Essays

Unfair Terms Control in Business-to-Business Contracts

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Abstract

The aim of the paper is to outline the regulation of one-sided (or onerous) standard terms in business-to-business contracts according to Italian law, in the light of the specific legislative rules and existent case law. Differently than other European legal systems, Italian law does not provide for a substantive control of unfair standard terms in business-to-business contracts. After the implementation of the European Directive no 93/13, the scope of the substantive judicial review covers only unfair terms in business-to-consumer contracts. Italian scholars often discussed the extension of the scope of application of consumer law to business-to-business contracts, but the legislature never addressed the issue.

The Italian Civil Code of 1942 represented a forerunner in providing rules for the incorporation of standard terms in contracts, that are applicable to every kind of contractual relationship between businesses. At the present stage, such rules do not protect adhering parties in an effective way and give rise to many disputes. In some cases, the need of protection of weaker businesses induced Italian courts to develop judge-made law based on open-ended clauses, such as good faith. In other cases, Italian judges adopted the parameter of the worthiness of protection or the *causa* doctrine, to affirm the invalidity of harsh contractual terms. Further limitations of contractual freedom are the so-called 'abuse of economic dependence' and rules devoted to certain contractual terms, which are often standardized in business-to-business contracts (exclusions or limitations of liability and time constraints for the exercise of a right). After sketching the comparative law background with reference to German and French law, the article offers a comprehensive account of the aforementioned elements. The examination leads the author to affirm that Italian law entails an indirect control of unfair terms in business-to-business contracts. In the final part, its relevance in the international context is evaluated.

I. Introduction

In their renowned work, 'Introduction to Comparative Law', Konrad Zweigert and Hein Kötz point out that

> '(t)he special interest of the law in Italy is that the problem of standard terms of businesses has been specifically addressed by the Codice civile as compared with other European civil codes: the rules which seemed modern in 1942 are no longer adequate, largely because they permit only 'covert' and

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'camouflaged' rather than open control of standard terms'.[1]

The rather severe analysis provided by the German authors is undeniably correct. The Italian rules on judicial review (applicable also to B2B contracts) seemed modern when the Code was enacted, but after a few decades, when in the 1970s other legal systems in Europe began to enact specific regulations concerning the judicial control of standard terms, the Italian legal system was immediately left behind.[2]

Since it came into force in 1942, the Italian Civil Code has provided a rule on the incorporation of standard terms into a contract in Art 1341. The second provision devoted to standard terms, Art 1342, states that in cases of conflict between words added by the parties and the preformulated text, the former prevails. Finally, with respect to the construction of contracts, Art 1370 provides a classic *contra proferentem* rule, according to which, where there is a doubt, clauses in standard terms or form contracts must be construed in favour of the party on whom they are imposed. The aforementioned rules apply both to consumers and businesses.

Notwithstanding the critics and the requests for a legislative intervention, which first emerged in scholarship by the end of the 1960s,[3] the Italian legislature – until now – has never adopted a general set of rules on the substantive judicial review of B2B contracts. The most important innovation in the field of standard terms was the implementation of Directive no 93/13 on unfair terms in consumer contracts.[4] The implementation of the rules affected only B2C relationships,[5]

[1] H. Kötz and K. Zweigert, *An Introduction to Comparative Law* (translation by T. Weir, Oxford: Oxford University Press, 3rd ed, 1998), 339-340. See also O. Lando, 'Unfair Contract Clauses and a European Uniform Commercial Code', in M. Cappelletti ed, *New Perspectives for a Common Law of Europe* (Leyden/London: Sijtoff et al, 1978), 267, 270, who writes that the Italian rules 'cannot help an adhering party against a stipulator who can dictate the terms of the contract'; N. Jansen, 'Unfair Contract Terms', in N. Jansen and R. Zimmermann eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 919, 922: 'Yet, when the first legislation in Europe on standard contract terms was introduced with Art 1341 and 1342 Italian *Codice civile* of 1942, those rules still did not provide for a mechanism of judicial review'.

[2] See for a comparative assessment, as provided in the abovementioned years, E.H. Hondius, 'Unfair Contract Terms: New Control Systems' 26 *American Journal of Comparative Law*, 525 (1978); O. Lando, n 1 above, 267.

[3] Cf S. Rodotà, 'Condizioni generali di contratto, buona fede e poteri del giudice' *Condizioni generali di contratto e tutela del contraente debole: atti della Tavola rotonda tenuta presso l'Istituto di diritto privato dell'Università di Catania: 17-18 maggio 1969* (Milano: Giuffrè, 1970), 84; E. Roppo, *Contratti standard. Autonomia e controlli nella disciplina delle attività negoziali di impresa* (Milano: Giuffrè 1975), 272; C.M. Mazzoni, *Contratti di massa e controlli nel diritto privato* (Napoli: Jovene, 1975), 207-218.

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95, 29-34.

[5] The Directive was implemented through the legge 6 February 1996 no 52. The new provisions on unfair terms in consumer contracts were inserted into the Italian Civil Code in

but the European legislative intervention once again raised a debate concerning the need for judicial review of B2B contracts. Interestingly, the question was submitted to the Italian Constitutional Court. The absence of a protection mechanism for small and medium enterprises could be considered unreasonable in light of Art 3 of the Italian Constitution since legal subjects, no matter whether natural persons or legal entities, may face the same 'take it or leave it' situations as consumers do. The Constitutional Court firmly rejected the assertion and referred in its decision to the political aims pursued by the European Union, which were considered non-extendable to B2B relationships.[6]

Nevertheless, it would be wrong to say that the subject is not of interest for Italian scholars or that under Italian law B2B contracts do not undergo any substantive judicial control. On the one side, Italian scholars are accustomed to adopting the category of 'asymmetric contracts' to describe B2B relationships in which one party has more contractual power than the other, and they have affirmed that courts are already empowered to undertake a substantive control of contractual terms.[7] On the other side, in certain cases (an 'indirect')[8] judicial control is granted on the basis of open-ended clauses or particular rules. In fact, in some cases courts have applied the doctrine of abuse of rights (*abuso del diritto*), based on the principle of good faith, to preformulated terms that grant businesses the right to withdraw *ad nutum* from a contract. Other judgments have declared the legitimacy of a substantive review, referring to the general

Art 1469-*bis* et seq. With the decreto legislativo 6 September 2005 no 206, the same provisions were then transposed in the Italian Consumer Code in Arts 33-36.

[6] Corte costituzionale 22 November 2002 no 469, *Foro italiano*, I, 332 (2003), with comments by A. Palmieri and A. Plaia. See also A. Genovese, 'La crisi della disciplina del contratto *standard*' *Contratto e impresa*, 1156, 1169 (2019), demanding a further intervention of the Constitutional Court.

[7] V. Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' 5 *European Review of Contract Law*, 304-349 (2009); A.M. Benedetti, 'Contratto asimmetrico' *Enciclopedia del diritto* (Milano: Giuffrè 2012), Annali V, 370-392. *Contra* G. D'Amico, 'Giustizia contrattuale e contratti asimmetrici' *Europa e diritto privato*, 1, 30-38 (2019). A different approach has been adopted by a group of scholars, who tried to elaborate a general regime for the so-called 'third contract' (*terzo contratto*): see especially the essays collected in G. Gitti and G. Villa eds, *Il terzo contratto* (Bologna: il Mulino, 2008), whereas the label '*terzo contratto*' was coined by R. Pardolesi, 'Prefazione', in G. Colangelo ed, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti. Un'analisi economica e comparata* (Torino: Giappichelli, 2004), XI, XIII, referring to a 'grey area' in between B2C contracts and B2B contracts of sophisticated contracting parties. The paradigm is based on particular regulations concerning B2B relationships in which parties have an unequal bargaining power. One of the main examples of such regulations is the 'abuse of economic dependence' provided by Art 9 legge 19 June 1998 no 192 (see below IV.3). The research group had the aim to identify principles underlying the different regulations in order to reconstruct a system of rules applicable to 'unequal' or 'asymmetric' B2B relationships (cf G. Amadio, 'Il terzo contratto. Il problema', in G. Gitti and G. Villa eds, ibid 9, 16-21).

[8] Such a terminology was first adopted by U. Morello, 'Condizioni generali di contratto' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 1988), III, 334, 344, who refers to rules that are not based on an '*ad hoc* general clause', namely a general clause provided for the control of standard terms.

clause on the 'worthiness' (*meritevolezza*) of a contract (Art 1322 Italian Civil Code) and to the notion of *causa contractus*. In addition, attention must be devoted to special rules which are outside of the Italian Civil Code. The notion of 'abuse of economic dependence' (*abuso di dipendenza economica*), as outlined in Art 9 legge 19 June 1998 no 192, can to some extent encompass also the phenomenon of unfair terms in B2B contracts. Finally, Art 1229 Italian Civil Code limits contractual freedom in the field of limitations or exclusions of liability.

As a final introductory remark, it must be pointed out that the Italian legal system does not provide comprehensive rules on the control of price-related terms. Consumer law is acquainted with the exclusion of any judicial assessment of 'core terms' as provided by Art 4, para 2, of the Unfair Terms Directive,[9] whereas general contract law establishes only some rules on *laesio enormis*, which implicate an unfair exploitation of one contracting party and the corresponding existence of a gross advantage being enjoyed by the opposing party.[10] Other provisions deal with usury, especially in loan contracts.[11]

II. The Comparative Law Background

Among European States, there are different conceptions of the review of unfair terms. French jurists usually refer to such rules as an instrument to protect weaker parties, whereas in the German legal system the problem of standard terms' control is connected to the need of limiting the power of professional suppliers and trade organizations drafting their terms unilaterally.[12] This explains why German law traditionally does not distinguish whether the other party is a consumer or not, as the relevant issue was supposed to be the drafting of the contract in a standardized form.

In recent years, the essential structure of unfair terms regulations in B2B contracts have been deeply discussed by the German and the French doctrine. This was mainly due to the willingness of creating an attractive set of rules for businesses in order to make German and French law more competitive within

[9] See generally M. Farneti, *La vessatorietà delle clausole "principali" nei contratti del consumatore* (Padova: CEDAM, 2009); M. Dellacasa, 'Judicial review of "core terms" in consumer contracts: defining the limits' 11 *European Review of Contract Law*, 152, 158 (2015).

[10] See Art 1448 Italian Civil Code, which remarkably refers to a fixed fifty percent criterion for establishing a relevant disproportionate bargain. On the historical background and for a comparative assessment, see S. Lohsse, 'Excessive Benefit or Unfair Advantage', in N. Jansen and R. Zimmermann eds, n 1 above, 701, 702-704; H. Kötz, 'Comparative Contract Law', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd ed, 2019), 902, 917.

[11] See, for a general overview, M. Graziadei, 'Control of Price Related Terms in Standard Form Contracts: The Italian Experience' *Annuario di diritto comparato e di studi legislativi*, special edition, 193 (2018).

[12] N. Jansen, n 1 above, 923.

the market of legal rules.[13] Certainty and respect of contractual freedom are usually considered the more relevant factors to assess when there is the need to choose the law applicable to an international contract. Not surprisingly, the English Unfair Contract Terms Act 1977 ('UCTA') grants a significant amount of freedom to determine the content of standard terms in international contracts.[14] German and French law both prescribe a general substantive control of unfair terms, but their inherent features differ one from each other.

1. Extended Scope of Application in the German Legal System

In German law, since the entry into force of the *AGB-Gesetz* in 1976, the substantive control of standard terms has been extended to B2B contracts.[15] Already in the preceding decades the German federal court considered standard terms ineffective in referring to the general clause of good faith (§ 242 BGB).[16] German judges have always been willing to protect small and medium-sized businesses against businesses that exercised a monopolistic power. In Germany, the former make up more than ninety percent of the total businesses and provide a fundamental contribution to the German economy. It is often stated that the so-called '*Mittelstand*' (in economic jargon, small and medium businesses) are the engine of the country. It goes without saying that the propensity to protect small and medium-sized businesses is sometimes defined as a genuine choice of economic policy.[17]

Rules on unfair terms, which merged into the BGB in 2002, entail two

[13] See especially S. Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' 21 *European Review of Private Law*, 13, 64-67 (2013).

[14] See section 26 UCTA 'International supply contracts': '(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (2) below (…) (3) Subject to subsection (4), that description of contract is one whose characteristics are the following – (a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and (b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States (the Channel Islands and the Isle of Man being treated for this purpose as different States from the United Kingdom)'.

[15] See O. Sandrock, 'The Standard Terms Act 1976 of West Germany' 26 *American Journal of Comparative Law*, 551 (1978). From a comparative law perspective, see also V. Rizzo, *Le «clausole abusive» nell'esperienza tedesca, francese, italiana e nella prospettiva comunitaria* (Napoli: Edizioni Scientifiche Italiane, 1994); E. Ferrante and R. Koch, 'Le condizioni generali di contratto: collocazione e limiti del controllo di vessatorietà nella prospettiva italo-tedesca' *Contratto e impresa Europa*, 695 (2011).

[16] See, on the historical background, P. Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Tübingen: Mohr Siebeck, 2010), 349-355.

[17] See A. De Franceschi, 'Una proficua *Wahlverwandtschaft*: *Schuldrechtsmodernisierung* e diritto privato europeo', in P. Sirena ed, *Dal 'fitness check' alla riforma del codice civile* (Torino: Giappichelli, 2019), 351, 369.

levels of protection, depending on whether the adhering party is a business or a consumer. In B2B contracts only the general rule laid down in § 307, para 1, BGB would be relevant in prescribing that standard terms that, contrary to good faith, cause a disproportionate disadvantage to the adhering party are ineffective. In fact, according to § 310 BGB, which places the so-called '*Differenzierungsgebot*', the list of clauses included in §§ 308 (*Klauselverbote mit Wertungsmöglichkeit*) and 309 (*Klauselverbote ohne Wertu-ngsmöglichkeit*) BGB do not apply to B2B contracts. The same provision also states that in assessing the abusive nature of standard terms in B2B contracts, account must be given to trade uses and customs.

Despite the clear regulatory framework, in assessing the unfair nature of a standard term also for B2B contracts the German federal court refers to the lists of §§ 308 and 309 BGB (provided for consumers).[18] It follows that any derogation from the default rules could potentially lead to the abusive nature of the clause. Other critical aspects concern the excessively strict criteria used to assess the existence of an individual negotiation and the insufficient consideration of trade usage and customs.[19] Many practitioners consider the equal treatment of business and consumer adhering parties unsustainable, especially with regard to the assessment of exemption or limitation of liability clauses.[20] It is argued that the limitation of contractual freedom is excessive, since it significantly affects the risk distribution chosen by the contracting parties and places the German legal system in an isolated position in the European context.[21] In light of the described case law, some scholars doubt that the rules contained in the BGB could represent a reference point for the harmonization of European law.[22]

2. Recent Reforms in the French Legal System

Unlike German law, the generalized control of contractual clauses in B2B contracts does not belong to the French tradition.[23] Only in recent years, due to

[18] See L. Leuschner, 'AGB-Kontrolle im unternehmerischen Verkehr – Zu den Grundlagen einer Reformdebatte' *Juristenzeitung*, 876 (2010), claiming that the German federal court evaluates B2B contracts 'an denselben strengen Maßstäben, die auch für Verbraucherverträge gelten' (according to the same strict parameters adopted for B2C contracts); T. Pfeiffer, 'Entwicklungen und aktuelle Fragestellungen des AGB-Rechts' *Neue Juristische Wochenschrift*, 913, 917 (2017).

[19] Cf B. Gsell, 'Deutsche Erfahrungen mit der begrenzten Erstreckung der Klauselkontrolle auf den unternehmerischen Verkehr', in J. Kindl et al eds, *Standartisierte Verträge zwischen Privatautonomie und rechtlicher Kontrolle* (Baden-Baden: Nomos, 2017), 244.

[20] See L. Leuschner, 'Grenzen der Vertragsfreiheit im Rechtsvergleich. Eine rechtsvergleichende Untersuchung der Grenzen der Vertragsfreiheit am Beispiel haftungsbeschränkender Vertragsklauseln im deutschen, französischen, englischen, österreichischen und schweizerischen Recht' *Zeitschrift für Europäisches Privatrecht*, 335 (2017).

[21] R. Schulze and T. Arroyo Vendrell, 'Standartisierte Verträge zwischen Privatautonomie und rechtlicher Kontrolle – eine Einführung', in J. Kindl et al eds, n 19 above, 20.

[22] M. Lehmann and J. Ungerer, 'Save the 'Mittelstand': How German Courts Protect Small and Medium-Sized Enterprises from Unfair Terms' 25 *European Review of Private Law*, 313 (2017).

[23] Cf J. Ghestin, *Rapport introductif*, in C. Jamin and D. Mazeaud eds, *Le clauses abusives*

the need to ensure balance between the contracting parties, control systems begun to be discussed.[24] The first debates intervened after the *Chronopost* case, in which the Court of cassation declared an exemption clause '*non-écrite*' due to the fact that it

> '*contredit la portée de l'obligation essentielle souscrite par le debiteur*' (contradicts the scope of the essential obligation subscribed by the debtor).[25]

The judgment was followed by *loi* 4 August 2008 no 776, with the aim of providing a tool to protect businesses against abuses in the distribution sector, according to which it constitutes an illegal conduct

> '*De soumettre ou de tenter de soumettre un partenaire commercial à des obligations créant un déséquilibre significatif dans les droits et obligations des parties*' (to subject or attempt to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties) (Art L 442-6, para 2, Code de commerce).[26]

Finally, with heavily criticized dispositions,[27] the *ordonnance* of 2016[28] introduced in the French Civil Code the legal concept 'contrat d'adhésion', described as a contract

> '*qui comporte un ensemble de clauses non négociables, déterminées à l'avance par l'une des parties*' (that contains a set of non-negotiable terms, determined in advance by one of the parties) (Art 1110 *Code civil*).[29]

entre professionnels (Paris: Economica, 1998), 3-9.

[24] See F. Limbach, *Le consentement contractuel à l'épreuve des conditions générales. De l'utilité du concept de déclaration de volonté* (Paris: LGDJ, 2004), 41-50.

[25] Cour de cassation-chambre commerciale 22 October 1996 no 93-18632, *Recueil Dalloz*, 121 (1997), with a case note of A. Seriaux. See generally D. Mazeaud, 'La protection par le droit commun', in C. Jamin and D. Mazeaud eds, n 23 above, 44-46.

[26] On the differences between the parameters to assess the unfairness of a clause in B2C and B2B contracts, see Cour de cassation-chambre commerciale 25 January 2017 no 15-23547 (on the decision, cf J.B. Seube, 'Comment savoir si une clause crée un déséquilibre significatif?' *Defrénois*, 18, 35 (2017)).

[27] See O. Deshayes et al, *Réforme du droit des contrats, du régime général et de la preuve des obligations* (Paris: LexisNexis, 2nd ed, 2018), 341: 'L'article 1171 est probablement le texte qui a suscité les plus vives polémiques et les plus sévères condamnations lors des consultations publiques' (Art 1171 is probably the provision that provoked the most heated controversy and the most severe condemnations during public consultations).

[28] *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*. The *ordonnance* was ratified by the *Loi* 20 April 2018 no 287. See O. Deshayes et al, 'Ratification de l'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations' *Semaine juridique - Edition générale (JCP G)*, 885 (2018).

[29] Art 1110 *Code civil* distinguishes between the aforementioned *contrat d'adhésion* and the *contrat de gré à gré*, namely '*celui dont les stipulations sont librement négociées entre les*

The latter article states that

> '*Dans un contrat d'adhésion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat est réputée non écrite*' (any non-negotiated clause, determined in advance by one of the parties, that creates a significant imbalance between the rights and obligations of the contracting parties is deemed not written) (Art 1171 Code civil).[30]

The new provision modifies the relationship between judge and contract, providing for a generalized substantive control, similar to that established in favor of consumers.[31] In this regard, it has been argued that the *Code civil* embraced a modern 'philosophy' of contract law, which ensures the force of law and the related inviolability of the agreements only in cases where the contractual terms have been negotiated.[32] Otherwise, where the terms have been prepared by a party for a multitude of contractual relationships, the need for substantive control exists.

III. Rules on Standard Conditions and Form Contracts

The first set of rules of Italian law that must be analyzed is the one devoted to the 'formal' control of standard conditions and form contracts. Such rules do not provide a strong protection in favor of the adhering party, but are often applied by Italian judges. Several questions related to the interpretation of the relevant provisions were tackled in the case law. A review of the orientations of the Court of Cassation on the most important aspects of the regulation is therefore undeniable in order to assess Italian law's state of art in the field of judicial review of B2B contracts.

1. Regulatory Framework

parties'. See D. Mazeaud, 'Imaginer la réforme' *Revue des contrats*, 610 (2016). See also E. Minervini, 'Contratti per adesione e clausole abusive nel codice civile francese riformato', in D. Di Sabato ed, *La riforma del* code civil*: una prospettiva italo-francese* (Napoli: Edizioni Scientifiche Italiane, 2018), 151.

[30] According to Art 1171 *Code civil* '*L'appréciation du déséquilibre significatif ne porte ni sur l'objet principal du contrat ni sur l'adéquation du prix à la prestation*' (The assessment of the significant imbalance does not relate to the subject matter of the contract nor to the adequacy of the price).

[31] On the relationship between Art 1171 *Code civil* and Art L 212-1 *Code de la consommation*, see M. Mekki, 'Réforme des contrats et des obligations: clauses abusives dans les contrats d'adhésion' *Semaine juridique - Edition générale (JCP G)* 1190 (2016); O. Deshayes et al, n 27 above, 342-353; J.S. Borghetti, 'Le nouveau droit français des contrats, entre continuité et europeanisation' *Annuario del contratto 2016* (Torino: Giappichelli, 2017), 3, 22-23.

[32] Cf T. Revet, 'Le projet de réforme et les contrats structurellement déséquilibrés' *Recueil Dalloz*, 1217 (2015); Id, 'Une philosophie générale?' *Revue des contrats*, Hors-série, 5 (2016).

The Italian Civil Code draws a distinction between the more general problem of incorporation of standard conditions (Art 1341, para 1) and the specific problem regarding the incorporation and validity of 'one-sided' or 'onerous' clauses (Arts 1341, para 2 and 1342, para 2).[33] The latter are valid only if there is explicit approval in writing, whereas the general rule for incorporation is that the terms are known or might have been known by using ordinary diligence.[34] The separate treatment of 'one-sided clauses' or 'onerous clauses' has deprived the general problem regarding incorporation of any practical importance.[35] Issues related to incorporation usually arise only for clauses that are not one-sided.[36] The latter are subdivided in two groups by Art 1341, para 2, Italian Civil Code, and it is understood that the list cannot be extended by analogy.[37]

Art 1342 Italian Civil Code sets outs the treatment of clauses that are added to a form contract for the purpose of uniformly regulating multiple contractual relationships, typically with different contracting parties.[38] By stating in the first para that any added clauses prevail over the originally formulated clauses, the article prescribes a rule of contractual interpretation. The second para simply clarifies the scope of application of Art 1341, para 2, Italian Civil Code. It makes clear that the rule on onerous conditions applies also in cases in which the form contract is signed.

The *contra proferentem* rule stated in Art 1370 Italian Civil Code[39] has a

[33] Art 1341 Italian Civil Code 'General conditions of contract': '(1) General conditions, prepared by one of the parties, are binding on the other party if known by the latter at the time when the contract was concluded or if she or he might have known thereof by using ordinary diligence. (2) At any rate, the conditions do not produce effects, unless specifically approved in writing, when, in favour of the party who has predisposed [drafted] them, they provide limitations of liability, the faculty to withdraw from the contract or to suspend the execution thereof, or burden the other party with time constraints for the exercise of a right or limitations to such party's power to raise defenses, restrictions on freedom of contract with third persons, tacit extension or renewal of the contract, clauses providing for arbitration or derogations from the usual venue or jurisdiction of the courts'.

[34] See G. Gorla, 'Standard Conditions and Form Contracts in Italian Law' 11 *American Journal of Comparative Law*, 1, 3 (1962), who recalls the fact that the quoted provisions of the 1942 Code are novel and were not provided by the Civil Code of 1865 nor by the Commercial Code of 1882.

[35] ibid 5. See also R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 4th ed, 2016), 348.

[36] But see Section III.3 below, on clauses that are not legible.

[37] See Corte di Cassazione ordinanza 25 August 2017 no 20397, *Vita notarile*, 272 (2018). But see Section III.5 below.

[38] Art 1342 Italian Civil Code 'Contracts made by means of forms or formularies': '(1) In contracts made by subscribing to forms prepared for the purpose of regulating in a uniform manner certain contractual relationships, the clauses added to such forms prevail over the original formulated clauses, even if incompatible, and even though the latter have not been stricken out. (2) In addition, the provision of the second para of the preceding article is applicable'.

[39] Art 1370 Italian Civil Code 'Construction against the author of a clause': 'The clauses inserted in general conditions of contract or in model or form contracts predisposed (drafted) by one of the contracting parties are construed, in cases of doubt, in favour of the other'. See generally A. Genovese, *L'interpretazione del contratto* standard (Milano: Giuffrè, 2008), 24-25.

subsidiary nature.[40] In principle, the general conditions must be construed according to the rules on construction of contracts contained in Arts 1362 ff Italian Civil Code. Usually, the first criterion indicated in the aforementioned set of rules, which refers to the 'common will' of the parties, is not considered applicable because the adherent party does not truly express a will.[41] The meaning of the general conditions has to be revealed through objective criteria, having reference primarily to the understanding of the majority of the users of the term under scrutiny. At any rate, Art 1370 applies only if there is 'a doubt' concerning the meaning of the words used. This is an infrequent event.[42]

2. Definition of Standard Conditions and Form Contracts

Initially, there is the need to point out the distinction between standard conditions (Art 1341 Italian Civil Code) and form contracts (Art 1342 Italian Civil Code) in order to clarify the scope of application of the review in terms of compliance with required formalities. The first expression refers to the terms prepared by one of the contracting parties and adopted in order to regulate an undetermined series of relationships, whereas the second one concerns forms prepared by third parties, even though the forms are not used by one of the parties as her standard conditions.[43]

In more detail, Art 1341 Italian Civil Code refers to blocks of standard conditions, used – as said – to regulate a series of relationships.[44] This means that the rule applies if the contracting party that uses the standard conditions exercises an activity that implicates the formation of multiple relationships.[45] If the choice to adopt the standard conditions is taken on the basis of a negotiation conducted by the contracting parties, Art 1341 Italian Civil Code is inapplicable.[46] A

[40] L. Bigliazzi Geri, 'L'interpretazione del contratto', in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2013), 366, who points out that, in matters of construction, Art 1370 Italian Civil Code prevails only over Art 1367 Italian Civil Code, which states that, in cases of doubt, an interpretation which renders the terms of the contract effective is to be preferred over one which would not.

[41] S. Patti and G. Patti, 'Responsabilità precontrattuale e contratti standard', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1993), 364-365.

[42] L. Bigliazzi Geri, n 40 above, 366-367.

[43] G. Gorla, n 34 above, 11.

[44] Corte di Cassazione 19 March 2018 no 6753, 'Contratto in genere' *Repertorio del Foro italiano*, 44 (2018); Corte di Cassazione 15 April 2015 no 7605, *Massimario Giustizia Civile*, 2015; Corte di Cassazione ordinanza 7 December 2012 no 22047, *Foro italiano*, I, 892 (2013); Corte di Cassazione ordinanza 7 December 2011 no 26333, 'Contratto in genere' *Repertorio del Foro italiano*, 376 (2011). See for further references M. Maggiolo, *Il contratto predisposto* (Padova: CEDAM, 1996), 93-96.

[45] Corte di Cassazione 23 May 2006 no 12153, *Il Foro italiano*, I, 1896 (2007). For B2C contracts, the substantive control mechanism provided by Arts 33-36 Italian Consumer Code requires only that the business has drafted the term.

[46] Corte di Cassazione 10 August 2016 no 16889, 'Locazione' *Repertorio del Foro italiano*, 39 (2016); Corte di Cassazione 17 March 2009 no 6443, 'Contratti pubblici' *Repertorio del Foro italiano*, 637 (2009).

negotiation surely exists in cases in which material modifications have been introduced into the standard conditions or the form contract. The onus of proving the nature as standard conditions is on the party who wants to have a term declared as non-effective.[47] Such a claim has a 'constitutive nature', and, therefore, the judge can affirm on its own motion the absence of proof.

According to the Court of Cassation, if the standard conditions are contained in a deed drafted by a public official (eg, a notary), Art 1341 Italian Civil Code is not applicable.[48] Therefore, also where the deed contains onerous clauses, approval in writing is not required. The case law is based on the idea that the form requirements set by the provision on standard conditions is substituted by the notarial form. Some authors have criticized the solution, arguing that a deed does not ensure that the weaker party has been able to influence the content of the contractual provisions through a negotiation.[49]

Art 1342 Italian Civil Code applies also if the form prepared by a third party was adopted only once by the contracting party.[50] Due to the 'objective' standard nature of such a form, the need for protection exists as with standard conditions prepared by one of the contracting parties. In addition, premising the application of Art 1342 on the contracting party having used the form contract on multiple occasions would make the provision redundant, because Art 1341, para 1, Italian Civil Code would apply directly to standard form conditions (although printed in form contracts).[51] Art 1342 Italian Civil Code does not apply if the form is chosen not by one of the contracting parties, but by brokers who submit a text to the parties which encompasses particular clauses.

The aforementioned rules are not applicable in cases in which the parties adopt a model contract (a so-called '*contratto-tipo*') drafted by associations who represent different categories of contracting parties.[52] A prominent example in Italian case law is found in collective labor agreements.[53] It is arguable that the

[47] Corte di Cassazione 14 March 2014 no 5952, *Assicurazioni*, 307 (2014); Corte di Cassazione 30 September 2005 no 19212, 'Contratto in genere' *Repertorio del Foro italiano*, 411 (2005).

[48] Corte di Cassazione 20 June 2017 no 15237, 'Contratto in genere' *Repertorio del Foro italiano*, 305 (2017); Corte di Cassazione 21 September 2004 no 18917, 'Contratto in genere' *Repertorio del Foro italiano*, 367 (2005); Corte di Cassazione 21 January 2000 no 675, *Foro italiano*, I, 1153 (2000); Corte di Cassazione 23 April 1998 no 4188, 'Contratto in genere' *Repertorio del Foro italiano*, 325 (1998); Corte di Cassazione 27 April 1998 no 4269, 'Contratto in genere' *Repertorio del Foro italiano*, 326 (1998); Corte di Cassazione-Sezioni unite 10 January 1992 no 193, *Vita notarile*, 761 (1992).

[49] See E. Bargelli, 'Condizioni generali di contratto – sub Art. 1341', in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 555.

[50] S. Patti and G. Patti, n 41 above, 467.

[51] ibid.

[52] See on the different classifications of 'contratti-tipo', E. Battelli, *Contratti-tipo. Modelli negoziali per la regolazione del mercato: natura, effetti e limiti* (Napoli: Jovene, 2017), 55-60.

[53] Corte di Cassazione-Sezione lavoro 28 October 2008 no 25888, 'Lavoro (contratto)' *Repertorio del Foro italiano*, 22 (2008); Corte di Cassazione-Sezione lavoro 6 August 2003 no 11875, *Notiziario giurisprudenza lavoro*, 8 (2004).

same applies when the parties are members of the trade association which has prepared the contractual terms.[54]

3. Incorporation of Standard Conditions

Art 1341, para 1, Italian Civil Code states that general conditions are binding if known by the other party at the time when the contract was concluded or if she might have known of them by using ordinary diligence. The onus of proof concerning the knowledge or the possibility of knowing the content of the general conditions lies with the contracting party who wants to take advantage of them.[55] With respect to the 'possibility of knowing' the general conditions, the law prescribes ordinary diligence as a parameter that the judge has to apply in the individual case. The reference is to the general rule on diligence provided by Art 1176 Italian Civil Code. Some authors refer to the characteristic position that the adherent party has with regard to the individual contract and to the possibility that she exercises a professional activity.[56] Other authors, and the prevailing orientation of the Court of Cassation, affirm that one has to refer to the general behavior of adherent parties in the context of the type of transaction which is at issue.[57]

Issues related to transparency fall within the scope of the provision. So if it is not legible[58] or if its meaning is obscure, the term is not considered part of the contract.[59] In addition, Art 1341, para 1, Italian Civil Code indicates 'the time when the contract was concluded' as the relevant moment in time. This means that the general conditions are not part of the contract if they are printed on the invoice and dispatched after the conclusion of the contract.[60] The rule is applicable if the standard conditions are printed on the individual contract or on a supplementary sheet to which the former refers.[61]

A disputed problem in legal writings relates to the consequences of an infringement of the requirement set by Art 1341, para 1, Italian Civil Code. It is

[54] G. Gorla, n 34 above, 16.

[55] Corte di Cassazione 14 March 2014 no 5952, *Assicurazioni*, 307 (2014).

[56] R. Scognamiglio, *Dei contratti in generale*, in A. Scialoja and G. Branca eds, *Commentario del codice civile* (Roma-Bologna: Il Foro italiano-Zanichelli, 1970), 263.

[57] C.M. Bianca, 'Condizioni generali di contratto' *Enciclopedia giuridica* (Roma: Treccani, 1991), 2; U. Morello, n 8 above, 337; S. Patti and G. Patti, n 41 above, 339. In the case law, see Corte di Cassazione 26 February 2004 no 3863, *Foro italiano*, I, 2133 (2004) with a comment by A.L. Bitetto, concerning a parking contract.

[58] See E. Minervini, 'Clausola vessatoria illeggibile – Clausola vessatoria illeggibile contenuta in un modulo o formulario' *Giurisprudenza italiana*, 790 (2019).

[59] C.M. Bianca, n 57 above, 2. For further developments, see E. Ferrante, 'Il consenso contrattuale e le sue gradazioni: l'esempio dell'interpretazione contro l'autore della clausola', in P. Sirena and A. Zoppini eds, *I poteri privati e il diritto della regolazione – A quarant'anni da "Le autorità private" di C.M. Bianca* (Roma: Roma Tre-Press, 2018), 367-407.

[60] See also G. Gorla, n 34 above, 17.

[61] E. Bargelli, n 49 above, 553-554. See also Corte di Cassazione ordinanza 12 February 2018 no 3307, *Giurisprudenza italiana*, 787 (2019), which clarifies that the rule on incorporation applies also to form contracts, subject to Art 1342 Italian Civil Code.

not necessary to detail the different theories developed on this matter. According to the prevailing view, the literal meaning of the words used by the provision indicates that clauses – which are not known or not knowable with ordinary diligence – do not become part of the contract.[62] In this sense, the Italian rule is conceptualized as a tool capable of resolving the problem of 'incorporation' of clauses in the contract (according to German terminology, *Einbeziehung in den Vertrag*). Consequently, both contracting parties theoretically may object that an unknown or an unknowable clause is not part of the contract. The gaps that arise in the contract are filled through default rules.[63]

4. The Specific Approval in Writing

As it has been stated, the control provided by the Italian Civil Code in Art 1341, para 2, is the requirement of express written approval of one-sided clauses. From the Civil Code's time of enactment, the Italian courts have always required a 'dual signature', one for the contract as a whole and one for any one-sided clauses.[64] This means that one-sided clauses need not be individually approved by a signature (ie a signature for every one-sided clause). Rather, the provision requires only a second, separate acceptance with a declaration expressed after the first signature which makes mentions of the one-sided clauses.[65] Thus, the first signature has the function of proving the existence of an agreement and identifying the contracting party, whereas the second signature should induce the latter to focus on clauses which are particularly onerous and may limit contractual freedom. In theory, the requirement should induce the adherent party to reflect on the content of the terms and take precautions in the event of one-sided clauses. The reality is that often the adherent party faces a 'take it-or-leave it' situation and cannot influence the contents of the contract. In Italian legal scholarship it is, therefore, stated that the control mechanism in terms of contractual form is insufficient to protect the interests of weaker contracting parties.[66]

There is a huge amount of jurisprudence of the Court of Cassation dealing with the issue. Judge-made law has forged the requirements of 'separateness' and 'specificity' of the approval. The Court of Cassation has declared[67] that at the bottom of the contract, where the second signature appears, reference to the one-sided clauses may be made by specifying the article or section number that

[62] S. Patti and G. Patti, n 41 above, 345.

[63] See especially G. De Nova, 'Nullità relativa, nullità parziale e clausole vessatorie non specificamente approvate per iscritto' *Rivista di diritto civile*, II, 486 (1976); G.B. Ferri, 'Nullità parziale e clausole vessatorie' *Rivista di diritto commerciale*, I, 11 (1977).

[64] S. Patti and G. Patti, n 41 above, 352-355.

[65] A. Genovese, 'Condizioni generali di contratto' *Enciclopedia del diritto* (Milano: Giuffrè 1961), VIII, 805-806; R. Sacco and G. De Nova, n 35 above, 360.

[66] C.M. Bianca, 'Condizioni generali' n 57 above, 5.

[67] Corte di Cassazione 9 July 2018 no 17939, 'Contratto in genere' *Repertorio del Foro italiano*, 12 (2018).

the term has in the contract. However, it is not permissible to refer to a group of terms within which only some of them are one-sided. The latter manner of reference is valid only if there is a brief indication of the content of every term. In addition, in some cases, Italian judges have affirmed that the requirements of 'separateness' and 'specificity' set by Art 1341, para 2, Italian Civil Code are fulfilled only in cases where the manner of referring to one-sided clauses can be expected to raise the attention of the adherent party to clauses that can disadvantage her.[68]

An additional problem concerns online contracts containing one-sided clauses. According to the prevailing opinion, the second signature must be provided through the same technological procedure as the first one.[69] The idea is that satisfaction of the requirement means having to use a form designed to prompt a further assessment of the onerous clauses. In this way, even without a handwritten signature, the 'separateness' and 'specificity' of the approval would be established.

There are still ongoing discussions in respect of the treatment of one-sided clauses not expressly approved in writing. It would go beyond the scope of the present contribution to list all the different opinions. For our purposes, it should be noted that some scholars refer to an absolute nullity, others speak of a relative nullity that can be declared only in the interest of the adherent party, and a third group of scholars affirm that the issue should be treated as a matter of non-incorporation of the clause into the contract.[70] Recently, the Court of Cassation has clearly endorsed the understanding according to which the absence of express, written approval results in the relative nullity of the one-sided clause.[71] This means that only the party who is protected by the law, namely the adherent party, can take advantage of the nullity of the term. If a judge declares a term null and void, the contract continues to be binding as to the rest, and the term not expressly approved is 'substituted' by default rules. The solution is very similar to the one adopted for consumer contracts by the Italian Consumer Code at Art

[68] Corte di Cassazione 12 October 2016 no 20606, 'Contratto in genere' *Repertorio del Foro italiano*, 340 (2016); Corte di Cassazione 27 February 2012 no 2970, *Rivista del notariato*, 444 (2012).

[69] See F. Ricci, 'Le clausole vessatorie nei contratti online' *Contratto e impresa Europa*, 651, 687-689 (2014); E. Battelli, 'Riflessioni sui procedimenti di formazione dei contratti telematici e sulla sottoscrizione on line delle clausole vessatorie' *Rassegna di diritto civile*, 1035 (2014); G. Cerdonio Chiaromonte, 'Specifica approvazione per iscritto delle clausole vessatorie e contrattazione *on line*' *Nuova giurisprudenza civile commentata*, 404 (2018).

[70] The relevant references are provided by L. Buonanno, 'Linguaggio della norma ed interpretazione delle categorie nella patologia degli atti negoziali' *Contratto e impresa*, 444, 458-469 (2018).

[71] Corte di Cassazione 21 August 2017 no 20205, 'Contratto in genere' *Repertorio del Foro italiano*, 304 (2017); Corte di Cassazione ordinanza 4 June 2014 no 12591, available at www.dejure.it; Corte di Cassazione 20 August 2012 no 14570, 'Contratto in genere' *Repertorio del Foro italiano*, 462 (2012). A different opinion was expressed in the past by Corte di Cassazione 15 February 1995 no 1606, 'Contratto in genere' *Repertorio del Foro italiano*, 292 (1995), which refers to an 'absolute' nullity.

36. According to para 1 of the latter provision, in consumer contracts unfair terms are void while the rest of the contract remains valid. In addition, para 3 of Art 36 Italian Consumer Code states that nullity operates only for the benefit of the consumer and may be ascertained by the court on its own motion. The attempt – and desire – to harmonize the two different regimes for standard contracts appears clear. Nevertheless, the interpretation of the Court of Cassation seems to contradict the literal meaning of the words used in Art 1341, para 2, Italian Civil Code, where it is stated that terms not expressly approved in writing will not produce effects as occurs under the preceding para of the article.[72]

5. The List of 'One-Sided' or 'Onerous' Clauses

One of the associated problems concerns the correct identification of those clauses that fall under the provision of the second para of Art 1341 Italian Civil Code. As it has already been mentioned, interpretation by way of analogy is not permissible. Nevertheless, in some cases, having regard to the *ratio legis* of the specific clause, it is possible to provide an 'extensive interpretation'.[73] The difference between analogy and extensive interpretation is not easy to sketch.[74] Italian courts apply Art 1341, para 2, Italian Civil Code when it is possible to subsume a term of the contract under one of the clauses set out in the enumeration. There has been considerable litigation related to clauses which as matter of interpretation may be covered by Art 1341, para 2, Italian Civil Code. It must be pointed out that, in determining whether the second para of Art 1341 Italian Civil Code applies, courts only consider the nature and reach of a clause (as a question of law). They do not investigate whether the party burdened with the clause is in a weak position.[75]

It is difficult to provide a thorough inventory of those clauses that have been deemed as onerous, in part because the task of evaluating the character of the clauses is remitted to the lower courts (the first two instances, tribunals and courts of appeal), and their decisions are not as readily available as those of the Court of Cassation. No doubts arise for clauses that correspond to the wording used in the enumeration contained in the aforementioned provision, which takes into consideration clauses that: provide for limitations of liability; give the power to withdraw from the contract or suspend its execution; burden the other party with time constraints on the exercise of a right or limit such party's power to raise defenses; create restrictions on freedom of contract with third persons; entail a tacit extension or renewal of the contract; or provide for arbitration or derogations from the usual venue or jurisdiction of the courts. Pursuant to Art 1341, para 2, Italian Civil Code, the Court of Cassation has held as one-sided: clauses granting

[72] See S. Patti and G. Patti, n 41 above, 356-361.
[73] See especially G. Gorla, n 34 above, 10; U. Morello, n 8 above, 339.
[74] See E. Bargelli, n 49 above, 559.
[75] G. Gorla, n 34 above, 11; R. Sacco and G. De Nova, n 35 above, 360.

withdrawal rights;[76] clauses limiting the power to raise defenses (eg, the '*solve et repete*' clause);[77] extension or renewal clauses;[78] clauses limiting the freedom of contract with third persons; and arbitration[79] and jurisdiction clauses.[80]

In the absence of a direct reference in the list of Art 1341 Italian Civil Code, express approval in writing is required for clauses imposing a risk of impossibility of performance on the other party such that the latter has to pay even if she does not receive the intended counter-performance, for clauses which make the offer of a customer irrevocable at the moment when an order is signed,[81] and for clauses that exclude guarantees of the seller within a contract of sale.[82] Additionally, clauses that oblige one of the parties to sell only products of the drafter[83] or to apply a minimum price[84] are considered one-sided.

On the other hand, the control mechanism does not affect penalty and forfeiture clauses,[85] agreed rights of termination in the case of a so-called '*clausola risolutiva espressa*',[86] or clauses providing for the determination of the subject

[76] Corte di Cassazione 13 July 1991 no 7805, 'Contratto in genere' *Repertorio del Foro italiano*, 258 (1991); Tribunale di Milano 19 July 2001, *Danno e responsabilità*, 85 (2003). Conversely, the exclusion of a withdrawal right is not considered a one-sided clause: see Corte di Cassazione 4 June 2013 no 14038, 'Contratto in genere' *Repertorio del Foro italiano*, 344 (2013).

[77] Tribunale di Cagliari 13 November 2007, *Rivista giuridica sarda*, 445 (2009). See also F. Addis, 'Clausola limitativa della proponibilità di eccezioni', in M. Confortini ed, *Clausole negoziali. Profili teorici e applicativi di clausole tipiche e atipiche* (Torino: UTET, 2017), 773, 787-789. It must be observed that, in individual contracts, clauses that limit the power to raise defenses are regulated by Art 1462 Italian Civil Code. Under the latter provision, clauses that prevent a party from raising an exception connected to the nullity, to the avoidance or to the rescission (in a case of *laesio enormis*) of the contract are void. In addition, even if the clause is valid, the judge can suspend a judgment if grave reasons exist.

[78] Corte di Cassazione 12 October 2015 no 20401, *Nuova giurisprudenza civile commentata*, 237 (2016).

[79] Tribunale di Torino 23 January 1986, 'Arbitrato' *Repertorio del Foro italiano*, 43 (1986). Nevertheless, a clause that refers to an informal arbitration proceeding has not been held as onerous: see Tribunale di Pisa 16 December 1996, *Rivista dell'arbitrato*, 265 (1998); Tribunale di Venezia 19 February 1992, *Giurisprudenza italiana*, I, 2, 1188 (1994).

[80] Corte di Cassazione 12 February 2018 no 3307, *Nuova giurisprudenza civile commentata*, I, 1234 (2008).

[81] According to Art 1328 Italian Civil Code, an offer to conclude a contract is revocable. See on the latter provision A.M. Benedetti and F.P. Patti, 'La revoca della proposta: atto finale? La regola migliore, tra storia e comparazione' *Rivista di diritto civile*, 1293-1335 (2017).

[82] Corte di Cassazione 23 December 1993 no 12759, 'Contratto in genere' *Repertorio del Foro italiano*, 296 (1993). With respect to more recent developments, see G. De Cristofaro, 'Autonomia privata e pattuizioni di esclusione totale della garanzia per vizi nei contratti di compravendita - Note a margine di due recenti pronunce della Corte di Cassazione' *Rivista di diritto civile*, 219 (2018).

[83] Corte di Cassazione 29 March 1977 no 1214, *Giurisprudenza italiana*, I, 1, 1284 (1977).

[84] Corte di Cassazione 23 May 1994 no 5024, *Foro italiano*, I, 2528 (1995).

[85] Corte di Cassazione 18 March 2010 no 6558, 'Contratto in genere' *Repertorio del Foro italiano* 441 (2010); Corte di Cassazione 23 December 2004 no 23965, 'Contratto in genere' *Repertorio del Foro italiano*, 481 (2004); Corte di Cassazione 26 June 2002 no 9295, 'Contratto in genere' *Repertorio del Foro italiano*, 419 (2002).

[86] Corte di Cassazione ordinanza 5 July 2018 no 17603, 'Contratto in genere' *Repertorio del Foro italiano*, 105 (2018); Corte di Cassazione 11 November 2016 no 23065, 'Contratto in

matter of the contract (which often present similarities with limitations of liability clauses).[87] The exclusion of the control as regards form for penalty clauses is justified by the presence of a mandatory provision in Art 1384 Italian Civil Code, according to which the judge can reduce (also on his or her own motion) the amount of the penalty.[88] For agreed rights of termination, the possibility to sanction the abusive behaviour of the right-holder was addressed by some judgments through the general principle of good faith.[89] Clauses that grant to one of the contracting parties the power to unilaterally modify the contents of the contract also do not fall under the list contained in Art 1341, para 1, Italian Civil Code.[90] The same was stated by the Court of Cassation in respect of a clause, contained in a tenancy contract, that imposed on the tenant costs that would have otherwise fallen to the landlord[91] and in respect of a clause that extended the liability of a carrier also for losses due to theft. [92] Further, a clause fixing a precise duration for a long-term contract was not held as one-sided.[93]

6. The Problem of 'Bilateral' or 'Reciprocal' Clauses

With the expressions 'bilateral' or 'reciprocal' clauses, Italian scholarship refers to clauses that are drafted by one of the contracting parties but that in abstract terms could provide a favourable or negative outcome for both contracting parties.[94] In the past, some authors expressed the opinion that such clauses could not be considered onerous because of the equal treatment that they assure to contracting parties. Such a view has been rejected by the majority of scholars and as considered by the Court of Cassation.[95] First, notwithstanding the bilateral character of the clause, it is not possible to exclude that the drafter inserted such clause only in order to take advantage of the other party.[96] Second, the latter

genere' *Repertorio del Foro italiano*, 438 (2016); Corte di Cassazione 28 June 2010 no 15365, 'Contratto in genere' *Repertorio del Foro italiano*, 509 (2010).

[87] See below III.3.

[88] See for details F.P. Patti, 'Penalty Clauses in Italian Law' 25 *European Review of Private Law*, 309, 317-322 (2015).

[89] See below III.2.

[90] Corte di Cassazione 29 February 2008 no 5513, *'Contratto in genere' Repertorio del Foro italiano*, 387 (2008), which clarifies that the abovementioned clause does not result in a limitation of liability.

[91] Corte di Cassazione 12 July 2007 no 15592, *Giurisprudenza italiana*, 693 (2008).

[92] Corte di Cassazione 27 April 2006 no 9646, 'Contratto in genere' *Repertorio del Foro italiano*, 408 (2006).

[93] Corte di Cassazione 3 September 2015 no 17579, 'Contratto in genere' *Repertorio del Foro italiano*, 329 (2015).

[94] See V. Cusumano, 'Le condizioni generali di contratto: vessatorietà e bilateralità' *Nuova giurisprudenza civile commentata*, 239 (2016).

[95] Corte di Cassazione 1 March 2016 no 4047, 'Contratto in genere' *Repertorio del Foro italiano*, 348 (2016); Corte di Cassazione 2 February 2016 no 1911, *Foro italiano*, I, 1279 (2016); Corte di Cassazione 12 October 2015 no 20401, n 78 above; Corte di Cassazione 24 June 2004 no 11734, 'Contratto in genere' *Repertorio del Foro italiano*, 371 (2004).

[96] G. Gorla, n 34 above, 10 refers to an 'irrebuttable presumption that they favor the drafter'.

does not have the possibility to influence the contents of the contract. The absence of negotiations preempts the adherent party from evaluating the effects that the clause may have on the contractual relationship. Recently, this problem arose in a case decided by the Court of Cassation, which has clarified once again that the control mechanism at issue applies also to reciprocal clauses.[97]

7. Clauses Added to a Form Contract

A special rule is provided by Art 1342 Italian Civil Code for contracts made by signing forms prepared for the purpose of regulating certain contractual relationships in a uniform manner. Clauses added to such forms prevail over the original formulated clauses, even if incompatible, and even though the latter have not been stricken out. The rule applies regardless whether the added clauses are handwritten or typed.[98] The assessment of incompatibility is done by the court. Such an incompatibility does not exist if the added writing is merely aimed at supplementing or clarifying the contents of the contract.[99]

IV. Principles and Open-Ended Clauses

In recent years, landmark decisions of the Court of Cassation begun to refer to general principles and open-ended clauses, in cases in which one of the contracting party's behavior – although based on terms of the contract – was considered manifestly contrary to the requirement of good faith. In addition, the Italian Supreme Court provided a substantive control of certain terms able to frustrate the typical purpose of the envisaged contract. Legal doctrine has often criticized such interventions, as they are a potential source of uncertainty in Italian contract law. The decisions are often an attempt to accommodate contractual freedom to constitutional values.[100]

1. Good Faith. Prohibition of Abuse of Rights

An important development in Italian case law concerns the general clause of good faith.[101] A landmark Court of Cassation decision of 2009 expressly referred

[97] See especially the wording of Corte di Cassazione 12 October 2015 no 20401 n 78 above.

[98] Corte di Cassazione 13 October 2009 no 21681, 'Contratto in genere' *Repertorio del Foro italiano*, 309 (2009).

[99] R. Sacco and G. De Nova, n 35 above, 364.

[100] See especially P. Perlingieri, ' "Controllo" e "conformazione" degli atti di autonomia negoziale' *Rassegna di diritto civile*, 204 (2017); Id, 'Legal Principles and Values' 3 *The Italian Law Journal*, 125, 127-129 (2017).

[101] For a general overview, see L. Antoniolli, 'Good Faith and Fair Dealing', in L. Antoniolli and A. Veneziano eds, *Principles of European Contract Law and Italian Law. A commentary* (Alphen aan den Rijn: Kluver Law International, 2005), 49, 52-53. The relevant provisions in the Italian Civil Code are: Art 1175 Italian Civil Code 'Fair behaviour', 'The debtor and the

to the doctrine on the prohibition of abuse of rights, usually referred to good faith.[102] The subject matter of the case was a right of withdrawal in a long-lasting contract between a car manufacturer and a car dealer. The judges stated that, independent of the contents of the term that granted to the car manufacturer the right to withdraw *ad nutum*, the exercise of the right has to be compliant with the duty of good faith. This decision gave rise to a new development focused on withdrawal rights provided in long-term B2B relationships.[103] The control mechanism looks more at the behavior of the contracting party than at the content of the clause. Nevertheless, such case law – even if rather limited – represents a way of protecting the interests of weaker parties in B2B relationships in the absence of a generalized unfair terms control mechanism.

A relevant distinction that affects Italian contract law is the difference between rules on conduct/liability and rules on the validity of contracts.[104] If there is a breach of a rule of conduct, the legal consequence is usually only the obligation to pay damages, whereas the unlawful behavior does not affect the validity of the contract. Good faith is considered a rule of conduct, and therefore its violation, even in a pre-contractual stage, does not in principle affect the validity of the contract.[105] Nevertheless, as stated above, there are some judgments which can impact the exercise of rights based on contractual terms in B2B relationships. The most prominent example is the already mentioned case of a term granting a withdrawal right *ad nutum* in a long-term contract. The Italian Court of Cassation has affirmed that the exercise of a right can be deemed abusive[106] and, therefore, unable to produce its intended effect.[107] Technically speaking, the validity of a contractual term that granted the right to withdraw

creditor shall behave according to rules of fairness.' And: Art 1375 Italian Civil Code 'Performance in good faith', 'The contract shall be performed according to good faith.'

[102] Corte di Cassazione 18 September 2009 no 20106, *Foro italiano*, I, 85 (2010) with a comment of A. Palmieri and R. Pardolesi. See also the case notes contained in S. Pagliantini ed, *Abuso del diritto e buona fede nei contratti* (Torino: Giappichelli, 2010).

[103] On this issue, see especially V. Brizzolari and C. Cersosimo, 'Organizzazione dei rapporti commerciali tra imprese e "contratti relazionali"', in P. Sirena and A. Zoppini eds, n 59 above, 433, 450-456.

[104] See generally G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 17-25, 99-105; C. Cicero, 'Regole di validità e di responsabilità' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET 2014), Agg IX, 539. For a critical overview, see G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013).

[105] See T. Febbrajo, 'Good Faith and Pre-Contractual Liability in Italy: Recent Developments in the Interpretation of Article 1337 of the Italian Civil Code' 2 *The Italian Law Journal*, 291, 305 (2016).

[106] On the concept of 'abuso del diritto' and its applications in recent Italian case law, see generally N. Lipari, 'On Abuse of Rights and Judicial Creativity' 3 *The Italian Law Journal*, 55, 67 (2017). See also L. Balestra, 'Rilevanza, utilità (e abuso) dell'abuso del diritto' *Rivista di diritto civile*, 541 (2017).

[107] Corte di Cassazione 18 September 2009 no 20106 n 102 above.

was not at issue in that case. Nevertheless, the judgment represents a recognition of the possibility to evaluate the exercise of a right established by a contractual term. Subsequently, the Italian Court of Cassation adopted a similar approach with regards to an explicit dissolution clause (*clausola risolutiva espressa*).[108] In theory, and as regulated by Art 1456 Italian Civil Code, it is through such clauses that contracting parties identify those breaches that allow for an out-of-court termination of the contract. Thus, the explicit dissolution clause eliminates the possibility of evaluating the fundamental character of the breach (see Art 1455 Italian Civil Code) which is set as a ground for the judicial termination of the contract. According to the aforementioned judgment, if the behavior of the creditor is contrary to good faith, the exercise of a right to terminate the contract does not produce effects.[109] This happens, inter alia, in cases in which the breach of contract is of minor importance and does not infringe the interests of the creditor.[110] Even if there is not a considerable amount of case law dealing with such issues, it is possible to affirm that also in B2B relationships in Italian law there is a certain tendency to evaluate the behavior of contracting parties according to good faith.

2. Worthiness and *Causa Contractus*

In recent case law, Italian judges have begun to apply the provisions on the worthiness of the interests[111] and on *causa contractus* to declare the nullity of contractual terms. The terminology used by the courts is not always consistent. Sometimes the tests developed by the judges refer to an abusive advantage of one of the parties, other times to a significant imbalance or to a non-correspondence with the aims which that type of contract should have.[112] For our purposes, it should be observed that the envisioned judicial review also affects B2B relationships, mainly in the fields of insurance and banking contracts.

Thus, it is necessary to consider judgments dealing with what are known as 'claims-made' clauses in insurance contracts. Important rulings of the Italian Court of Cassation have affirmed the possibility of challenging the validity of

[108] Corte di Cassazione 23 November 2015 no 23868, *I Contratti*, 659 (2016), with a critical comment by F. Piraino. But see Corte di Cassazione 27 October 2016 no 21740, in C. Granelli ed, *I nuovi orientamenti della cassazione civile* (Milano: Giuffrè, 2017), 357-361.

[109] Corte di Cassazione 23 November 2015 no 23868, ibid.

[110] See for more examples F.P. Patti, 'Due questioni in tema di clausola risolutiva espressa' *I Contratti*, 695, 700-701 (2017).

[111] Art 1322 Italian Civil Code 'Party autonomy': (1) The parties can freely determine the contents of the contract within the limits set by the law. (2) The parties may also enter into contracts that do not belong to the types having a particular regulation (in the Civil Code), provided they are intended to achieve interests worthy of protection under the law. See on the relationship of the provision with constitutional values, F. Criscuolo, 'Constitutional Axiology and Party Autonomy' 3 *The Italian Law Journal*, 357 (2017).

[112] See generally A.M. Garofalo, 'Meritevolezza degli interessi e correzione del contratto' *Nuova giurisprudenza civile commentata*, 1212 (2017).

such clauses in B2B contracts according to the general requirement of 'worthiness of the contract', as provided by Art 1322 Italian Civil Code.[113] It is widely acknowledged that claims-made policies are beneficial for the insurance industry. For instance, if one underwrites professional liability policies on an occurrence basis, it is difficult for insurers to ascertain their potential exposure. An occurrence-based policy can require indemnification of an insured party for multiple years after the policy has expired, whereas once a claims-made policy expires, the insurer can expect no further claims for that policy period. Nevertheless, the legitimacy of such clauses is questionable.

The Italian Civil Code adopts, as a default rule, the loss-occurrence model (Art 1917 Italian Civil Code). Moreover, claims-made policies could be detrimental for professionals for different reasons. As an example, if the misconduct that gives rise to the professional liability occurs during the policy period but the claim is not going to be filed in that period, it can be difficult to obtain a new claims-made policy if in the pre-contractual phase for the new insurance policy the contracting party complies with the duty of disclosing circumstances that may result in a prospective claim although not yet made.[114] In addition, professionals need to maintain insurance for new claims from year-to-year and must be able to obtain coverage for potential claims about which they acquire knowledge in the current year.[115] The main rulings in Italian case law are two decisions of the Joint Chambers (*Sezioni unite*) of the Italian Court of Cassation. With the first one,[116] the Italian judges stated that so-called 'mixed' claims-made policies[117] should be declared invalid because the underlying interests sought by the contract do not deserve protection under the applicable law and that such assessment must be carried out, pursuant to Art 1322, para 2, Italian Civil Code, by the lower courts (tribunals and courts of appeal). Yet this adoption of Art 1322, para 2, Italian Civil Code was quickly abandoned by a subsequent judgment of the Joint Chambers.[118] According to the new ruling, the behavior of the insurance company, inserting claims-made terms in the contract, could amount to a case of pre-contractual liability. In addition, in cases in which the term is capable of subverting the function that the insurance contract should

[113] See generally S. Landini, 'The Worthiness of Claims Made Clauses in Liability Insurance Contracts' 2 *The Italian Law Journal*, 509 (2016); F. Delfini, 'Claims-Made Insurance Policies in Italy: The Domestic Story and Suggestions from the UK, Canada and Australia' 4 *The Italian Law Journal*, 118 (2018).

[114] F. Delfini, n 113 above, 119.

[115] ibid.

[116] Corte di Cassazione-Sezione unite 6 May 2016 no 9140, *Foro italiano*, I, 2014 (2016) with a comment by R. Pardolesi.

[117] 'Mixed' claims-made policies provide coverage only if: (a) the claim is made during the policy period and also (b) the event – eg, the professional's misconduct – occurred in a limited previous period.

[118] Corte di Cassazione-Sezioni unite 24 September 2018 no 22437, *Foro italiano*, I, 3512 (2018) with a comment by A. Palmieri and R. Pardolesi.

fulfil, a substantive review of the clause is possible on application of the '*causa concreta*' doctrine.[119] It is interesting to observe that in a recent comment, such an interpretation was seen as consistent with the new provision of the French Civil Code, contained in Art 1170 ('*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite*').[120]

The aforementioned judgments still appear isolated, and it is difficult to assess whether the proposed interpretations will bring substantive changes in the way in which B2B contractual relationships are treated. Nevertheless, they show a given willingness of Italian courts to limit contractual freedom where the effects of the contract appear irrational relative to the social and typical function that the specific contract should fulfil.

3. Abuse of Economic Dependence

Art 9, para 3, legge no 192 of 1998 states that a pact through which an abuse of economic dependence is realized is null. The essence of the abuse of economic dependence is described in paras 1 and 2 of the aforementioned provision.[121] The scope of application of legge no 192 of 1998 is textually limited to subcontracting agreements regarding manufacturing activities (Art 1).[122] But in recent years, following the suggestions of some scholars,[123] Italian courts have begun to consider the abuse of economic dependence as a general clause, applicable also to contracts which are not subcontracting agreements for manufacturing activities.[124] On

[119] For references to previous judgments that apply the doctrine of 'causa concreta' and for some critical remarks, see C.M. Bianca, 'Causa concreta del contratto e diritto effettivo' *Rivista di diritto civile*, 251 (2014); V. Roppo, 'Causa concreta: una storia di successo? Dialogo (non reticente, né compiacente) con la giurisprudenza di legittimità e di merito' *Rivista di diritto civile*, 957 (2013); M. Martino, 'La causa in concreto nella giurisprudenza: recenti itinerari di un nuovo *idolum fori*' *Corriere giuridico*, 1441 (2013); D. Achille, 'La funzione ermeneutica della causa concreta del contratto' *Rivista trimestrale di diritto e procedura civile*, 37 (2017).

[120] A.M. Garofalo, 'La causa: una "storia di successo"? (a proposito delle opere di Vincenzo Roppo sulla causa del contratto)' *juscivile.it*, 163, 212-213 (2018). See also Section II.2. above.

[121] Art 9 legge no 192 of 1998 'Abuse of economic dependence': '(1) The abuse by one or more businesses of the state of economic dependence in which, in its or in their regard, a client or supplier business is situated, is prohibited. The economic situation in which a business is able to determine, in commercial relations with another business, an excessive imbalance of rights and obligations is considered an economic dependency. The economic dependence is assessed also taking into account the real possibility for the party who has suffered the abuse to find satisfactory alternatives on the market. (2) The abuse can also consist in the refusal to sell or in the refusal to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, in the arbitrary interruption of commercial relations in progress. (3) The pact through which the abuse of economic dependence is realized is null'.

[122] See generally M. Maugeri, 'Subfornitura' *Enciclopedia del diritto* (Milano: Giuffrè, 2015), Annali VIII, 775; R. Leccese, 'Subfornitura' *Digesto delle discipline privatistiche, sezione commerciale* (Torino: UTET, 2008), 744.

[123] See F. Macario, 'Genesi, evoluzione e consolidamento di una nuova clausola generale: il divieto di abuso di dipendenza economica' *Giustizia civile*, 509 (2016).

[124] See Corte di Cassazione 23 July 2014 no 16787, *I Contratti*, 241 (2015); Corte d'Appello di Milano 15 July 2015, *Giurisrpudenza italiana*, 2665 (2015); Tribunale di Vercelli 14 November

the basis of the proposed enlargement of the scope of application of Art 9 legge no 192 of 1998, some authors argue that there exists a general ground for undertaking a substantive control of contractual terms in B2B relationships in Italian law.[125]

Through Art 9 legge no 192 of 1998 it is possible to declare the nullity of a contractual clause that constitutes an abuse of economic dependence (para 3). Certainly, the abuse of economic dependence entails a substantive judicial review of clauses in B2B relationships. The abuse could also concern the price applied by the business which has more contractual power.[126]

At any rate, there is a fundamental difference between the abuse of economic dependence and a provision that provides for a substantive control of standard terms in B2B transactions, namely because of the elements that must be fulfilled in order to establish such an abuse. The special rules apply only where a given 'dominance' of a business over another business is recognizable.[127] The dominance is expressed by the fact that the 'strong' business can impose unfair terms on the 'weak' business because the latter does not have other alternatives on the market.[128] Thus, the provision does not aim to solve the problem of information asymmetry, as occurs in the context of standard terms control,[129] but instead looks to prevent the extreme limitation of contractual freedom of one of the parties as a result of the economic power exercised by a stronger party (ie, a stronger business).[130]

2014, *Foro italiano*, I, 3344 (2015) stating that Art 9 legge 19 June 1998 no 192 is applicable to every kind of relationship between businesses; Tribunale di Massa 15 May 2014, *Nuova giurisprudenza civile commentata*, I, 218 (2015) with a comment by V. Bachelet; Tribunale di Torino 21 novembre 2013, *Foro italiano*, I, 610 (2014).

[125] See especially Ph. Fabbio, *L'abuso di dipendenza economica* (Milano: Giuffrè, 2006), 305-321, 412-414; Id, 'Osservazioni sull'ambito d'applicazione del divieto di abuso di dipendenza economica e sul controllo contenutistico delle condizioni generali di contratto tra imprese' *Nuova giurisprudenza civile commentata*, I, 902 (2007); F. Di Marzio, 'Abuso di dipendenza economica e clausole abusive' *Rivista di diritto commerciale*, I, 789 (2006).

[126] See Tribunale di Massa 15 May 2014, n 124 above.

[127] See M. Maugeri, *Abuso di dipendenza economica e autonomia privata* (Milano: Giuffrè, 2003), 145-155; F. Di Marzio, n 125 above, 823; M. Orlandi, 'Dominanza relativa e illecito commerciale', in G. Gitti and G. Villa eds, n 7 above, 137, 153-160; L. Nonne, *Contratti tra imprese e controllo giudiziale* (Torino: Giappichelli, 2013), 241-243; A. Barba, 'L'abuso di dipendenza economica: profili generali', in Id, *Studi sull'abuso di dipendenza economica* (Padova: CEDAM, 2018), 1, 30-31.

[128] Cf G. Colangelo ed, n 7 above, 79-87; G. Villa, 'Invalidità e contratto tra imprenditori in situazione asimmetrica', in G. Gitti and G. Villa eds, n 7 above, 113, 118-128.

[129] See generally H. Kötz, 'Der Schutzzweck der AGB-Kontrolle. Eine rechtsökonomische Skizze' *JuS*, 209 (2003); A.N. Hatzis, 'An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts', in H. Collins ed, *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 43; M.W. Hesselink, 'Unfair terms in contracts between businesses', in R. Schulze and J. Stuyck eds, *Towards a European Contract Law* (Munich: Sellier, 2011), 131.

[130] P. Sirena, 'L'integrazione del diritto dei consumatori nella disciplina generale del contratto' *Rivista di diritto civile*, I, 787, 814 fn 114 (2004).

An often-mentioned example of a void clause concerns terms which are imposed during the renegotiation of a still existing contract.[131] The renegotiation should be the result of a change in the circumstances, but sometimes it is sought by the stronger business to the detriment of the weaker business, the latter of which made investments with the expectation of continuing the contractual relationship. By way of renegotiation, the stronger business tries to achieve additional benefits compared to the ones obtained through the initial conclusion of the contract. Art 9 legge no 192 of 1998 is applicable also in cases in which the stronger business, according to the contractual provisions, has the right to modify the clauses of the contract (*ius variandi*).[132]

The growing number of judgments that advocate an application of the abuse of economic dependence as a general clause could have a relevant impact on practical matters.[133] Nevertheless, the peculiarity of the provision, which seems to be more related to competition law than to contract law, cannot be understood as a substitute for a substantive control mechanism for standard terms in B2B relationships.

V. Rules on Specific Contractual Terms

In the absence of general rules on substantive control of standard terms in B2B contracts, some particular provisions affect terms, which are often use in B2B relationships. For exclusions or limitations of liability and terms that provide for time constraints for the exercise of a right the Italian Civil Code restricts contractual freedom, in order to assure the effectiveness of rights granted in case of breach.

1. Exclusions or Limitations of Liability

Art 1229 Italian Civil Code provides a regulation on 'Clauses excluding liability'. It prescribes that every clause that excludes or limits liability for intent or gross negligence is void. Moreover, it provides that every clause that excludes or limits liability is void if the fact of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public order.[134] The rules contained in Art 1229 Italian Civil Code have a general scope of application, not

[131] Cf R. Natoli, 'L'abuso di dipendenza economica', in V. Roppo and A.M. Benedetti eds, *Trattato dei contratti* (Milano: Giuffrè, 2014), V, 377, 392.

[132] R. Natoli, ibid 393-394.

[133] See M. Maugeri, n 122 above, 791-793.

[134] Art 1229 Italian Civil Code 'Clauses excluding liability': '(1) Every clause that excludes or limits liability for intent (willful acts) or gross negligence is void. (2) In addition, every clause that excludes or limits liability is void if the fact (encompassing conduct) of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public order.' Clauses excluding liability are also contained in the list of one-sided/onerous clauses as set out in Art 1341, para 2, Italian Civil Code.

limited to standard conditions and form contracts. Nevertheless, they acquire a significant importance with reference to standard contracts because they provide for a substantive review of terms that are often adopted in B2B contracts. In scholarship, it is stated that such a substantive review partially fills the gap connected to the lack of protection in terms of the mere review as to form provided by Art 1341, para 2, Italian Civil Code.[135] With respect to the relationship of the latter provision with the rules contained in Art 1229 Italian Civil Code, it must be noted that the review in terms of form as regards an express approval in writing (Art 1341, para 2, Italian Civil Code) applies only to limitations or exclusions of liability for ordinary negligence (*colpa lieve*), which entail conducts of the debtor that are not contrary to public policy. Exclusions or limitations of liability for wilful acts or gross negligence are void, irrespective of express approval of the term in writing.[136]

If there is an 'exclusion of liability', no obligation to pay damages arises in case of a breach of contract (according to Art 1218 Italian Civil Code). In terms of a 'limitation of liability', the provision intends to capture clauses that reduce the exposure of the breaching party as concerns an obligation to pay damages.[137] A limitation of liability exists where parties – *ex ante* – provide for a cap indicating the maximum amount of payable damages.[138] However, the scope of application is considered broader and is able to encompass also other contractual remedies,[139] eg, clauses that limit the possibility to terminate a contract in the presence of a fundamental breach[140] or clauses that limit the availability of warranties in a contract of sale.[141]

The first para of Art 1229 Italian Civil Code states that exclusions or limitations of liability provided for intentional or grossly negligent breaches are

[135] See G. Ceccherini, *Responsabilità per fatto degli ausiliari. Clausole di esonero da responsabilità*, in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2016), 202. Before the enactment of Directive no 93/13, see E. Roppo, *Contratti standard* n 3 above, 35-38.

[136] C.M. Bianca, *Diritto civile*, 3, *Il contratto* (Milano: Giuffrè, 3rd ed, 2019), 324; G. Ceccherini, n 135 above, 204-205.

[137] See C.M. Bianca, *Diritto civile*, 5, *La responsabilità* (Milano: Giuffrè, 2nd ed, 2012), 75-77; G. Ceccherini, n 135 above, 220-223.

[138] But also a penalty clause (*clausola penale*) could be qualified as a limitation of liability if the stipulated payment for non-performance is significantly lower than the foreseeable damage: see C.M. Bianca, ibid 77; G. Villa, 'Danno e risarcimento contrattuale', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 2, 751, 966; G. Ceccherini, ibid 223.

[139] See F. Benatti, 'Clausole di esonero della responsabilità' *Digesto delle discipline privatistiche - sezione civile* (Torino: UTET, 1988), III, 400; L. Delogu, *Le modificazioni convenzionali della responsabilità civile* (Padova: CEDAM, 2000), 13; G. Ceccherini, ibid 217; F.P. Patti, *La determinazione convenzionale del danno* (Napoli: Jovene, 2015), 175.

[140] Corte di Cassazione 9 May 2012 no 7054, *Giurisprudenza italiana*, 2255 (2012) with a comment by G Sicchiero.

[141] See R. Montinaro, 'Clausole di esclusione o modifica della garanzia per vizi e/o per evizione', in M. Confortini ed, n 77 above, 385, 399.

void.[142] Therefore, in principle, only exclusions or limitations of liability for breaches resulting from ordinary negligence are enforceable. Nevertheless, even if the provision does not address the issue, some scholars argue that clauses aimed at excluding or limiting strict liability are valid, albeit with a reduced scope of application, except where they are contrary to public policy.[143]

The aforementioned claim is of importance, because often parties shape the wording of the term in a very generic way, without indicating that the clause covers only breaches incurred with ordinary negligence. According to a strict application of Art 1229 Italian Civil Code, such clauses should be considered void. Therefore, with the aim of safeguarding the effects of the contract, in such cases scholars propose reducing the breadth of the clause, in the sense that it covers only breaches committed with ordinary negligence.[144] The Italian courts have not taken an express position on the issue, but on the basis of a survey of the case law it has been possible to confirm that courts generally grant to the breaching party the possibility of demonstrating that the breach was not intentional and was not perpetrated with gross negligence.[145] If the breaching party is able to provide such an evidence, she can escape liability.

The rules typically apply to clauses that exonerate a party from liability for breaches of contractual obligations, even if the performance was provided by a third party who acted as an auxiliary of the contracting party.[146] A difficult issue arises with terms that define the subject matter of the contract (ie, the contractual obligations), which theoretically are not subject to Art 1229 Italian Civil Code. The line to draw in this respect can be fine, and the courts have repeatedly been engaged in the exercise of providing an answer to this crucial question because the efficacy of some terms depend on it.[147] The main examples in case law are insurance contracts, where the predominant orientation is to not consider clauses that define the risk as limitation of liability clauses.[148] By contrast, in the field of banker's liability for loss of items contained in safe deposit boxes, clauses that impose a cap on the value of the items inserted in the boxes are

[142] On the justifications for the provision, see C. Menichino, *Clausole di irresponsabilità contrattuale* (Milano: Giuffrè, 2008), 77-78.

[143] See P Trimarchi, *Il contratto: inadempimento e rimedi* (Milano: Giuffrè 2010), 203-204. A D'Adda, 'Il controllo legale sui patti di esonero da responsabilità negoziale e tutela del credito' *Annuario del contratto 2012* (Torino: Giappichelli, 2013), 3, 7-9.

[144] See L. Delogu, n 139 above, 131-134; A. D'Adda, ibid 11; T. Pasquino, 'Clausole di limitazione della responsabilità', in M. Confortini ed, n 77 above, 477, 496.

[145] A. D'Adda, ibid; T. Pasquino, ibid.

[146] Corte di Cassazione 7 October 2010 no 20808, 'Obbligazioni in genere' *Repertorio del Foro italiano*, 54 (2010).

[147] Se generally C.M. Bianca, *La responsabilità* n 137 above, 776-777; A. D'Adda, n 143 above, 29-33.

[148] See Corte di Cassazione 15 May 2018 no 11757 *Archivio giuridico della circolazione*, 617 (2018). Nevertheless, there are exceptions. The issue is related to an extension of a limitation of risk: see, for instance, Corte di Cassazione 7 April 2010 no 8235, *Foro italiano*, I, 2413 (2010).

usually considered as limitations of liability.[149]

In addition, Art 1229, para 2, Italian Civil Code states that every clause that excludes or limits liability is void if the fact of the debtor or of his/her auxiliaries constitutes an infringement of duties deriving from public policy. The typical example of a clause held void according to the latter provision is an exclusion or a limitation of liability connected to a performance which injures moral or physical integrity or violates criminal law.[150]

The nullity provided by Art 1229 Italian Civil Code usually affects only the individual clause which excludes or limits liability, whereas the rest of the contract remains valid.[151] Such a conclusion follows the general rule of Art 1419 Italian Civil Code on the 'partial' nullity of a contract: The nullity of the single clause results in the nullity of the entire contract only if contracting parties would not have concluded the contract without the part affected by nullity. This is normally not the case when it comes to exclusion or limitation of liability clauses. It means that damages are an available remedy in cases of breach.

2. Time Constraints for the Exercise of a Right

The Italian legal system distinguishes between statutes of limitations, or prescription, (*prescrizione*) (Arts 2934-2963 Italian Civil Code) and statutes of repose (*decadenza*) (Arts 2964-2969 Italian Civil Code). With respect to prescription, modifications of the legal regime are not possible. The rules are mandatory in nature, and Art 2936 Italian Civil Code expressly states that any agreement aimed at modifying the legal regime of prescription is void.[152] Nevertheless, parties can fix by agreement time constraints for the exercise of a right (so-called '*clausole di decadenza*'). According to Art 2965 Italian Civil Code, these clauses cannot render the exercise of the right excessively difficult for one of the parties.[153] The provision can be understood as a recognition of contractual freedom, which counterbalances to a certain extent the prohibition against modifying the prescription periods fixed by the law (Art 2936 Italian Civil Code).[154]

[149] See Corte di Cassazione 22 December 2011 no 28314, *Giustizia civile*, I, 1477 (2012); Corte di Cassazione 30 September 2009 no 20948, 'Contratti bancari' *Repertorio del Foro italiano*, 25 (2009).

[150] C.M. Bianca, *La responsabilità* n 137 above, 781; G. Ceccherini, n 135 above, 307; F.P. Patti, *La determinazione* n 139 above, 347.

[151] T. Pasquino, n 145 above, 495-496.

[152] See, for some comparative remarks, R. Zimmermann, 'Modification by agreement', in N. Jansen and R. Zimmermann eds, n 1 above, 1883-1885.

[153] Art 2965 Italian Civil Code 'Time constraints established by contract': 'The pact through which parties establish time constraints for the exercise of a right are void if they render the exercise of the right excessively difficult for one of the parties.'

[154] See generally S. Patti, 'Certezza e giustizia nel diritto della prescrizione in Europa' *Rivista trimestrale di diritto e procedura civile*, 21, 36 (2010); P. Gallo, 'Decadenze stabilite contrattualmente – Art. 2965', in E Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 867, 868-869; G. Di Lorenzo, 'Clausola sulla decadenza', in M. Confortini ed, n 77 above, 1299, 1308.

The legal system does not fix a precise limitation on contractual freedom in this regard. The evaluation demanded of the judge as to the difficulty to exercise the right is discretional in nature and decisions are taken on a case-by-case basis.[155] The Court of Cassation has clarified that judges have to consider the length of the period established by the agreement for exercise of the right and/or the activity that is required of the creditor in order to exercise her right.[156] In this context, provisions concerning the suspension or the interruption of the prescription period are not applicable, but parties can stipulate suspension periods by agreement.[157]

Time constraints are admissible only in the field of disposable rights. If contained in general conditions or form contracts, the *clausole di decadenza* are subject to the control as regards form provided by Arts 1341 and 1342 Italian Civil Code.[158] Such clauses are mentioned in the list provided by Art 1341, para 2, Italian Civil Code.

VI. International Application of the Rules

According to well-established case law, the rules provided for by Arts 1341, 1342 and 1370 are part of the domestic *public order*. This means that they are mandatory in nature and cannot be set aside through a contractual agreement.[159] Nevertheless, if according to rules on international private law an international contract is subject to the law of a different State, the aforementioned provisions do not apply. In this respect, there are several examples in case law.[160]

The explanation is that the Italian legal system distinguishes between 'domestic public policy', composed primarily of mandatory rules, and 'international public policy', referring to the fundamental principles of the Constitution.[161] If the judgment adopted in a different State infringes Italian international public policy, the ruling is not enforceable in the Italian jurisdiction.[162] Arts 1341, 1342 and 1370 Italian Civil Code do not make up a part of so-called international public policy, and, therefore, the validity of standard terms can be assessed on the basis of

[155] G. Di Lorenzo, ibid 1311.

[156] See Corte di Cassazione 27 October 2005 no 20909, *Obbligazioni e contratti*, 211 (2006); Corte di Cassazione 25 March 1998 no 3186, available at www.dejure.it.

[157] G. Di Lorenzo, n 154 above, 1308.

[158] See Section III above.

[159] C.M. Bianca, *Condizioni generali* n 57 above, 7.

[160] Corte di Cassazione, 25 March 1961 no 683, *Diritto marittimo*, 252 (1962); Corte di Cassazione-Sezioni unite 2 May 1960 no 968, *Foro padano*, I, 1125 (1961).

[161] See especially Corte di Cassazione 30 September 2016 no 19599, available at www.dejure.it. International public policy is mentioned by Art 16 legge 31 May 1995 no 218.

[162] See for a general overview G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019).

the foreign law applicable to the contract.[163] Nor can the rules of the Italian Civil Code on general conditions and form contracts be considered 'overriding mandatory provisions' (*norme di applicazione necessaria*) that may in any case be applied by Italian judges even if a law different than the Italian law is applicable to the contract.[164]

With respect to the other mandatory rules put under scrutiny in the present contribution, only rules that protect personality rights and good faith reflect constitutional principles comprising international public policy. For good faith, the assumption is based on the strong connection to the duty of solidarity stated in Art 2 of the Italian Constitution.[165] At any rate, the minimal body of existing case-law prevents the drawing of any general conclusions. The Court of Cassation has in the past stated that mandatory rules on limitations of liability are not 'overriding mandatory provisions', except in cases in which the aim of the rule is avoiding a limitation of liabilities in relation to non-economic interests.[166]

A different outcome holds true for purely domestic contracts lacking international connections. In these cases, parties cannot set aside national mandatory provisions through a choice-of-law clause.[167] For instance, two Italian parties who concluded a contract in Italy that had to be performed in Italy could not escape the application of Italian mandatory rules by choosing English law as the *lex contractus*. Therefore, one has to distinguish between national default rules, which can be derogated from by the choice of a foreign law, and national mandatory rules, which cannot be derogated from by a choice of a foreign law. If in a purely domestic contract parties choose the law of a different legal system so as to derogate from the law of the Italian legal system, the contract would be subject to the mandatory provisions of both legal systems.[168] Such a conclusion is consistent with Art 3, para 3, Regulation 593/2008 (Rome I).[169]

[163] C.M. Bianca, *Condizioni generali* n 57 above, 7; R. Sacco and G. De Nova, n 35 above, 366; S. Patti and G. Patti, n 41 above, 361-362.

[164] 'Overriding mandatory provisions' are regulated by Art 17 legge 31 May 1995 no 218. See, on the relationship between 'international public policy' and 'overriding mandatory provisions', A. Bonomi, *Le norme imperative nel diritto internazionale privato* (Zürich: Schulthess, 1998), 214-217; S.M. Carbone, 'Le "norme" applicabili alla responsabilità contrattuale nel regolamento Roma I: il ruolo dell'autonomia privata', in N. Parisi et al eds, *Scritti in onore di Ugo Draetta* (Napoli: Editoriale Scientifica, 2011), 93, 104-107.

[165] See generally M. Grondona, 'Solidarietà e contratto: una lettura costituzionale della clausola generale di buona fede' *Rivista trimestrale di diritto e procedura civile*, 727 (2004); F. Piraino, *La buona fede in senso oggettivo* (Torino: Giappichelli, 2015).

[166] Corte di Cassazione 6 September 1980 no 5156, *Rivista trimestrale di diritto e procedura civile*, 923 (1981).

[167] See A. Bonomi, n 164 above, 19-20; A. Frignani and M. Torsello, *Il contratto internazionale. Diritto comparato e prassi commerciale* (Padova: CEDAM, 2nd ed, 2010), 126; G. Alpa, 'Autonomia delle parti e scelta della legge applicabile al contratto interno' *Nuova giurisprudenza civile commentata*, II, 573, 581 (2013).

[168] F. Pietrangeli, 'Clausola di individuazione della legge applicabile', in M. Confortini ed, n 77 above, 1055, 1090.

[169] European Parliament and Council Regulation 593/2008/EC of 17 June 2008, on the

In these cases, the Italian mandatory rules would apply only if the foreign law chosen by the parties does not provide rules able to adequately safeguard the interests protected by the Italian mandatory rules. The latter are applicable also if the parties have chosen a foreign jurisdiction.[170]

From a different point of view, it should be observed that choice-of-law clauses are not subject to the control provided for by Arts 1341 and 1342 Italian Civil Code. The latter refer only to jurisdiction clauses and scholars do not consider these provisions applicable to choice-of-law clauses.[171]

VII. Conclusion

The first important aspect to note is that Italian law does not provide for the substantive judicial review of standard terms in B2B relationships. The control mechanism of Arts 1341 and 1342 merely relates to form. If a business fulfills the requirements set by the Italian Civil Code – ie, 'express written approval' – it is in principle not possible to challenge the validity of an onerous term. This explains why judicial disputes usually affect only small and medium-sized enterprises, whereas big and well-organized businesses normally do not have any problem in satisfying the form requirements and enforcing one-sided clauses.[172] Given the fact that Italian case law is inconsistent and that it is often uncertain whether a term falls under one of the clauses set out in the list of Art 1341, para 2, Italian Civil Code, it is advisable to call for a separate signature whenever doubt exists as to the one-sided nature of a clause.

In the absence of a mechanism for scrutinizing terms for substantive unfairness, there are other ways of protecting the interests of weaker parties in B2B relationships ('indirect' judicial control). Some recent judgments demonstrate that where businesses engage in grossly unfair behavior in relationships with weaker businesses, even if undertaken on the basis of contractual clauses, unpredictable outcomes may result on application of open-ended clauses such as 'good faith' and 'worthiness', notions which are considered of growing importance also in the field of B2B contracts. In cases in which one of the businesses is in the position of exercising a dominance over another, also rules on abuse of economic dependence, provided by Art 9 legge 19 June 1998 no 192, may have an impact on the contractual relationship and cause the nullity of a clause where a business is, in commercial relations with another business, able to realize an

law applicable to contractual obligations (Rome I) [2008] OJL 117, 6-16. With respect to the issue discussed in the text, see E. Cannizzaro, '*Lex contractus* e contratti interni' *Nuova giurisprudenza civile commentata*, II, 585, 589 (2013); N. Boschiero, 'I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I', in Id, *La nuova legge comunitaria della legge applicabile ai contratti (Roma I)* (Torino: Giappichelli, 2009), 67, 70-75.

[170] F. Pietrangeli, n 168 above, 1091.

[171] G. Alpa, n 167 above, 582.

[172] U. Morello, n 8 above, 343.

excessive imbalance of rights and obligations.

Exclusions and limitations of liability are also tackled by general mandatory rules, which prescribe the nullity of a clause in cases of intentional breach and gross negligence, or for breaches that infringe rights related to public policy. The regime of prescription cannot be derogated from by contracting parties. However, it is possible to establish, through a contractual agreement, time constraints on the performance of obligations. Such limitations cannot render the exercise of a right excessively difficult, according to Art 2965 Italian Civil Code. The application of the latter provision is subject to the discretionary evaluation of the courts.

Except for good faith, the rules are usually not considered overriding mandatory rules or rules related to 'international public policy', with the result that they do not prevent an Italian court from applying a foreign law – one setting different rules as governing the contractual relationship – to an international contract. However, the rules are mandatory under Italian law, meaning that parties cannot set them aside through a choice of a foreign law in a purely domestic contract.