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RESEARCH ARTICLE

The *Cause* of the Contract in French and Italian Law: 'I will Survive'

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Abstract

Almost 10 years ago, the *Ordonnance* of 10 February 2016 reforming the French Civil Code (CC) removed the cause from the conditions for validity of the obligation. Thus, it broke with the tradition of the *Code Napoléon*, and a large number of civil codifications followed. Since 2016, French scholars have argued that, notwithstanding its conceptual implications, the disappearance of the formula of the *cause* has resulted in semantic rather than substantial changes. Whereas, in one opinion, the *cause* is still found underlying 'contenu litice et certain' (Article 1128), its various forms and functions today appear in several CC provisions.

Keywords: EU law; contract law; French civil code; Italian civil code

I. *La cause est morte … vive la cause* in the new French Civil Code? Setting the scene

It has been almost 10 years since the *Ordonnance* of 10 February 2016 reforming the French Civil Code (hereinafter CC) removed the *cause* from the conditions for the validity of the *obligation*. In doing so, the *Ordonnance* departed from the 1804 *Code Napoléon*,[1] which had inspired many codifications of the 19th century such as the Belgian,[2] Dutch,[3] Italian,[4] and Spanish[5] codifications. The previous reform project, the *Avant-projet de réforme du droit des obligations et de la prescription* ('Catala Project'), had itself chosen to leave the *cause* untouched.[6] Since 2016, French scholars have, however, argued that, notwithstanding its conceptual implications, the disappearance of the formula of the *cause* would result in more semantic changes than substantial ones.[7] Indeed, one line of thought even suggests that the *cause* is now to be found in Article 1128 CC, which refers to the '*contenu licite et certain*' ('content which is lawful and certain') of the contract. Article 1128 should today be understood as a general formula encompassing and condensing both the object and the cause of the

[1] Art. 1131 of the original 1804 *Code civil* provided: '*L'obligation sans causa, or sur une fausse cause, or sur une cause illicite, ne peut avoir aucun effet*' (*The obligation without a cause, or based on a false cause or on an unlawful case*, shall have no effect).

[2] See Art. 1131 of the Belgian Civil Code of 1804. The Code was reformed between 2020 and 2024.

[3] See Art. 1131 of the Dutch Civil Code of 1838. The Code was replaced with a new civil code in 1992.

[4] See Art. 1104 of the Italian Civil Code of 1865. The Code was replaced with a new civil code in 1942.

[5] See Art. 1275 of the current Spanish Civil Code.

[6] For a comparative analysis, see J Cartwright et al (eds), *Reforming the French Law of Obligations: Comparative Reflections on the* Avant-projet de réforme du droit des obligations et de la prescription (the *'Avant-Projet Catala*') (Hart, 2009).

[7] S Rowan. 'The New French Law of Contract' (2017) 66 *International and Comparative Law Quarterly* 805ff. On the new Art. 1128, see S Rowan, *The New French Law of Contract* (Oxford University Press, 2022) 85ff.

contract.[8] Irrespective of this opinion, it is evident that the various forms and functions of *cause* find their place today in several provisions scattered throughout the Civil Code.

The 2016 reform seems to have preserved the previous state of the law while only the word *cause* has been removed.[9] Indeed, the question has arisen as to whether the new legal framework really covers all the issues previously resolved by reference to the *cause*, or whether its abolition was too drastic, with the result that something has been overlooked. A further, more ambitious question is whether the replacement of the general concept of the *cause* with its fragmented applications actually achieves the goal of improving modern contract law, at least as far as domestic disputes are concerned.

Neither question is new. Both have been the subject of heated debate in France since the reform came into force. The second is even more far-reaching and goes beyond the borders of the legal systems belonging to the Roman legal family, questioning the usefulness of the general and abstract concept of *cause* in contract law and envisaging a path similar to that taken by the concept of consideration in common law.[10] Although the posed questions are not new, the present article intends to revisit the debate on the *cause* of the contract by introducing a problem-oriented comparison between its French and Italian applications. It will specifically examine whether the French reform currently offers alternative solutions to those previously adopted, employing the notion of *cause*. Furthermore, it will ascertain whether, subsequent to the 2016 reform, the two legal systems are, in actuality, pursuing a convergent or a divergent trajectory.

This investigation is crucial for both historical and contemporary reasons. Indeed, French and Italian contract law have been intertwined since the first Italian Civil Code of 1865. After the unsuccessful attempt to create a French-Italian code of obligations and contracts in 1927,[11] the current Italian Civil Code of 1942 maintains many similarities with the *Code Napoléon* and, therefore, still recognises the cause as a requirement for a valid contract.[12] More importantly, in both jurisdictions, the *cause* has received growing doctrinal attention and has been increasingly applied since the 1990s.[13] Indeed, the rising number of references to the *causa* in Italian case law since the 1990s has prompted writers to characterise the development of the concept as a success story[14] and even as an idol of courts ('*idolum fori*').[15] The different paths taken by French and Italian law since 2016 make the comparison between the two systems, which belong to the same legal family, even more compelling. In the years immediately following the French reform, the debate on the *cause* was revived in Italian literature; however, unlike in France, critical views towards the doctrine of the *cause* and proposals

[8] T Genicon, 'L'avenir de la cause en droit français des contrats' in G Albers et al (eds), *Causa contractus* (Mohr Siebeck, 2022) 721. The wording '*contenu licite et certain*' was used in the *Avant-Projet Terré* : see F Terré (ed), *Pour une réforme du droit des contrats* (Dalloz, 2009).

[9] See T Genicon, 'L'avenir de la cause en droit français des contrats', 1551–56; C Grimaldi, 'Les maux de la cause ne sont pas qu'une affaire de mots' (2015) 14 *Recueil Dalloz* 814ff; G Wicker 'La suppression de la cause dans le projet d'ordonnance: la chose sans le mot' (2015) 27 *Recueil Dalloz* 1557–68; M Latina, 'Apprécier la réforme' (2016) *Revue des contrats* 620; D Mazeaud, 'Prime note sulla riforma del diritto dei contratti nell'ordinamento francese' (2016) *Rivista diritto civile* 432–44.

[10] G Gilmore, The Death of Contract (1974) with foreword by K. L. Collins (The Ohio State University Press, 1995), 61ff. In the Italian literature, see U Breccia, 'Causa e *consideration*' (2007) *Rivista critica diritto privato* 579. For a historical overview, see R Zimmerman, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford University Press, 2001) 80ff.

[11] About the *Projet de Code des obligations et des contrats franco-italien* of 1927, see G Alpa and G Chiodi (eds), *Il progetto italo francese delle obbligazioni (1927): Un modello di armonizzazione nell'epoca della ricodificazione* (Giuffré, 2007); D Deroussin, 'Le Projet de Code des obligations et des contrats franco-italien de 1927: chant du cygne de la culture juridique latine?' (2007) https://journals.openedition.org/cliothemis/1795.

[12] As the Civil Code of 1865 did: see fn 4.

[13] J Ghestin, *Cause de l'engagement et validité du contrat* (Librairie générale de droit et de jurisprudence (LGDJ), 2006) 487ff.

[14] E Roppo, 'Causa concreta: una storia di successo? Dialogo (non reticente né compiacente) con la giurisprudenza di legittimità e di merito' (2013) I *Rivista diritto civile* 957ff.

[15] M Martino, 'La causa in concreto nella giurisprudenza: recenti itinerari di un nuovo idolum fori' (2013) *Corriere Giuridico* 1441ff.

to remove this concept from the Civil Code have remained a minority.[16] The most recent reform of the Belgian law of obligations in 2022 has also contributed to the resurgence of the Italian debate on the *cause*. By keeping this concept in Articles 5.53–5.55 of the new Civil Code, the Belgian legislator, whose Article 1804 was inspired by the French Civil Code, has distanced itself from today's French model, thus demonstrating the persisting vitality of the concept of *cause*. After almost 10 years, the time has come to compare the applications of the *cause* and assess their diversity.

This article begins with a brief review of the criticisms of the concept of *cause* that underpin the reforms finally instituted by the French legislator in 2016 (Section II). A short overview of the provisions that uphold previous applications of the *cause* of the contract will be provided in Section III. A description of the state-of-the-art of the doctrine on the *cause* (*causa*) under Italian law follows (Section IV). The article will then focus on several practical issues ('bare agreement', illusory and trivial exchanges, unequal bargains, frustration of contract) that the concept of *cause* has historically and more recently addressed in both systems (Sections V–IX). In conclusion, by directing attention towards Italian law, this contribution investigates the possible consequences, in Italy, of adopting a casuistic approach to those issues as an alternative to a general concept of *causa*. This is done with the objective of enhancing legal clarity and reducing or eliminating criticism of the *cause* (Section X). In Italy at least, the general concept of the *cause* remains essential either to provide a uniform justification of the cases currently resolved by reference to the *cause* or to allow a degree of flexibility that may be helpful in dealing with new cases.

II. Grounds for criticism of the cause of the contract at the heart of the 2016 reform

Several criticisms of the concept of *cause* of the contract lie at the heart of the choice made by the French legislator in 2016, and these were already present in the previous attempts to reform the *Code Napoléon*. Most of the criticisms have been raised since the beginning of the 20th century, in both French and Italian law. In Italian law, *causa* was coined as the 'fourth side of the triangle', a metaphor for the futility of the concept, and this criticism has persisted over the years.[17] Similarly, Marcel Planiol qualified the theory of cause as '*fausse*' and '*inutile*'.[18] According to this line of criticism, the *cause* is superfluous and can be replaced by simpler, less enigmatic concepts such as the content and the object of the contract.[19] Another concern was that it is a dangerous vehicle for paternalism and an enemy of freedom of contract.

[16] A substantial critique of the conceptual and practical viability of the doctrine of *cause*, in the light of the French doctrinal debate, was raised by M Girolami, *L'artificio della causa contractus* (Cedam, 2012) and M Girolami, 'Modernità e tradizione nel diritto dei contratti: i progetti di riforma del Code Napoléon nella prospettiva del giurista italiano' (2012) I *Rivista diritto civile* 243–92. M Franzoni, in 'La causa e l'interesse meritevole di tutela secondo l'ordinamento italiano' (2017) *Juscivile* 410–21, raises doubts about the consistency of the current understanding of the *cause* as *in concreto* (see Section IV) with legal certainty needed by parties of international commercial contracts. By contrast, at the time of France's discussions of the CC's reforms, the majority of Italian literature endorsed the notion of *cause*: see, for example, C Scognamiglio, 'La riforma del contratto in Francia: problemi e prospettive' (2011) *Contratti* 2011, 128ff; CM Bianca, 'Causa concreta del contratto e diritto effettivo' (2014) *Rivista diritto civile* 251ff; R Senigaglia, 'Per un'ermeneutica del concetto di causa' (2016) *Jus civile* 507–32; GB Ferri, 'Une cause qui ne dit pas son nom: Il problema della causa del contratto e la riforma del terzo libro del Code civil' (2017) *Rivista diritto commerciale* 1ff and GB Ferri, 'Causa del contratto (diritto francese)' in *Le parole del diritto. Scritti in onore di Carlo Castronovo* (Giuffré, 2018) 177ff; E Navarretta, 'La causa e la *réforme du code civil* francese' (2018) *Persona e mercato* 31–37; C Tenella Sillani, 'La riforma francese del diritto dei contratti e il destino della causa' in G Conte et al (eds), *Dialoghi con Guido Alpa: Un volume offerto in occasione del suo LXXI compleanno* (Roma Tre Press, 2018) 537–49; M Giorgianni, *L'evoluzione della causa del contratto nel codice civile francese* (Joverne, 2018) 119–20.

[17] G Giorgi, *Teoria delle obbligazioni nel diritto moderno italiano* III (Utet, 1925–30) 621.

[18] M Planiol, *Traité élémentaire de droit civil* II (Gallica, 1931) 394ff; L Aynes, 'La cause, inutile et dangereuse' (2014) *Dr. et patr*. 40.

[19] In recent years, see Girolami, L'artificio della causa contractus; Girolami, 'Modernità e tradizione nel diritto dei contratti'.

In addition to being accused of being superfluous and paternalistic, the *cause* is usually blamed for being polysemic, having taken on different meanings and forms over the last two centuries. Indeed, numerous and even contradictory formulations have famously followed one another: *cause* of the contract versus *cause* of the obligation; subjective versus objective *cause*; cause as illustrating the socio-economic function of the contract versus *cause* as the actual economic function of the individual transaction; and *cause* as a requirement of the act versus *cause* as a way of assessing the substantive fairness of the contractual relationship.[20] All formulations reflect changes in both the socio-economic context and the general understanding of the relationship between private autonomy and judicial control of the contract.[21] Recently, and in the same vein, several authors have criticised the hypertrophic use, or even misuse, of the concept of *cause*. According to them, such hypertrophy and over-inflation of the concept ultimately undermine legal certainty and, as a consequence, make national contract law less attractive for international commercial parties.[22] This leads to the final criticism, which focuses on the alleged incompatibility of the *cause* with international commercial practice, an assumption that influenced the decision to remove the *cause* from being one of the requirements for the validity of the contract.[23]

It is beyond the remit of this article to explore whether the *cause* of the contract is actually incompatible with the needs of international trade, but we note that the *cause* as a requirement for the conclusion of a valid contract does not appear in the Principles of International Commercial Contracts (PICC)[24] or in any of the three academic drafts of a European civil code (the Draft Common Frame of Reference (DCFR), the Principles of European Contract Law (PECL), and the *Code européen des contrats (Avant-Projet)*).[25] This trend had been pioneered by the Vienna Convention for the International Sale of Goods (CISG), which does not deal with the validity requirements of the contract (Art. 4). By elevating mere consent to being a sufficient condition for the conclusion of a contract, the PICC and those three academic drafts intend to strengthen contractual freedom, unless vices of consent or gross disparity can be proved. Since the beginning of the 21st century, these texts have undoubtedly had an influence on the new (attempted or actual) reforms of the civil codes.

However, while the accusations of paternalism, hollowness, polysemy, and hypertrophy reflect specific weaknesses in the concept of *cause*, as experienced in both French and Italian law, its alleged incompatibility with the needs of international commercial contracts is not a sufficient reason to remove the concept of *cause* from a national legal system. Indeed, it is quite obvious that the parties to

[20]For a critical examination of the polysemy of the cause, see G Gorla, *Il contratto* (1954) (Romatre Press, 2023) 262ff. For an analysis of the various understandings of the *causa* in Italian law, see E Navarretta, 'Art. 1343—Causa illecita' in E Gabrielli (ed), *Commentario del codice civile: Dei contratti in generale (artt. 1321–1349)* (Utet, 2011) 577 ff; AM Garofalo, 'Itinerari della causa dal Code civil del 1804 al Codice civile del 1942' in G Albers et al, *Causa contractus* 201ff. For an overview of the different meanings of the *cause* in French law, see Ghestin, *Cause de l'engagement et validité du contrat*, 6ff, C Larroumet, 'De la cause de l'obligation à l'intérêt au contrat (A propos du projet de réforme du droit des contrats)' (2008) *Recueil Dalloz* 2441ff.

[21]A di Majo, 'Causa del negozio giuridico' (1988) *Enciclopedia giuridica Treccani* 1.

[22]Franzoni, 'La causa e l'interesse meritevole di tutela secondo l'ordinamento italiano'; A Nervi, 'Ancora sulla causa del contratto: Un istituto da adoperare con cura' (2022) *Jus* 73ff, 90; Roppo, 'Causa concreta', 986ff also criticises the hypertrophic use of the cause of the contract.

[23]The decline in the international influence and attractiveness of French law was one of the main reasons underlying the reform, according to Rowan, 'The New French Law of Contract', 808–10.

[24]Under Art. 3.1.2 PICC, 'a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement'. The comments under Art. 3.1.2 PICC emphasise that neither *cause* nor consideration is required (www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-3-section-1/#1623694323415-30641944-9988).

[25]See II.—1:101 DCFR (Meaning of 'contract' and 'juridical act' (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral) and Book I Chapter 7 (Grounds of invalidity). See also Art. 2:101 PECL: A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement. See, finally, Arts. 1ff Code Européen des Contrats—European Contract Code.

international commercial contracts need an adequate guarantee of contractual freedom, and that both cause and consideration would not be easily understood outside their respective legal environments, with the risk of uncertainties and misunderstandings. It does not follow, however, that the *cause* of the contract is an unnecessary or outdated conceptual tool in domestic transactions, especially if they involve one or both non-business parties. It is one thing for international and European restatements of contract law to be a source of inspiration for reforms of the national civil codes; it is quite another for concepts standing at the heart of national contract law to be set aside without empirical verification of their remaining value.

III. The substitutes of the *cause* in the current French Civil Code

The reform of the French Civil Code takes into account the aforementioned criticism by fragmenting and upholding the different functions and applications of the cause. In particular, it adopts the objective understanding of *cause* by codifying, in Articles 1106–1108 CC, the taxonomy of contracts traditionally based on the *cause* itself.[26] More importantly, the *cause de l'obligation* (cause of the obligation) is implicit in a number of provisions that embody and generalise the previous case law. Article 1169 in particular seems to incorporate the well-established understanding of the *cause* as *contrepartie* of the obligation (ie what has been agreed in return for the benefit of the person undertaking an obligation). It codifies its forms as *illusoire* or *dérisoire*, that is, as a sanction of the illusory or derisory character of the performance of the contracting party, also well established in previous case law,[27] and which recalls the illusory promise familiar to the English debate on consideration.[28] In the same vein, Article 1170 ('Any contract term which deprives a debtor's essential obligation of its substance is deemed not written') confirms the solution adopted by the French *Court of Cassation* in the well-known *Chronopost*[29] and *Faurecia*[30] cases, while restricting its application to clauses limiting liability that seek to undermine the scope of the principal obligation.

At the same time, the subjective understanding of *cause* as purpose ('*but*'), which is reported to have been predominant in the case law prior to 2016,[31] still appears in Article 1162 CC, where it mentions both the stipulations and the purpose of a contract. In addition, Article 1135 gives relevance to the mistake in the motive of the parties' reasons for entering into the contract ('*erreur sur un simple motif*'), provided that the parties themselves expressly made it a determining element of their consent,[32] thus solving problems previously addressed by the increasing emphasis on the subjective understanding of the *cause*.[33]

Lastly, Article 1186, without expressly mentioning the *cause*, takes inspiration from the words of Henri Capitant (*L'obligation ne peut vivre qu'autant qu'elle reste appuyée sur sa cause*)[34] in stating that a

[26]The distinction between subjective and objective understanding of *cause* is well-established in the French literature: see, for a concise analysis, Rowan, 'The New French Law of Contract 817-818.

[27]For a comprehensive overview of the case law on the matter, see Ghestin, *Cause de l'engagement et validité du contrat*, 174ff.

[28]G Gilmore, *The Death of Contract (1974)*, foreword KL Collins (Ohio State University Press, 1995) 85.

[29]Civ 22 October 1996 93-17.255 (1996) *Bulletin des arrêts des chambres civiles de la Cour de cassation* IV, p 223. See C Larroumet's comment, 'Obligation essentielle et clause limitative de responsabilité' (1997) *Dalloz Chronique* 145–46; Civ 19 July 2002 *Bulletin des arrêts des chambres civiles de la Cour de cassation*, p 129.

[30]As to the *Faurecia* saga, see Comm. 13 February 2007 and Comm. 29 June 2010 www.legifrance.gouv.fr, where the *Cour de Cassation* stated: '*seule est réputée non écrite la clause limitative de réparation qui contredit la portée de l'obligation essentielle souscrite par le débiteur*'.

[31]T Genicon, 'Défense et illustration de la cause en droit des contrats: À propos du projet de réforme du droit des contrats, du régime général et la preuve des obligations' (2015) *Recueil Dalloz* 1551–56.

[32]T Genicon "Défense et illustration de la cause en droit des contrats', 1564, makes reference to the '*porosité de la théorie des vices du consentement et de celle de la cause*'.

[33]For a detailed analysis of the doctrines developed by French academics before the 2016 reform, see Ghestin, *Cause de l'engagement et validité du contrat*, 115ff.

[34]H Capitant, *De la cause des obligations* (Dalloz, 1923) 247ff.

contract *devient caduc* (terminates) when one of its essential elements ceases to exist. This provision, in turn, consolidates the doctrine which, prior to the reform, invoked the failure of the *cause* as a ground for terminating a contract, despite the fact that the *Code Napoléon* did not mention this. This doctrine was applied by the *Cour de Cassation*, for example to a mortgage linked to a cancelled contract of sale.[35]

IV. The *cause* of the contract in the Italian Civil Code and its current prevailing understanding

Unlike in France, the Italian legislator has not yet reformed the 1942 *codice civile*, the Italian Civil Code (hereinafter It CC). According to Article 1325 no 2 It CC, the presence of a *causa* is necessary for the validity of a contract. In addition, the illegality or immorality of the *causa* renders the contract null and void under Article 1343 It CC. Thus, the *causa* is considered illegal when the contract aims at circumventing the application of a mandatory rule (Art. 1344 It CC). Furthermore, under Article 1345 It CC, the illegal or immoral motive common to both parties is a ground for nullity if it is the only reason that led the parties to conclude the contract.

Even more importantly, the 1942 legislator, in recognising the freedom of the parties to conclude contracts not regulated by law, required them, under Article 1322, paragraph 2 It CC, to 'pursue interests worthy of protection according to the legal system as a whole' ('*meritevoli di tutela secondo l'ordinamento giuridico*'). This expressed the need for the state to control private autonomy and to adapt it to a social function. This original provision is absent from the codes that inspired the Italian law of obligations in 1942 (ie the French but also the German codes). It was originally identified with illegality or immorality, or limited to futile and economically worthless contracts without binding legal effects.[36] After almost 50 years in which this provision was rarely applied in practice, it has, however, been revived by the academic debate and by the courts over the last three decades, and it has earnt its own place in contract law doctrines as a concept related to the notion of *cause*.[37]

Accordingly, Article 1322 has been used as a further textual basis for a substantial review of contracts not regulated by law, together or separately from any review rooted in the cause of the contract. In particular, under a rather vague definition given by the *Corte di Cassazione*, a contract that is contrary to morality, the economy, or public order as manifestations of the principle of solidarity would be 'unworthy of legal protection'.[38]

The evolution of these concepts under Article 1325 no 2 and Article 1322 It CC provides an insight into how both of them have responded to emerging needs and filled legislative gaps over the years.[39] Starting with *cause*, after being referred to for several decades as the socio-economic function of the contract,[40] the *cause* of the contract has, since the mid-1990s, been understood and used intensively

[35] Civ 1re July 1997 www.legifrance.gouv.fr/juri/id/JURITEXT000007036579/.

[36] For the identification of 'unworthiness' as illegality or immorality, see GB Ferri, *Causa e tipo nella teoria del negozio giuridico* (Giuffré, 1960) 406ff; for the identification of 'unworthiness' as economic futility, see F Gazzoni, 'Atipicità del contratto, giuridicità del vincolo e funzionalizzazione degli interessi' (1978) I *Rivista diritto civile* 52ff; F Galgano, *Il negozio giuridico* in L Mengoni (ed) *Trattato di diritto civile e commerciale* III (Giuffré, 1988) 85ff. For a contrasting interpretation, see A Guarneri, 'Meritevolezza dell'interesse e utilità sociale del contratto' (1994) *Rivista diritto civile* 799ff.

[37] U Breccia, 'Interessi non meritevoli di tutela' in U Breccia, *Immagini del diritto privato* II 1 (Giappichelli, 2020) 407ff; AM Garofalo, 'La causa del contratto fra meritevolezza degli interessi ed equilibrio dello scambio' (2012) II *Rivista diritto civile* 573ff; G Lener, 'La meritevolezza degli interessi nella più recente evoluzione giurisprudenziale' (2020) *Rivista diritto civile* 615ff; F Piraino, 'Meritevolezza degli interessi' (2021) *Enciclopedia del diritto. I Tematici*, I, 667ff and F Piraino, 'La causa del contratto come finalità individuale di rilevanza sociale' (2023) *Europa e diritto privato* 699–774; M Sabbioneti, 'La rivincita della meritevolezza: una fiaba giuridica della postmodernità' (2022) *Storia metodo cultura* 247ff. As to case law, see Section VII.

[38] Civ SS UU 24 September 2018 no 22437 (2020) II *Giurisprudenza Commerciale* 115.

[39] U Breccia, 'Causa' in Breccia, *Immagini del diritto privato* 371ff.

[40] E Betti, *Teoria generale del negozio giuridico* (Esi, 1994, reprint of 2nd ed) 170ff.

by the courts as the *actual* economic purpose of the resulting contract. This understanding was developed by Giovanni Battista Ferri in the 1960s[41] to overcome the then-prevailing theory of *cause* as the social-economic function of the contract, a theory itself developed by Emilio Betti at the beginning of the 20th century.[42] Ferri's theoretical perspective was originally proposed on the basis that a contract might be declared illegal or immoral, even if it formally complied with a given legal framework.[43] The scrutiny based on the *actual* purpose of a contract was later developed to assess the *existence* of a cause ('*causa concreta*') and it has become dominant in the academic literature[44] and in the case law. By giving prominence to the interests that the contract is specifically intended to realise, Italian law followed a path similar to that taken in France towards a more subjective understanding of cause (the '*subjectivisation de la cause*'), which, by remaining separate from the motifs, focuses on the interests that the parties share and that are at the heart of their commitment ('*cause finale*').[45]

Contrary to Emilio Betti's original conception, the theory based on the actual economic purpose of the contract does not primarily aim to subject private autonomy to public control. Instead of abstract taxonomies, the notion of *cause* as the actual economic purpose of the contract covers the interests jointly and objectively pursued by the parties, with the aim of reconstructing them, even beyond the express contractual terms, in the light of circumstances external to the contract. By reducing the distance between *cause* in the objective and in the subjective sense, this new understanding appears as a double Janus, strengthening party autonomy, on the one hand, and introducing further judicial control of party autonomy, on the other.

Consequently, the notion of 'concrete cause', '*causa concreta*', has resulted in an increase in the applications of nullity for lack of *cause* in certain instances, while it has led to a reduction in applications in other cases. Indeed, as a result of the application of this theory, contracts without apparent consideration or justification may be enforced if, as a result of their reconstruction, the objective purpose and meaning of the agreement are revealed. As an example of this tendency the courts have rejected the idea that *expressio causae* (ie the explicit reference to an external basis for an attribution of validity) is indispensable for the validity of an act, provided that its objective justification can be reconstructed in the light of all the circumstances of the case.[46]

These doctrinal discussions, which have subsequently found their way into jurisprudence, are undoubtedly at the heart of both the wide application of the concept of *cause* currently in Italian law and the revival of the 'interests worthy of legal protection' under Article 1322 paragraph 2 It CC, as mentioned earlier. However, a change in the theoretical understanding of *cause* would not be a sufficient explanation if it were not combined with the undoubtedly creative attitude of the Italian courts, and the substantial need to update the remedies granted by the Civil Code, both in terms of contractual unfairness and in terms of supervening circumstances. Thus, although the Italian Civil

[41] Ferri, *Causa e tipo nella teoria del negozio giuridico* 1ff. See also M Bessone, *Adempimento e rischio contrattuale* (Giuffré, 1969) 281, who emphasises the concrete function ('*funzione concreta*') of the contract. An even more radical criticism of the *cause* as the function of a contract is made by R Sacco and G De Nova, *Il contratto* (Utet, 2016) 781ff.

[42] E Betti, *Teoria generale del negozio giuridico*, 181ff.

[43] Ferri, *Causa e tipo nella teoria del negozio giuridico* 358.

[44] The idea of the *cause* as actual purpose ('*causa concreta*') has been largely upheld by Italian writers since the 1980s (Di Majo, 'Causa del negozio giuridico', 9; Breccia, 'Causa', 333ff; E Navarretta, *La causa e le prestazioni isolate* (Giuffré, 2000); Roppo, 'Causa concreta', 957ff; Bianca, 'Causa concreta del contratto e diritto effettivo') and is reflected in the main contract law textbooks (see, for example, the first editions of the following: CM Bianca, *Il contratto* (Giuffré, 1984) 425; U Breccia, L Bigliazzi, GFD Busnelli, and U Natoli, *Diritto civile* 1 *Fatti e atti giuridici* (Utet, 1987); E Roppo *Il contratto* (Giuffré, 2001) 364).

[45] Ghestin, *Cause de l'engagement et validité du contrat*, 74ff; J Rochfeld, *Cause et type de contrat* (LGDJ, 1999) 73ff. For the rejection of the dichotomy between objective and subjective cause, see J Rochfeld, *Cause et type,* 214ff.

[46] This is a consolidated trend in the recent literature on 'isolated attributions' and *expressio causae* matters (which, by the way, go well beyond the purpose of this article): see, for example, Navarretta, *La causa e le prestazioni isolate*, 261ff and E Navarretta, 'Le prestazioni isolate nel dibattito attuale: Dal pagamento traslativo all'atto di destinazione' (2007) *Rivista diritto civile* 823ff; M Martino *L'expressio causae* (Giappichelli, 2011) 265ff.

Code provides for remedies for vices of consent (Arts. 427ff CC), *laesio enormis* (Art. 1448), impossibility of performance (Art. 1463), and supervening hardship (Art. 1467), their strict requirements have prevented Italian courts from extending the scope of those provisions beyond their wording, while the flexible concepts of *cause* and 'interests worthy of legal protection' have allowed the courts to adapt contract law to new needs of protection. Therefore, whereas the classical applications of *cause* as a ground of nullity for lack of cause have decreased their importance, the judicial scrutiny of the contract aimed at redressing the imbalances between the parties has received increasing attention.

V. The scrutiny of a contract based on its *cause*: a few practical issues

In order to assess both the impact of the replacement of the term 'cause' by alternative or similar concepts in French law and their distance from the current applications of this term in Italian law, a list of practical questions needs to be identified. The role of the *cause* in the reconstruction and qualification of both typical and atypical contracts is the logical premise of most of its functions,[47] and, therefore, must be briefly outlined.

In French law, as mentioned in Section III, the new Articles 1106–1108 CC expressly codify the traditional taxonomies of contracts based on the *cause: synallagmatique/unilatéral* (synallagmatic/unilateral); *à titre onéreux/à titre gratuit* (onerous/gratuitous); *commutatif/aléatoire* (commutative/aleatory); unlike the original *Code Napoléon*, they provide definitions that belong to a very well-established doctrinal background.

Similar classifications are not explicitly included in the Italian Civil Code. However, they are indisputably used as criteria for the classification of contracts in private law textbooks. Traditional taxonomies are the result of an interpretative process that highlights the abstract objective of a contract, common to all those belonging to the same category, and based on the objective understanding of the cause, identified by the presence or absence of consideration and the way in which the consideration and the performance interact. In both French and Italian law, the trend towards a 'subjective cause' ('*subjectivisation de la cause*') has led this concept to performing a further interpretive function, as a means of identifying the real objective pursued objectively and jointly by the parties, beyond abstract classifications (as illustrated in Sections III and IV).

The clarification of ambiguous clauses and the reconstruction of implied terms are among the additional results of the cause-based interpretation process. For example, a man died while flying a leisure helicopter, and the *Corte di Cassazione* was asked whether his widow could claim the benefit of the life insurance policy he had contracted. To determine whether a clause in a life insurance policy excluded cover if the accident occurred while the insured was on board an aircraft, the Court recalled the understanding of the *causa* as the real purpose of the contract, and emphasised the importance of examining the circumstances under which the insurance contract was concluded in order to interpret the scope of the disclaimer. This was particularly pertinent given that the insured individual was an amateur pilot who intended to insure himself against the risks associated with practising his hobby, with the consequence that the clause could not be interpreted as excluding the insurance cover while the insured party was piloting an aircraft.[48] Most of the issues that the notion of *cause* is called upon to solve stem from its role as an interpretative tool to reconstruct contractual terms. Thus, while the *cause* is not usually used to select legally binding agreements from situations where the parties do not intend to engage,[49] one of its traditional functions is to prevent the enforcement of a *nudum pactum* in

[47] On the interpretative function of the *cause*, see Rochfeld, *Cause et type de contrat*, 223ff. Her thesis is further discussed by Ghestin, *Cause de l'engagement et validité du contrat*, 141ff.

[48] Civ 12 November 2009, no 23941. Further examples of the interpretative function of the doctrine of *cause* are mentioned in Section VIII of this article.

[49] The dominant conceptual tool is that of 'parties' intention': as to Italian law, see Roppo, *Il contratto*, 11ff; as to French law, see D Perrouin-Verbe, 'Causa and the Requirements for Valid Contracts' in Albers et al, *Causa contractus*, 373–77; S Fulli-Lemaire, 'Le rôle passé de la cause au stade de la formation du contrat' in Albers et al, *Causa contractus*, 410. However, this is a

both French and Italian law.[50] This is a 'bare' agreement, which, in concealing the very reason behind it, cannot be classified under the taxonomies of contract cited earlier, and is considered unworthy of grounding an action in court. A further level of ambiguity arises where the contract contains a *contrepartie*, and therefore falls within a well-known legal framework, but makes no practical sense. This is the case, for example, with a contract concerning a *res sua* (ie an element that is already in the possession of the other party) or a *res extinta* (eg an insurance contract against the theft of something that has already been stolen), or with a contract of sale that has a merely symbolic price (as in the exemplary sale *nummo uno*, ie at one euro). The reason for the nullity of these agreements is not the state's intention to limit private autonomy but rather the need to identify the rational ground and the minimum seriousness of the needs met by a contract, which is the threshold for enforcing the agreed obligations.[51]

A second application of the *cause* manifests itself when a contract has an external legal basis—as in the case of a guarantee or a benefit conferred in performance of a previous obligation—which results in the contract being non-existent, void, or failed. In addition to these main functions, the *cause* is also often called upon to perform tasks on the borderline with other conceptual tools. Three situations come to mind. The first situation concerns the absence of a circumstance upon which the parties have implicitly based their agreement (*Fehlen der Geschäftsgrundlage, presupposizione*) and without which they would not have given their consent to the contract. Here, too, the *cause* serves as a means of guaranteeing the will of the parties. The second issue relates to the existence of unbalanced exchanges. The *cause* serves as an (often concealed) test of fairness, when no alternative and adequate remedy is provided for, as was the case in the original *Code Napoléon* (see Art. 1118) and as is still the case in the Italian Civil Code (where the general action for rescission has very restrictive requirements under Art. 1448). Here, private autonomy is subject to a more thorough examination. Third, the *cause* plays a role not only at the time of the conclusion of the contract but also after this turning point, as a parameter to assess the impact of supervening circumstances on the agreed *synallagma* and its survival. The following paragraphs will briefly deal with this set of issues, providing insight into the possible practical effects of the abolition of the *cause* in French law, compared to the current Italian legal framework.[52]

VI. *Nuda pacta*, illusory and trivial exchanges under current French law

One of the practical consequences that the application of the lack of *cause* has traditionally entailed in Italian and French contract law is the nullity of contracts entered into without any real justification (*ex nudo pacto non oritur ius*).[53] After the entry into force of the new Article 1128 CC, the question

tendentious statement as the courts sometimes do use the *cause* as an argument to declare the unenforceability of agreements not accompanied by a serious intention to be legally bound, as emphasised by Fulli- Lemaire, ibid. In Italy, see Civ 15 June 1999, no 5917 (2000) *Giustizia civile* 135 with comment by M Balestrieri 'La preordinata volontà di non pagare il corrispettivo come causa di nullità della compravendita' (concerning a sale contract signed by the buyer intentionally planning not to pay anything and declared void for lack of cause). According to a minority opinion, non-binding contracts would fall under Art. 1322 para. 2 It. CC as 'unworthy of legal protection' (F Gazzoni, 'Atipicità del contratto, giuridicità del vincolo e funzionalizzazione degli interessi' (1978) I *Rivista diritto civile* 52ff).

[50] For a historical overview, see E Cortese, 'Causa (diritto intermedio)' (1960) VI *Enciclopedia diritto* 544ff. In seeking a common root between *causa* and consideration, see B Häcker, 'Causa und consideration: Ein historischer Dialog' in Albers et al, *Causa contractus*, 324f.

[51] In the Italian literature, clearly, U Breccia, 'Causa', 371ff.

[52] The use of *cause* to review immoral or illegal contracts is beyond the scope of this article, as it would require further investigation focusing on the comparison between the new Art. 1162 CC ('*Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties*') and Art. 1343 It. CC, which states that the *cause* is unlawful if it is contrary to mandatory rules, public order, or morality.

[53] PG Monateri, 'L'accordo nudo' in *Scintillae iuris. Studi in memoria di G. Gorla* III (Milano, 1994) 1967ff.

arises whether the lack of a *contrepartie* can still lead to nullity in France, as it did under the former Article 1131.[54]

Several textual arguments support an affirmative answer. First, Article 1163 still requires the object of the *obligation* to exist. Second, by requiring that the *contrepartie convenue* not be *illusoire ou dérisoire*, Article 1169 provides an a fortiori argument for the unenforceability of mere agreements as well as promises or transfers of assets based on non-existent external reasons. Indeed, the *contrepartie* is implicitly required to exist first, with the consequence that, for example, the absence of a *dette préexistante* may justify the invalidity of a promise to pay. In addition, Article 1169 presupposes a prior investigation into the qualification of the contract as onerous or gratuitous, which a *nudum pactum* does not allow any court to do. Third, Article 1128 CC requires legal and certain 'content' as a condition for the enforceability of a contract. 'Content' is a broader and less concrete concept than 'object', and, according to one view, would merge both 'object' and 'cause', with the consequence that the *cause* would 'rise from its ashes'.[55] If this were not the case, and the term 'content' were completely autonomous, it would still be questionable whether a mere or naked agreement could satisfy such a requirement in terms of certainty.

In order to measure the scope of application of the newly formulated Article 1169 CC, the existing case law provides reliable guidance. In fact, the new provision incorporates and ratifies several grounds for nullity confirmed by previous judicial practice, which used the ground as a means of assessing the practical sense of a contract beyond its compliance with a legal framework.[56] The main groups of cases the French *Cour de Cassation* dealt with are trivial prices (*vente sans prix sérieux*, as in the case of the transfer of company shares for a symbolic price),[57] the absence of a *contrepartie réelle* (as in the case of a contract for the rental of video cassettes where the economic purpose was impossible to achieve),[58] as well as typical cases ('*Fallgruppen*') falling under the heading of '*cause fausse*', including the well-known cases of *ab initio* impracticability of a contract concerning a *res extincta* or a *res sua*. Accordingly, a guarantee given while the debtor was already insolvent would still be void according to the new wording of Article 1169 CC.[59]

In this context, even the well-established applications of the lack of *cause* to aleatory contracts ('*contrats aléatoires*') are confirmed. This includes, in particular, the group of cases concerning life annuities concluded with very old or seriously ill beneficiaries, where the *alea* is considered to be non-existent and the contract is therefore declared null and void.[60]

Finally, the reform does not explicitly address the absence of circumstances upon which the parties implicitly based their agreement even without mentioning them. However, Article 1135 CC allows a contract to be challenged on the grounds of mistake as to the decisive reason for the consent, which must be assessed in light of the circumstances under which the consent was given (see Art. 1130).

[54]It is worth mentioning that Art. 1132 of the old Code Napoléon stated that '*la convention n'est pas mois valable, quoique la cause n'en soit pas exprimé*'. On the role of the *cause* as a requirement of a valid contract, see, in general, J Ghestin, G Loiseau, and Y-M Serinet, *La formation du contrat: l'objet et la cause, les nullités* (LGDJ, 2013); about the promise to pay an inexistent obligation, see Ghestin, *Cause de l'engagement et validité du contrat*, 453ff; for some concise historical information on the *expressio causae*, see AM Garofalo, 'La causa dal Code civil al codice civile' in G Albers et al, *Causa contractus*, 210–13.

[55]Genicon, 'L'avenir de la cause en droit français des contrats'.

[56]Ghestin, *Cause de l'engagement et validité du contrat*, 165ff.

[57]Comm. 22 March 2016 no 14-14.14.218. The judgment is interesting in stating that the nullity is relative when aimed at protecting the private interests of the other party rather than absolute when based on the absence of an essential element of the contract.

[58]Civ 3 July 1996 (1997) *Dalloz* 500.

[59]Comm. 17 May 2017 15-15.746.

[60]Ghestin, *Cause de l'engagement et validité du contrat*, 310ff.

VII. Bare promises, illusory and trivial exchanges under current Italian law

It is not surprising that, according to Article 1325 no 2 It CC, a 'bare promise' (*nudum pactum)* is, in principle, void for lack of *cause* under Italian law. Some cases help to illustrate the application of this ground of nullity. Thus, in 1992, the Italian *Corte di Cassazione* declared null and void a contract that transferred the concession for the operation of some international bus routes to another company, without providing any apparent financial consideration.[61] A further application is the free granting of an option to buy a property.[62] A quite controversial case is the practice of selling shares just before a dividend is paid and buying them back afterwards, with the underlying purpose of saving tax. After considering this practice of dividend stripping as belonging to a unique transaction, the *Corte di Cassazione* declared it null and void for lack of cause, arguing that the parties had no real interest in the exchanges assessed as a whole, apart from tax savings (an interest that was apparently not considered worthy of legal protection).[63]

Since the 1990s, the number of cases of nullity of a 'bare promise' has decreased, together with the successful application of the *cause* as the real economic purpose of a contract (considered in Section IV). As the concept of *cause* leads to an appreciation of the overall and comprehensive understanding of economic transactions and the practical results sought by the parties, even beyond their express terms, the *Corte di Cassazione* has begun to recognise the validity of agreements transferring rights without consideration, provided that they are considered worthy of legal protection. This has been the case, for example, in relation to property transfers made in the context of both post-separation family arrangements[64] and trust.[65] According to a well-established doctrine of the Supreme Court, first-demand guarantees are also considered valid, subject to the *exceptio doli* (ie the defence of bad faith)[66] and other defences, including the non-existence of the obligation to be guaranteed, and the immorality or illegality of the underlying contract.[67]

With regard to exchanges for a trivial, symbolic, or ridiculous price, agreed in exchange for the transfer of a right or the undertaking of an obligation, applications for nullity for lack of *cause* are rare, as the courts tend to base their nullity on specific provisions of the Civil Code other than Article 1325 paragraph 2 It CC.[68] Nevertheless, the overall consideration of the contractual relations between the parties may prevent the nullity of the contract, even if the price is derisory (eg the simultaneous acquisition of shareholdings that impose additional financial burdens on the holder).[69] By comparison, the reasoning based on a grossly disproportionate *synallagma* applies to a large number of cases concerning life annuities. According to an uncontroversial doctrine of the *Corte di Cassazione*, life annuities are null and void for lack of *cause* if they are concluded with a person who is extremely old

[61] Civ 20 November 1992, no 12401 (1993) I *Foro italiano* 1506. For critical remarks, see L Bozzi, 'Note preliminari sull'ammissibilità del trasferimento astratto' (1995) I *Rivista del diritto commerciale* 199–232.

[62] Court of Appeal Milan 5 February 1997 (1998) I(1) *Giurisprudenza italiana* 488, witth comment by F Pernazza, 'Il corrispettivo nel patto di opzione tra causa e *consideration*'.

[63] Civ 21 October 2005, no 20398 (2007) *Giurisprudenza italiana* 867, with comment by S Sorrentino, 'Dividend washing, causa "concreta" del contratto, contratti collegati e nullità per mancanza di causa'.

[64] Civ 9 October 2003, no 15064; Civ 9 October 1991, no 10612 (1991) I *Giustizia civile* 2895, with comment by F Gazzoni, 'Babbo Natale e l'obbligo di dare'; Civ 21 December 1987, no 9500 (1988) *Corriere giuridico* 144, with comment by V Mariconda, 'Articolo 1333 c.c. e trasferimenti immobiliari'.

[65] Tribunal Bologna 1 October 2003 (2003) *Vita notarile* 1297, with comment by L Santoro, 'I traguardi della giurisprudenza italiana in materia di trusts'.

[66] See Civ 15 May 2019, no 12884 (2020) *Corriere giuridico* 773, with comment by GB Barillà, 'I presupposti per l'esercizio dell'*exceptio doli* nell'escussione delle garanzie bancarie autonome: obblighi del garante e diritti del beneficiario'.

[67] Civ 4 April 2024, no 10786.

[68] A symbolic or ridiculous price might reveal the absence of *cause* and lead to the nullity of a contract. This doctrine is well established and is based on the lack of one of the essential elements of the sales contract according to Art. 1470 CC (see, for example, Civ 28 August 1993 no 9144). The nullity applies even if the parties agreed that the price should not be paid (Civ 12 June 2024 no 16422). Conversely, a price significantly lower than the value of the asset raises the question of the qualification of the contract as donation or *negotium mixtum cum donatione* (see, for example, Civ 9 February 2011 no 3175).

[69] Civ 21 December 2023, no 35685.

or seriously ill,[70] or the *contrepartie* is disproportionately low.[71] Once again, the parallels with French law are striking.[72]

A third group of cases are resolved by invoking nullity for lack of *cause*. These cases focus on 'absurd' contractual exchanges which, although they comply with a recognised legal framework, pursue interests which in practice turn out to be futile. Clear examples of nonsensical contracts are those concerning *res sua* or *res extincta*, which border on bilateral mistake. Examples include the following: a servitude purchased by the owner of an estate who was already entitled to the servitude as a result of a previous usucaption;[73] an owner who agrees to carry out various work in the courtyard of a condominium in exchange for permission to improve the view from their property, without knowing that the law grants them this right in any case;[74] a mutual undertaking to enter into an identical subsequent preliminary contract;[75] a consultancy contract between a company and a person who is also a director of the same company;[76] guarantee given by a shareholder who has unlimited liability for the company's debts;[77] and a professional services contract with an engineer to obtain a certificate of habitability for an apartment, without knowing that the municipality has already issued such a certificate.[78] The contractual issue arising from such cases concerns the practical economic meaning of the contract. Consequently, if the agreement, despite its apparent nonsense, pursues legitimate interests, it remains valid (as the Italian Supreme Court has held with regard to mutual promises to conclude a further preliminary contract).[79] Against this background, it is also not surprising that nullity for lack of *cause* has been extended to cases where a factual or legal situation assumed by both parties as an implicit basis for their consent subsequently turns out to be non-existent *ab initio*.[80]

VIII. *Cause* and unequal bargains under French and Italian law

In the case of illusory and trivial exchanges,[81] the French *cause* traditionally addresses problems of both manifestly unbalanced and irrational bargains by emphasising the opacity of their content and the (abstract or actual) non-existence of a *contrepartie*. Indeed, addressing problems of inequality in the contractual exchange is part of the DNA of the *cause*, although a variety of alternative remedies have been developed in legal systems since the *laesio enormis* was extrapolated from Roman

[70] Civ 10 October 2023, no 28329 (2024) *Giurisprudenza italiana* 2070, with comment by G Biancardi, 'L'alea dei contratti vitalizi di assistenza alle persone anziane'; Civ 28 April 2008, no 10798; Civ 27 October 2017, no 25624 (2018) *Famiglia e diritto* 437, with comment by N Cevolani, 'La questione dell'alea nel vitalizio assistenziale'; Civ. 25 March 2013, no 7479; Civ 11 March 2016, no 4825; Civ. 22 April 2016, no 8209; Civ. 29 July 2016, no 15904.

[71] Civ. 9 January 1999, no 117 (1999) *Giurisprudenza italiana* 1360; Civ. 19 October 1998, no 10332 (1999) *Giurisprudenza italiana* 2264.

[72] See Section VI.

[73] Civ 14 January 1946, no 36 (1946) I *Foro italiano* 191ff.

[74] Civ 22 July 1987, no 6492 (1987) *Massimario Annotato della Cassazione (Giustizia Civile)* 1875.

[75] Civ 2 April 2009, no 8038 (2009) I *Nuova giurisprudenza civile commentata* 998, with comment by Salvadori. The Grand Chamber of the Supreme Court civ 6 March 2015, no 4628 (2015) *Responsabilità Civile e Previdenza* 619 subsequently made clear that the second preliminary contract is valid only if the parties' specific interest in a progressive formation of the contract can be detected (see U Stefini, 'Il "preliminare di preliminare" e le intese precontrattuali nella contrattazione immobiliare' (2015) *Rivista diritto civile* 1230ff; see critically R De Matteis, 'Accordi preliminari e modularità del vincolo a contrarre' (2015) II *Nuova giurisprudenza civile commentata* 391). On the same line, see *Corte di Cassazione civ* 28 October 2020, no 23736 (2021) II *Rivista del Notariato* 122.

[76] Civ 8 May 2006, no 10490 (2006) *Corriere giuridico* 1718, with comment by F Rolfi, 'La causa come "funzione economico sociale": tramonto di un idolum tribus?'.

[77] Tribunal Nocera Inferiore 2 March 1995 (1996) I *Giustizia civile* 3047, with comment by M Psaro, 'In tema di fideiussione del socio illimitatamente responsabile'.

[78] Civ 9 February 2018, no 393.

[79] See Civ (Grand Chamber) 6 March 2015, no 4628; Civ 28 October 2020, no 23736.

[80] Civ 24 February 2000, no 2108; Civ 8 August 1995, no 8689; Civ 11 August 1990, no 8200.

[81] See Sections VI and VII.

sources.[82] Wherever the *contrepartie* is not symbolic but performance and counter-performance are grossly unbalanced, a number of slightly different problems arise. In particular, the various constellations of asymmetries in bargaining power come into play. Instead of introducing a remedy similar to the unconscionability test or the general action for *laesio enormis* (as the Italian legislator did in 1942), the French legislator dealt with the problem of unequal bargain in a series of provisions.

First, the doctrine of the '*contrepartie illusoire ou dérisoire*' is well suited to dealing with situations of inequality of bargaining power that affect the *réalité* of the counter-performance. This is the case of life annuities, where the underlying individual vulnerability of the beneficiary leads them to accept an annuity that is so predictably short-term that it defeats the purpose of the contract.[83] Additionally, the *Chronopost* and *Faurecia* cases applied this doctrine to solve the problem of unfair contractual terms which render the main obligation in business-to-business contracts meaningless.[84] This doctrine is now reflected in Article 1170 CC. Further, the landmark *Point club Vidéo* decision, which used the *cause* to challenge an unfair and unilaterally unsuccessful bargain between two businessmen, was not subsequently confirmed by the French *Cour de Cassation*: a development that Article 1168 CC implicitly acknowledges when it clarifies that inequivalence in exchange as such is not a ground for nullity, unless the law provides otherwise (as it does in Art. 1171 CC).[85]

By comparison, the solutions upheld in Articles 1170 and 1168 of the French Code, without making reference to the *cause*, could also be achieved in Italy by using the *causa* as it is currently understood. In fact, the Grand Chamber of the *Corte di Cassazione*, when considering the validity of insurance contracts with claims-made clauses, confirmed that they are 'worthy of legal protection' and finally used the absence of *cause* both to assess the feasibility of the contractual purpose and to avoid jeopardising the insurer's liability.[86] Another application of the doctrine *de la cause* marks a difference between the paths taken by French and Italian law in dealing with issues of unequal bargaining. Since the financial crisis of the 2010s, investment contracts have been examined by Italian courts under the doctrine of *cause*, with the aim of providing non-professional investors with remedies against breaches of EU regulatory standards in financial markets. While EU secondary legislation does not provide investors with specific individual rights and remedies, but rather imposes standards of conduct on financial parties, the remedies offered by domestic laws of obligations are their only available means of protection and private enforcement of business conduct rules.[87]

In particular, some contracts did not pass the test based on either the lack of *cause* (Art. 1325 no 2 CC) or their unworthiness of legal protection (Art. 1322 para. 2 CC). Thus, the *Myway*[88] and *Foryou*[89] contracts were declared unworthy of legal protection because of the gross disparity between the expected profits and the interest paid on the loan, combined with the unfair exploitation of the investors' need for additional benefits and the lack of information on the risks associated with the financial product.

Finally, a more flexible approach was adopted for interest rate swaps, which the Grand Chamber of the Italian Supreme Court considered to be 'worthy of legal protection', subject to certain restrictive

[82] J Gordley, 'Inequality in Exchange' (1981) 69 *California Law Review* 1587–656.

[83] See Sections VI and VII.

[84] See Civ 22 October 1996 93-17.255, Comm. 13 February 2007, Comm. 29 June 2010 cited in full in fn 29 and 30.

[85] Comm 27 March 2007 05-20.696 and 9 June 2009 08-11.420.

[86] Civ SSUU 24 September 2018, no 22437. This doctrine is well-established and followed by subsequent judgments: see, for instance, Civ 12 March 2024, no 6490, www.dejure.it; Civ 25 February 2021, no 5259 (2021) I *Foro italiano* 1669; Civ 13 May 2020, no 8894 (2021) *Corriere giuridico* 195, with comment by M D'Auria, 'Ancora sulle *claims made*: profili critici'.

[87] F Della Negra, *Mifid and Private Law: Enforcing EU Conduct of Business Rules* (Bloomsbury, 2019) 227ff.

[88] Civ 3 May 2017, no 10708 (2018) II *Rivista del Notariato* 1062; Civ 10 November 2015, no 22950.

[89] Civ 15 February 2016, no 2900 (2016) *Nuova giurisprudenza civile commentata* 852, with comment by G Versaci, 'Giudizio di meritevolezza e violazione di regole di condotta in materia di intermediazione finanziaria'.

conditions regarding transparency and disclosure of costs and risks.[90] Even in the case of leases with indexation clauses, the Grand Chamber ultimately adopted a 'softer' approach, affirming that they were 'worthy of legal protection' and denying that such clauses could affect the nature of the contract and the essential obligations of the parties.[91] Therefore, in their attempts to build a bridge between EU vertical standards in financial markets and contract law, Italian courts, like other national courts, aim to accommodate individual contractual justice and regulatory objectives by using different tools.[92]

IX. *Cause* as a means of empowering the scope of frustration under current French and Italian law

Under French law, the new Article 1186 CC put an end to the use of the *cause* as an argument for terminating a contract for a supervening failure of the *synallagma*, notwithstanding the fact that it implicitly confirms the solutions previously adopted by reference to the concept of *cause*. On the other hand, the new Article 1195 CC gives relevance to an unforeseeable change of circumstances that renders performance excessively onerous for a party who had not accepted the risk of such a change, thus expressly recognising the *imprévision* (hardship) and allowing the adaptation of a contract.[93]

Conversely, under Italian law, the *cause* still plays a role as a means of extending the scope of termination beyond the wording of the existing provisions of the Civil Code. Thus, frustration of contract is limited to the impossibility of the debtor to perform the agreed obligation (Art. 1463 CC), while only in very limited circumstances will it apply to a supervening gross imbalance between performance and consideration (Art. 1467 It CC). Furthermore, frustration of contract does not cover situations where the agreement is implicitly based on circumstances that existed at the time of the conclusion of the contract and subsequently cease to exist.[94]

In Italian law, although the initial absence of such an implicit basis is a ground for nullity,[95] its subsequent absence allows the interested party to claim termination, since, as the Supreme Court argues, such a change in circumstances (eg a change in a town plan) would result in the *cause* of the contract ceasing to exist. Accordingly, the doctrine of '*presupposizione*' (ie the supervening failure of the implicit basis of the agreement) is well established in the case law and fills a clear gap in the Italian Civil Code.[96] The *Corte di Cassazione* took a step forward in defining the scope of frustration in a series of decisions in 2007. In the first case, a couple booked a hotel, but the husband unexpectedly died before arrival. In the second case, a consumer booked a package holiday, but an epidemic then broke out in the destination country. Under the Italian Civil Code (Art. 1463 It CC), a cancellation would not be allowed, as a supervening impossibility to enjoy the benefit of the service is irrelevant.

[90] Civ SSUU 12 May 2020, no 8770 (2020) *Responsabilità Civile e Previdenza* 1515. On the interest rate swap saga, see AM Garofalo, *Aleatorietà e causa nella rendita vitalizia e nell'interest rate swap* (Esi, 2018) 291ff. In particular, the method of calculation of 'mark to market' profits have to be disclosed (see, for instance, Tribunal Reggio Emilia 23 February 2023, no 227 and Court of Appeal of Milan 4 April 2023, no 1148, both in www.dejure.it).

[91] Civ SSUU 23 February 2023, no 5657 (2023) *Repertorio Foro Italiano, Locazione finanziaria*, no 19.

[92] As to France, see Della Negra, *Mifid and Private Law*, 156–58.

[93] For a comparative analysis of hardship in English, German, and international contract law and in France before the 2016 reform, see H Rössler, 'Hardship in German Codified Private Law—In Comparative Perspective to English, French and International Contract Law' (2007) 15 *European Review of Private Law* 483ff. After the 2016 reform, see P Stoffel-Munk, 'L'imprévision et la réforme des effets du contrat' (2016) *Revue des contrats* 30ff.

[94] Civ 15 May 2024, no 13435 (2024) *Guida al diritto* 23, concerning a change in the urban plan involving land promised for sale.

[95] See Section VII.

[96] The Italian literature on the matter is abundant: see, for instance, C Camardi, *Economie individuali e connessione contrattuale: Saggio sulla presupposizione* (Giuffré, 1997); A Nicolussi, 'Presupposizione e risoluzione (2001) *Europa e diritto privato* 843; E Navarretta, 'Le ragioni della causa e il problema: L'evoluzione storica e le prospettive nel diritto europeo dei contratti' (2003) *Rivista del diritto commerciale* 988; E Navarretta *La causa e le prestazioni isolate*, 321ff.

However, the *Corte di Cassazione* concluded that the contract may be annulled if an unforeseen circumstance radically alters the purpose of the contract,[97] using the *cause* as a means of interpreting the parties' intentions, and thereby redistributing the risk of the bargain and extending the scope of frustration. This line of reasoning has been followed in subsequent judgments of the *Corte di Cassazione* concerning tourism contracts.[98]

X. Comparative considerations: 'I will survive'

The comparative overview of the substitutes of the *cause* in France and the various applications of the *causa* in Italy lead to several observations. As far as the development of the doctrine of the *cause* is concerned, there has been a tendency towards its subjectivisation in both jurisdictions since the beginning of the 1990s.[99] This general trend is also reflected in the formulation of Article 5.53 of the new Belgian Civil Code, which carries on with *cause* as a requirement for the validity of a contract and embraces its definition as a motive that is known or should have been known by the other party, thus focusing on the reconstruction of the purpose common to the parties.[100]

This understanding of the *cause* gives the courts the power to assess the actual and objective purpose jointly pursued by the parties in concluding the contract, rather than merely to check its conformity with a recognised legal framework (a 'type' of contract). In this way, the *cause* plays a role in both the interpretation and the construction of contracts beyond their textual elements, while the actual feasibility of the *synallagma* and its projection into a substantive arrangement of interests are further pieces of the puzzle. As a result, in both the French and the Italian legal systems, there has been a shift away from *cause* as a minimum requirement for judicial enforcement of an obligation to *cause* as a means of controlling the effectiveness of private autonomy.[101] There has also been a shift away from a public policy conception of this element towards an emphasis on protecting party autonomy against irrational or opaque arrangements of interests. In some cases, the Italian courts have even gone too far in using the flexible concept of '*causa in concreto*' as a panacea, with the double result of its hypertrophic growth and loss of conceptual precision. The group of cases where the *cause* is applied to extend the scope of frustration of contract is to be cited as a main example of this hypertrophic tendency.[102]

In this context, our comparative analysis clearly shows that, after 2016, the answers given by the new provisions of the French Civil Code to the selected questions mentioned earlier (*nuda pacta* and illusory and trivial exchanges; unequal bargains; scope of frustration) will presumably be the same as those previously given by the French courts and those currently applied by the Italian case law by using the doctrine of the *cause*. Consequently, it can be deduced that the two systems will remain in harmony in the near future, at least as far as solving these problems is concerned. This conclusion reinforces our original doubts as to whether the Italian legislator, in reforming the current Civil Code, should follow the French path of replacing a general concept with fragmented, casuistic provisions, when the Italian Civil Code itself was inspired by the French legal tradition.[103]

[97] Civ 20 December 2007, no 26958 (2008) I *Nuova giurisprudenza civile commentata* 531; Civ 24 July 2007, no 16315 (2008) *Danno e resp.* 845, with comment by Delli Priscoli.

[98] Civ 10 July 2018, no 18047 (2018) *Diritto e Processo* 320–58, with comment by SP Cerri, 'Irrealizzabilità del contratto di pacchetto turistico e causa in concreto'; Corte di Cassazione civ 29 March 2019, no 8766 (2019) *Corriere Giuridico* 717; Civ 18 January 2023, no 1417 (2023) *Pactum Online*, 29 June 2023, with comment by A Cioni, 'L'inadempimento delle obbligazioni legate ai pacchetti turistici: un passo falso per la Cassazione'.

[99] See Sections I and IV–IX.

[100] '*La cause s'entend des mobiles qui ont déterminé chaque partie à conclure le contrat, dès lors qu'ils sont connus ou auraient dû l'être de l'autre partie*.' It is to be emphasised that the new code expressly provides for the *nullité relative* (relative nullity) as a remedy for the absence of *cause*.

[101] Navarretta, *La causa e le prestazioni isolate*, 240.

[102] See Section IX.

[103] See Genicon, 'L'avenir de la cause en droit français des contrats', 715–31.

In reality, the hypertrophy of the *cause* is owinng to a certain judicial activism that has attempted to fill the gaps left by written rules that have become obsolete. In this sense, a reform of the Italian Civil Code should without a doubt introduce ad hoc rules for most of the issues mentioned earlier, such as inequality in bargaining and unfair exploitation,[104] the Italian equivalent of the German doctrine of the disappearance of the basis of the transaction (*Wegfall der Geschäftsgrundlage*),[105] frustration, and hardship.[106] Indeed, invoking the general doctrine of the *cause* leaves several uncertainties as to the remedy applicable to the mentioned contractual failures. At the same time, the introduction of ad hoc remedies would reduce both the hypertrophy and the paternalistic flavour of which this doctrine is accused.

There is, however, a 'hard core' of contractual issues that the doctrine of *cause* is suited to resolve in both French and Italian domestic litigation, as it revolves around the illuministic idea of the contract as a rational and reasonable product of the parties' will rather than a mere agreement. The cases of non-existent, illusory, or trivial *contrepartie*—including those concerning the lack of an external legal cause of an act—form the contours of this hard core.[107] Changing the name and removing the word *cause*, while retaining the previous solutions, therefore does not improve clarity but, rather, leaves the general concept in the background. This would be particularly true in Italy, where it is the general term *causa* that tends to evoke and absorb such a hard core of issues. Nor can the removal of the *cause* in French law be justified by concerns about the polysemy of the word, which simply reflects the historical diversity of the understandings of private autonomy.

On the contrary, maintaining the general concept of the *cause* in legal systems where it has been developed over centuries would be essential either to provide a uniform justification of the cases currently resolved by reference to the *cause* or to allow a degree of flexibility that may be helpful in dealing with new cases.[108] Since legal arguments are relevant in adjudicating rights and remedies, the doctrine of the *cause* could still play a role even if the legislator introduced a specific rule to solve each problem falling under the heading of the 'lack of *cause*'. In this regard, the flexibility of the *cause* argument facilitates its function as a gap-filler in addressing the issue of the horizontal effects of EU regulatory standards in financial contracts. In this capacity, it functions as a unifying element, facilitating a connection between the EU's vertical harmonisation framework and the national general rules of contract law.[109] Further, the extensive use of the *cause* argument in the construction of contracts is also explained by the flexibility of the argument which is employed by case law in order to justify the most appropriate responses to the aforementioned contractual failures.

The courts could, in principle, have resorted to alternative conceptual tools to address the need for novel contractual remedies and to modernise contract law. For instance, in Italian law they could have expanded the scope of rescission (Arts. 1448ff CC), the concept of impossibility of performance (Arts. 1463ff CC), or the supervening imbalance between performance and counter-performance (Art. 1467). However, this would have necessitated a greater degree of argumentative effort to achieve the result of gap-filling the contract, whereas the cause offers a larger margin of interpretive freedom, albeit with the requirement of accuracy and judicial self-responsibility in dealing with it.

It is, further, obvious that a *cause*-based reasoning requires a cultural and legal environment that is familiar with this concept. It is, therefore, understandable that, while being silent on the lack of *cause*

[104]E Navarretta, 'Causa e giustizia contrattuale a confronto: Prospettive di riforma' (2006) *Rivista diritto civile* 411ff; E Navarretta, 'Europa cum causa' in *Diritto comunitario e sistemi nazionali: pluralità delle fonti e unitarietà degli ordinamenti* (Esi, 2010) 328ff.

[105]See s. 313 BGB.

[106]Critically, see FP Patti, '*Causa* and Unexpected Circumstances' in G Albers et al, *Causa contractus*, 517ff.

[107]In the Italian literature on the matter, see U Breccia, 'Morte e resurrezione della causa' in Breccia, *Immagini del diritto privato*, 635ff; Navarretta 'Le ragioni della causa e il problema, 979ff.

[108]Genicon, 'L'avenir de la cause en droit français des contrats', 718.

[109]See, for example, OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 *Modern Law Review* 1294–329.

issues, the Principles of International Commercial Contracts, the Principles of European Contract Law, and the Draft Common Frame of Reference rather opted to dealing with gross disparity and unfair exploitation by means of an ad hoc rule, which details the circumstances under which one party has taken advantage of the vulnerability of the other party and, therefore, the unbalanced contract may be declared void (see Art. 3.2.7 PICC, II.-7:207 DCFR, 4:109 PECL). Provisions on exploitation of unequal bargaining power, however, do not cover all lack of *cause* issues, and the latter rather call into question the application of further flexible concepts such as good faith and *exceptio doli*.

At national level, then, the choice to confirm the concept of *cause* (albeit in a narrowly defined understanding) as 'reason' (*raison d'être*) of the contract must ultimately be seen as a compromise between an overly general concept and its elimination, and certainly as a paradigm for legal systems belonging to the Romanic family.[110]

[110]The choice made by the Belgian legislator (see fn 100) can be seen as a feasible paradigm.

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