frustration of purpose (where the performance has become “useless”). It is possible to find this distinction in German law as well, where the *Äquivalenzstörung* (i.e. unconscionability) is regulated by § 313 (*Störung der Geschäftsgrundlage*) German Civil Code (BGB), whereas the *Zweckverfehlung* by § 275 BGB. In German law, especially after the new BGB rules of 2001, the importance of the adjustment of contract terms (*Anpassung*) as a remedy has increased. French law has moved in this direction too, even if through the operation of the doctrinal formant which has elaborated the so-called *théorie de l'imprévision*, often disapproved by the same civil jurisdiction that, in spite of the administrative one, has been reluctant to recognize this power of intervention to restore the balance of contractual asymmetries.

The Italian legal order, instead, seems not to contemplate specifically the second category. It is left to the judicial interpretation which offers, depending on the case under consideration, different solutions, almost all of them falling into the category of *presupposizione*<sup>5</sup>. The termination of contract for supervening

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<sup>5</sup> The *presupposizione*, although not yet contemplated in any provision, is a dogmatic principle to be observed in “absolute” terms ; the defect of which counts with regard to the invalidity of contract. It



unconscionability requires to be dealt with as a different topic. As we will see, the remedies given by the German model differ from the supervening events that lead to impossibility, distancing itself from the uniformity of the *disciplina "risolutoria"* provided in the Italian civil code, which nonetheless, even if in residual terms, suggests the solution of a contractual rebalancing, through a fair variation of the contractual conditions offered by the party against which the discharge is requested.

Regarding the interpretative difficulties that arise out of the mere terminological translation of the expressions evocative of termination forms, it is possible to observe, by way of an example, how the expressions "breach of contract" and "discharge", wherewith the termination of the effects of the contract due to failure (whichever the reason is) is meant, are often referred to dissonant legal situations. The expression "discharge", in particular, has been the subject of careful studies. The doctrine has made different classifications in order to clarify the forms

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can be defined as the objective (past, present and future) *de facto* and *de jure* situation taken in consideration – though in default of an explicit reference in contractual clauses – by the contracting parties in the formation of their consent as a condition of validity and effectiveness of the contract (the so-called *condizione non sviluppata o inespressa*), the failure or accomplishment of which is totally unrelated to activity and will of the contracting parties and does not correspond – complementing it – to the subject matter of a specific obligation of both the parties.

In confirmation of a continuous reference to the *presupposizione*, as an unconnected part with reasons and cause, but as relevant as them for the validity of contract (*cf.* Cass. civ., sez. III, judgment 25.05.2007, n. 12235); all the more so if it is intended as a concrete cause and not as an abstract type any longer (Cons. Stato, sez. III, 07.06.2012); however, it is sometimes assimilated to the condition, and other times deepened in the broader issue concerning the cause. In accordance with this orientation a recent pronouncement of the Italian Court of Appeal, which has determined that in the contract wherein might be recognized a *presupposizione* (that is an objective *de facto* situation which – though not mentioned – has been implied or considered by the contracting parties as an implied premise of their consent, independently of their will), where the "presupposed" situation is already "defective" at the time of conclusion of contract, a case of nullity of the contract occurs, wherein the said defect turns to be a *mancaza di causa* (i.e. failure of "cause"); where instead the "presupposed" situation fails afterwards in the performance of the already executed contract, the contract itself terminates for "*fatto non imputabile alle parti*", that is, for an event not due to liability of the parties (so, App. Roma, Sez. I, 04/06/2012). For a representative picture of tendency of doctrine and lines of decision with regard to the *presupposizione*, see A. BELFIORE, *Il contratto in generale*, Toma IV, *La presupposizione*, in *Trattato di diritto privato*, edited by Mario Bessone, Vol. XIII, Torino, 2003, *passim*, however at p. 1 in particular, Belfiore, states how the *presupposizione* is not an autonomous legal institution, but rather an "institution, or entity or principle" able to concentrate and stabilize not rational decisional models and interpretative policies. It must be also said that the institution of *presupposizione*, though recognized by doctrine as well as by decisions of the courts since the beginning of the 40s, initially received scant implementation. In confirmation of this, see Cass. January 15, 1947, n. 32. in *Monit. Trib.*, 1947, p. 3; Cass. July 1, 1947, in *Riv. Dir. Comm.*, 1947, II, p. 163, with note by R. SACCO, *La presupposizione e l'art. 1467*. On the issue, see also C. RUPERTO-V. SGROI, *Nuova rassegna di giurisprudenza sul codice civile*, vol. IV, t. II, edited by R. Sgroi, Milano, 1994, p. 946 *et seq.* and A. CATAUDELLA, *Sul contenuto del contratto*, Milano, 1966, p. 232- 348, who pointed out from the outset the operative value of the *presupposizione*.



of termination out of a set pattern, even if both the English and the U.S. legal orders (though the latter to a much lesser degree) do not present systematic regulations concerning the termination of contract, comparable to the one provided in the Italian civil code where an entire chapter is dedicated to the *risoluzione del contratto* (artt. 1453 – 1469 c.c.).<sup>6</sup>

2. It is possible to notice the profound evolution over the centuries of the concept of “discharge of contract” if we only think that in the end of the 16<sup>th</sup> century it was strictly related to the death of the debtor in case of personal service contracts. These hypotheses have been differently applied in the English legal model, as opposed to the North-American one, if we think that the latter has considered the *intuitu personae* also in reference to the identity of the counterpart (i.e. the creditor). With time, the importance of the exact performance of the contract has made fall within the hypothesis of “discharge” also the cases of serious disease which made the debtor in any case incapable to perform the contract. It must be remembered, for example, the decision that stated the discharge of the contract due to the impossibility of an ill pianist to play in a concert. Also in this case, as in the one previously described, the discharge of contract is not seen from a subjective perspective, but rather from an objective one, therefore the good health of the artist is considered as an implied condition of the contract. Otherwise the impossibility of performance should be caused by a self-evident inevitable event, such as atmospheric agents. In fact, the hypotheses of “impossibility” were mainly provided with regard to discharge of maritime contracts, due to a “frustration of the adventure”<sup>7</sup>. Shortly afterwards the range of hypotheses of contracts discharged due to impossibility became wider and wider, as far as to include even the hypotheses of agreement to specific goods where the origin of the goods was fundamental and it turned to be “impossible”.

The forms of discharge under consideration which primarily concern this analysis are the one “by breach” of one of the contractual parties and the one “by frustration”. These forms demonstrate how it is not possible to have “breach of contract” if the contract is “frustrated”, that is when the performance of one of the

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<sup>6</sup> It is the Chapter XIV of the 4th Book of the Italian Civil Code which is divided in three Sections: “della risoluzione per inadempimento”; “dell’impossibilità sopravvenuta”; “dell’eccessiva onerosità”. On the topic, the doctrine is extremely extensive, cf. by way of representative example, some fundamental readings, B. GRASSO, *Eccezione di inadempimento e risoluzione del contratto*, Napoli, 1973, p. 32 *et seq.*; R. SACCO, *I rimedi sinallagmatici*, in *Tratt. di dir. civ.*, edited by Sacco, *Il contratto*, Torino, 1993, p. 393 for whom the objective elements do not affect the action of *risoluzione*; G. VISINTINI, *Inadempimento e mora del debitore*, Milano, 2006, p. 393.

<sup>7</sup> See *Anson’s Law of Contract*, 27th edition, J. Beatson, Oxford, 1998, p. 503.



contractual parties becomes impossible not due to the fault of the defaulting party<sup>8</sup>. However, it is necessary to think that the release from contractual obligations of the parties is realized, first and foremost, through the discharge by performance, as well as by an agreement which either follows the contract or is expressly stated in the same “to-be-discharged” contract<sup>9</sup>. The latter may be either a case of bilateral or a case of unilateral discharge, which is the discharge that occurs by express will of only one of the contractual parties, only exceptionally, mainly in case of divisible contracts and provided that the will is communicated within a «reasonable» term<sup>10</sup>.

But the discharge by agreement comprises very different concepts such as the *discharge by release under seal*, *by accord and satisfaction*, *by rescission of a still enforceable contract*, without considering that the *payment of a debt or satisfaction of other obligation*<sup>11</sup> is indeed considered the first form of discharge.

The “by release under seal” typology may be considered as a solemn disclaimer, which does not require the presence of consideration, therefore the performance of one of the contractual parties does not appear necessary. The one concerning accord and satisfaction is another aspect of discharge by agreement, where the release from the contract occurs due to a new agreement and by the performance which was subject matter of the original obligation. In civil law orders, this hypothesis can be, at the same time, inserted among the other forms of discharge that are different from the performance, such as, for example, the novation. Also the rescission falls within the forms of discharge by agreement and takes place when the contract presents defects right from the start, seemingly in a very similar way to how provided in the Italian civil code<sup>12</sup>, but, in fact, only when the contractual parties agree so that the contract is not enforceable any longer, that is when an agreement is executed and the consideration of each party is the abandon of the claims laid by the other party<sup>13</sup>.

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<sup>8</sup> At any rate, the “doctrine of frustration”, as it is known today, comes from a very recent line of cases, which dates back to the well-known case *J. Lauritzen A.S. v. Wijsmuller B.V., (The Super Servant Two)* [1990], in 1 Lloyd’s Rep. at p. 8.

<sup>9</sup> It is clear that, just as the contractual parties can, by agreement, create a contract, they can, similarly, discharge the contract; however, also in this case the contract must be supported by a consideration.

<sup>10</sup> Cf. P.H. RICHARDS, *Law of contract*, Pearson Education, 2006, pp. 332- 336.

<sup>11</sup> Cf. *Anson’s Law of Contract*, cit., p. 491.

<sup>12</sup> The Italian Civil Code at artt. 1447 e 1448 c.c. clearly classifies the cases where it is possible to obtain the *rescissione* of contract, that is when one of the parties has “assunto obbligazioni a condizioni inique, per la necessità, nota alla controparte, di salvare sé o altri dal pericolo attuale di un danno grave alla persona”, or when there is a “sproporzione tra la prestazione di una parte e quella dell’altra e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l’altro ha approfittato per trarne vantaggio”.

<sup>13</sup> Moreover, also the rescission can occur in different ways: through the substitution of one of the contractual parties or through the indication of new terms as in the historic case *Morris v. Baron & Co*, now included in the *Arbitration Act*, 1996, s. 41 (3), provided that the intention to terminate the previous contract is well-expressed, or else it would be a case of variation.



The rescission is often described as alternative to the termination of contract, but even though these two terms are misused in order to describe equivalent situations, in fact they technically represent different legal institutions. The rescission or (*Anfechtung* § 142 BGB) retroactively invalidates the effects of the contract and presumes that the agreement is vitiated, the termination, instead, presumes that the agreement is effective and, depending on whether it is a divisible contract or not, it can be respectively *Kündigung* or *Rücktritt* and has, in any case, *ex nunc* effects.

It is clear that these last two hypotheses occur with regard to synallagmatic contracts and must be considered as consequences of the breach of contract, whereas the termination is considered as a consequence of the declaration of will of the “weak” party.

Therefore, although the expression rescission is often used as alternative to the one of termination, only the first one, similarly to the Italian institution of *rescissione*, is related to “genetic anomalies” of the contract, which invalidate the formation of the contract and which, most of the times, consist of hypotheses of *mistake*, *misrepresentation*, *duress*, *fraud*, *breach of a duty of disclosure*.

The termination, regulated in English law more specifically as a consequence of the breach of contractual obligations, can be assimilated instead to the *risoluzione per inadempimento* regulated by the art. 1453 of the Italian civil code. Therefore, the termination of contract occurs in case of non-performance, of defective performance, of express repudiation, or of failure to perform a promissory representation, that is a promise elevated to the status of condition of contract.

The partial breach entails termination especially if the contractual obligation is indivisible, similarly to what the art. 1316 c.c. provides<sup>14</sup>, or when the defaulting part of the obligation is of particular importance and value, hence the seriousness of the non-performance of the other party is unequivocal. Nevertheless, also the art. 1455 c.c. provides that “il contratto non si può risolvere se l’inadempimento di una delle parti ha scarsa importanza, avuto riguardo all’interesse dell’altra”<sup>15</sup>. With regard to the contract itself, its termination can be the consequence of the non-performance of certain obligations, turning to be in this way equivalent to the Italian *clausola risolutiva espressa*, wherewith, according to the provisions of art. 1456 c.c., the contracting

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<sup>14</sup> Art. 1316 c.c., entitled «obbligazioni indivisibili» provides that «l’obbligazione è indivisibile quando la prestazione ha per oggetto una cosa o un fatto che non è suscettibile di divisione per sua natura o per il modo in cui è stato considerato dalle parti contraenti».

<sup>15</sup> For further about the objective theory, for which the seriousness of the performance must be estimated with regard to the extent of the non-performance in respect to the economy of the contract cf. G. G. AULETTA, *La risoluzione per inadempimento*, Milano, 1942, p. 416; M. BIANCA, *Diritto civile*, 5, Milano, 1994, p. 270; M.G. CUBEDDU, *L’importanza dell’inadempimento*, Torino, 1995, p. 15 where the function of art. 1455 c.c. is pointed out as “minimum limit” for the option given to the defaulting party to claim the *risoluzione* of contract Cf. Cass., June 14, 2001, n. 8063, in *Studium juris*, 2002, p. 97.



parties can agree on the termination of the contract in case a certain obligation is not performed in compliance with the agreed conditions.

The termination does not have retroactive effects and, similarly to what provided in the Italian legal order (art. 1453 c.c.), once the *risoluzione* is claimed, it is not possible to demand the performance of contract, whereas the reverse can happen; indeed, as a general rule, the party that wants to terminate the contract must, first of all, give notice of termination, a kind of a *diffida ad adempiere* pursuant to art. 1454 c.c.<sup>16</sup>

3. By the expression “frustration of contract”, in its widest sense, is meant the effect produced by the impossibility of realizing the purpose underlying the contract, which is defined *impossibilità sopravvenuta* in the Italian legal system, *force majeure* in France and *Unmöglichkeit* in Germany.

This expression includes several different types, given that the material impossibility cannot be assimilated to the economic impossibility, or to the supervening “inadequacy” of the performance to satisfy the interest stated at the time of conclusion of the contract. It can be said from the outset that the economic impossibility has had several difficulties in England and represents, somehow, the major difference with respect to the U.S. experience, where the importance of the change of the economic value of the performance has been analyzed in all its aspects.

Among the first forms of frustration fully acknowledged by the English courts, there is the so-called frustration of purpose, by means of which is meant the situation where the performance, though possible, has become useless (namely, there is no longer interest in the performance of contract since its conditions have failed).

A specific form of frustration is the one of adventure, which can be found with regard to specific “commercial” contracts<sup>17</sup>, indicative – though not always – of an only temporary impossibility of performance. As respects to this, famous the case *Jackson v. Union Marine Insurance Co., Ltd* (1874) where the unsatisfied contractor has been given by the judge the right to terminate the charter-party regarding the hire of a ship which had to go from Liverpool to Newport in order to load iron rails but ran aground for several days due to weather perils, constraining in this way the consignor

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<sup>16</sup> The following fundamental readings are recommended: A. GUARINO, *La diffida ad adempiere e la gravità dell'inadempimento*, in *Studi in memoria di Vassalli*, Torino, 1960, p. 965; A.P. MANFREDI, *Natura ed effetti del termine nella diffida ad adempiere*, in *Nuov giur. civ. comm.*, 1988, p. 187.

<sup>17</sup> Cf. M.D.L.F., *Impossibility: Shipping: “Frustration of Adventure”*, in *California Law Review*, vol. 10, 4, (may 922), p. 338.



to have recourse to another carrier<sup>18</sup>. Also the one in question is a case of discharge, where, due to delayed performance, there cannot be satisfaction of the interest of the contractual party; the unforeseeable contingency has reflections on the “usefulness” of performance rather than on its “possibility”. In fact, even if the performance has not become concretely “impossible”, in any case it has turned to be “other thing”<sup>19</sup>.

These are all hypotheses wherein a termination of contract with related discharge occurs, hypotheses which have in common the fact that events or circumstances, wherein there is no deceit nor fault of the defaulting party, have occurred; hence the certainty that frustration never occurs when the event that made the performance impossible is due to liability of the contractual parties.

*Taylor v. Caldwell* is the leading case which established the doctrine of frustration<sup>20</sup>; it pertains to the letting of a music hall which, before the first concert was to be given, was destroyed by fire, following which the lessee claimed compensation on grounds of not being able to use the music hall. The Queen’s Bench denied the request of compensation and the most attentive doctrine pointed out that the dismissal of compensation was an inevitable consequence of the nonexistence of the music hall – permanent and necessary condition for the contract to be binding – borrowing in this way from the tradition of civil law systems the determination of the necessary conditions of a contract. In particular, Judge J. Blackburn said that the defendant is not bound to “pay” when “the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor”. Besides this leading case, another example of frustration of purpose is the *Krell v. Henry* case, wherein the Court of Appeal justified the partial breach of the debtor who had to pay the rental for a balcony rent in order to watch the coronation of King George – which never took place because of a sudden illness of the King – indicating the coronation procession as foundation of the contract, which nonoccurrence frustrated the purpose of the party<sup>21</sup>.

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<sup>18</sup> The ship, left on 2 January, ran aground right after its departure, with the possibility – documented by technicians – of restarting its route only in August. The issue was focused on the significance of the clause which envisaged and justified the possible “perils of the sea”, whereupon the Court set a “reasonable implementation”.

<sup>19</sup> R. DAVID, *Les Contrats en droit anglais*, cit., p. 309.

<sup>20</sup> [1863] 3 B.&S. 826. See also *Cf. Anson’s, Law of Contract*, cit., p. 491, or, for a more analytical description of the case as well as for an exposition of the underlying *ratio*, see G. TREITEL, *Frustration and Force Majeure*, 2nd edition, 2004, Thomson, Sweet Maxwell, p. 44 *et seq.*

<sup>21</sup> *Krell v. Henry* [1903] 2 K.B. 740. *Cf. Various Authors, Contract Law, (Casebooks on the common law of Europe)*, Oxford and Portland, Oregon, 2002, p. 612.



Both cases represent an application of the “undeveloped condition” (i.e. *unentwickelte Bedingung*), concept elaborated by the acknowledged German jurist Windscheid, who first expound that, a “will”, an “intention” must be intended as declared under a certain presupposition, should the legal effect be subjected to the permanence of a certain fact and law situation. This well-known elaboration provoked not few critics, given that it raised the risk that the contract might not be depending on the mere inner motivation of the parties; hence, the doctrinal elaboration with the intent to accomplish a process of objectification of the presupposition – compared to the one originally defined by Windscheid – which doctrinal elaboration has brought the problem of the presupposition back to the contents of contract. The following orientations, seemingly distant from the “dogma of will”, represent indeed the most coherent expression of it, lifting the undeveloped or unexpressed condition to fundament of the entire contract, insofar as being an expression of a *de facto* situation inferable from the context of the contract – common to both the parties – should its occurrence be independent from their will.

It cannot be denied that the studies on the “presupposition” have since always had, especially in the Italian legal system, connections with the studies on the so-called *teoria delle sopravvenienze*, linked to the reasonableness of the *rebus sic stantibus* clause. In fact, according to well-established doctrine, as well as to lines of cases, a *presupposizione* is deemed to be invalidated, compromised, by supervening events, every time that, from the contents of the contract, “si evinca che una situazione di fatto, considerata, ma non espressamente enunciata dalle parti in sede di stipulazione del medesimo, quale presupposto imprescindibile della volontà negoziale, venga successivamente mutata dal sopravvenire di circostanze non imputabili alle parti stesse, in modo tale che l'assetto che costoro hanno dato ai loro rispettivi interessi venga a trovarsi a poggiare su una base diversa da quella in forza della quale era stata convenuta l'operazione negoziale, così da comportare la risoluzione del contratto stesso ai sensi dell'articolo 1467 c.c.”<sup>22</sup>.

The assertion that considers this a case of frustration requires an examination that remarks the elimination of the implied terms as a consequence of the “supervenience” of some events<sup>23</sup>. In this way, in common law systems, a frustration would occur whenever there is an implied intention of the parties to discharge the bond in case of occurrence of such events. This examination has been sometimes

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<sup>22</sup> Cf. Cass. n. 633 of 24/03/2006. G.B. FERRI, *Dalla clausola rebus sic stantibus alla risoluzione per eccessiva onerosità*, in *Quadrimestre*, 1988, p. 54; M. AMBROSOLI, *La sopravvenienza contrattuale*, Milano, 2002, *passim*.

<sup>23</sup> With regard to this, it is interesting the distinction operated by Criscuoli who lists three types of implied terms: by law (or by statute); by custom (or usage); by the courts (or in fact). G. CRISCUOLI, *Il contratto nel diritto inglese*, Padova, 1990, p. 123. On the additional judiciary power concerning implied terms, see CABELLA PISU, *L'impossibilità sopravvenuta come limite della responsabilità contrattuale nel diritto anglo-americano*, in *Contatto e impresa*, 1990, p.638.



interpreted from a subjective perspective and sometimes from an objective one, depending on whether the judge concentrates his attention on the intentions of the parties, or rather on a reasonable man's intention. The objective interpretation gained the upper hand to the detriment of the subjective one, turning into a different sort of examination known as "theory of just and equitable result", the aim of which is to keep the contract alive so that it can produce its (in compliance with law) effects whenever it is just and reasonable to do so.

This latter theory has had, in any way, interpretative difficulties especially regarding to the analysis of what can be really considered "foundation of contract" so, with this purpose, another theory, named "Theory of radical change in the obligation" and thus aiming at considering frustrated each contract that has undergone a radical change in the obligation<sup>24</sup>, has arisen.

But these theories, seemingly different from each other, turned out to be mere interpretive phases, which led to an apparently more restrictive interpretation but undoubtedly of easier application of the doctrine of frustration.

In English law, the theory of the implied condition and the related developments of the frustration of contract do not allow to build a uniform framework of situations which justify the termination of contract in case of particular supervening events. The review of the line of judicial cases does not permit the fulfillment of a map which displays when the prior allocation of risks justifies the existence of a contract and the functioning of rules regarding frustration. At any rate, it is possible to notice an extension to the termination of contract when the non-performance "goes to the roof of the contract", without nevertheless confusing the "conditions" to the "warranties".

In English law, as well as in U.S. law, the conditions that lead to the termination of a contract are closely related to the default of a condition, intended as the promise, on which execution, the right to a valuable consideration depends. It is a condition that concerns the foundation of the contract, hence the expression "fundamental breach": the supervening events cause the dissolution of the foundation of contract, due to the substantial change of the obligations taken by the parties. And sometimes also the term for the performance of the contract may become a reason for the frustration of the contract itself, especially when the "term is found to be an innominate term and its breach has had the effect of depriving the innocent party of substantially what it was intended he should obtain under the contract"<sup>25</sup>.

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<sup>24</sup> On the supervening events which change contractual features, also from a comparative perspective, see Various Authors, *Sopravvenienze e dinamiche di riequilibrio tra controllo e gestione del rapporto contrattuale*, edited by Raffaele Tommasini, Torino, 2003, passim, and in particular, p. 111 *et seq.*

<sup>25</sup> For further information about the topic, see P. H. RICHARDS, *Law of contract*, 4th edition, Pearson, 2006, p. 271 *et seq.*



The fundamental breach may be caused by the alteration of the economic balance of the contract, which, however, does not necessarily and exclusively mean an increase of the costs of the performance. Nevertheless, this economic aspect, in order to be relevant for the termination of contract, must be included in a wider concept of impracticability of the purpose agreed by the parties; after all, in general, in case of objective difficulty of performing the contract due to the “onerousness” (i.e. supported by, or relating to a good and valuable consideration) of the performance itself, the risk burdens the debtor.

In the North American experience, unlike in the English one, there are several classifications which describe the different hypotheses of fundamental breach, such as, by way of an example, the one of “pure” impossibility and the frustration. All the cases wherein the performance has become objectively impossible are included in the first one, whereas the circumstances, in which intentions and purposes of the single contractual party (which are combined only by the conclusion of the contract) cannot be satisfied, are included in the frustration.

Regarding the impossibility, it is moreover possible to separate the category concerning the impracticability, often identified with the doctrine of purpose, but different from it insofar as the material aspect of the performance is irrelevant; in fact, the impracticability occurs mainly when terms and ways of performance, different from the settled ones and caused by unforeseeable events, affect the validity of the contract. As for this, it is necessary to remember the aforementioned case where the delayed delivery of goods due to bad weather conditions constrained the contractor to have recourse to another carrier, and where, therefore, the delivery of the first carrier became useless.

The so-called commercial impracticability has been elaborated by the American doctrine as a subcategory of the impracticability. It is focused on the economic aspect – which has been examined by the Courts in an objective, more than subjective, perspective – and analyzes the increase of the cost of performances considering the evaluation of an average man and the nature of the deal<sup>26</sup>. Different, instead, is the position of English judgments, which are tendentially more reluctant

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<sup>26</sup> Several interesting studies have been conducted through an economic analysis approach, which have divided the topic in three fundamental areas: risk-allocation function; information harvesting function; incentive function. Cf. M. CENINI, B. LUPPI, F. PARISI, *The Comparative Law and Economics of Frustration in Contracts*, in *University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper no. 09-20*. An analysis which follows this approach cannot prescind from the studies conducted by J. GORDLEY, *Impossibility and Changed and Unforeseen Circumstances*, 52 *American Journal of Comparative Law*, 2004, p. 513; H. MUIR WATT, *Analyse économique et perspective solidariste*, in Various Authors, *La nouvelle crise du contrat*, Parigi, 2003, p. 183; M.J. WHITE, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 *Journal of Legal Studies*, 1988, p. 353; P. TRIMARCHI, *Commercial impracticability in contract law: An Economic Analysis*, 11 *International Review of Law and Economics*, 1991, p. 63; R.A. POSNER-A.M. ROSENFELD, *Impossibility and Related Doctrine in Contract Law. An Economic Analysis*, 6 *Journal of Legal Studies*, 1977, p. 83.



to acknowledge that only the huge increase of costs of production could be cause of frustration<sup>27</sup>. The commercial impracticability, in any case, has always been analyzed from a perspective which does not disregard the importance of the assumptions underlying the contract. The origins of the doctrine of impracticability can be tendentially traced back to the well-known decision of the Supreme Court of California, *Mineral Park Land Co v. Howard*.

It is possible to notice the distinction between the doctrines of impossibility and impracticability also in the part of the Uniform Commercial Code, the most complete form of codification in the U.S., dedicated to contracts of sale. Two different sections are dedicated to the discipline, underlining in this way this differentiation. Article 2 – 613 releases the seller from the obligation to deliver the goods if «the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer»; and Article 2 – 615 releases the parties in case delivery «has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made».

From the reading of the latter section, in particular, it is possible to observe how the intention is to underline that an increase of costs of performance is not enough, it must be determined by an objective occurrence. From this, one can infer that the valuation of the unforeseeability of the loss – necessary to discharge the parties – is made on the basis of subjective criteria, though rendered objective. Therefore, what will be analyzed is not the unlikely occurrence of the event, but rather the fact that its non-occurrence is one of the basic assumptions on which the contract was made. Moreover, the U.C.C. clarifies that the impracticability can be declared if it is demonstrated that the debtor has acted in order to eliminate the impediment with a reasonable effort. It follows that the impossibility of performance cannot be caused by any fault or default of the debtor; otherwise a self-induced frustration – incompatible with the *ratio* of the supervening impossibility which imposes the role of independent “third party” on the factors causing the impossibility – would occur.

Furthermore, as an alternative solution to the termination of contract, the Article 2 – 614 allows the debtor to replace the performance which has become impossible or commercially impracticable with a commercially reasonable substitute, reasserting in this way the propensity of common law systems to solve any “inadequacy” in “remedial” terms, and particularly by means of the principle of equivalence. Nevertheless, the offer of remedies – which most of the times guarantee

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<sup>27</sup> With regard to this, see the famous case *Herne Bay Steam Boat Co v. Hutton*, where has been pointed out the absence of frustration as the obligations have not become different in nature, so “a contract should be held frustrated if it would be unjust to cling to it in a changed situation”. Cf. Various Authors, *Contract Law, (Casebooks on the common law of Europe)*, cit., p. 615.



the protection through the principle of equivalence – is always possible, besides rendering, at first sight, always obligatory the performance, even when the non-performance is without default of the counterpart. This formulation, tempered by the increasing importance of the doctrine of frustration, finds its strength in the well-known principle of sanctity of the contract.

At the same time, English statute law in the field of frustration is poor, but, certainly, the *Law Reform (Frustrated Contracts) Act 1943* cannot be disregarded. It has clarified some aspects of the problem concerning the restitution of what has been given before the occurrence of the frustrating event. According to the reference rule which was previously in force, the consequences deriving from the non-performance of contract before the occurrence of the supervening events remained the same, so that the parties were not discharged from the obligations accrued before the occurrence of the event, even if they had become exigible afterwards. Thereby, this could lead to the unpleasant situation wherein one of the parties had to perform even if the valuable consideration had become impossible in the meantime. The 1943 Reform has brought about a better protection to the party insofar as, for instance, there has been an advanced payment, giving it the possibility to recover it, also through indemnity, based on the enrichment of the counterpart.

In any case, in the English legal system as well as in the U.S. one, the “generic” supervening impossibility and unconscionability (or hardship) of one of the performances follow the same doctrinal framework, that is in the field of law which concerns the protection of the party against the effects of supervening events; however, the criteria on which they are based are appreciably different. And in any case, should it be a supervening impossibility, either party would be protected, whereas in case of unconscionability of performance, only the economic interests of one of the parties would find protection<sup>28</sup>.

Finally, other hypotheses of discharge of contract falling within the forms of impossibility can be determined either by legislative intervention or by judicial decisions, and, indeed, the expression “impracticability” has been often used to refer to them precisely because the discharge is not determined by the difficulty of performing within the terms and in compliance with the assumptions directly or indirectly agreed in the contract, but rather by the unlawfulness of performance in the light of the new legislative interventions, as well as of the judgments. It is a type of discharge which is justified also in common law systems.

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<sup>28</sup> On the little propensity to protect the person who has already performed when the contract becomes frustrated, see T. WEIR, *Non-performance of a Contractual Obligation and its Consequences in English Law*, in Various Authors, *Il contratto di inadempimento. Realtà e traduzione del diritto contrattuale europeo*, edited by L. Vacca, Torino, 1999, p. 71.



4. The *Gesetz zur Modernisierung des Schuldrechts* has “modernized” the law of contract and has created a uniform notion of non-performance built on the breach of the obligation originating in the contract<sup>29</sup>. The discipline of breach, before the reform, was not regulated in an organic way; all the forms of breach of contract, also the so-called positive ones, used to be redirected to the only generic reason of supervening impossibility. Now the partial performance or the so-called breach of secondary obligations – which express themselves through the obligation of behaving, in the development of the obligatory relationship, in order not to cause detriment to the counterpart – gain their own identity and autonomy from the non-performance intended in the canonical sense of the term, that is non-performance of the principal obligation.

The reform process concerning contract law and in particular the determination of hypotheses of revocation as well as the acknowledgment of a general discipline about the termination of contract on grounds of non-performance independent of liability, has clearly taken its cue from UNIDROIT principles and from the principles of European contract law (so-called Ole Lando project) which are based on a uniform concept of non-performance.

The primary role of the supervening impossibility category has been somehow replaced by a uniform concept of “breach of obligation”, which comprises in the category of non-performance also those aspects which, although fully recognized by the doctrine, were not integrated in any provision (*cf.* § 241 BGB).

In the past, there was not a clear distinction between subjective impossibility and objective impossibility, but – similarly to what happens in the Italian legal system – there was only the supervening impossibility in case that generic impossibility was without fault of either party (§275 BGB).

There was a general form of termination where one could find the hypotheses resulting from the impossibility of performance (*Unmöglichkeit*), from delay (*Verzug*) and from the presence of defects related to the subject matter of the contract. The discipline of default was closely related to the supervening impossibility of performance, on the basis of which the other types – which were already object of provisions in other civil law countries – were built. The supervening impossibility, always indicated as foundational reason of the termination of contract, today is only one of the expressions of the *Pflichtverletzung* (i.e. breach of obligation) – to which the new BGB provisions dedicate particular attention – but gains primary importance in the whole discipline of the termination of contract, in accordance with the main

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<sup>29</sup> About the reform, bibliography is very extensive. *Ex Pluribus*, *cf.* C.W. CANARIS, *La riforma del diritto tedesco delle obbligazioni. Contenuti fondamentali e profili sistematici del Gesetz zur Modernisierung des Schuldrechts*, Padova, 2003, *passim*; J. M. SMITS, *The German Schuldrechtsmodernisierung und Europäisches Vertragsrecht*, Tübingen, 2008, *passim*; R. ZIMMERMANN, in Stefan Vogenauer § Stephen Weatherill, *Contract Law Reform: The German Experience, The Harmonisation of European Contract Law*, Oxford, 2006, p. 76.



orientation expressed by the new sources of European private law (Vienna Convention, Unidroit Principles, Principles of European Contract Law, Common Frame of Reference). It is therefore possible to find in the new BGB provisions the several types of impossibility: objective (of fact or material), subjective, original, supervening and economic (so-called loss of foundation of contract); saying that, for all these forms, the impossibility, independently of responsibility for the failure, releases the debtor. Of particular interest is the «personal» impossibility, about which it is helpful to mention the example case of the singer who cancels the performance due to serious illness of her child<sup>30</sup>. What is relevant is not the interest of the creditor, but rather the interest of the debtor, whose performance cannot be claimed because impossible, or better, not “acceptable” (*Zumutbarkeit*)<sup>31</sup>. The impossibility of fact is another form of impossibility that has raised several critics. It is linked to economic necessities which objectively seem to endanger the *pacta sunt servanda* principle but that are indeed justified by reasonable economic analyses<sup>32</sup>.

The analysis of the different aspects of the supervening impossibility has been clearly facilitated by the introduction in the BGB of the *Vermutung*, which was known until then only due to the contribution of doctrine and judgments.

Moreover, the possibility of refusing the performance has been introduced. This concept is related to the forms of absolute impossibility, as well as to the ones concerning the “irrecoverableness” of performance, sometimes linked to the economic impossibility. The new category allows refusing the performance whenever it is unacceptable and it is a consequence of the introduction in BGB provisions of the concept of *Unzumutbarkeit*, which somehow seems to replace the one of the supervening impossibility. In these new terms, the *Unzumutbarkeit* of the performance is a sufficient condition for the debtor to lose his right to a valuable consideration, without prejudice to the right of restitution.

In other words, new forms of “relative” impossibility come to light. It becomes moreover possible to claim together for the termination of the contract and the compensation, and in this case, as we will see, independently for responsibility for the failure. In particular, according to the provisions of §325 BGB, in case of reciprocal contracts, the right to demand damages is not excluded by revocation; therefore it is not considered as an alternative to it, as it is, instead, in other civil law systems.

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<sup>30</sup> Example elaborated by C.W. CANARIS, *Contenuti fondamentali e profili sistematici del Gesetz zur Modernisierung des Schuldrechts*, in C.W. CANARIS, *La riforma delle obbligazioni del diritto tedesco delle obbligazioni*, edited by G. De Cristofaro, Padova, 2003, p. 14.

<sup>31</sup> The fact that this case of justified breach for “personal interests” is being considered among the other forms of supervening impossibility can be clearly deduced also by the reasons of the bill of law, *Cf.*, *Bundestagsdrucksache*, 14/6040, p. 130.

<sup>32</sup> J. WILHELM, *Schuldrechtsreform 2001*, in *Juristenzeitung*, 2001, p. 866.



Another problem, now solved, was the one concerning the old formulation of § 306 BGB, which gave primary importance to the maxim «*ad impossibilia nemo tenetur*» and according to which: «Ein auf eine unmögliche Leistung gerichteter Vertrag ist nichtig».

The equation impossibility of performance - nullity of contract has been clearly disproved by the new § 311a, according to which the validity of a contract is not excluded by the fact that the debtor is released by the duty of performing according to §275, 1° and 3° paragraph, or by the fact that the performance is already impossible at the time of conclusion of the contract. Moreover, according to § 311a, 2° paragraph, in presence of the aforementioned circumstances, the creditor may claim the debtor for compensation as an alternative obligation to the original one which has become “impossible”. This does not apply if the debtor demonstrates that was not aware of the original impossibility of the performance and is also not responsible for this lack of awareness. Nevertheless the impossibility of the performance entails the “irrecoverableness” of the performance itself, as well as it eliminates the duty of performing. So, this “lack” in the contract is replaced by a new obligation, introduced as a compensation for the creditor since the purposes of the contract do no longer exist. However, this new obligation occurs only if at the time of the conclusion of the contract the debtor either was aware of the obstacle, or ignored it for a reason for which he is accountable<sup>33</sup>. These new provisions confirm the new importance of the concept of responsibility as closely related to the discipline of compensation, which gains more autonomy from the rigid principle of warranty.

The principle of warranty (as a rigid instrument of control) has had somehow a secondary role, but at the same time it is possible to notice that the assessment concerning the responsibility of the impossibility is not based on the demonstration of the fact that the debtor concurred to make the performance impossible, but rather concerns the state of unawareness of the “irrecoverableness” of the performance.

This choice of the reform goes beyond the objective approach based on the assumption that the debtor, with the conclusion of the contract, assumes the warranty of being able to perform and becomes in consequence compelled, independently of the liability.

Moreover, the new direction of the reform, which is based on the presumption of validity of the contract (§ 311 a), has not insignificant consequences on the determination of the damage, which now has to be determined in the light of the positive contractual interest. The previous provision, which excluded the validity of the conclusion of a contract concerning an impossible performance, led, instead, to a

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<sup>33</sup> G. HOHLOCH, *La codificazione degli obblighi di protezione e della responsabilità per culpa in contraendo*, in Cian, *La riforma dello Schuldrecht tedesco: un modello per il futuro diritto europeo delle obbligazioni e dei contratti?*, Padova, 2004, p. 243.



responsibility for duty of disclosure (pre-contractual) about the existence of the impossibility, which legitimizes the compensation only for the negative interest, the aim of which is to put the person in the same condition as if the contract was not made.

A rapid comparison with the Italian experience brings immediately out the contrast between these general lines and what provided at artt. 1346 e 1418, paragraph 2, Italian Civil Code, where the “possibility” of the subject matter of the contract is a contractual requirement, otherwise the contract will be invalid. However, a wider approach shows how this solution is in line with the UNIDROIT and the PECL principles – which underline how the impossible obligation excludes the claim for performance in kind but not the “secondary” claim for payment – and shows above all that the German legal system not only follows the results offered by European studies, but also, first and foremost, concurs in the same process of standardization of European contract law.