The dimension of time on language and legal thought. Some preliminary notes on long term contracting in the comparative legal discourse(*).

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1. Introduction.

This paper aims at exploring how time affects some legal categories, such as contracts and, in particular, the usage of language by contracting parties depending on the extended life of the relation. When faced with the need to deal with changes in external circumstances, either ordinary or extraordinary, the wording of contracts changes accordingly, as parties are not able to (nor they could) define precisely the terms of the exchange. In long term agreements, language mirrors parties' inability (and, to some extent, their choice not) to reduce, at the time of its making, contingencies affecting the contract.
As a consequence, the language is loose and the vagueness stems from the impossibility to foresee all future circumstances, all future states-of-the-world, and define once for all parties' needs over time. Despite being conscious in the long run such vagueness is somehow bound to increase, and the strength of the contract to decrease, still parties find useful to enter an agreement and avail themselves of a dotted line to follow in the government of their relation. The contract becomes nothing more than a guide for future behaviours, whose content has to be detailed as the relation evolves.
If parties' language varies in long term contracts with respect to a general paradigm of legal contracting, consequences are expected to be observed whenever judges or legislators provide default rules, for they cannot fill in the gaps with those terms that parties were not able to work out. In other words, uncertainty caused by the influence of time shapes under different forms the law of long term contracts.
Language challenges lawyers in several different ways. In the first place, it poses the problem of what 'long term contracts' really means. The starting point, then, is to understand in full what such formula is supposed to express.

2. Long term contracts in the current legal context.

The law of contracts is not a uniform body of law any longer. The primitive monolith is broken into at least two parts and "contract" as a legal category does not convey today a clear and unique meaning for an economic operation as it used to be in the past. In the current legal setting, such a divide is particularly clear within those legal systems belonging to the European Union[1]. Indeed, the mushrooming of rules on all aspects of

(*) Thoughts and ideas herein expressed stem from a cooperative efforts of the authors. Massimiliano Granieri has written paragraphs 1, 2, and 3; Roberto Pardolesi paragraph 4.

[1] Italian comparative legal scholars (and not only) have contributed to the understanding of such an evolution of contract law in Europe. See R. PARDOLESI, *Diritto dei consumatori ed eliminazione degli squilibri: verso una riscrittura giudiziale del contenuto dei contratti?* in *Discipl. comm*., 1999, 9; G. ALPA, *Nuove frontiere del diritto dei contratti*, in *Contratto e impresa*, 1997, 961, 979, and V. ZENO-ZENCOVICH, *Il diritto europeo dei contratti (verso la distinzione tra "contratti commerciali" e "contratti dei consumatori")*, in *Giurisprudenza italiana*, 1993, IV, 57. For an attempt of classification D. DI SABATO, *Contratti dei consumatori, contratti d'impresa*, in *Riv. trim. dir. e proc. civ*., 1995, 657.

consumer protection has led to an autonomous body of law, with its own principles, its own procedures, and its own language[2].
On the other side, another apparently uniform body of law stands, governing generically all other (commercial) relationships. Such broad and generic area hosts also those arrangements characterized by a stronger interaction between the parties because of the extension of the agreement over time.
A comparative survey helps noting that only recently long term contracts have been credited of legal validity. The original treatment by legal systems within the Western legal tradition was of general distrust, suspicion, and sometimes even of contrariety. If we observe the evolution of requirements and output contracts in the U.S., extraordinary commonalities can be discovered with the development of similar types in the French and Italian experience[3]. A contract with fixed price and open quantity was considered unenforceable for want of consideration, in an age when consideration was meant to be 'bargained-for' consideration, hence detriment in exchange for detriment[4]. In a formalistic standpoint, while one party was actually bound, the other was not (at least under the commonly accepted paradigm of exchange) and, in such a setting, the promise to perform, even within fixed limits, was considered illusory[5]. Courts attempted to solve

[2] Just to give an example of how intense has been the production of rules affecting consumers in Europe in the past few years see Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, 29). Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, 59). Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, 31). Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, 48) as modified by Directive 90/88 (OJ L 61, 10.3.1990, 14) and Directive 98/7 (OJ L 101, 1.4.198, 17). Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, 19). Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, 83). Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, 12). The massive production of rules on contracts as eventually led to the idea of a uniform contract law for all European member States. See the European Commission Communication on Contract Law (OJ C 255/1 of 13 September 2001).

[3] The common law was not ready to accept those kinds of commercial relations. The embarassment of the system has been described by G. GORLA, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico*, 2 voll., Milano, 1954, vol. I, 473: «la *common law*, col suo retaggio di diritto medievale dei contratti fondato su un mondo non d'affari, si è trovata e si trova in gravi difficoltà nel sanzionare questi negozi. Essa, cioè i suoi giudici, hanno cercato talvolta di cavarsela con espedienti, finzioni, acrobazie; talaltra hanno dovuto rinunciare all'ardua impresa, o hanno cercato di ringiovanire vecchie ispirazioni sulla *reliance*, pur essa, talvolta, costituente una finzione».

[4] *Ex multis*, *Wickam & Burton Coal Co. v. Farmers's Lumber Co*. (1920), 189 Iowa 1183, 179 N.W. 417, 14 A.L.R. 1293; *Miami Coca-Cola Bottling Co v. Orange Crush Co*., 296 F. 693 (5th Cir. 1924).

[5] The view is expressed by *Restatement (Second) of Contracts*, § 77 («A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances (...)»). Critiques to the illusory promise doctrine have been expressed by L.L. FULLER, M.A. EISENBERG, *Basic Contract Law*, 6th Ed., American Casebook Series, West Pub., St. Paul. Min., 1996, 106, because it is not at stake an imperfect bilateral contract (that is, a contract where one of the two promissory consideration is missing) but a perfect unilateral contract, in which the exchange is for a promise against an act, «the act of giving the promisor a chance». The same position is expressed in C.N. BRUCKEL, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: a Proposal for a New System of Validation*, 68 MINN. L. REV. 117, 141 (1983).

the issue justifying the commitment with exclusivity. In other words, if the buyer can buy only from the seller, then a commitment really exists and the promise is not illusory[6].

Of course, a strong injection of legal realism is needed to provide a solution consistent with the everyday business life, where requirements and output contracts accomplish important economic results. And it came with the enactment of § 2-306 (1) of the *Uniform Commercial Code*, where requirements and output contracts are eventually held valid and enforceable[7].

As far as the Italian Civil code is concerned, an extraordinary parallel evolution can be observed between requirement and output contracts and the "contratto di somministrazione". Interestingly, Gino Gorla –not by chance, a comparative legal scholar– first came across such similarities, when in his two-volume work on contracts in 1952 focused on requirements contracts[8]. Traditionally, as we have seen, those types of contracts, at least until the adoption of § 302 of the U.C.C., have been considered not enforceable for want of consideration. Reasons for distrust has always been the vagueness of the language, the words used by parties to create a contract without too strict commitment, without a sufficient level of detail as to prompt the illusion that an exchange of real performance took actually place. In Italy, only the enactment of the Italian Civil Code in 1942 let the "somministrazione" reach the same dignity as other known typologies of contracts, with respect to a past situation where such form of long term contracting, while appreciated and actually used by middlemen and the industry, suffered a strong identity crisis and was sometime doubted of validity because of the indeterminacy of one of the performances[9]. As a matter of fact, since 1882 (year of enactment of the Commerce Code) the dominating idea of exchange in contract is deeply related to the paradigm of the sale of goods, where the bargain leads to a trade between a good and its price. The exchange of a certain (identified) good is carried out in a certain place, at some (determined) point in time, between two identified and rational parties and the two considerations are supposed to be approximately the same in value. Of course, if parties show the same need for the same good, although different in quantity, over an unpredictably long period of time, the above described paradigm imposes the reiteration of the same contract, as to create as a long series of sales as it is required by the buyer. Sometimes, nonetheless, in order to satisfy recurrent needs, parties may find convenient to enter a relationship where quantity and price are not actually determined. From an economic standpoint, the idea of having a relation that replaces a number of identical and repeated instantaneous exchanges is by far convenient as it spares buyer the costs of repeatedly identifying sellers, sellers the costs of ensuring appropriate outlet to their productions, and general reduction of transaction costs. Of course, a contract of such a kind is something more than a short list of goods

[6] Cf. BRUCKEL, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts*, 135.

[7] The Official comment 1 to the Section expressly recognizes that the specific solution provided for those kinds of arrangements is actually the one governing in general the whole UCC, «which requires the reading of commercial background and intent into the language of any agreement and demands good faith in the performance of that agreement». For comments see S.A. SILKWORTH, *Quantity Variation in Open Quantity Contracts*, 51 U. PITT. L. REV. 235 (1990).

[8] Cfr. GORLA, *Il contratto*, cit.

[9] Once again a result which is common to the experience of the U.S. contract law and strongly influenced by the classical ideology. For a critique see MACNEIL, *Economic Analysis of Contractual Relations*, cit., 1021 («[t]he subject of exchange must be sufficiently identifiable so that the user of the model can tell what the choice or choices concern»).

and prices to be exchanged. It is rather a plan, drafted by parties with the underlying idea that actual performances will be determined at the time a specific need occurs.
Following the tradition of the *Code Napoleon*, also in Italy, at the very beginning, the 'somministrazione' is considered not as a contract but as an objective act of commerce (see art. 3, No. 6, Commerce Code of 1882). The objective nature is given by the fact that there is an act of 'undertaking' by the merchant (the *Übernahme*, under the German law). Such a feature does not bring to the appraisal of the contract for the continuity of the supply; rather, it valorises the activity carried out by the merchant for the procurement of goods. The element of exchange overwhelms the relational dimension, where the duration is a prevailing attribute.
As time passed, the recurrence of performances over a period of time caused the legal thought to focus on the long term contract (the 'somministrazione') as something distinct by the indefinite couples of considerations, repeated for the life of the agreement[10]. Of course, the enforceability of the relation does not depend now on the validity of the two performances; rather, it draws from the acceptance of the idea that the relation is accomplishing an autonomous and worthwhile economic function by itself. Thus, the duration is a cutting across feature of many contractual relations, that parties work out to satisfy over an appreciable period of time certain requirements[11].
It does not take much to understand that the long way ended with an important result: long term contracts do exist, are legally possible and enforceable, and are structurally and functionally different from other expressions of private ordering, and they imply a different use of the language. Still the problem remains, of how to define them.

3. Defining long term contracts using the variable of time. The language of scholars.

The formula "long term contracts" has been widely employed in the legal discourse by judges, lawyers, and legislators. Despite the widespread use, what is really behind the language is far from being well defined and every effort for a clarifying study should move from here. Actually, the repeated use of the locution contributed to the semantic impoverishment of the terms and, as a result, the formula itself is diluted and barely distinctive of a well identified category. Still, an operational definition is needed, for time and the relational dimension affect the structure and require a further definition of rights and duties depending on the differentiated types.
Interestingly, on the evolution of the formula here dealt with different factors have exerted some form of influence. Indeed, the area of phenomena generically referred to

[10] The main contributor to the evolution of the 'somministrazione' as an autonomous and enforceable type of contract was L. MOSSA, *Il contratto di somministrazione*, Cagliari, 1914. The peculiarity of the 'somministrazione' would be in the definitive replacement of a unique contract to a host of sales contracts and, as a consequence, the creation of a relation over the repetition of instantaneous, discrete events. The relation is functional to the satisfaction of a continued need for supply. See also O. CAGNASSO, *La somministrazione*, in *Trattato di diritto privato* diretto da P. Rescigno, vol. 11, t. 3, Torino, 1984, 409.

[11] The logic underlying the above described evolution ended in the open character of art. 1570 of the Italian Civil code. As noted by OPPO, *I contratti di durata*, cit., 176: «[d]all'attinenza della durata alla causa, propria dei nostri rapporti, deriva che, quando il contratto abbia per contenuto la ripetizione di prestazioni che potrebbero, isolatamente prese, costituire l'oggetto di altrettanti contratti ad esecuzione istantanea, la durata introduce nel contratto (...) un elemento atipico rispetto al contratto ad esecuzione istantanea, che lo allontana dallo schema causale di quest'ultimo».

as long term contracts is commonly studied by at least three different sciences: law, economics, and sociology.
Such concurrence of contributions is, at the same time, concurrence of communicative actions (to use the Habermas' terminology[12]) and, to some extent, concurrence of problems. Concurrence of languages sometimes blurs into confusion, as terms are used in a fungible way, although describing supposedly different legal entities.
Lawyers use the words long term contracts referring to any contract somehow destined to last over an appreciable period of time. Such criterion is highly imperfect and poorly selective. Indeed, as the relational contract theory points out, all human relationships have several coordinates and all contractual relationships have to be seen in a diachronic perspective[13]. Lawyers sometimes resorted to time as a distinctive feature of certain forms of private ordering, although time by itself is poorly peculiar and by no means distinctive of an autonomous category of contracts[14].
The perspective changes completely when long term contracting is referred to the particular needs of the parties. From this standpoint, we observe that long term contracts appear more frequently within those settings that industrial economists have defined as

[12] See J. HABERMAS, *The Theory of Communicative Action, Volume One: Reason and the Rationalization of Society*, Boston: Beacon Press, 1984.

[13] Relational contract theory is considered a reaction to the formalism of classical and neoclassical contract theory. In the U.S. legal history, classical contract law is the one identified in the school of thought developed in XX century, whose major contributor is Samuel Williston (see *The Law of Contracts*, 1920). The product of this school is the Restatement (First) of Contracts of 1932. More details can be found in I.R. MACNEIL, P.J. GUDEL, *Contracts: Exchange Transactions and Relations*, (3rd ed.), Foundation Press, NY, 2001, 13, fn. 20. Neoclassical contract law is mostly expressed by the *Uniform Commercial Code*, Article 2, and by *Restatement (Second) of Contracts*. Classical and neoclassical contract law are usually referred to as 'traditional' contract law, as opposed to the relational contract law. On this latter, see I.R. MACNEIL, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 (1978), fn. 2. According to FEINMAN, *The Significance of Contract Theory*, cit., 1285, neoclassical contract law is nothing but an attempt to order the classical one and it is by no means something original. Classical contract theory has been terribly criticized by M.A. EISENBERG, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000). Ian Macneil and its school has been the author who prompted the relational contract theory over a 30-year production of articles, essays and books. Among his main works: *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974), *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974), *The New Social Contract*, Yale Univ. Press, New Haven, 1980, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 NW. U. L. REV. 1018 (1981), *Values in Contracts: Internal and External*, 78 NW. U. L. REV. 340 (1983), *Relational Contract: What Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985), *Relational Contract Theory as Sociology*, 143 J. INSTITUTIONAL & THEORETICAL ECON. 272 (1987), *Relational Contracts Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000). When seen from a comparative perspective (not necessarily internal to the U.S. system), Macneil's work has exerted an extraordinary influx on the later generations of (not only legal) scholars. See W.C. WHITFORD, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545 (1985). Among economists, see V.P. GOLDBERG, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979), R.E. SCOTT, *A Relational Theory of Default Rules for Commercial Contracts*, 19 JOURNAL OF LEGAL STUDIES 597 (1990).

[14] Indeed, studies on time in civil law have been so far rare, as pointed out by P. FERRO-LUZZI, *Il tempo nel diritto degli affari*, in *Banca, borsa e titoli di credito*, 2000, I, 407, 409. Scattered contributions, mainly in philosophical perspective, are R.H.S. TUR, *Time and Law*, 22 OXFORD JOURNAL OF LEGAL STUDIES 463 (2002), and G. HUSSERL, *Diritto e tempo: saggi di filosofia del diritto* (toriginal title *Recht und Welt*, Frankfurt am Main, 1964), Milan, 1998.

"intermediate-market transactions"[15]. To make things simpler, market transactions other than those involving consumers are worked out such in a way to cope with the uncertainty coming from the unforeseability of end consumers' needs. To avoid shortages and eventually stoppages in production and distribution, each previous layer of the distribution system and, more backward, of the production system has to enter stable and long lasting relationships as to ensure reliable sources of supply and continuous outlet to the market.

Such complex web of contractual relations leading from the very early stages of procurement to the final consumers have been explored in the industrial organization literature and economics has contributed to the understanding from the legal viewpoint of these intermediate market transactions, including distribution and requirements contracts. Here, though, another science (and another language, accordingly) comes into play. Indeed, economists, usually refer to long term contracts as incomplete contracts. But incomplete contracts are not necessarily long term contracts. According to neo-institutional economics, incompleteness is a reaction to transaction costs and a consequence of the human limits, and although duration and incompleteness are directly related, all human relations are always somehow incomplete. So, it would not be utterly wrong to state that all contracts to a certain degree are incomplete and, in this respect, there is no way to reach a definition of what is a long term using the generic trait of incompleteness[16].

Sociologists and sociologists of law resort to relational contract theory and sometimes also "relational" is used as a synonym of long term. Nevertheless, the semantic areas of the two terms is not overlapping or coincident. A relational contract is a contract embedded into a web of social relations and structures and, for the same reason, it creates reciprocity and interdependence among parties[17]. Of course, time is one of the variables from which a relation depends and, of course, the language is one of the common, pre-existing structures, from a sociological standpoint, which parties rely upon and that makes possible the exchange. In this regard, though, time is not distinctive at all.

One of the most strict critiques to the relational contract theory is that of a missing operational definition. As a consequence, considering a long term contract as a relational contract without having defined the latter would shade inextricable doubts on the ontology of the former. Though fascinating, relational contract theory has nonetheless strong adversaries. Professor Mel Eisenberg has concluded that all endeavours to define relational contracts with the purpose of having a separate body of rules for them is doomed to failure, the reason for such negative result being that the relational dimension is pervasive and recurrent in any form of contracting[18]. The value of a theory on relational contracts would be the contribution to the understanding of the contract as a legal entity necessarily alive and to the erosion of the classical contract

[15] See O.E. WILLIAMSON, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 237 (1979).

[16] The literature of law and economics on incomplete contracts is alluvional; among other and more recent contributions, cf. G. BELLANTUONO, *I contratti incompleti nel diritto e nell'economia*, Padova, 2000, besides the traditional A. SCHWARTZ, *Incomplete Contracts*, in *New Palgrave Dictionary of Economics and Law*, 1997, vol. 2, 277 (where relevant quotations), ID., *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUDIES 271 (1992).

[17] See, *retro*, authors quoted in fn. 13.

[18] See M.A. EISENBERG, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

theory. Besides that, there cannot be a law of relational contracts. Moreover, to the extent the theory loses its connection with the domain of law, it become a general (or generic) theory of all human relations. In one of its numerous articles, the inventor of 'relationalism' in contracts considers (quite paradoxically, if one thinks of long term contracts as being relational) consumer contracts as one of the clearest and most straightforward examples of relational contracting. As a matter of facts, it has to be so, since the spot, quick, and discrete transaction is possible in so far as parties can rely on several pre-existing and commonly accepted social structures, such as money and language (even legal rules), that make up the relation. It is self evident that what is peculiar for spot transactions cannot be, at the same time, distinctive of long term contracts.

Notwithstanding all risks of misinterpretation and its expansive character, and even though relational contract theory is a genuine, autochthon reaction to the classical contract theory, relational contract theory has been terrifically explicative because the idea of looking at long term contracts as relationships shows how contracts in general, as parties' engineered products, live their lives and evolve over time. What really changes is the content and, to be sure, the sense of what parties meant at the time the contract was made. Put in a different way, even though the language employed witnesses the effort of reducing the relation to the present of its making –what Macneil defines "presentiation"–, the relationship has no present and contract is rather a way to project the exchange into the future. Since the language is chosen once for all, its content varies whilst the relationship evolves, so that the question turns out to be whether the perspective to be privileged is one *ex ante* –at the time the contract was made, according to the presumable meaning adopted by parties– or one *ex post*, with the meaning and implications of a relationship which is now enriched by the effect of the elapsed time. It is not at stake here the idea of favouring that is respectful of parties' will for, according to the relational theory, parties to a relation express continuously their will; the real issue then becomes which view better reflects such a will.

4. The language of the contract and the language of the law.

Contract is *lex contractus*; it is the law by and among the parties in all legal systems. This statement helps to 'discover' the normative language of contracts and it is evidence of parties' will and parties' ability to shape out a common program for the future (*in eadem sententia consentiunt*, they agree in the same sentence, in the same words). In this vein, contractual drafting ends up being as difficult and complex as drafting statutes.

In long term contracts the proper scope of language is not to give a defined content to parties' needs. Rather, it pursues the opposite purpose: to create a sufficiently loose cage, that the relationship itself will fill in.

As of now, notwithstanding the enthusiastic acceptance of relational contract theory and its implications, the law has continued to deal with ongoing relations as they still belonged to the monolithic idea of classical contract law. A conspicuous example can be default rules. In the 90s there has been an incredibly rich debate on default rules, as probably a by-product of an intense work done in economics studies (from there migrated to law and economics) on incomplete contracts. Economists reasoned in a descriptive way. They concluded that the contract is incomplete, as indeed this is how they perceived it with respect with all possible state-of-the-world. Legal scholars, on the

other side, took a step further, adopting a normative perspective and tried to define the best rules to fill in the gaps of incomplete contracts. The debate has been crucial to the understanding of many aspects of contract law, especially in the perspective of harmonization and, among other things, the creation of an European Civil Code. It offered more reliable tools to decide whether and when mandatory rules are to be adopted and what are the effects of the adoption of a rule. Important articles have been written by civil law scholars using part of this results[19].

Paradoxically enough, such a rich and multifaceted debate turns out to be biased[20]. Relying on an instantaneous model of contracting, it did not consider properly the issue of language and its relational dimension.

Providing missing terms is, needless to say, something which involves the language. If we accept the idea that long term contracts differ somehow from other types of contractual settings, then also default rules –in other words, the law of contracts – need to be drafted according to a specific language. A language which is impalpable and generic as it is the one used by parties, but, at the same time, respectful of parties' will. It is not here an issue of mere interpretation, of which meaning for which word or sentence. It is rather a way to consider language as 'relational', as mutable over time to reflect, in every single moment, even when much time passed since the conclusion, what parties want.

To be more explicit. The economic wisdom about contract drafting assumes that parties will strive to regulate any contingency that deserves being dealt with, meaning they will undergo transaction costs till the point where those costs exceed the advantages stemming from the assessment of the consequences of the foreseen contingency: as it is obvious, beyond a certain point, contracting will be no longer convenient. This approach does not upset the traditional doctrine just because it usually focuses on peripheral margins of a deal which is, under every other respect, predominantly (although not totally) explored and disciplined. But when it comes to long term contracts, this unstable equilibrium fades away. By definition, the penumbral areas dominate; the number of issues which cannot be properly considered becomes overwhelming: the inevitably bounded rationality expressed by the parties postulates that several risks are ignored or not coherently allocated, just because trying to govern them would be simply too expensive.

What happens is that language becomes apparently ambiguous. The preciseness that would be basic standard in the usual transaction is substituted by loose references to paradigms lacking, at the time of contracting, any substance. Were the normal rules of interpretation to be resorted to, the outcome would probably come close to recognizing the promises involved in the deal are illusory. But in such a context, the different language is a clear clue of the necessity of availing oneself of different hermeneutics. The contract promise will become effective in a future environment which will be contributing in a decisive manner to its very definition, with nothing really surprising in so multi-tiered a process of progressive definition.

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[19] Cf. R. PARDOLESI, *Regole di «default» e razionalità limitata: per un (diverso) approccio di analisi economica di diritto dei contratti*, in *Riv. crit. dir. privato*, 1996, 451 (in response to A. SCHWARTZ, «*Law & Economics*»*: l'approccio al diritto dei contratti*, in *Rivista critica di diritto privato*, 1996, 427), and U. MATTEI, *Il problema della codificazione civile europea e la cultura giuridica. Pregiudizi, strategie e sviluppi*, in *Contratto e impresa/Europa*, 1998, 223.

[20] For such critique, see particularly J.M. FEINMAN, *Relational Contract Theory in Context*, 94 NW. U.L. REV. 737 (2000).

This is only the first step: many others are to be implemented in order to shape a long-term contract discipline capable to fit, and protect, such an important tool of the economy.
In one sentence, or so: the problem is not limited to realize the province of contracts is to be vertically divided into B2B (sophisticated) contracts and consumer transactions, plagued with information asymmetry (discounting the likely opportunity of discovering a third, grey sector, where judicial activism –aiming to restore the fairness of the exchange and to short-circuit the abuse of economic dependency— might take the lead). The province of contracts should undergo a further, horizontal divide, according to the weight of future momentum in the deal.
Long term contracts have built their own language; but are still searching (and desperately need) proper, specific rules.