DOI 10.26807/rfj.v2i9.438

The Italian Law of Obligations from the Civil Code of 1942 to today profiles of an evolution

La Ley de Obligaciones Italiana desde el Código Civil de 1942 hasta la actualidad perfiles de una evolución

Carlo Castronovo
Università Cattolica del Sacro Cuore
City: Milan
Country: Italy

Original article (research)
RFJ, No. 9 Especial 75 años PUCE, pp. 79 -104, ISSN: 2588-0837

ABSTRACT: This article examines the category of obligations and its evolution from the Italian civil code of 1942 to the present day. It mainly focuses on the figure of the non-performance obligation due to its theoretical and practical relevance. He then tackles the currently debated topic of recoding.

KEYWORDS: Law, legal system, civil law, legislation.

RESUMEN: Este artículo examina la categoría de obligación y su evolución desde el Código Civil italiano de 1942 hasta la actualidad. Se centra principalmente en la figura de la obligación sin desempeño debido a su relevancia teórica y práctica. Posteriormente aborda el tema actualmente debatido de la recodificación.

PALABRAS CLAVES: Ley, sistema legal, derecho civil, legislación.

JEL CODE: K, K0

INTRODUCTION

The Italian law of obligations has its systematic root in Book IV of the Civil Code of 1942, which is entitled Delle obbligazioni. The structure of the entire system consists of the three initial articles, 1173, 1174 and 1175, which are placed in chapter one as Preliminary Provisions of title one. They are devoted respectively to the Sources of obligations, the pecuniary nature of performance and conduct by fairness. Two other provisions join the preceding ones as cardinal rules of the discipline, art. 1176, which in chapter two opens the discipline of performance, imposing on the obligor the duty of care of the good family man, and art. 1218 which begins chapter three, Non-performance of obligations, regulating the obligor's liability. A further rule governs the obligation and is that of Art. 2740(1): "The debtor is liable for the performance of obligations with all his present and future assets". This so-called property liability should not be confused with the liability into which the obligation is converted as a consequence of non-performance. While the latter is coessential to the obligation, of which it can be said to be the other side once the non-performance has occurred (Mengoni, 2011), the so-called patrimonial liability, as a guarantee provided by the obligor, can be considered to be the other side. Asset liability, as a guarantee provided by the debtor's assets, i.e. as a bond other than obligatio, is outside the obligation (Di Majo, 2013), concerning which it is, therefore, accessory, just as the process is more generally accessory, even if it is functional, but only in a possible way (i.e. after deducting fulfilment and enforcement in specific form, which does not concern the assets as a whole, but only the goods due with the obligation), to the achievement of the economic result intended by the creditor. In the absence of specific guarantees, the lien on the debtor's assets will become active only later, it can be said to act as a background to the obligation; and the means of preserving the asset guarantee, subrogation and revocation actions, and attachment, serve to maintain the so-called general asset guarantee, not to enforce it.

To orient the discourse on the obligation from the idea of patrimonial liability, with an extemporaneous revival of the old syntagma Schuld und Haftung, means reversing the direction of the system (Larenz, 1987).

As regards the language used by the legislature to express the very idea of obligation, it should be noted that the latter is declined both in the singular and in the plural, depending on the content it is intended to signify (Zurita and Benatti, 2020). Thus, as we have already seen, the book of the Civil Code containing the discipline is entitled of obligations and Art. 1173 refers to the sources of obligations, while immediately after Art. 1174 speaks of the object of the obligation, and so on. The model is the Roman obligatio, as a genus capable of summing up and encompassing all species of obligation, the characterisation of which concerning the genus takes place in chapter 7, devoted to certain species of obligation. We have said that articles 1173, 1174 and 1175 contain the framework of the system. This is not only because they are the rules which, each from a different point of view, express the essence of the obligation, but also because, as we shall see at once, they constitute the heads of the chapter, the starting point of the lines of development along which, by way of a radial pattern, the law of obligations has developed in the Italian legal system, from its foundation in 1942 with the new civil code to the present day.

1. ARTICLE 1175 AND THE OBLIGATIONS OF FAIRNESS AND PRE-CONTRACTUAL LIABILITY

The chronological order according to which these rules proved to be seminal for the evolution of the living law is inverse to the numerical order. Thus in the first years immediately after the code came into force, it is article 1175 which becomes the normative place of the new structure which the doctrine intends to give to the obligation. Significantly, it is Emilio Betti (1953), a Romanist who is accustomed to the idea of obligation as a vinculum iuris which abstracts the debtor from the creditor as a unilaterally binding duty for the debtor, who ritualizes the obligation as a bond of solidarity, "concerning the principles

of corporate solidarity" (Mengoni, 2011, p. 262), in which the credit is a bond of solidarity, "concerning the principles of corporate solidarity" (Mengoni, 2011, p. 262). in which credit is not opposed to debt in terms of a mere claim, and the creditor is not a mere spectator of the debtor's effort aimed at a mere result to be achieved by the former. Credit and debt are situated in an interactive framework, in which both parties, debtor and creditor, are bound to respect the legal sphere of the other party, according to a model of reciprocity in which the idea of cooperation is realised (Mengoni, 2011). And concerning this cooperation, the obligation acquires a new functional dimension.

This idea of reciprocity in which cooperation is realised is expressed in Art. 1175 as an ideal rule when, in advance of the discipline of performance as conduct typically expressive of the debtor's obligation, it draws the framework constituted by the obligations of correctness that are imposed on the aggrieved party to the same extent as on the debtor. In this respect, Art. 1175 can ideally be said to make use of the theory of accessory obligations and especially of obligations of protection as characterised by reciprocity, in a much more appropriate way than § 242 BGB which imposes on the obligor alone the obligation to perform the obligation in good faith. Shortly after Betti, it will be Mengoni (2011) who will identify the obligations of protection as 'obligations of fairness, "according to the terminology of our art. 1175" (p. 229). And Betti (1953) clarifies that it is these same obligations that must be observed "already before a relationship of obligation comes into being, that is to say, from the stage of negotiations" (p. 68).

The implicit reference is to Article 1337, which is another of the novelties of the Italian Civil Code of 1942 because it regulates for the first time in general pre-contractual liability, requiring the parties who enter into negotiations to enter into a contract to behave in good faith. This rule should also be compared, as Betti says, to Article 1175, in that it anticipates the obligations of fairness at the beginning of negotiations, that is, at the prodromal stage of the contract, before it is concluded. On this

point, Betti (1953), reasoning about the obligatory relationship in the traditional manner, which identified it according to the Romanist tradition with the obligation to perform, fails to notice the contradiction when he states that the obligations of fairness arise before an obligatory relationship is created. What Art. 1337 requires to be said is that the obligations of fairness precede the conclusion of the contract, but precisely, for this reason, it means that the obligatory relationship, through the arising of the obligations of fairness, begins to exist with them, pending integration with the obligation to perform if and when the latter, with the conclusion of the contract, also comes into existence. If it is true that with the assertion of obligations of protection or of fairness, the obligation has become a complex relationship, in which the obligations of protection stand alongside the obligation to perform, albeit in an ancillary function, the implication that follows is that the obligatory relationship begins to exist when any of its constituent elements, thus also the obligations of fairness alone, come into existence, whether the obligation to perform comes into existence subsequently or not.

This observation is important for the further development of the theory of obligation, as we shall see below. What can already be seen is that obligations of correctness, as is positively clear from articles 1175 and 1337, are obligations ex lege, capable of integrating with the obligation to perform, even when the source of the latter is the contract and private autonomy (Castronovo, 1990). From this, it follows that the obligations of protection, while integrating with the obligation of performance in the unity of the obligatory relationship, insofar as they are founded on a different source have an autonomous destiny: that is, as we have seen, they pre-exist the obligation of performance, and survive it (Mengoni, 2011); they are not therefore bound to its fate. The ultimate implication that can be drawn from this, and that Italian doctrine has drawn from it, is therefore that they can come into existence even when an obligation to perform is not in view but a social contact must be said to have been established capable of generating that mutual trust from which good faith gives rise to them.

2. THE OBLIGATION BETWEEN THE PATRIMONIAL NATURE OF THE PERFORMANCE AND THE NON-PATRIMONIAL NATURE OF THE CREDITOR'S INTEREST (ART. 1174)

Turning to the second of the three articles of the Civil Code that constitute the positive foundation of the law of obligations, Article 1174, it can be said that initially with it we return to obligatio in the traditional Romanesque sense: the vinculum iuris that consists of and is exhausted by the obligation to perform. The rule tells us that it is characterised by patrimonially: what the debtor owes to the creditor or, as art. 1174 puts it, "the performance that is the object of the obligation must be susceptible of economic evaluation; adding, however, that "it must correspond to an interest, even a non-pecuniary one, of the creditor". It is a question, as has been pointed out (Giorgianni, 1945), of two provisions, the first of which, it may be added, looks back to the Romanesque tradition of obligatio, the second looking forward, in the direction in which we have seen art. 1175 turn before. However, while the prediction of fairness as a source of accessory obligations enriches the obligation from a structural point of view, the prediction of interest remains outside the structure of the obligation but connotes it in essence at the functional level. The creditor's interest is the lever of the obligation since it constitutes both the efficient cause and the final cause (Mengoni, 2011); the obligation departs from the creditor's interest and reaches perfection with the realisation of the interest because of which the vinculum iuris between the debtor and the creditor is triggered. Furthermore, the result as the object of the obligation cannot be understood as an element of the content of the obligation but as télos, objectum as that which is placed before it, to which the debtor's conduct tends to achieve fulfilment (Mengoni, 1952).

Read in this light, the prediction of the necessity of the interest, even when not patrimonial, takes on a double significance of novelty. On the one hand, it overcomes the negative attitude regarding its relevance to the establishment and continuation of the obligatory relationship, and on the other,

it definitively opens up the boundaries of nonpatrimonially to the obligation in the sense that, if the structure remains firmly anchored to the idea "ea enim in obligatione consistere, quae pecunia lui praestarique possunt" (D. 40, 7,9, Ulpianus libro vicensimo octavo ad Sabinum), the function highlights the subjection of what is traditionally characterised by patrimoniality to the personal dimension in which the variety of interests that characterise human affairs unfolds, subordinating having to being.

Moreover, art. 1174, by specifying that the creditor's interest can also be non-pecuniary, on the one hand, specifies the provision of art. 1322, para. 2 of the Civil Code in the sense that "interests worthy of protection according to the legal system", to which the latter rule generally refers, can be <also non-pecuniary>: the social appreciability of the interest as a limit of the obligation no longer coincides with patrimoniality; on the other hand, it no longer allows art. 1174 to be read as a rule placed for the exclusive protection of the debtor, who in the face of the creditor's claim can object to the lack, original or subsequent, of the interest to exonerate himself from the obligation that he is bound by. The social appreciability of the interest as a limit of the obligation no longer coincides with patrimoniality; on the other hand, it no longer allows art. 1174 to be read as a rule placed for the exclusive protection of the debtor, who, in the face of the creditor's claim, may object to the lack, original or supervening, of the interest to exonerate himself from the obligation that abstains from it, but colours the obligation in the sign of reciprocity - anticipating the unfolding of it that we have seen confirmed in art. 1175 - in favour, therefore, of the aggrieved party, who precisely by 'forcing' the interest can demand performance from the debtor and, in the event of non-performance, that the compensation be commensurate not so much with the value of the performance, which may then no longer have any value for it, but with the extent of the interest violated.

3. NON-ASSET DAMAGE IN CONTRACTUAL LIABILITY

We thus proceed along the new path opened up by Art. 1174, which has emerged in the last decade on the front of the damage deriving from the injury of the non-material interest which, having given rise to the obligation and being unsatisfied, legitimises the aggrieved party to compensation. This recent development can be said to be alien to the idea that the legislature of 1942 may have had when it made the non-material interest of the aggrieved party a relevant premise of the obligation, in the presence of which the latter conforms with the legal system.

The legislator's view did not go beyond the accreditation of the obligation and the meaning of Art. 1174, in this respect, was limited to expressing the idea that the non-pecuniary nature of the interest was not in contrast with the essentially patrimonial nature of the obligation: the latter, despite the non-pecuniary nature of the interest from which it took its cue, could count on the approval of the legal system, which did not consider it necessary to make distinctions at the level of the quality of the interest once the economic appreciability of the performance was certain. The view was that expressed by the doctrine in the sense that the satisfaction of the creditor's interest tended to coincide with the attainment of the performance (Mengoni, n.d.a.). In short, the interest is a precondition of the result.

But if the result is the attainment of the good owed by the performance, it is evident that the interest, before "objectifying itself as the legally essential function of the conduct owed, so that the realisation of the interest becomes the object (or content) of the corresponding right", is the "aim in a subjective sense" (Mengoni, 1952, p. 82) to which the creditor is directed and because of which it establishes the obligation with the debtor. It is this subjective aspect of the interest that has recently emerged as a function of the qualification of the relationship, expressing the value for the creditor of achieving the result due: how much this result counts for the creditor and, conversely, the failure to achieve it.Furthermore, the

highlighting of the interest as a separate element concerning the performance and its patrimoniality brings to fruition the idea of Emilio Betti (1953) that the question of the obligation should not be exhausted in the purely structural perspective but should also take into account the "teleological consideration (no longer) rejected as a 'contamination". (p.6).

It can be said that the overcoming of the vision which identifies the obligation as a debit-credit relationship (apart from the integration which in the modern key is made by accessory obligations, transforming it into a complex relationship, according to what we have seen accepted by art. 1175 of the Civil Code) with the performance lies in the passage from the affirmation that "the notion of aim in the subjective sense is irrelevant for the construction of the obligation" (Mengoni, 1952, p. 63) to that according to which "the protected interest does not represent the content of the credit right, but rather an element of the obligatory case", ascertained by the consideration that "the interest in itself can also be an element of the obligation". (Mengoni, 1952, p. 63) to that according to which "the protected interest does not represent the content of the credit right, but rather an element of the obligatory case", ascertained by the consideration that "the interest in itself can also be of a non-pecuniary nature, while the obligation is a typically patrimonial relationship" (Mengoni, 1952, p. 82). The apparent contradiction, between the coessentiality of the interest to the idea of obligation and its possible non-pecuniary nature when the latter is essentially patrimonial, is resolved in the terms precisely suggested by art. 1174: it is the performance that is marked by patrimoniality and which alone "must be susceptible of economic evaluation".

There is therefore an 'interest in performance', which translates into a claim for performance, and an 'interest in the obligation', without which the obligation does not arise. When the creditor's interest is patrimonial, the interest in performance coincides with the interest in the obligation, and the result of the performance is no more than the attainment

of the latter, which then "is entirely absorbed in what we may call the entelechy or end in itself of the obligation to perform" (Castronovo, 2018, p. 208); hence in the case of non-performance, the damage to be compensated has as its reference parameter the value of the performance. Not so in the case where the interest is nonpecuniary. Here the legalisation of the 'interest in the obligation' means that the failure to achieve the result makes this interest active, placing it as a reference term for the compensation for the service not performed or badly performed in violation of the interest for which it is intended (Zecchin, 2020). In this hypothesis, for the unsatisfied creditor, the value not achieved, what intervenes between the occurrence of the obligation and its (non-)performance, is not measured by the economic value of the non-performed service, which ends up losing its meaning, but by the original need translated into an interest in the obligation, which was finally disappointed. If, as Giorgianni (1968) states since "the interest of the aggrieved party may be non-pecuniary... it cannot be considered inherent to the function of the obligation that the interest of the aggrieved party has as its objective the economic result of the performance of the debtor" (p. 63), it is on this non-economic result that the damages are to be measured.

In these terms, if, in the negative, it is finally stated that for the non-enforcement of the non-pecuniary interest, "in the obligation, on the one hand, become complex in structure, on the other hand, characterised by the highlighting of the creditor's interest...the compensation...can no longer be a pure conversion of the value of the original object of the obligation" (Castronovo, 2018, p. 330), in the positive, it must be concluded that the compensation must be commensurate tout court with the value of the unsatisfied interest. With this, one runs into the aporia of translating into the patrimoniality of the compensation what is born as not susceptible to economic valuation. But this is the unquenchable contradiction that characterises non-asset damage.

4. THE OPENING UP OF THE SOURCES OF THE OBLIGATION (ART. 1173) AND THE OBLIGATION WITHOUT PERFORMANCE

We come to the last of the rules constituting the fundamental discipline of the general part of obligations, the first in the logical order followed by the legislature of 1942: Art. 1173, devoted to the sources of obligations. This may appear to be a purely classificatory rule, not capable of adding anything to our knowledge of the law of obligations. In reality, as has been well pointed out in doctrine, compared to the corresponding article (1097) of the 1865 code, art. 1173 of the Civil Code, through the formula "any other act or fact capable of producing them in conformity with the legal system", "clearly intended not to recall the other sources other than contracts and torts, but to reserve to the 'legal system'... the judgement of the suitability of each act or fact for the production of obligations... Hence the entirely elastic character of the list in article 1173" (Giorgianni, 1988, p. 590). From this elastic character an important implication has been drawn: that "it belongs to the general theory... the problem of establishing which acts or facts... in addition to those indicated in Art. 1173 or expressly regulated... are capable of generating obligations" (Giorgianni, 1988, p. 593).

Positive law has therefore opened a window of the method, authorising interpreters to identify the normative coordinates from which to derive the morphological elements of material facts to be considered suitable as sources of obligation. The rule contained in Art. 1337 of the Civil Code, which governs pre-contractual liability, has proved particularly fruitful in this respect. By stating that "the parties, in the course of negotiations and the formation of the contract, must behave in good faith" (Marsden and Siedel, 2017), this rule has positively established that obligations of conduct are imposed on the parties before an "obligation arises as an elementary relationship, limited to the performance due by the debtor and to which the creditor is entitled" (Mengoni, n.d.b., p. 284). In the beginning of the negotiation, Art. 1337 of the Civil Code positively entrenches

that figure which in German doctrine has been called Schuldverhältnis ohne primäre Leistungspflicht (Larenz, 1987) in which the absence by definition of the obligation to perform, which does not yet exist nor is it possible to say whether it will come into existence, does not prevent good faith from giving rise to an obligatory relationship, which is such although lacking the obligation to perform.

Analysing this obligatory relationship without performance, what is highlighted on the factual level is that the law has established the obligation to behave in good faith, which is articulated in the obligations to protect the legal sphere of the other party, based on the reliance of each party on the other, considered plausible as an attitude at the negotiation stage. The question, which space opened up by Art. 1173 on any other act or fact capable of producing an obligation following the legal system, induces the doctrine to ask itself is whether other situations arise, characterised by similar reliance between the parties, and whether, in the presence of the latter, they should not be considered to be governed by rules similar to those of the pre-contractual negotiations, thus giving rise to another kind of 'obligation without performance'. In this case, this category, envisaged as a dogmatic qualification of the case 'pre-contractual negotiations', becomes a genus to which they belong, constituting not so much the original, but no longer the exclusive, model. On closer inspection, pre-contractual negotiations are qualified not so much by being oriented towards the conclusion of a contract, but rather by the establishment of a social contact-oriented towards that end, from which arises an expectation on the part of each party, i.e. mutual trust that in the first place that contact will not be exploited to the detriment of the other. Social life presents us with a possible series of hypotheses in which, as in negotiations, subjects meet with a view to a goal to be pursued even though such a result does not involve the establishment of a relationship with an obligation to perform and a corresponding right to claim. A contractual agreement is a contractual agreement between a party and a third party

that is not a contractual agreement and that is not a contractual agreement. It is precisely this that has been theorised in Italian doctrine since the 1990s, hypothesising an arc between other figures of social contact that have come to the fore in the meantime and the formal model of the obligatory relationship without primary obligation to perform developed in German doctrine as the legal form of the so-called culpa in contrahendo.

The original case of the latter, as Jhering discovered it, is governed by Art. 1338 of the Civil Code, and contemplates the liability of the contracting party "who, knowing or having to know...a cause of invalidity of the contract, has not given notice thereof to the other party". Pre-contractual liability thus arises as a consequence of the violation of an obligation to inform (Castronovo, 2010). The doctrinal elaboration following Jhering highlighted those negotiations giving rise to the obligatory relationship before the obligation to perform arises, under good faith which, based on the trust placed between the parties at the start of negotiations, is articulated in a series of obligations, aimed at mutually protecting the legal sphere of the parties, of which that of information is only one type. The intuition of this pre-contractual obligatory relationship gave reason to Jhering's idea of attributing a contractual nature to pre-contractual liability, overcoming the apparent contradiction precisely by recognising that an obligatory relationship can exist without the obligation to perform is a constituent element.

From this starting point, a plausible line of evolution was oriented by the question of whether, even outside a precontractual negotiation, erroneous information that is a source of damage for the person who has requested and obtained it, can be a source of analogous liability, i.e. of a liability ex contractu such as that arising from the violation of good faith during negotiations. The request for information is an attempt to establish social contact with someone who is not obliged to provide it, a contact that is made when the request is satisfied. This seemed to the writer to be the case in which to recognise at the same time that purpose-oriented social contact highlighted

in German doctrine as the source of an obligatory relationship even though without an obligation to perform (Dölle, 1943) and the assimilation of it to pre-contractual negotiations, already considered the source of a Schuldverhältnis ohne primäre Leistungspflicht. In this context, the asymmetry of information between the party requesting the information and the party receiving it also highlights the suitability of the professional status of the party providing the information as a specific source of reliance. This aspect comes to the fore in cases where the information is provided in fulfilment of a professional assignment but is then used by third parties who, precisely based on the professional status of its author, have reason to rely on it. This is why professional status as a source of reliance is no longer relevant only within the limits of untruthful information, but more generally concerning conduct that proves harmful, as a result of the breach of a duty of protection, for a person who is not a creditor of a service.

The most eminent concrete case in which in Italy first the doctrine (Castronovo, 1995) and then jurisprudence (Court of Cassation, 22 January 1999, no. 589) have applied the model of the obligation without performance to liability based on a social contact qualified by the professional status of the liable party is that of the health care professional within a structure to which the patient has asked to be treated. In this case, the professional subject is not a debtor vis-à-vis the patient but treats the patient, with whom the undeniable social contact is characterised by the trust engendered by the professional status of the practitioner. This is reflected like liability in the event of an eventus adversus that is attributable to the practitioner: the trust founded on the status that qualifies the social contact has given rise to obligations of good faith oriented towards protecting the person who submits to the intrusion of his legal sphere with a view to treatment; and liability, being qualified by the violation of these obligations, acquires a contractual nature.

Although it is a coherent development of the idea that an obligatory relationship may also exist without an obligation

to perform, as is undoubtedly the case in pre-contractual negotiations, and that such an eventuality arises when, as a result of an expectation generated between the parties, good faith gives rise to obligations of protection whose breach, precisely because it relates to an obligatory relationship, gives rise to contractual liability, the idea that a purpose-oriented social contact may give rise to an obligatory relationship without an obligation to perform even if the purpose is not the conclusion of a contract is hostile to the German doctrine, which considers that it must be circumscribed to the conclusion of a contract, the idea that a purpose-oriented social contact can give rise to an obligatory relationship without an obligation to perform, even if the purpose is not the conclusion of a contract, is hostile to German doctrine, which considers that Schuldverhältnis ohne primäre Leistungspflicht must be confined to the original form of pre-contractual negotiations. The consequence of this, however, is hypertrophy of culpa in contrahendo, to which hypotheses of liability are attributed that are extraneous to the c.i.c. since they cannot be described in terms of a precontractual negotiation. To avoid such straining, the author theorised the obligation without a performance as a genus that does not end with pre-contractual negotiations and of which the latter is to be considered the first species. Secondly, following the reform of the German law of obligations, § 311 BGB, after having in Absch. 2, after having provided in various ways that an obligatory relationship may be created by having as its content only obligations of protection in pre-contractual negotiations and situations similarly oriented towards negotiation, in Absch. 3, it admits that such obligations may also arise concerning persons "die nicht selbst Vertragspartei werden sollen", i.e. between persons who in a proper and textual sense cannot be considered parties to a pre-contractual negotiation.

In the case of an obligation without performance, it is necessary to take into account the fact that the obligation is not governed by art. 1337 of the Civil Code, but rather by its own reference rule. The first thought runs precisely to Art.

1337, since it is undeniable that pre-contractual negotiations have constituted the model on which the obligation without performance has been modelled. The idea is theoretically plausible but historically inappropriate. We have seen how the German experience, insisting on the precedent of precontractual negotiations, has come to hypothesize, within § 311 BGB, similar contractual and finally similar negotiation figures, thus remaining a prisoner of the original model. For this reason, the solution we hypothesized runs directly to art. 1173 of the Civil Code. (Albanese, 2014), whose calibration we tested at the outset in the light of the doctrine which has concluded that the sources of the obligation are now atypical. Moreover, in particular, it is appropriate to recall what we referred to earlier: that it belongs to the general theory... the problem of establishing which acts or facts... in addition to those indicated in article 1173 or expressly regulated... are capable of generating obligations. The arguments put forward in favour of the development of the obligation without performance may be considered to asseverate the latter as a new figure of obligation. The arguments put forward in favour of the development of the non-performing obligation can be considered to asseverate the latter as a new form of obligation. If the obligation comes into existence even without the obligation to perform, and, as art. 1337 clearly shows, it is already as such in conformity with the legal system, the non-performing obligation, which generalises the features of the c.i.c., reveals itself to be the adequate result of a fact capable of generating obligation. In these terms, moreover, although it has met with criticism and misunderstanding, it is accredited in doctrine and jurisprudence.

But it is a positive law itself that points in this direction, and it is a series of rules on mandates, contained in Art. 1718 of the Civil Code, relating to the duty of safekeeping of the agent concerning the things sent to him on behalf of the principal, other instrumental duties and a duty to notify the principal. (1) of the Civil Code, relating to the agent's obligation of safekeeping concerning things sent to it on behalf of the principal, other instrumental obligations and an obligation to

give notice to the principal. In our view, the last paragraph is of relevance, which provides that "the provisions of this article apply even if the agent does not accept the assignment given to it by the principal, provided that the assignment is part of the agent's professional activity". The case in point is certainly extraneous to pre-contractual negotiations since the principal can unilaterally decide on the assignment to the agent; secondly, the so-called accessory obligations are incumbent on the agent who does not intend to accept the assignment, when the latter falls "within the professional activity of the agent". Thus, the purpose-driven social contact and the professional status of the person whom the law burdens with the obligations in question are intertwined. And it is confirmation in positive law that even outside pre-contractual negotiations an obligatory relationship may arise in the absence of an obligation to perform

5. OVERCOMING THE DISTINCTION BETWEEN OBLIGATIONS OF 'RESULT' AND OBLIGATIONS OF 'MEANS

After the preliminary provisions contained in Arts. 1173, 1174 and 1175, the more general rules on obligations, as mentioned at the outset, are contained in Art. 1176(1) and Art. 1218, which open Chapters II and III of Tit. I of the Code of Obligations devoted respectively to performance and non-performance. They are to be read in the functional sense resulting from the systematic placement assigned to them by the legislature. The first constitutes the general directive given to the obligor for performance, while the second, and it alone, is the rule about non-performance from the point of view of the liability arising therefrom. This means that diligence contributes to the accuracy of performance but does not exhaust it, so that proof of diligence is not sufficient to exonerate the obligor from non-performance and consequent liability, the criteria for which are contained exclusively in Art. 1218. Furthermore, it has been stated in legal literature that "not so much the performance of the service as the preservation of the possibility of performance is the main function of diligence, from a technical legal point of view" (Mengoni, 2011, p. 164), i.e. according to Art. 1218,

which states that the debtor is exonerated from liability only if he proves "the impossibility of performance resulting from causes not attributable to him".

This unitary reading of the rules on liability for nonperformance, which is confirmed by the heading of Art. 1218, which proclaims this rule as exclusive of the debtor's liability, excludes that in turn the rule of Art. 1176(1) can be invoked as a criterion of liability. Just as the diligence imposed on the debtor is not decisive in establishing performance, fault as lack of diligence is not decisive in establishing non-performance and the related liability. The uniqueness of the rule governing nonperformance means that the distinction between obligations of result and obligations of means is unacceptable if, as is normally the case, it is intended to be linked to a different liability regime (Mazzamuto, 2014). If the limit of the obligation is an impossibility, liability is also limited by impossibility, so that only when this occurs will the debtor be released, provided that he proves that the impossibility is due to a cause not attributable to him, (Bashkatov and Nadmitov, 2018) i.e., first and foremost, not due to fault. Thus diligence comes into play not as a criterion for attributing liability but as a criterion for excluding liability mediated by impossibility. In the middle of the last century, Luigi Mengoni (2011) spoke out against the idea of a different liability regime for the debtor depending on whether the obligation is one of result or means. In the middle of the last century, Luigi Mengoni (2011) stated that every obligation is an obligation to achieve a result and that in obligations of diligence or of means, negligence does not amount to fault as a criterion for attributing liability, but constitutes in itself that non-performance to which Art. 1218 reconciles liability, subject to proof of impossibility due to causes not attributable to the debtor.

Jurisprudence has also come to this conclusion fifty years later (Cass, sez. un. 28 July 2005, no. 15781, 2006; Cass, sez. un. 11 January 2008, no. 577, 2008). On the one hand recomposing the unity of the obligatory relationship, of which the unity of the discipline of liability is a corollary, and on the

other avoiding the undue assimilation of liability in so-called obligations of means to non-contractual liability. Believing that the debtor's liability is based on fault and placing the burden of proof of the latter on the creditor means reproducing the model of liability in tort, neutralising the vinculum iuris under which the debtor is not merely required, as in tort, to avoid damaging the legal sphere of others, but is obliged to conduct himself to achieve a result in the creditor's interest (Mazzamuto, 2014).

This unbridgeable gap between the wrongful act and non-fulfilment, between aquiline liability and contractual liability, has been blurred by several recent decisions by the Supreme Court (Court of Cassation, 26 July 2017, no. 18392; Court of Cassation, 11 November 2019, no. 28991).), which in the field of medical liability has re-established, in terms of evidence, partial assimilation of the latter to aquilian liability, requiring the patient to prove the causal link between the professional's conduct and the damage suffered, rather than guilt in terms of inexperience. Although it cannot be concluded that in these terms the Supreme Court has resurrected the outdated distinction between obligations of means and obligations of result, by imposing the burden of proof on the plaintiff regarding the causal link it ends up projecting the model of aquilian liability onto contractual liability, whereas the single discipline of liability contained in article 1218 of the Civil Code does not assign to certain types of obligations a rule different from the latter and comparable to that of noncontractual liability.

It is possible that the Court of Cassation's unintended contamination of contractual liability with liability for tortious acts was prompted by the recent regulations contained in law no. 189 of 8 November 2012, and subsequently in law no. 24 of 8 March 2017, which, in article 7, paragraph 3, states that "the healthcare professional ...is liable for his actions according to article 2043 ...unless he acted in the performance of a contractual obligation undertaken with the patient". However, the above-mentioned decisions concerned allegedly contractual ground, where, as we have just said, the different structure of

the obligatio and consequent liability on the one hand, and of the illicit act on the other, does not allow contractual liability to be assimilated to aquilan liability.

6. LEGISLATIVE INNOVATIONS AND RELATIVISATION OF THE SO-CALLED PATRIMONIAL LIABILITY

A fundamental principle of the law of obligations in the Roman tradition is the invalidity, for the debtor in pecuniary obligations, of the limit of supervening impossibility as a cause of exclusion of liability, in deference to the principle genus numquam perit (Petoft, 2020). Indeed, the liberating impossibility does not coincide with the extinction of the genus to which the object of the obligation belongs (Mengoni, n.d.c.), but concerning monetary obligations the aphorism has always meant that the debtor cannot rely on his financial impotence as a ground for inexcusability of performance. This rule for pecuniary obligations, implicit in the requirement of unattributable impossibility as the sole cause of exclusion of liability (except for contractual clauses admissible under Article 1229 of the Civil Code), appeared to have been superseded following Law no. 3 of 27 January 2012, the contents of which in this respect were subsequently absorbed within Legislative Decree no. 14 of 12 January 2019, the so-called Code of Corporate Crisis and Insolvency. These rules provide that an 'over-indebted debtor, i.e. in a state of definitive inability to meet its obligations, may, according to various procedures, offer its assets, which are in theory insufficient to fully satisfy creditors, in exchange for its 'exdebitation'. This is achieved through a declaration by the court, which, at the same time as pronouncing the decree closing the proceedings, "declares unsatisfied bankruptcy debts unenforceable against the debtor" (art. 281 l. no. 14/2019, and already art. 14- terdecies l. no. 3/2012), without prejudice to the obligation to pay the debt within four years of the judge's decree where significant benefits arise that allow the satisfaction of creditors to an extent of not less than ten per cent" (art. 283, para. 1). The terminology adopted by the legislator and in particular the qualification of 'uncollectible' referred to the pecuniary obligations that remain

unsatisfied after the exdebitration procedure may have led to the belief that through the latter an extraordinary hypothesis of uncollectibility of the performance occurs, an uncollectibility equivalent quoad effectum to the impossibility provided for by article 1218 of the Civil Code in the light of the directive of correctness under article 1175 of the Civil Code. (Mengoni, 2011). In these terms, precisely concerning those pecuniary obligations of which we have just seen that the bromcardo genus numquam perire censetur excludes even the prospect of the extinction impossibility of the obligation, there would have been a systematic crack in the design of contractual liability contained in the civil code, and consequently in that of the obligation itself. In reality, as the very 'insolvency' logic adopted by the law seems to suggest, we find ourselves here beyond the obligation as a right of the creditor and obligation of the debtor referring to conduct called performance as well as to the relative liability resulting from the attributable non-performance. The discipline in question does not deter non-performance from its imputability, but goes directly to the asset guarantee, adapting it to the concrete reality of the debtor's assets, concerning his incapacity or overindebtedness (Di Majo, 2013): the latter is, in fact, "the situation of persistent imbalance between the obligations assumed and the assets that can be readily liquidated" (art. 6 l. no. 3/2012), and it is concerning this imbalance - not to a conflict of the creditor's interest "with an interest of the debtor to which...a judgement of pre-eminent value is inherent" (Mengoni, n.d.d., p. 333) - that the law reconfigures the credit according to the debtor's actual assets. It is the other logic, that of the patrimonial guarantee, which, as we said at the beginning, takes over from that of the obligation when the latter has not been able to make the creditor achieve the result due.

CONCLUSIONS

What has just been said shows, by way of example, that Italian law of obligations can no longer be reduced within the confines of the civil code as conceived by the legislator of 1942. It is, in particular, the normative solicitations coming from

Europe, especially those concerned with consumer protection, that has both enriched its contents and undermined its design. This has affected all the European Union legal systems, which are linked by a common destiny to the regulatory framework that the latter has established with a view to a uniform law that now overcomes national barriers. Along this line of tendency, also the European codification projects, although so far unrealised, have in turn exerted a drive to reshape the positive law of obligations, as happened first in Germany in 2002 and then in France in 2016. This is also the reason for the most recent initiative of the Italian government, which is rather general in content, to undertake a reform of the civil code, also concerning the matter at hand. It is not without significance, however, that the Italian civil code, being more modern than both the Code civil and the BGB, is more adequate than the former from a systematic point of view and than the latter also in terms of content. As regards the first aspect, it is sufficient to think that the obligation has a discipline separate from each of its sources, avoiding, in particular, the drowning in the modes of acquisition of property which characterised the Code civil; and as regards the second, the discipline of non-performance, which is much more linear, in particular concerning the basis of liability, and complete to avoid the lacuna of the positiven Vertragsverletzungen which doctrine and jurisprudence had to remedy.

This greater modernity of the Italian code has provided a more favourable basis for the developments of jurisprudential law (doctrine and iurisdictio) that we have referred to in the preceding pages. Thus, the clarification of the non-pecuniary nature of the interest in the case of the obligation has allowed the evolution of contractual non-pecuniary damage, in more advanced terms than those reached by the German reform of the law of obligations with the new section 253, still restricted by the limitation to cases determined by law, which in Italy remains circumscribed to the liability of third parties (art. 2059 Civil Code) but exclusively concerning moral damage. And the discipline of pre-contractual liability contained in art. 1337, with the obligation of good faith placed to preside over the

negotiation phase, has finally revealed the positive foundation of the contractual nature of pre-contractual liability, as well as having made the latter more certain as a positive figure of liability straddling the law of obligations and that of contracts. At the same time, the opening of the sources of obligations has made it possible to derive, from the very discipline of pre-contractual liability, the idea of a purpose-oriented social contact as a general figure capable of reshaping the boundary line between contractual liability and civil liability.

The point of intersection between written law and the law of jurisprudence and doctrine, the point beyond which the former, through interpretation and application, flows back into the latter, has thus moved forward for the discipline laid down by the civil code. At this point, the question arises whether the time has not come for a new positive model to be recast in the Civil Code to take up the threads of the interpretative work carried out in the meantime. It is not easy to establish whether the time for a recodification of the Italian Law of Obligations is now: reworking a code requires a magical time in which a series of a priori imponderable factors must converge. The very idea of codification is the fruit of 'myths and destinies' born of time. Today, to some it seems necessary to recode, while not more than a few decades ago others claimed that the time for codification was over, and even today others still consider the codes an error of history from which we contemporaries should miraculously free ourselves

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Received: 18/02/2021
Approved: 02/08/2021

Carlo Castronovo: Professor Emeritus at the Università Cattolica del Sacro Cuore.
Email: carlo.castronovo@unicatt.it
City: Milan
Country: Italy
ORCID: https://orcid.org/0000-0003-0870-9746