COMMENTS

FOREIGN LAW IN INTERNATIONAL LEGAL PRACTICE: AN ITALIAN PERSPECTIVE

GUIDO ALPA

The article discusses the impact of foreign law on the Italian legal system. Initially, consideration is given to the role of foreign law in the overall historical development of Italian jurisprudence from the nineteenth century onwards. Then the focus shifts to the use of foreign law by Italian judges in cases other than those where the reference to foreign law is required by the rules of Private International Law or by the choice of the contracting parties. Foreign law, in this perspective, is envisaged as a reference to foreign models, rules and experience, which help to find the best solution in national cases. It considers also the use of foreign contractual models in national and international commercial relationships, particularly the use of names and formulae, references to *Lex Mercatoria* and the Unidroit Principles, the importation of principles and rules from economically more developed countries and the impact of EU legislative activity.

1. "Foreign Law" in Italian Legal Culture. Fashions and models from the nineteenth century to the present

In Italian legal culture, the expression "foreign law" has quite a restricted meaning, in as much as it refers either to the law in force in other countries necessarily applied by the Courts by virtue of the rules on the conflict of laws, or to the law chosen by agreement of the parties to govern the relationship created between them.[1]

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[1] The same perspective is adopted by U.DROBNIG, "The Use of Comparative Law by Courts, a General Report," in U.DROBNIG & S. van ERP (eds.), The Use of

However, the expression may also be used in a wider sense, that covers not only the statutory rules applied but also the other sources of law; namely "doctrine" (legal literature) and case law, according to the teachings of Rodolfo Sacco;[2] one of the most eminent Italian scholars of comparative law. From this perspective, we must take into consideration the cultural models, legal institutes and judgments, which derive from foreign experiences and are used by individuals or courts to help solve domestic legal problems. In this wider meaning, the use of foreign law in Italy is the subject of a very rich history, still awaiting its narrator.[3] This history can be summarily classified into five periods:

(i) the first period comprises the whole of the nineteenth century,
(ii) the second, the first half of the twentieth,
(iii) the third, the period which spans roughly two decades (from 1950 to 1970),
(iv) the fourth regards the following two decades (from 1970 to 1990), and
(v) the fifth, the final years of the twentieth century. Each subdivision into periods is arbitrary and each period cannot be assumed to be so monolithically homogenous that a sole and consistent approach took hold. However, taking a bird's eye view of the formation of law in Italy, certain trends – which correspond to the periods previously mentioned – appear

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Comparative Law by Courts, XIVth International Congress of Comparative Law(Athens,1997), The Hague, London, Boston, 1999, at p. 6. However, what is striking is the use of foreign models to solve domestic cases: see B.MARKESINIS, "Reading Through a Foreign Judgement" in Essays in Celebration of John Fleming, P.Cane & J Stapleton eds., Oxford, 1998, p.261ff.

[2] R.SACCO & A.GAMBARO, Sistemi Giuridici Comparati, Turin, 1996, at p.6 ff.; G.ALPA (ed.) Corso di sistemi giuridici comparati, Turin, at p.10.

[3] G.GORLA had studied the use of *lex alii loci* in the Middle ages (*ius commune Europeum*) : see ID., "Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo", in Foro Italiano, 1973, V, 89 ff. For further details see P.GROSSI, L'ordine giuridico medievale, Rome & Bari, 1998, passim. Roman Law is still mentioned in Italian decisions, but only *exornatione gratia* (G.MICALI, "Il diritto romano nella giurisprudenza della Corte suprema di cassazione", in Giurisprudenza Italiana, 1993, IV, 489 ff.), while, accordino to the Spanish Civil Code, Roman Law is the basis for interpreting the law through general principles.

prevalent, thereby lending scientific credit to this temporal sub-division.[4]

(i) The first period witnesses the preponderant influence of French law, which reverberates over all aspects of our legal system, including statutory law, legal literature and court decisions. As regards statutory law, the *Code Napoléon* initially constitutes the law imposed by the General's armies in the provinces conquered from the Piedmontese, Austrians, Lorraines and Bourbons. After the fall of Napoleon, his model of Civil Code is transplanted to several of the states into which Italy was divided (the Civil Code of the Kingdom of Two Sicilies, the Civil Code of the Duchy of Parma; the Civil Code of the Kingdom of Sardinia or "Albertine" Code) and is subsequently chosen as the model for the first Civil Code of the unified Italy born in 1865. As for legal literature, the *Ecole de l'Exégèse* becomes the method for the analysis and application of universal law; so much so that the majority of the treatises and manuals of French law are first translated and then imitated by Italian legal writers. More than six hundred of these works are translated over the whole century, which sees the coming into being of the Italian "Scuola dell'Esegesi" (School of Exegesis – Interpretation), which holds that law is only the statutory state-enacted law and the legal writer's role is limited to an analytical commentary of its provisions. With reference to case decisions, given the proximity of French and Italian Law, the judgments of the *Cour de Cassation* and of the French tribunals are liberally quoted by legal writers and employed by judges, without regard for the fact that they have been rendered by foreign judges. Italian jurists do not consider French Law as a "foreign" law, belonging to a *ius alienum* (i.e. to the system of a different state) and applied by judges belonging to the administration of a foreign state.

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[4] Unfortunately the literature in English language about this proceeding is very poor: see, among others, M.BELLOMO, The Common Legal Past of Europe (1000-1800), Washington, 1995; for new comments see P.GROSSI, "La scienza giuridica" in Italia nell'Ottocento, Milan, 2000; G. ALPA, La cultura delle regole. Storia del diritto civile italiano, Rome & Bari, 2000.

(ii) The second period records a repudiation of the "Scuola dell'Esegesi" (the interpretative school) and the triumph of the Pandectist model, (the historical school of Germanic origin, introduced in Italy by the scholars of Roman law). Even Roman law was not considered then, as it is not today, as properly speaking a "foreign" law. It is not only the primary source of the Italian legal language, but also of many of the institutes governing natural persons, property, contracts, torts and associated remedies. Roman Law is so widely diffused among the sources of our own legal culture that it constitutes, to this very day a fundamental subject matter of study for the formation of lawyers, is often quoted in decisions of the courts and is studied in a "current" dimension; almost as if it were not a body of rules and principles to be historically placed in the context of its bi-millennial evolution, but is rather a *corpus* of rules still in force.

The choice of moving from French to Pandectist culture was not only the product of a fashion, but rather born of what at the end of the nineteenth and the beginning of the twentieth centuries was perceived as a necessary requirement. The aim was to dogmatically reconstruct Italian civil law and consequently the method for studying it. Savigny, Arndts, Dernburg, Windscheid, among others, peep out from the bookshelves of lawyers, top the reading lists in civil law courses, constitute the staple diet of jurists and therefore of judges, who, having received a Pandectist training, flaunt this in their judgments. So much was this the case, that a jurist of those times, Biagio Brugi, a famed author, veritable scholar of Roman and Private Law and editor of one of the manuals of Institutions of Private Law most widely studied by generations of students,[5] could well state, in a lecture held in 1919, that: "perhaps no foreign scholars have ever exerted an influence in Italy which can be compared to that of the Germans in our day and age." This was not a simple reckoning of historical accounts. It was a *cri de coeur* aimed at fostering awareness among Italian jurists of the bi-millennial history of

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[5] Istituzioni di diritto civile, Milano, 1915.

which they were heirs and which he now saw as being ignored in favour of the books copied from the German jurists, and an attempt to recover the originality of the Italian approach. It was also an invitation not to disregard the other aids of foreign legal science. The Italians, he suggested: "may indeed look as far away as to the English *common law* (in which our own authors are often still quoted) and to the decisions of North American Courts, which are in certain respects inimitable."[6]

Brugi's invitation was to remain unheeded. The influence of German culture was to remain unaltered up to the formulation of the new Civil Code in 1942, and further still for several more decades. However, due to the strange vicissitudes of legal history, at the end of the 'twenties, an extraordinary event occurred, which reflects the cosmopolitan climate that pervaded Continental Europe during that period. In 1927 a bilateral commission, officially set up between Italy and France, drafted a uniform Code of Obligations. This initiative is due to Vittorio Scialoja, another great jurist, who was a scholar of Roman and Private law and to the Frenchman Francois Larnaude. Jurists from other countries, such as Belgium, Rumania, Greece and Canada, took part in the initiative at the beginning, but it was the two founding nations who concluded it.[7] The purpose of the *Projet de Code des Obligations et des Contrats*, consisting of 739 articles, drafted in the two languages by the scholars of the "sister Nations", was to: "create, with the consensus of all their united strengths, a body of laws which, within each of the two states, would represent the most perfect legal regime which legal science wished for and legal practice required."

With the changing political balances at the end of the 'thirties, the German influence makes itself felt again; but the scholars of comparative law also continue to study the *common*

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[6] B.BRUGI, "I danni dell'imitazione straniera nella nostra giurisprudenza", in Atti della R.Accademia Lucchese di Scienze, Lettere ed Arti, vol. XXXVI (1919), at B.BRUGI p. 7.

[7] Commissione reale per la riforma dei codici/commission francaise d'etudes de l'union legislative entre les nations aliees et amies, Progetto di Codice delle Obbligazioni e dei Contratti, Testo definitivo approvato a Parigi nell'Ottobre 1927-Anno VI, Rome, 1928.

law models, taking into account not only institutes such as trusts which are unheard of in Italy, but also Company law.

(iii) From the nineteen fifties onwards, after the introduction of the new Civil Code which also incorporates commercial law in a unified whole, we record a sort of closure on the part of Italian jurists towards foreign experiences. Everyone is busy understanding, commenting, interpreting the new text, and comparative references to foreign laws are quite rare, both in legal literature and in Court rulings.[8] The most notable exception is that of Gino Gorla, who already in 1955 published a prodigious treatise on contract law, in which, in addition to the historical perspective, a comparative approach is also adopted. This takes the form of a reliance on cases: reference to cases, then as today, becomes a way to seek in other experiences, in particular in common law, the similarities, convergences and more useful practical solutions.[9] We too can pride ourselves, as the United Kingdom can also nowadays do, thanks to the works of Basil Markesinis, on having scholars who are more concerned in studying what unites than in what divides us. Scholars who emphasise "convergences" more than "divergences", the formulas adaptable to practical cases, rather than erudite musings which are an end unto themselves: scholars, in other words, animated by the longing for research, not to produce a sterile form of culture, but with the aim of seeking immediately functional, practical solutions.[10]

(iv) The fourth period is the most lively and we shall devote more time to it. It includes the influences recorded in court decisions, deriving from cases and other sources of foreign law, the influence of legal practice in other countries, especially the United States and the deployment of remedies derived from those experiences.

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[8] G.ALPA, La cultura delle regole, supra at n. 4.

[9] G.GORLA, Il contratto, Milano, 1955.

[10] This is the leitmotif through the essays collected by B. MARKESINIS (ed.), The Gradual Convergence. Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century, Oxford, 1994.

(v) The current period records, in addition to the tendencies which developed during the fourth period, above all the incidence of the law of the European Union, and therefore the necessary circulation of the models of the Member States of the Union, which are merged in the regulations, in the directives, in the very language used by the European legislator and by the Court of Justice of the European Community.

2. Examples of foreign models used by Italian Courts

Instances of the explicit use of models derived from foreign judgments (or legal rules) by Italian judges are still rare. Usually it is the lawyers who use these foreign elements in their defences and the judges, if they take them into account, make use of them in their motivations. But the recourse to foreign models is not only left to the culture of the lawyer or the judge, but also depends on the extent to which the quotation may be instrumental in bringing about the favourable decision of a dispute. However, it cannot be said that the use of comparative law is a usual and standard way of working for the Italian lawyer. Furthermore, many cases have been decided in which, while taking foreign models into account, the judge does not reveal the sources of his reasoning, nor does he expressly quote them. Closely investigating some of these cases, however, we can clearly observe the influence of foreign experiences. Here are some examples:

2.1 Privacy

One of the first Italian cases in which the problem arose of the safeguarding in our system of the right to privacy[11] regards the tenor Caruso, whose family life during childhood had been depicted in the film "Leggenda di una voce" (Legend of a voice). Certain sequences showed scenes of violence committed by his father, and Caruso himself was portrayed as a short-tempered, heavy drinking man, of dubious morality. To uphold the right of Caruso to obtain

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[11] G.ALPA, "The Protection of Privacy in Italian Law", in B. MARKESINIS (ed.), Protecting Privacy, Oxford, 1999, at p. 105 ff.

compensation on the basis of tort law, the judges posed the question whether there should exist the judicial protection of a general right "to confidentiality or privacy", qualified in English court rulings as a "right to privacy". The judges' reply – we are in the mid 'fifties – is negative. Their reasoning is formalistic, because it is based on the search for a legal provision aimed at protecting this specific right, and since the judges only discover rules aimed at safeguarding the use of a person's name or image, or her decorum or reputation, but not privacy *per se*, they conclude that the search is fruitless and gives a negative result. Therefore, the judges conclude that:

> *"in our legal system there is no right to privacy, but only individual subjective rights of the person are acknowledged and protected, in different ways; therefore, it is not forbidden to communicate, either privately or publicly, events, especially if imaginary, of another person's life, when knowledge of the same has not been obtained by means unlawful in themselves, or which impose an obligation of secrecy."*[12]

Gradually, however, the right of privacy made its way through the Italian courts: this time, through the utilisation of the "European Convention on human rights and fundamental liberties", signed in Rome on the 4th November 1950 and ratified in Italy by Statute n. 848 of the 4th August, 1955. The Convention – whose article 8 sets forth that *"toute persone a droit au respect de sa vie privée et familiare, de son domicile et de sa correspondance"* (every person has the right to the respect of his/her private and family life, home and correspondence) is quoted as the basis for the decision which upheld, both on appeal, and in the Court of Cassation, the right for damages of the family of Claretta Petacci, the unfortunate lover of Benito Mussolini, who had been executed along-side him, trying to shield him with her own body. In this case, it was a book, in which Claretta Petacci's personality was described in a scornful and disparaging way, which prompted the family to

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[12] Tribunale di Roma, 14.9.1953, in Foro Italiano, 1954,I,115.

claim the infringement of their right to privacy. The judges upheld this claim despite the fact that the injured party was deceased.[13]

2.2 Expropriation

Although no cases were expressly mentioned, nor was the legal theory of German origin relating to the subject matter, the Constitutional Court, in a landmark decision regarding the regulation of ownership, held that the legislator cannot, without compensation, compress the powers of the owner on a thing beyond the limits "naturally attached to the right of ownership" such as they are acknowledged at the current time. The case regarded certain owners of land situated in the centre of the town of Palermo, which fell under a zoning ordinance excluding the possibility of building on it. The town plan complied with the zoning law, which envisaged no compensation for zoning ordinances or encumbrances that limited or compressed the rights of the owners. The court applied – as was immediately pointed out by the scholars of the subject matter – the German concept of *Einzelakttheorie*, according to which the individual right, the right of ownership in particular, must be considered as a sphere, on the surface of which the legislator can carve, that is can impose restrictions on the owner without compensation; but when restrictions carve onto the essential nucleus, and reach into the "vital core" of the right, the sacrifice imposed on the owner must be compensated.[14]

2.3 Leasing

Leasing contracts made their appearance in an Italian court – according to the records – only in 1972. A small Tribunal in the province of Pavia, which is full of small businesses led by able and tireless entrepreneurs, had to solve the question of whether the machinery given by the lessor to the lessee for the manufacture of shoes should be considered the property of the lessor or of the lessee. The contract utilised was a leasing contract, unknown until then in the Italian experience, where according to tradition, use of a

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[13] Corte di Cassazione, 22.12.1956, n. 4487, ibi, 1957, I, 877.

[14] Corte Costituzionale, 29.5.1968, n. 55, ibi, 1968, I, 1365.

thing can be the subject of a contract of rental or of a contract of sale, or of a contract creating property rights. The Tribunal instead referred to commercial practice – without however quoting the experience from which this type of contract had been imported – to acknowledge the possibility of having such a contract in our own system, by virtue of the principle of freedom of contract.[15]

2.4 Liability for Prospectuses

Even for the presentation to the public of financial products, in the absence of statutes which would be enacted only in 1983, and then more comprehensively in 1991, the judges – in this case the judges of the Tribunal and of the Appeals Court of the town of Milan, which is the main financial centre of the country – relied on foreign experience, in particular the English and U.S. experience. They did not take care to mention any cases, but simply proceeded to follow the reasoning of these courts. On that occasion there was a prospectus prepared by the issuer to favour the underwriting of debenture securities by investors; the issuer was the client of a bank, American Express Bank, subsequently American Service Bank s.p.a., which was in charge of placement of the securities on the Italian market; it had invited its clients to underwrite the debentures and assured them that the issuer was in an economically sound position; the investment, however, proved disastrous, because a few months later the issuer went bankrupt. In the first instance the bank was not held liable, because the judge ascertained that there was no contract of guarantee with clients.[16] On appeal, instead, the bank was held liable in tort, because it had spread groundless information on the economic soundness of the issuer. In defining the limits of liability, the judges refer to liability for (misrepresentation in) Prospectuses, well known to common lawyers.

2.5 Nervous shock

In the Italian legal system, there has been great discussion as to the extent and qualification of personal injury. In addition to

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[15] Tribunale di Vigevano, 14.12.1972, in Banca e borsa, 1973, II, 287.

[16] Tribunale di Milano, 11.1.1988, in Giurisprudenza Commerciale, 1988, II, 585.

physical injury and so-called moral injury (which corresponds to the "pain and suffering" of common law) a different type of injury, consisting of injury to health (so-called "biological damage") has been ascertained. The purely psychic damage, due to the nervous shock produced by an accident, had never been taken into consideration as a legally relevant injury. However, the Constitutional Court, taking into account the English experience, specified by an *obiter dictum,* in a case in which the issue was whether compensation was due to the relatives of the victim, that such psychic injury, if caused by fault (negligence) or wilful damage, gives rise to compensation. The writer of the judgment was one of the most noteworthy scholars of Private law, Luigi Mengoni, a former Professor at the Catholic University in Milan, subsequently appointed to the Court. The judgment sets forth that liability for nervous shock must be tied to fault. It cannot be strict liability. On the other hand, the English Courts which admit this principle, in order to avoid arbitrariness, and so as not to burden the risk of the insurance companies with an overly large amount of claims, make a distinction depending on whether the claimant suffered shock as an occasional onlooker at the time of the accident, or if he was told of the event far away from the scene of the accident, upholding the claim in the first instance, but rejecting it in the second.[17]

2.6 Trusts

The last example regards trusts, a typical institute of equity, originally only available in the systems of English descent, and subsequently introduced, with different legal configurations, and on the basis of special statutes, also in countries having different legal traditions. Trusts were the subject of the Hague Convention of 1.7.1985, rendered executive in Italy by statute n. 364 of 16.10.1989, which entered into force on 1.1.1992. The Convention deals with the applicable law, but contains certain provisions which give the definition of a trust, for the purpose of extending the rules to all the types of this category, in the various forms in which the signing countries acknowledge the existence of the same. It is definitely

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[17] Corte Costituzionale, 27.10.1994, n. 372 in Foro Italiano, 1994, I, 3297.

accepted, in the Italian legal system, that a trust established abroad with a foreign trustee, relating to property located in Italy, is valid, even if the settler is an Italian citizen. Italian citizens who intend to set up a trust mostly use foreign legal systems, mainly the rules applicable in Jersey, but also those applicable in Ireland. This choice is preferable for succession purposes, for fiscal reasons, for reasons of confidentiality, but also because the purposes achieved through the establishment of a trust are not equally available using the institutes of civil law, such as fiduciary contracts, fiduciary nomination or registration, etc. Usually the following transaction takes place: the property is registered in the name of an Italian company, whose quotas or shares are in turn registered in the name of a foreign trustee.

After the approval, ratification and entering into force even in Italy of the Hague Convention, the problem arose as to whether it was possible to set up a trust, obviously governed by a foreign law, with an Italian trustee. This because the Convention, as it contained provisions on the definition of "trusts", introduced in Italy rules of substantive law; trusts (in their structure at equity) governed by a foreign law, which would now be fully compatible with Italian law, but only provided that the trustee be a foreigner. Decisions of the courts, extremely rare, are divided.

The first case concerned compulsory purchases, promoted in Sardinia, in the 'fifties, in order to enact the agrarian reform. The land subject to compulsory purchase had been set up as a trust by an English national, by will and testament. The expropriating body had instituted proceedings against the surviving spouse, designated as the trustee, and not against their children designated in the will as "beneficiaries". The Tribunal of Oristano, a town on the island, had acknowledged the validity of a trust set up abroad on property located abroad, but had deemed incompatible with Italian law (in particular with the principles of so-called "public policy") the institute of trust, when the same consisted of property located in Italy, as this would have been in contrast with the so-called "numerus clausus" of property rights. The basic point of the ruling was the idea that in trust, ownership is split between *cestui que trust* and the trustee, and that this gives rise, therefore, to a form of property right which is not compatible with the fullness of the right of ownership envisaged in the Italian Civil Code. For the judges, therefore, the alternative was between considering as owners either the surviving spouse or

the children. By holding that the surviving spouse, as trustee, had only apparent title to the property, with powers to dispose of the same, but only in accordance with the aims of the trust, the Tribunal decided that the children had right of ownership, and therefore they should have been the recipients of the expropriation procedures, which, thus, had not been effected properly.[18]

The second case regarded a trust set up by an English national on property situated in Italy; the executor trustee had applied to the Italian judge (of the Tribunal of Casale Monferrato, a small town in the northern region of Piedmont) for an authorisation to sell the property; the judge, maintaining that the trust in question was similar to a fiduciary agreement "cum amico" under civil law, refused authorisation, and held that the same was not necessary, as the fiduciary agent was already the owner of the property, albeit on a fiduciary basis.[19]

The third case regarded a trust set up in Jersey by Italian nationals. The trustee was the settler's wife, an Italian citizen, who held the property (that is the shares in two companies) in the interest of the beneficiaries, her children and her husband, the settler himself. Having deposited the shares to take part in the Annual General Meetings of the two companies, the Directors of the companies then refused to return them to her. She had therefore acted to re-acquire possession of the shares; the Directors had objected, claiming that "trusts" were not recognised in our own legal system, and that the trustee (who had been replaced in the meantime) could not claim any right to the shares. The judge instead ruled in favour of the plaintiff, without however discussing as to the nature of "trusts" and their compatibility with the Italian legal system (which, according to the majority of authors, in the case at hand should have been ruled out, as the trustee was Italian); the judge based his ruling on the provisions relating to actions for recovery, which are regardless of the title to the property, but are based on the factual relationship with the property, such as possession.[20]

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[18] Tribunale di Oristano, 15.3.1956, ibi, 1956, I, 1020

[19] Tribunale di Casale Monferrato, 13.4.1984 (decree), in Giurisprudenza italiana, 1984, I, 2, 754

[20] Pretura di Roma, 8.7.1999 (order), unpublished.

3. Use of *Anstalt* from Lichtenstein

For the purpose of tax savings, to invest capital abroad and for reasons of confidentiality, wide use has been made of the institute of *Anstalt*, a typical device of the law of Lichtenstein. It is similar to a foundation set up by a sole subject; it has legal personality and is considered by the Italian judges as a legal person existing under foreign law, recognised in Italy in the same way as our legal system recognises other foreign legal entities. Under the laws of Liechtenstein, the necessary officers of the company are the founder and the administrator, while a General Assembly and Statutory Auditors are not strictly required. The administrator may dispose of the estate and may promote actions to safeguard the same. The general provisions of law (art 16) and the Bruxelles Convention of 28th.02. 1968 (art. 1) are applied. The first doubts that had been expressed by the Italian judges (in particular the Tribunal of Milan,[21] have been settled, and the Court of Cassation has upheld the legitimacy of *Anstalts* even if set up by founders who remain secret.[22]

4. The foreign models utilised in Italian contractual practice

In Italian contractual practice it is rare for the parties, if they are both Italian, to choose a foreign law to govern the contract. On the other hand there are numerous institutes, types of contracts, negotiating practices, remedies which have been imported from foreign experiences, especially from English or U.S. common law, to govern economic relations. Here are a few examples.

Many types of contract have been accepted in our legal system, by virtue of the principle of freedom of contract. These – as opposed to what occurred in other countries, such as France – have retained their original names: for instance, leasing contracts, factoring, franchising, merchandising, project financing, joint ventures, contracts regarding the use of information and data transmission

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[21] Tribunale di Milano, 11.1.1979, in Rivista di diritto internazionale, 1980, 523.
[22] Corte di Cassazione, 21.1.1985, n. 198.

technologies, and so forth. As with all contracts defined as "atypical", because they are not comprised among the types regulated by the Civil Code or by statutes, they are governed by the contractual clauses negotiated between the parties. The judge's control is two-fold: on the one hand he verifies if they are worthy of protection under the Italian legal system, that is if the interests and the objectives they pursue are lawful and economically useful; on the other hand, in the event that a contract should fail to make adequate provisions for all the eventualities that may come about, the judge proceeds to qualify the same, taking into account the nominate legal types. For instance, in the case of a leasing contract, reference is made either to the conditional sale agreements (with retention of title), or to rental contracts; for joint ventures, reference is made to association *en participation*, etc.

As for negotiating practices, the use of side-letters is frequent, and so is the use of letters of intent, letters of guarantee. Above all, for certain complex economic transactions, such as the sale of share holdings, the technique adopted in the United States is followed: a due diligence research is made, a first agreement is reached (closing) and then the parties proceed to the definitive contract. Even as regards remedies, reference has been made to the experiences of common law, to better attain the interests of the parties: after some hesitation, the so-called "autonomous contract of guarantee" has been accepted (configured at common law as bid bonds, etc.). But it should be specified that often even among Italian parties, the use of US Standard Contract forms, drafted in English, is preferred. Even if the contracts are complex, and therefore more articulate than the average contract utilised in Italy, we never arrive at the detailed regulation of US Contracts, consisting often of weighty files, in which every conceivable event is taken into account and provided for.

5. *Lex Mercatoria* and Principles of International Commercial Contracts evolved by Unidroit

In international commercial contracts the Italian parties, when together with their foreign counterparts they do not choose a foreign law, normally refer to the principles of *Lex Mercatoria*, or to the principles developed by the Institute for the Unification of Law (Unidroit), with its Head Office in Rome.

5.1 Lex Mercatoria

Even for the *lex mercatoria* – to the development of which the Italian merchants of medieval times gave a great contribution[23] – we can make the same observations as were made in relation to Roman law. It was not considered as a sort of foreign law, as in the history of our experience (not national but cultural) it is considered part of the history of Italian law. In any event, whilst the Italian judges have no difficulty in acknowledging it as "a body of rules of conduct appraisable as widely used in the mercantile *societas*, the problems that may arise regard the possibility of making arbitration awards based on the same. The question is intertwined with the issue of international arbitration, which is not the subject of this paper.

It is worth recalling one of the few instances in which Italian judges have dealt with the matter. The case regarded a contract entered into between an Italian company and a German one, containing an arbitration clause, which referred the settlement of disputes to the Refined Sugar Association of London, which applies the principles of the *lex mercatoria*. The award was not motivated, in accordance with the practices of the Association. As the parties were citizens of two countries (Germany and Italy) which had signed the Geneva Convention of 21.04.1961 on International Commercial Arbitration, the Italian party (non-prevailing) claimed that the award was null and void, on the basis of the fact that the Convention envisages that where either party requests that the award be motivated, prior to the rendering of the decision, the award must be so motivated (art. 8). The German company had defended itself claiming that the Association belonged to a country (the United Kingdom), which had not signed the Convention, and therefore the award was valid.

The Court of Cassation issued a very elaborate ruling in which it upheld the claim of the Italian party. The motivation for this sets off from the notion of *lex mercatoria* previously mentioned; it went on to specify that *lex mercatoria* lacks sovereignty, because the mercantile *societas* has no boundaries, but it does not have the

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[23] P.GROSSI, L'ordine giuridico medievale, supra at n. 3.

enforceability of sovereign systems. Having therefore to refer to a legal system in order to render the arbitrators' decisions enforceable, the Court of Cassation deemed it appropriate to apply the Geneva Convention, claiming that the same has a more modern approach than that of New York. The choice is motivated in the sense that since the parties are citizens of countries that are signatories of this Convention, this Convention: "must be considered as recalled by implied reference in the contractual stipulations between entrepreneurs belonging to ratifying States of the same.[24]

5.2 The Unidroit Principles

The principles of Unidroit represent a veritable melting pot of models from the most varied experiences, but above all represent a fortunate attempt to merge the principles of civil law, of common law and of the *lex mercatoria*.[25] They start by upholding of freedom of contract and they propose clear and simple rules which regard the binding force of contracts, the principle of good faith and reasonableness, the formation, interpretation and execution of the contract, in addition to rules on non-performance and damages. From the viewpoint of the Italian experience, of particular relevance is the envisaging of rules relating to situations of hardship.

In all systems, rules are established, expressly or construed from judicial or theoretical interpretation, regarding the eventuality that performance may become frustrated. In the Italian experience we can point out two occurrences: that in which frustration was extraordinary and unforeseeable, which bears with it the consequence of termination of the contract (art. 1467); and that in which the frustrating circumstances were foreseeable, but not actually envisaged by the parties. In this case, one has to ascertain the possibility of applying the theory of so-called "pre-supposition" which, connected with the bona fide clause, with "Causa" of the contract and with the negotiating basis (that is with the assignment of advantages and risks) may entail the termination of the contract.

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[24] Corte di Cassazione, 8.2.1982,n. 722, in Foro italiano, 1982,I, 2285

[25] J.BONELL, An International Restatemene of Contract Law. The Unidroit Principles of International Commercial Contracts, Irvington, N.Y., 1994

In international trade there is a trend, as underlined many times, toward keeping the contract alive. Therefore the general rule according to which the parties are compelled to carry out their respective obligations, even if their performance has become more onerous (art. 6.2.1.), is tempered by the institute of "hardship". The features of this institute are outlined in article 6.2, where they are indicated as follows: frustration must be dependent on a risk not accepted in the contract, on external circumstances, which must not be ascribable to the party which invokes the same, and must have supervened or, if precedent, must not have been known or recognisable by the party who invokes them. The effect of "hardship" clauses is directed at maintaining the relationship alive. Therefore, the possibility is given to the party invoking the same to re-open negotiations without hindrance and without suspension of the performance due under the agreement. Should negotiations fail, the interested party may apply to the judge (in our case to the arbitrator).

Here lies another scope for intervention, which in countries of codified law is totally ignored, indeed it is strenuously opposed: the judge, in fact, may – beyond the ruling of termination of the contract, which is the customary conclusion – "adapt the contract with the aim of re-establishing the balance between performances" (art. 6.2.3). What is really extraordinary for civil lawyers is to admit the power of the judge to "re-write the contract" on behalf of the parties, in contrast with the principle of "sanctity of contract". But the aim of the Principles is precisely to save the economic transaction and to render it feasible in accordance with the supervening risks.

6. The European Union rules

Community law cannot be considered a "foreign law", because it is one of the sources of the legal systems of the Member States. However, both Regulations and Directives tend to create uniform rules for the internal market. These rules are created originally by the organs of the Community, but can be traced back to the models coming from the individual countries of the Community; these rules are effective in the "strong" models (the French, German and English models) which are often adapted to the new exigencies; to those stronger models the weaker models (from a political,

numerical, economic viewpoint) adapt.[26] (26). Thus it was, for instance, for the directive on "unfair clauses in consumer contracts", for the directive on consumer credit, for the directives on banks and insurance companies and, above all, for the rules on competition. It is important to underline that from the complex of directives on the subject matter of contracts, special rules can be singled out which tend to become general: let us think of the use of the form of contract to protect the weaker party, to the ban on the abuse of bargaining (contracting) power; to the rules on prior and subsequent information in the stipulation of contracts, to the principle of good faith which is now at the basis of any type of contract.

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[26] See B. MARKESINIS, "Learning from Europe and Learning in Europe", in ID., Foreign Law & Comparative Methodology.A Subject and a Thesis, Oxford, 1997, p. 163 ff. and ID., "Our Debt to Europe: Past, Present and Future", in The Clifford chance Millennium Lectures. The Coming Together of the Common Law and the Civil Law, Oxford-Portland, 2000, p. 37 ff.