THE CONTRACTUAL LIABILITY FUNCTION: EFFICIENT BREACH THEORY OR BEST RISK BEARER THEORY? THE TWO THEORIES TESTED BY THE COMMERCIAL IMPRACTICABILITY DOCTRINE IN THE ITALIAN LEGAL SYSTEM

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ABSTRACT: The aim of this paper is to examine whether the Italian commercial impracticability doctrine reflects the efficient breach theory or the best risk bearer model. The conclusion is that in the Italian legal system there is a discipline that could be considered as a form of “modified” efficient breach theory, according to which judges can decide to terminate contracts that are *ictu oculi* inefficient because the cost of performance (C) is greater than value for the promissory (V), but since judges’ decisions cannot always be right, it allows the potentially compliant party to offer a modification of the contract to the other party. In these hypotheses, if performance is efficient, that is C is less than V, parties will find an agreement to execute the contract.

1. Introduction.

The need to introduce regulatory solutions for contractual balance when faced with occurrences that could affect the mutual advantage for the contractual parties, seems to be a major problem for which legal systems have always tried to provide solutions. With specific reference to the Italian legal system, it is important to note how the legislator, through Article 1467 of the Italian Civil Code, established the right for periodical or executory contracts to request that the contract be terminated for the party for whom the performance had become too expensive following unforeseeable, extraordinary events. The legislator acknowledged this, specifying that termination may not be requested if that cost lies within normal contractual contingencies. Still in Article 1467, Session 3, the right of the party for whom termination is requested can avoid it by offering a reduction that makes the contract fair.
The main difficulty was found in the need to outline the meaning of excessive emerging costs. In particular, the result is somewhat doubtful in law if we consider applying the regulation in Article 1467 of the Italian Civil Code solely for the effects of events affecting the cost of the performance, or if, in truth, reference should be made to the entire contractual content from an economic point of view, having to observe the exchange and justify the mutual performance, undertaken by the parties. If we accept this opinion we should consider also the creditor allowed to ask for termination of contracts.

Finally, the concept of extraordinary, unforeseeable occurrence, for both reference to the need to define how the rule is applied and to understand its underlying purpose must be considered.

As stated above, termination is solely foreseen in the provision in question for the hypothesis where the economic sacrifice is the result of an occurrence that does not fit into a normal contractual contingency. Therefore, a difference is introduced between the hypotheses where the uncertainty arising from executing the signed agreement is considered to be intrinsically connected to the deferred execution methods of the mutual performance. And, conversely, the contingency cannot be ascribed to normal contingencies that could occur when executing the contract. It has, therefore, been observed that in the latter hypothesis, the normal contingency becomes a limit within which the contract should be executed.

As can easily be noted, the question concerns, from a functional point of view, methods and limits within which it is deemed that contractual balance must be preserved and reintegrated. With that in mind, the contribution of Law and Economics can take on considerable significance, to emphasize certain aspects that have not always been afforded attention by Italian legal scholars.

The question of commercial impracticability will, first of all, be examined in light of the efficient breach theory. According to that theory, compensation for damages should be considered a solution to making sure that social and private efficiency coincide, following complete internalization of any damage to the noncompliant party. From this point of view, terminating the contract, if the noncompliant party has a net benefit, would be justified.

Conversely, termination will also be examined from the best risk bearer theory perspective. This necessitates considering how a contract should be executed and the different risk attitudes of each contractual party. Conclusions can differ considerably from those of the efficient breach theory. The results of this inquiry will also permit further, new considerations on whether to differentiate regulations established for cases where events causing the excessive cost are not foreseeable and extraordinary, compared to cases where they are, in fact, foreseeable.

2. A law and economics approach to the various problems

When executing a contract, there is normally an exchange that both parties have decided is advantageous. In Law and Economics the contract is considered a tool with a decisive efficiency vocation, and, as such, can easily be examined considering an approach that looks at and observes the different rules from an economics point of view.
In fact, a party is willing to take on an obligation if the relative costs are greater than the benefits arising from the counterpart’s service being executed. In Law and Economics, the contract’s social function can be justified based on the allocation function it performs; the parties themselves voluntarily agree to transfer an asset from who values it less to who values it more, with a resulting increase in social wealth. In this way the contract is a socially useful tool from the Kaldor-Hicks efficiency point of view. However, we need to point out that the contract is also socially desirable from Pareto efficiency criterion, as it implements a real Paretian improvement, as both parties increase their (ex ante) welfare.

2.1 Efficient breach theory

Most scholars, especially American authors, believe that the function of compensation for contractual damage is that of internalizing, for the noncompliant party, the value the counterpart attributed to the service that would be lost if the service were not performed. If the party deems it advantageous not to comply, despite the compensatory obligation, that means that the breach should be considered, due to the internalizing of the other value as socially efficient, because the costs underlying execution of the promise are greater than the benefit for the counterpart. From this considered perspective, the function of the compensatory obligation is not solely to “compensate” the compliant party. If considered closely ex post, a payment of damages is purely a transfer of money that does not increase social welfare, but simply determines a redistribution of wealth. Conversely, ex ante, payment of damages explains a deterrence function as it brings about the parties to perform their services when this is socially desirable. On that point, we need to introduce the distinction between “external” events that do not come under the parties’ control and “endogenous” ones occurring, on the other hand, through the will of contracting parties. With reference to the second contingency type, the parties, taking due precautions, can prevent excessive cost situations occurring by make the “best” effort required of them to guarantee execution of contract. However, there are “external” events – that is beyond the parties’ control – related to which a diligence obligation cannot be programmed, as they cause excessive cost situations (and, at times, impossibility) that cannot be attributed to the conduct of the contracting parties. That is probably the case for those extraordinary, unforeseeable events contemplated by Article 1467 of the Italian Civil Code. In those hypotheses, the fact that it is not desirable to perform the promises contemplated by the contract could become evident. Just think of occurrences that enable a judge, with no doubts, to consider compliance as not efficient, in light of emerging “external” contingencies making performance excessively costly for one of the two contracting parties.

In such cases, there would seem to be no technical justification for foreseeing a compensation of damages rule, seeing as how that obligation could not increase social wealth. It could be considered enough to foresee a termination of the contract sic et simpliciter.
2.2 Best risk bearer theory

However, applying Law and Economics reasoning, we should ask whether or not the need to measure compliance efficiency is the sole function of the compensatory obligation. Indeed, we should not deny the fact that some scholars\(^1\) felt that compensation for damages can also, above all, fulfill, in a broad sense, an insurance function, through which the party more adverse to the risk does not take on all or part of the risk contingent to contractual execution.\(^2\) Just think of the case of the fisherman who cannot deliver the goods promised because of excessive contingent costs. Instead of asking the fisherman, as required by the efficient breach theory, to pay damages, the best risk bearer theory could demand the opposite; that the wholesaler, who is better able to bear the risk, “indemnify” the fisherman for the loss suffered. The potentially compliant party would be the one having to pay a sum of money to the noncompliant party. The two theories completely overturn the vision.

2.3 Article layout

The solution we intend to provide for the question presented requires the inquiry to be a double one. First of all, we will adopt the efficient breach theory view; that is, considering that the negative consequences arising from noncompliance be internalized in full. After that, examination of possible normative solutions will consider the best risk bearer perspective, discussing whether the legal structures considered could, in a broad sense, perform an insurance function. We will imagine that events causing contingent costs are external, that is, they do not depend on the parties’ will. As an example, imagine the case of a farmer who has sold a certain quantity of a specific product that is not easy to find to a wholesaler, to be delivered on a certain date and a flood stops his cultivating. Only by sustaining new costs, not yet sustained–nor even budgeted for–would the farmer be able to use his land. In that hypothesis internalizing the costs based on the efficient breach theory would require payment for damages. In that way there would only be compliance if the costs the farmer has to sustain are less than the benefit for the buyer. On the other hand, the best risk bearer theory compensation of damages by the farmer or, the opposite, payment of indemnity by the wholesaler to the farmer, requires examination of the parties’ risk attitude.

3 Efficient breach theory and best risk bearer theory.

\(^1\)Scott &Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, available at the website: http://law.bepress.com/cgi/viewcontent.cgi?article=1013&context=uvalwps

We can assume that a sale agreement is drawn up whenever the relative costs (C) for the seller are lower than the value attributed to the goods by the buyer (V). In that case the surplus generated by the transactions is \( V - C \). We then need to take a look at how that surplus is distributed between the parties. The price (P) performs that function. In fact, the surplus generated by the transaction (\( V - C \)) will give the seller \( P - C \), while the buyer will have, as its utility, \( V - P \).

Executing the contract is advantageous for the buyer when you have the following conditions:

\[ V \geq P. \]

Conversely, referring to the seller, the sale will be advantageous if:

\[ P \geq C. \]

Now let’s assume that a certain event occurs that increases costs, which go from C to \( C_1 \). In that case, if:

\[ C_1 \geq P \]

compliance would not be advantageous for the seller.

If we also had that:

\[ C_1 \geq V \]

compliance would also be inefficient, according to traditional logic, from a social point of view, as the value created is negative.

The efficient breach theory establishes that if perfect compensation is foreseen – where perfect must be considered as the full coincidence of compensation paid with the utility hoped for through executing the contract \(^3\) – the breach will only be had when the cost for the service is greater than the benefit for the buyer, i.e., an efficient solution. If the seller decides to comply, that means that the costs are less than \( V \) – we still have an efficient solution. The framework described above guarantees that contracting party breaches are efficient. \(^4\)

By foreseeing a compensatory obligation, the noncompliant party internalizes costs arising from not executing services with resulting coincidence between private and social optimum.

However, we should note that where you have \textit{ictu oculi}, the inopportunity to execute one’s service (as it can easily be presumed, with no need for investigation, that \( C_1 \geq V \)), the theoretical justification adopted above might no longer be valid related to the need to introduce regulatory solutions for arising compensatory obligations. In that case, any consideration related to the most socially desirable choice does not presuppose that the noncompliant party should internalize the value that the counterpart obtains from executing the contract, as that valuation can be submitted to judgment. Then the compensation for damages should solely be considered as a way to redistribute wealth ex post, and is not suited to increasing social wealth but, due administrative costs, it determines a social loss.

Conclusions, however, inevitably differ from what was said above if the risk aversion concept is introduced. With that in mind, the compensation for damages can be

\(^3\) With no prejudice to the overreliance problem.

\(^4\) Note that the efficient breach theory, in the most frequent presentations, means that there is always payment of compensation for damages in case of non-performance. See Bigoni, Bortolotti, Parisi & Porat, \textit{Unbundling Efficient Breach}, (August 8, 2014), available at the website SSRN: http://ssrn.com/abstract=2477973
considered indemnity to compensate the party most risk adverse for the occurrence of events altering the terms of the exchange. According to the best risk bearer theory, the risk must be borne by the party who can influence the probability that the unfavorable event occurs or can bear it better (hence the expression “best risk bearer”).

Returning to the wholesaler and farmer hypothesis, nothing can exclude the fact that farmer finds himself having to bear a contingent cost because workers go on strike. In this hypothesis, a contract termination rule could be foreseen. However, with a rule that imposes a payment of the price, the farmer – who we assume is more adverse to taking risks – still manages to earn the amount he would have received if he had completed the performance. The contingency underlying the contract is only borne by the wholesaler. This is consistent with the best risk bearer theory seeing as how the risk is allocated to the party that can withstand it better. We need to assume that the best risk bearer\textsuperscript{5} makes sure he is paid a premium for taking on contingent cost risks, and the premium is still received if no contingency costs occur.

From a Law and Economics perspective, with rational contracting parties, the wholesaler, faced with that assumption of the risk, would ask for and normally obtain (given the different risk attitude) payment of a sum of money that, in a broad sense, explains an insurance premium function to take on all risks that could occur while the contract is being executed.

4. The four hypotheses.

At this point, we need to enrich the model by examining four hypotheses:

1) The seller is risk adverse whereas the buyer is neutral and the event causing the contingent cost affects the seller, with an increase in C.

2) The seller is risk neutral and the buyer is risk adverse. The event causing the contingent cost affects the seller with an increase in C.

3) The seller is risk adverse and the buyer is neutral. The event affects the buyer through a drop in V.

4) The seller is risk neutral and the buyer is risk adverse. The event causing the contingent cost affects the buyer with a drop in V.

4.1 Examining the four cases

a. Seller risk averse, buyer risk neutral and the event causing the contingent cost concerns a subsequent increase in costs for the seller.

Adhering to the best risk bearer theory enables us to examine this example and enables us to assess any choices that the parties might make to reach an optimal allocation of risk.
In particular, the seller who is risk adverse, being able to foresee an increase in its costs C due to external events is willing – in the question being considered – to pay a fair insurance premium (or even higher) to be assure that he will not suffer consequences from negative contingencies.
The buyer, risk neutral, would accept receiving a fair premium to take on the obligation to compensate the seller who is risk adverse.
In a hypothetical bargain, we would then need to identify the amount of that compensation. This amount, if the insurance perspective is adhered to in full, would fully correspond not only to the losses but also to the lack of earnings sustained by the risk adverse party in an unfavorable circumstance.
In the case in question, compensation could amount to the difference between the costs that the seller would have sustained without the negative occurrence, and the price that would have been obtained by the counterpart if mutual services had been executed.
In this way we would have a Paretoian improvement. In the presence of a contingent risk, the seller (risk adverse) would pay an insurance premium, in a broad sense, to the buyer so that the latter undertakes to hold him harmless of contingencies from executing the contract.
Imagine a farmer involved in delivering a certain quantity of a certain product. The profit budgeted is P - C. An event occurs causing a change to C. Imagine that C₁ (the new C value) becomes greater than V. In this case, the parties could have established in the initial contract that the wholesaler still pays the profit to the farmer, that is P - C, against a drop in the price paid explaining the insurance “premium” function.
The solution proposed here, though abstractly, could respond to a logic consistent with the “best risk bearer theory” assumptions. It undoubtedly does not match common feelings as it would seem unlikely that one of the two contracting parties, though not having to provide its service, could still obtain the profit hoped for.⁶

4.2 Seller neutral to risk, buyer adverse to risk and contingent cost causes an increase to C.

We are now going to the hypothesis in which the contingent cost is due to an increase in seller costs, but, conversely, it is the buyer who is risk adverse.
Actually, despite the default regulatory solution established, in a hypothetical negotiation, not only related to the contract’s economic values but also to its regulatory

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⁶ Think of the worker who, for excessive contingent costs, cannot go to work. In many legal systems he/she still has a right to a salary.
content, it would be the buyer, in this case, who asks to be relieved of the contractual contingency by foreseeing compensation for damages and, in exchange, payment of an insurance premium.

So the contractual contingency will fall on the seller who, if C should increase, may, alternatively either decide to execute its service with higher costs or, if more advantageous, comply by paying the counterpart damages.

4.3 Seller adverse to risk and buyer neutral. The event causing the contingent cost affects the buyer with a drop in V.

Let’s consider that, when the contract is stipulated, a risk neutral buyer and a risk adverse seller could contemplate that a negative contingency might occur, reducing the value the buyer would have obtained by executing the contract. In this hypothesized transaction, the seller could ask for and obtain, on paying an insurance premium – for the case in question this means a drop in price – that the buyer take on the entire contractual contingency. The seller is willing to pay an insurance premium that is equal or higher than a fair one, whereas, the buyer would be indifferent to taking on the contract contingency and obtaining a fair premium (being risk neutral). In that case, buyer liability could be a full insurance function as the relative compensatory obligation holds the seller, who is risk adverse, unharmed by negative consequences arising from the non-execution of the finalized agreement.

Imagine, for example, that the product to be produced by the seller loses value heavily for the buyer. It is possible that payment of an insurance premium translated into a drop in price, the buyer can undertake to pay the seller the full price.

Consider the example of a party who rents a balcony to watch a horse race. Let us imagine that the competition is canceled. In this case, it is possible that the tenant who is risk neutral is called on to pay the rent even if he does not enjoy the race.

4.4 Risk neutral seller, risk adverse buyer and contingent cost causing a drop in V.

Consider that the contingent cost decreases the V value; however, hypothesize that it is the buyer not the seller who is risk adverse. Then consider that the law establishes contractual termination as a default rule. Being risk adverse, the buyer would then prefer to pay ex ante an insurance premium, which in this case would be settled as a price increase to still and always achieve the expected earnings, amounting to (V-P).

It can therefore be sustained that, regardless of the default regulation established by law, the parties in a hypothetical negotiation were to concur when the agreement was stipulated on the opportunity to allocate the contractual risks, against payment of a premium, to the seller who unlike the buyer is risk neutral.

For example, let’s consider again the hypothesis of a horse-racing fan who is risk adverse and decides to rent, from a risk neutral party, a balcony to watch the race. Let’s also suppose that, due to bad weather, there is a concrete possibility that the race will not be held. The parties could then agree that, against payment of an insurance premium ex ante – that for this case would mean an increase in the price to be paid – the risk neutral owner is willing, despite the fact that the contract was not executed, to pay the
horse-racing fan (risk adverse) indemnity amounting to the missed utility because the race was not held.

If we want to consider a real buying and selling agreement, imagine that the product the risk neutral seller has to produce loses value for the buyer (adverse to risk). We can provide the example of a seller who undertakes to build a special car for the buyer and the buyer then has his/her license revoked (assuming we are talking about an external event). With a risk neutral seller and a risk adverse buyer, the parties could come to an agreement that the latter, against payment of an insurance premium established ex ante, would hold the buyer harmless for the lack of earnings. In these cases, the contracting parties would choose the full transfer of the contingency risk to the seller. This means that the seller (who, purely for presentation purposes, in the horse race example) has to compensate the buyer for not having seen the horse race and, in the car purchase example, the seller has to compensate the buyer for the utility not obtained.

You can hereto note that the parties' different attitudes toward risk lead to very different negotiation solutions. However, we still need to understand what criteria the legislator could have applied to choose a certain discipline, imagining it had adopted the best risk bearer theory.

5 “INSURANCE” FUNCTION AND MORAL HAZARD.

In the hypotheses considered until now, events causing the contingent cost were supposedly all external, i.e., not dependent on the parties’ will. This hypothesis is clearly a simplifying one. Considering, as stated above, that the contingent cost situation may also be the result of endogenous occurrences, caused by the non-optimum conduct of contracting parties.

The problem arises when it is not easy to distinguish whether the altered exchange is due to external or endogenous occurrences. In turn, that critical issue profile can cause moral hazard conduct, that is the opportunistic behavior of one party, not fulfilling his obligations, given the impossibility to attribute negative events to that conduct or to external factors.

Imagine an animal breeder who has to transfer a herd. As he cannot do so directly, he needs a professional rancher. However, when the transfer is completed the rancher turns up without all of the animals that had been delivered to him. He claimed that they had fallen in a crevasse and could only be recovered at exorbitant costs. Considering this case, the impossibility for the breeder to observe the rancher’s conduct means that the latter can blame the excessive contingent cost situation on an external event, thus making it out of his control.

In a hypothetical case such as this, if the rancher reaches his destination without animals, nothing can be done to prove whether he stole the animals or whether they actually fell into a crevasse. The moral hazard behavior consists in the conduct exploiting the chance to be voluntarily noncompliant seeing as how the contract’s non-positive result can also be attributed to external occurrences that the subject need not answer for. In such cases, the contract might have to be configured in a way that is completely different from how it was described in the previous hypotheses (more specifically in the two where the noncompliant party was compensated). Let’s imagine
that the breeder wants to offer insurance against any contingent costs with the rancher. The obstacle for this contract is the fact that it cannot stop moral hazard conduct. The parties could stipulate a contract in which the rancher insures the redelivery of the animals or payment of damages if they should be lost. In this way, we would have a situation where an insurance obligation is not offered by the breeder to the rancher but, on the contrary, by the rancher to the breeder; even though the breeder could be risk neutral. These considerations decidedly limit the possibility that best risk bearer theory be accepted by the legislator.

On the other hand, that problem does not occur when it is the risk neutral party that has to compensate its counterpart. With compensation for damages, de facto, following internalization of negative consequences arising from his conduct, the party having to pay damages has no incentive to apply moral hazard conduct.

6 COMMERCIAL IMPRACTICABILITY: THE TWO THEORIES COMPARED.

The efficient breach theory “apparently” does not justify that regulation. That theory means to leave the debtor a choice whether to comply or pay damages, thus internalizing the cost borne by the creditor. In that way you get an efficient result without the judge having to assess whether there is compliance or not. The judge only has to quantify damages suffered.

In the case of excessive contingent costs, applying the efficient breach rule, the debtor will not comply and will pay the damage when \( C_1 \) is greater than \( V \) – an efficient solution. However, if there is no longer a need to deter underlying the compensatory obligation, we can introduce, as happens in the regulation in question, solutions which, with reference to this specific hypothesis of the exchange not being socially desirable, do not foresee the liability of the non-compliant party. For extraordinary, unforeseeable events, payment of damages does not seem to have a deterrent function when the cost \( (C_1) \) of the service is higher than the benefit for the counterpart. However, on closer examination, if the costs and lost earnings that the counterpart bears through noncompliance are not internalized, termination of the contract as set forth in Article 1467 of the Italian Civil Code Italian could lead to socially undesirable breaches, in cases where \( C_1 \) is less than \( V \).

However, Article 1467 of the Italian Civil Code, first session, must be read with Session 3 which establishes that the party against whom termination is requested may avoid it by offering to amend contractual conditions fairly.

Therefore, this interpretative criterion can then be adopted using Session 1 of Article 1467 of the Italian Civil Code. The legislator intended to regulate cases in which \( C_1 \) is generally greater than \( V \), and the event causing that contingent cost cannot be attributed to the conduct of the parties who at the time of agreement were not objectively able to foresee the possibility.

With Session 3, the legislator wants to “recover” those exchanges for which \( C_1 \) is greater than \( P \) but less than \( V \); therefore, complying is efficient. It is clear that in this hypothesis the burdened party will try to prove the contingent cost, but, similarly, there
is still room for renegotiation. In any case, this can guarantee fulfillment of a socially desirable performance.

In other words, we could say that Article 1467 of the Italian Civil Code, Session 3, aims to “remedy” potential errors made by judges when following a negative contingency occurrence, to assess and execute the agreement previously stipulated. Interpreted like that, regulation of commercial impracticability is “partially” consistent with the efficient breach theory, as interpreted in this work. We contend that it is only “partially” consistent with that theory because the hypothesis of excessive contingent costs that determine that $C_1 \text{ in } \text{ictu oculi} > V$, the contract would be terminated.

It is, however, possible to understand that difference from a functional point of view. The precautions that can be taken to avoid the excessive contingent cost in the presence of possible extraordinary, unforeseeable events, cannot, typically, be contemplated by the parties and hence, taken by them. The same cannot be said relating to those occurrences that the contracting parties could foresee and for which it was possible to take optimum precautions, thus avoiding the excessive contingent costs.

So winding up the contract, when foreseeable occurrences take place without contemplating liabilities for the noncompliant subject would mean depriving the contractual regulations of that deterrence that the compensatory obligation explains; as the debtor, in certain situations (for example, because it regrets the contractual transaction stipulated), knowing that it can be exempt of liability, would be an inducement not to take suitable precautions.

Conclusions differ if we consider the content of this regulation in light of the best risk bearer theory.

On that point, there would seem to be no evidence of the conformity of what is regulated by Article 1467 of the Italian Civil Code with the principles of that theory. Firstly, let us note that Article 1467 does not talk of compensation for damages, which is indemnity, but foresees termination tout court of the contract. From this point of view, we can see that Posner and Rosenfield, in their work on the impossibility and related doctrines, were not called on to interpret a rule foreseeing tout court termination with a contingent impossibility, but based their technical assumptions on a plurality of decisions which seemed to be justified on the best risk bearer theory and which foresaw full allocation or risk to the party that could bear it better.\footnote{Posner & Rosenfield, cit., passim.}

In the Italian legislation, with reference to commercial impracticability, there is, conversely, a solution that simply determines the termination of the contract but does not worry about transferring the risk to one of the two parties.

On considering that, it is more difficult to sustain that the legislator, when drawing up Article 1467 of the Italian Civil Code had a theory similar to the best risk bearer one in mind.

One can also see that an assessment for the judging body, on the different attitudes toward risk of the parties, is anything but simple in the case where the contracting parties have not specifically drawn up the contractual content for hypotheses of unfavorable contingencies. This only legitimizes different solutions related to specific cases where the different risk attitudes of the contracting parties is obvious (just think of
consumers relations where the consumer is usually risk adverse and the professional is neutral.

In the case where a certain assessment of the attitude of contracting parties to risk is not possible (consider the case where the contract is drawn up by two private individuals in an equal condition), we need to ask ourselves whether a contracting forcing rule\(^8\) should be foreseen to stimulate parties to define the allocation of risks themselves. Based on the logic of the insurance function of compensation, the parties should allocate the contractual contingency based on their risk attitudes. It is possible that, based on circumstances, in one case the debtor will take on the risk and in another it will be the creditor.

To avoid the judge finding himself forced to make such considerations, the legislator could deem it necessary to oblige the parties to foresee, when deemed advantageous, the different possible solutions specifically and unequivocally. The rule of the contract being terminated for excessive contingent costs, remaining with Italian law, could then be considered a bargain forcing rule, stimulating the parties to conventionally regulate the hypotheses of extraordinary, unforeseeable events causing excessive costs. Therefore, it is the contracting parties who should take a specific position to establish whether they want to adopt insurance solutions or not.

However, a third hypothesis is possible. The Italian legislator did not consider the problem of choosing a bargain forcing rule or a majoritarian default rule, but simply opted for the rule that lowered legal costs the most; that is the rule leaving damages where they fall.

7. CONCLUSION.

This article is a comparison between potential consequences when imagining that the system incorporate the efficient breach theory or the best risk bearer one, referred to as commercial impracticability.

The efficient breach theory would seem to always require compliance or compensation for damages by the noncompliant party. This guarantees that the costs borne will be lower than \(V\) in compliance, and greater than \(V\) in a noncompliance, where the \(V\) variable is the service value for the counterpart. There are cases where \(C>V\) could be

\(^8\) Scott & Triantis, op. cit., p. 55 states, A “‘bargain forcing’” default is one that encourages the parties to bargain explicitly over the term in question by penalizing one party (or both) should they remain silent. These rules are not set to reflect the ultimate risk allocation preferred by most bargainers. The most familiar of these defaults are so-called ‘information-forcing’ default rules that induce one party to share important information with the other.” Id at 609-610: “We prefer the broader bargain forcing characterization in this paper because it embraces both information forcing defaults as well as other related contract defaults, such as the indefiniteness doctrine. The latter rule encourages the parties to bargain over heterogeneous factors, such as contract price, at the penalty of having the agreement held unenforceable.” For discussion, see Robert E. Scott, A Theory of Self-Enforcing Indefinite Agreements, 103 Colum L. Rev. 1641, 1645-59 (2003)”.

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assigned to the judge for assessment of whether compliance is desirable for the social point of view. This would seem to be the first case regulated in Session 1 in Article 1467 of the Italian Civil Code. The Italian legislator would seem to have reprocessed the efficient breach theory introducing termination in the contract tout court when C is surely greater than V.

However, a situation could emerge where C1<V, and a contracting party could request that the contract be terminated pursuant to Article 1467 of the Italian Civil Code because after the contract had been stipulated, the costs, though still lower than the counterpart’s benefits, had become higher than the agreed upon price. For that hypothesis, Session 3 of Article 1467 of the Italian Civil Code offers a solution that enables us to recover the circumstance that could potentially be “mistakenly” subsumed in the forecast of the provision’s session, in the hypothesis that C is less than V.

Related to commercial impracticability, the best risk bearer theory does not have many loopholes in the Italian Legal System compared to the efficient breach one, though you could say that the legislator has adopted the bargain forcing rule and that it is up to the parties to give themselves regulations that take the different risk attitude into account. Although in legal sectors some gaps can be opened to apply the best risk bearer theory, as in consumer rights, Article 1467 of the Italian Civil Code would seem not to refer to the regulation resulting from that theory. Article 1467, in its first and third session, seems to introduce some refinements to the efficient breach theory, but they do not cut into the traditional approach.

In summary, it can be said that two distinct theories are being upheld. The first one affirms that the Italian Civil Code has adopted a particular kind of efficient breach theory with the disposition ratified by Article 1467 of the Italian Civil Code, Session 1. But this must be read together with the third session enabling the recovery of potential errors arising from applying the first clause. The first clause excludes compensation when it is clear that C>V so payment of money would not perform any function. The third session enables correction of possible mistakes arising from applying the first session in the hypothesis where C1 is less than V yet excessive contingent costs are still declared.

Other interpretations that can be attributed to this for Article 1467 of the Italian Civil Code lie in considering it as a rule to stimulate parties to dictate the preferred regulation, or as a rule that reflects an efficient procedure as termination of the contract leaves the costs where they fall and thus limit the parties’ legal costs. In light of the various considerations made, the first solution seems to have a more solid regulatory base.

We are, however, left with a fourth hypothesis by which the legislator would have chosen the rule involving lower legal costs: that is the one that leaves costs where they fall.