

Some notes on risk, the impact of default and *perpetuatio obligationis*

1. – One of the concepts that has been attracting the growing attention of scholars in recent years is that of risk (1).

As of today, this phenomenon does not appear to have been adequately studied or even classified in legal literature.

The definition of risk has recently been stated as follows: « risk is the economic consequence of an uncertain event » (2). However, this phrase does not appear totally satisfactory.

What in fact emerges as significant is not so much the uncertainty of the event on which the economic consequence depends, but rather the uncertainty of the latter in itself.

From this point of view, in my opinion it appears preferable to stress that the essence of the risk is made up of the uncertainty of keeping what one has or of suffering damage, rather than acquiring an increase, or vice versa.

The risk we are discussing belongs indisputably to the order of economic phenomena and therefore it is a question of legal risk, in the sense that the economic risk is considered here from the point of view of its « having to be, i.e. who has the burden of it is forced by need to undergo it ».

The risk may concern the party who is the holder of an existing juridical position, such as the owner of a commodity or its future holder, such as the party who is entitled to receive that commodity from his debtor.

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(1) G. ALPA, *Rischio*, Enciclopedia del diritto 1989, vol. 40, pp. 1144 ff; Idem. *Rischio contrattuale in Noviss. Dig.*, appendix, Turin 1986, Vol. VI, pp. 863 ff.; M. BESSONE, *Adempimento e rischio contrattuale*, Milan, 1975; ALPA-BESSONE-ROPPO, *Rischio contrattuale e autonomia privata*, Naples, 1982; R. NICOLÒ, *Alea*, Enciclopedia del diritto, Milan, 1958, I, pp. 1024 ff.; C. CARAVELLI, *Alea*, *Nuovo Digesto italiano*, I, Turin. 1937; G. DI GIANDOMENICO, *Il contratto e l'alea*, Padua, 1987, pp. 7 ff.; A. D'ANGELO, *Contratto ed operazione economica*, Giappicchelli 1992, pp. 296 ff.; G. GORLA, *Del rischio e pericolo nelle obbligazioni*, Padua, 1934, pp. 19 ff.; C.M. BIANCA, *Dell'inadempimento delle obbligazioni*, Milan, 1979, pp. 108 ff.

(2) V. CALANDRA, *Delle obbligazioni*, in *Trattato Scialoja e Branca*, Bologna, 1966, under art. 1893, pp. 235 ff.; G. ALPA, *Rischio*, *Enciclopedia del diritto*, 1989, vol. 40, p. 1146.

It may be instantaneous in nature or require a certain duration in time, as is the case when it is a deferred, continued or periodic obligation (3).

In the case in which the risk is inherent to an obligation, it may be divided into contract risk and tortious risk.

Regarding contract risk, it is argued (4) whether it refers to the contract or to the obligation which arises from it.

In my opinion, however, this is a false problem, because in one case it regards the risk for a commitment to be taken (5), whilst in the other, that of a commitment which has already been taken.

The first aspect raises the delicate problem of the relationship between contract risk and the agreement (6), which is still a topic to be explored and examined in depth.

The difference between the risk inherent to the obligation and that taken at the time of the transaction is part of the things that happen naturally.

The risk that is taken can be one's own or of another, as in the hypothesis of a contract of guarantee and in particular in a contract of surety or an insurance contract (7).

We said above that one aspect of the risk is the uncertainty of being able to keep what one had, understood in the physical meaning or, more typically, in its economic value, and thus it can be lost or increased. In particular, this is the risk of the owner of an asset to which the general rule of «*res perit domino*» refers.

(3) The author of the entry on «*risk*» in *the Enciclopedia Italiana di Scienze, lettere ed arti*, Treccani, vol. XXIX, p. 420, discusses static and dynamic risks from a different point of view.

(4) In the sense that risk is inherent to the contract: G. PACCHIONI, *Obbligazioni*, Milan, 1898, p. 344, no. 1; in the sense that it is inherent to the obligations: G. GORLA, *Dal rischio e pericolo nelle obbligazioni*, Padua, 1934, p. 49 and 50.

(5) With reference to the legal transaction, G.C. GRAZIOLA, in *Enciclopedia Europea*, Garzanti, vol. IV, entry on *Rischio*, p. 754, defines risk as «*the conditions in which a subject makes a choice or takes a decision and when every single decision is associated with a multiplicity of consequences, each of which corresponds to the realization of a particular state of the world*».

(6) For a recent history of the concept of agreement and the relative bibliography: see L. FERRIGNO, *Contratto ed impresa*, Padua, 1985, I, pp. 115 ff. In the sense that the concept of agreement has for some time been in difficulty and that it is identified at the level of distribution of the risks agreed by the parties: M. BESSONE, *Adempimento e rischio contrattuale*, Milan, 1975, pp. 207 ff., 227, 258 ff., 262, 268 ff., 273 ff., 258 ff.; ROPPO, *Il Contratto*, Bologna, 1977, pp. 175 ff., A. D'ANGELO, *Contratto ed operazione economica*, Turin, 1992, p. 291 and others tend to identify the agreement with the economic transaction itself, which recalls the concept of risk.

(7) In contracts of guarantee or insurance, the guarantor or the insurer covers the risk of others, both in keeping what the insured possesses and releasing the guaranteed party from a risk taken. One of the largest problems recently raised in legal literature and in case law concerns the determinability of the guaranteed risk and the nullity of open-end guarantees due to the indeterminability of the object, i.e. of the other's guaranteed risk: G. VALCAVI, *Se ed entro quali limiti la fideiussione omnibus sia invalida*, *Foro it.*, 1985, I, 507, *Idem.*, *Sulla fideiussione bancaria ed i suoi limiti*, *Foro it.*, 1990, I, pp. 558 ff.

The continuous changes in the economic values of commodities explains the basis of the cliché that keeping what one has is one of the most difficult things to do.

Thus, the subject who has a liquid capital expressed for example in legal tender or in foreign currency, will undergo the effect of its inert and conservative behaviour if the capital has not been changed in time into a more stable currency.

Similarly, the holder of a commodity will be affected by its depreciation if the investment is kept unchanged, rather than promptly selling it off.

There is a particular application of the «*res perit domino*» principle in the particular case of articles 1376, 1378, 1465 Civil Code due to the real effects of the contract, through the rule of «*res perit ei qui acquirit*».

The risk becomes more evident in the relations of obligations with a deferred, continuous or periodic due date, which have a *genus* as their object.

Here the debtor bears the risk of physical deterioration, either because he has the commodity to be supplied in his capital, because *res perit domino* or because he has to procure it *aliunde* to supply it to his creditor, because *et genus nunquam perit et casum sentit debitor*. On the contrary, the economic variation of the expected performance is in favour or to the charge of the creditor of the same, and with it the greater or lesser onerousness or advantageousness of the same with respect to the owed or owing supply. Therefore, in the final analysis, the reciprocal risk of the business, as a whole, is at the charge or in favour of the parties.

The matter of excessive onerousness, which is the cause of termination of the contract, in the case contemplated by article 1467 Civil Code, where the service due has become excessively onerous due to the occurrence of extraordinary and unforeseeable events, is fitting here (8).

Even more pertinent here is the topic concerning the normal risk of the contract which – in my opinion – requires further study and examination (9).

A complete discussion on risk necessarily also brings in that on the remedies at the disposal of the parties to limit the risk and maximize the result.

These are put options, in which the risk is limited by the call options, the futures, call options and put options (10), omitting the replacement purchases and sales of buy to cover.

(8) BOSELLI, *La risoluzione del contratto per eccessiva onerosità*. Turin, 1952, pp. 171 ff., 221 ff.; MIRABELLI, *La rescissione del contratto*, Naples, 1951, pp. 239 ff.

(9) BOSELLI, *Rischio, alea ed alea normale del contratto* in *Riv. trim. dir.*, and *Proc. civ.*, 1948, p. 769; G. DI GIANDOMENICO, *op. cit.*, pp. 249 ff.

(10) On call options and on put option, see *Dizionario di Banca e Borsa*, Milan, 1979, under the respective entries «*dont*», «*premio*», «*on call*» and «*put*».

Much more space must obviously be reserved for the subject of wagering contracts and in contrast with non-wagering ones than that allowed by these brief notes.

2. – A subject which is to be attentively remedied is that of the impact of the default on the risk.

The Italian Civil Code disciplines it under article 1221, as far as the default of debtor is concerned (11). The law is generally interpreted in the sense that the risk in on the defaulting debtor, as a consequence of a hypothetical perpetuity of the obligation to supply the thing due, depending on the default.

On the other hand, the creditor, during the default of the debtor, would remain harmless from the risk and would only have the chance of gaining, because he would continue being entitled to the fulfilment.

An interpretation of this kind appears totally erroneous.

The law must not be understood in the sense that the defaulting debtor is obliged to supply the thing owed, even after its deterioration and in spite of this, but rather that normally the defaulting debtor must prove the impossibility of consideration due to causes not attributable to him, as stated by article 1207, section 1, Civil Code, in a similar hypothesis.

In other words, this means that in the case in which the thing has deteriorated during the default of the vendor, the latter will not be entitled to claim payment of the price from the purchaser and must return to him the advances and payments received, therefore the unforeseen impossibility becomes the responsibility of the debtor.

As far as the creditor is concerned, carefully reading article 1221 Civil Code leads to considering that the default of the debtor does not produce the sterilization of the risk at the charge of the creditor, as one is generally led to believe.

The last part of section one of article 1221 Civil Code introduces the exception (with regard to the *species debita*) that where the debtor proves that «the object of the consideration would have deteriorated all the same with the creditor», if it had been stood, the loss is placed under the responsibility of the creditor, although the debtor is defaulting (12).

(11) C.M. BIANCA, *Dell'inadempimento delle obbligazioni*, cit. under articles 1219, 1220, 1221, 1222, pp. 183 ff., 232 ff.; A. MAGAZZÙ, *Mora del debitore*, in *Enciclopedia del diritto*, XXVI, pp. 934 ff.; U. NATOLI and L. BIGLIAZZI-GERI, *Mora accipiendi e mora debendi*, Milan, 1975, pp. 223 ff.; M. GIORGIANNI, *L'inadempimento*, Milan, 1975, pp. 87 ff.; M. BARASSI, *La teoria generale delle obbligazioni*, III, Milan, 1948, pp. 247 ff.; RAVAZZONI, *Mora del debitore*, in *Noviss. Dig. it.*, X, Turin, 1964, pp. 904 ff.; A. MONTEL, *La mora del debitore*, Padua, 1930.

(12) The exception already admitted by classical Roman law (Ulp. Dog. 30, 47, 6) was generalized by Justinian.

In line with the preceding hypothesis, the defaulting vendor who must prove that the thing would have deteriorated in the same way with the purchaser, despite his no longer having to receive the thing, must pay its price all the same and can no longer claim the return of any amounts or advances paid.

The gravity of the risk which, whilst in the limited hypothesis considered, continues to be incumbent on the creditor, despite those who deem that the default of the debtor sterilizes the risk borne by the other party, cannot be underestimated here.

In this regard, it must be said that an authoritative interpretation has extended the scope of article 1221, section 1, Civil Code, from the physical deterioration to any event of an economic nature, i.e. to that in which «the consideration could not have been used by the creditor» (13).

The risk continues to be incumbent, in the final analysis, although exceptionally, on the creditor despite the default of the debtor, until he is discharged in the fullest sense, with its materialization, i.e. with the ascertainment that the promise is impossible or the termination of the contract, as we will be able to say below.

This aspect is one of the most neglected, both in legal literature and in case law, with the exception of some mention of the difficulties relative to the proof that the commodity would have deteriorated all the same with the creditor (14).

3. – Unlike default, the creditor becomes insensitive to the risk (to any risk) relative to the expected consideration on the *perpetuatio obligationis* occurring, vis-à-vis the debtor. Beyond what it may seem from the literal expression, the perpetuated obligation must not be understood as definitively fixing (perpetually) the constraint of performance of the primary obligation of the debtor to supply the thing and of the creditor to pay the price.

Nor can fixing the constraint of the debtor to supply (despite the impossibility that has come into being) the deteriorated commodity at the agreed price be understood, running the risk of the subsequent and undefined price variations, in the case of the purchase of a *species*, of that commodity at that price.

Here it must be remembered that due to the default (which is temporary) and can be paid off at any time, the risk of deterioration of a *species*

(13) A. TRABUCCHI, G. CIAN, *Commentario breve al codice civile*, Padua, 1984, sub art. 1221, p. 816.

(14) C.M. BIANCA, *op. cit.*, Milan 1979, p. 238; P. PERLINGERI, *Codice civile annotato*, Turin, 19, sub art. 1221, pp. 59 ff.

debita is temporarily transferred from the creditor to the (defaulting) debtor.

Following the deterioration, the risk is definitively transferred from the creditor to the debtor in the sense that *casum sentit debitor*, with the consequence that the creditor is definitively released from the obligation of paying the price and the debtor is equally released from that of supplying the thing (it being *species perita*) but the latter must pay compensation for the loss existing at the time of the deterioration by way of liability (*perpetuatio obligationis*) (15).

In the final analysis, remaining with the case of the sale of a *species debita*, the defaulting vendor suffers the consequences of the loss of the commodity in the sense that he loses the right to claim the counter-consideration from the purchaser and must also pay him any greater value of the deteriorated commodity, with respect to the agreed price (by way of loss of profit), thus fixing, definitively, the reciprocal relationship.

This relationship becomes perpetual in the case of impossibility of performance.

The reciprocal risk of that defaulting vendor and of that purchaser is crystallized at that time, so that subsequently the parties run no further theoretical risk in relation to the primary performance, reciprocally expected and which has become impossible.

Following the materialization of the risk, the situation also becomes definitive in the sense that the creditor no longer runs the risk foreseen under article 1221, section 1, last part, Civil Code, and that is, that he may be summoned to bear the loss, because the commodity would have deteriorated all the same with him and the debtor (on his side) cannot further and for the remaining period of time, oppose any eventuality and the relative risk.

Obviously the creditor, after he has been released from his obligation towards the other party, and after the risk has become fixed at the time of the deterioration, can no longer claim any earnings from subsequent price increases of that commodity.

The materialization of the risk, following the *perpetuatio obligationis*, as I have written at an earlier date (16), and as has recently been correctly taught by the decision of 20th June 1990 no. 6200 of the Supreme Court, operates in the two directions, so that the parties become mutually insensi-

(15) P. PERLINGERI, *op. cit.*, *loc. ult. cit.*, and others agree that article 1221 Civil Code applies to the defaulting debtor of a *species* in the delivery of the thing, therefore this condition reverses on him the liability that otherwise would have been that of the purchaser in relation to the principle of *res perit domino*.

(16) G. VALCABI, *Intorno al concetto di perpetuatio obligationis, e al tempo di riferimento nella stima del danno da risoluzione per inadempienza contrattuale*, *Riv. dir. civ.*, 1992, II, p. 399; Id., *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II, p. 34 ff.

tive to any subsequent positive or negative events of the reciprocally expected counter-consideration which must not be performed by them.

Each of these two parties (including the creditor) cannot fear any prejudice for the future nor hope to draw any advantage, for example, from the subsequent trend of prices and therefore from their increase or decrease.

It must be underlined here that the contract risk principally concerns the counter-performance which is expected from the other party and its economic link with the performance due, so that release from the mutual obligation determines the termination of the risk or rather, in the relations of liability, its materialization with reference to the time considered.

What has been stated here on the materialization of the risk and of *perpetuatio obligationis*, in the hypothesis of impossibility of performance can be repeated for the case of termination of the contract under article 1453 and ff. Civil Code.

Here, however, the effects of the pronouncement of termination are retroactive in accordance with article 1457 Civil Code at the time of the non-fulfilment, releasing both (i.e. the creditor and the debtor) from their reciprocal obligations and fixing at that time the loss for which compensation is to be paid.

In the termination for contractual non-fulfilment, the obligation is perpetuated and the risk is materialized at the time to which the effects of the termination are traced.

From this time, the parties must no longer fulfil their performance and they can no longer claim that of the other (due to the reciprocal release from their obligations) and thus neither of the two is sensitive to the risk relative to the reciprocally expected performance and no longer mutually due.

Obviously the risk relative to the commodity which previously was to have been supplied will be deemed, from that time, as at the expense or in favour of each party and, due to the retroactive effects of the termination, is once again at the disposal of its owner, according to the rule of *res perit domino*.

In a termination under article 1454 Civil Code, the perpetuation is enacted at the time when the contract is terminated after the expiry of the term stated in the invitation.

In the termination under article 1456 Civil Code, it will take place at the time when the rightful termination occurs.

Each party, after the termination, in the various forms shown above, will once again run the risk concerning the commodities that it must return to the other.

The obligation of return will have the same events as any obligation and thus in its turn will be affected by the consequences of the default and

any materialization of the risk and relative compensation for damage, of which we have spoken regarding the primary obligation.

The compensation that follows the materialization of the risk and the *perpetuatio obligationis* must be performed by the party that is obliged to the other with the relative additional costs.