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RES JUDICATA AND CONSUMER PROTECTION IN THE EU: THE DIALOGUE BETWEEN THE COURTS (AND THE LEGISLATOR)

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ABSTRACT: The case law of the European Court of Justice (CJEU), despite confirming in theory the importance of res judicata, has regularly affirmed the need to overcome stability of national judges' opinions formally qualified as final if that is needed to ensure effective consumers protection. Against this scenario, the Italian Supreme Court (Cass., sez. un. 6 April 2023, n. 9479), seems to have initiated a dialogue with the CJEU, mainly aimed at giving actuation of the principles enacted by the European Court but nevertheless with some apparent revindications of autonomy. The variety of solutions adopted by national judges and the creative effort of the Italian Supreme Court seem to confirm that an intervention by European or national legislators could be required at this point on the matter.

KEYWORDS: *res judicata*; consumer protection; Supreme Courts; CJEU: enforcement procedure

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1. INTRODUCTION[1]

At least since the famous opinion of the Court of Justice of the European Union (CJEU) in the *Lucchini* case in 2007[2], it is clear that in the European legal system at certain conditions res judicata can be overcome to protect superior substantive interests set by the European legislator.

The topic has been at the heart of fecund debate. Res judicata is indeed one of the pillars of modern procedural law systems[3] and its challenge might derive the sunset of procedural law itself, toward the direction of a new role of the judges as administrators rather than independent adjudicators of disputes based on the rule of law[4].

The horizon of the discussion is the natural interrelation between the European legal system and the procedural systems of the member States, characterized in terms of supremacy of the first and autonomy of the latter ones in the subject of civil procedure, where attraction, independence, and resistances between the two levels coexist[5].

New elements of reflection on this regard have been enlightened by four preliminary rulings of the CJEU issued on May 17th, 2022, concerning the interpretation of Articles 6 and 7 of Council Directive 93/13/EEC of April 5th, 1993, on unfair terms in consumer contracts. Particularly, considering the opinion issued in the joined Cases C-693/19 and C-831/19, upon requests for preliminary rulings under Article 267 TFEU from the Tribunal of Milan, the Court stated that «*Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation which provides that, where an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not, on the ground that the force of res judicata of that order applies by implication to the validity of those terms, thus excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms on which that order is based*».

The ruling has attracted widespread attention among legal scholars, who have attempted to interpret it within limits and principles of the Italian procedural system, with the target of balancing the opposing values of certainty in legal traffics and due protection of the weaker party[6].

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[1] This paper has been presented by the Author in occasion of the Summer School organized by the *International Association of Procedural Law* (IAPL) in Madrid (Spain), at Complutense University, from 19 to 21 June 2023, on the subject of "*Challenges for procedural law*".

[2] Caponi (2011), p. 239 ff., spec. 276 ff.; Consolo (2008), p. 225 ff.; Biavati (2007), p. 1591 ff.; Zuffi (2008), p. 382 ff.

[3] Menchini (1997), par. 1.

[4] Biavati (2003), p. 153 ff. With particular attention to the evolution of the role of the judge under the CJEU's jurisprudence on consumer protection, see Fiengo (2022), p. 526 ff.

[5] Biavati (2000), p. 717 ff.

[6] See *ex multis* Caporusso, D'Alessandro (2022), p. 485 ff.; Soldi, Capponi (2023); Rasia (2023), p. 63 ff.; Giussani (2023), p. 291 ff.

Finally, the Italian Supreme Court issued an opinion with the declared aim to give full actuation of the principles enacted by the CJEU (Cass., sez. un. 6 April 2023, n. 9479).

The scope of res judicata in cases in which a consumer is a party has been the occasion for a new episode in the dialogue among the Courts and the dialogue between the Italian Supreme Court and the legislator.

2. APPARENT CRISIS OF RES JUDICATA: TERMS OF THE DEBATE

The crisis of the res judicata is a common feature of modern procedural systems, today mainly perceived as a consequence of inefficiencies correlated to a litigation explosion[7] observed both in common law and civil law systems[8] and the consequent rise of methods of dispute resolution alternative to the jurisdiction (so called *ADR*s) or remedies suitable to provide the parties with a judicial order immediately enforceable, even if still provisional and unstable in its effects[9].

More in deep, within the European legal system, the crisis of the res judicata has been analyzed into three different directions, that are[10]: first of all, the need of overcoming the substantial effect of res judicata of an opinion issued by a national judge, formally indisputable, because not appealable, but contrary to provisions set by the European legislator or the jurisprudence of the CJEU; secondly, the stability of res judicata in case of *ius superveniens* or *overruling* in the case law; third, stability of res judicata in case of declaration of unconstitutionality of a norm[11].

On the relationship between internal res judicata and European system, the starting point for a recognition of the state of the art must be that obviously the CJEU has always explicitly recognized in principle, in multiple opinions, the value of res judicata and the rule that national res judicata is normally intangible, even if the substantial effect of the decision is not compliant with the European law and case law. With the words of the CJEU: «*attention should be drawn, in that regard, to the importance, both in the legal order of the European Union and in national legal systems, of the principle of the authority of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection*

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[7] See on the matter Chiarloni, (2000), p. 107 ff.

[8] On the classic distinction between civil law and common law system, evanescing in practice but still relevant, see Taruffo (2002), p. 67 ff.

[9] Caponi (2009), p. 941 ff; Tedoldi (2013), p. 1059 ff., and 1070 ff.; Andolina (2007), p. 317 ff.; Biavati (2003), p. 164 ff.

[10] This is the classification of the problem given by Cordopatri (2015), p. 894 ff.

[11] On this particular matter, see Gradi (2022), p. 1190 ff.

can no longer be called into question […] Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring the authority of res judicata on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law» [12].

But in parallel, it is to be noted that the interpretation of the CJEU has put in place in practice a phenomenon of erosion of the domestic res judicata [13], within a context in which it seems indeed to be missing a proper theoretical reconstruction on the matter by the same Court, considering that the pragmatic approach based on the need of affirm the intangibility of certain substantive rules and principles tend to prevail [14]. A landmark opinion in this perspective has been the already mentioned case *Lucchini*, in which the Court ruled that «*Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final*» [15]. The meaning of the ruling has been somehow restricted by scholars, who have pointed out that the instability of res judicata in this case was mainly due to the violation of the competence of the European Commission in the subject of State aid, but still the Court fixed a relevant precedent with regard to validity of final decisions contrasting with European law [16]. In a subsequent relevant case, the CJEU held that «*Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question […]. In the absence of Community legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)*», so coming to the conclusion that «*Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a dispute concerning value added tax and relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in*

[12] Quoting from *CRPNPAC and Vueling Airlines*, 2 April 2020, C-370/17 and C-37/18, paragraphs 88-89. See also the cases: *Eco Swiss c. Benetton,* 1 June 1999, C-126/97; *Kapferer*, 16 March 2006, C-234/04; *Asturcom*, 6 October 2009, C-126/97; *Klohn*, 17 October 2018, C-167/17.

[13] See Biavati (2007), par. 2; Id. (2003), p. 23 ff.

[14] See Rasia (2023), p. 65 ff.; Turmo, p. 361 - 390.

[15] *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini*, 28 July 2007, C-119/05.

[16] See *supra*, note 1 for references. For a recent reconstruction on the latest tails of the case, see De Cesare (2021), p. 2638 ff.

the field of value added tax»[17]. This case provided a significant reaffirmation of the importance of res judicata, and that is the main meaning of the ruling[18], but nevertheless the Court stated that in that specific case the final decision of the national (Italian) judge had to be overcome.

In another perspective, the CJEU has clarified and delimited the value of res judicata from an objective standpoint, declaring that the force of res judicata extends only to the matters of fact and law actually or necessarily settled by a judicial decision[19] or only to the legal claims on which a court has ruled[20]. The CJEU has also recognized that «*the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance*»[21]: conclusively, final decisions are stable only on the questions on which the processual contradictory and right to be heard have been effectively enforced.

From this point of view, the pragmatic approach practiced by the CJEU and the resulting delimitation of validity of res judicata from an objective standpoint seem to recall somehow the contraposition between claim preclusion and issue preclusion correlated to the distinction between res judicata and collateral estoppel in the common law systems (and especially in the United States)[22], within a dynamic in which the elaboration of the notion of the res judicata in the case law might constitute a vehicle of the natural phenomenon of harmonization between different civil procedure families[23].

The scenario appears fragmented and open to a vast array of solutions, relying definitely on the specific characteristics of the single case, between abstract enunciation of the sacrality of res judicata and concrete need to overcome or delimitate its validity in certain circumstances, normally in order to protect substantial interests particularly important or allocation of powers among the European institutions, included the judiciary of each single member State.

Against this backdrop, within the physiological functional relationship of mutual fair collaboration between the EU and the member States, pursuant to the principle of sincere cooperation under Article 4 TEU, it is possible to argue that the crisis of the res judicata is only apparent or, at least, is not depending on or aggravated by the European system and the jurisprudence of the CJEU.

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[17] See *Amministrazione dell'Economia e delle Finanze, Agenzia delle Entrate v. Fallimento Olimpiclub Srl,* 3 September 2009, C-2/08.

18 See Raiti (2010), p. 677 ff.; Caponi (2011), p. 279 ff.

[19] *ThyssenKrupp Nirosta v Commission*, 29 March 2011, C-352/09; *Pappalardo e a. v. Commission*, 13 September 2017, C-350/16. On the matter, see also Trib. 5 June 1996, *Nmb France Sarl v. European Commission*, with a comment by Querzola (1998), p. 331 ff.

[20] *Klohn*, 17 October 2018, C-164/17. See Rasia (2023), p. 65-66, notes 6-7 for a more comprehensive recognition of the relevant case law.

[21] *Gerhard Köbler v Republik Österreich*, 30 September 2003, C-224/01.

[22] On the notions of res judicata and collateral estoppel, see Hazard Jr., Fletcher. Bundy, Bradt (2020), p. 1163 ff.; in the Italian doctrine, Taruffo (1971), p. 651 ff.

[23] On the matter of harmonization, see Van Rhee (2018), p. 1, 15.

The problem can indeed be harmonically reconstructed in terms of lack of proper formation of the res judicata on the substantive matter regulated by the law resulting from the integration of European and national systems in certain—exceptional—hypothesis: violation of the separation of powers and competencies among European institutions, like in the case *Lucchini*, is a paradigmatic example of fraudulent formation of res judicata, in which the final decision would have been nonetheless precarious in the national system, because of the availability against it of the exceptional remedies provided by domestic procedural law (like in the case of the extraordinary revocation—so called "revocazione straordinaria"—under Article 395 of the Italian civil procedure code, or the opposition by a third party—so called "opposizione di terzo"—under Article 404, paragraph 2, of the Italian civil procedure code)[24].

The totem of res judicata is save, as well as the consciousness that it is not a rigid obstacle to the supremacy of European law, within a legal system, and a community, in which, whenever possible, the ultimate goal is the rightful decision, and not only the legal decision[25].

3. JUDICIAL ORDERS FOR PAYMENT AND CONSUMER PROTECTION WITHIN DIRECTIVE 93/13/EEC OF APRIL 5TH, 1993: THE CJEU'S FOUR OPINIONS OF MAY 17TH, 2022

The architecture of an effective system of consumers protection is and has always been one of the main fields of intervention of the European Union, both on the substantial and processual aspects: the action of the European institutions has made possible the exportation of this culture from the United States, where it was born and the progressive creation of an authentic *ad hoc* system of norms, deriving from the interrelation of European and national sources of the law[26].

The Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts has been a significant milestone in this regard. The Directive aims to replace the formal balance that a contract establishes between the rights and obligations of professionals and companies, on the one hand, and consumers, on the other, with an effective balance that re-establishes equality between them. This goal is pursued by setting the rule that abusive contractual clauses must be detected and sanctioned as not binding for consumers[27],

[24] See Consolo (2011), p. 49 ff., spec. 177 ff.; Id. (2019), p. 122-123.
[25] Biavati (2007), par. 6.
[26] See Cassano, Dona, Torino (2021); Alpa (2014).
[27] Under Article 6, par. 1 it is provided that «*Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms*».

leaving each member State free to identify adequate and effective processual means to this scope[28].

Interpretation and application of the directive within the framework of the principles of equivalence (pursuant to which principles established by European laws must receive a processual protection at least equivalent to the ones established by national laws) and effectiveness (pursuant to which the protection of rights set by the European Union must be substantial and not unreasonably difficult for the weaker party) has been a fruitful test case of recalibration and readjustment of certain fundamental principles of civil procedural law, including the value of *res judicata*.

Particularly, since 2009 the CJEU recognized that it is not necessary for the consumer to litigate and contest the validity unfair contract clauses, as national courts must examine, of their own motion, the clauses as soon as they have available legal and factual elements necessary to do so and in case the clauses result abusive, national courts must disapply them[29]. Subsequently, the CJEU ruled that *ex officio* control on the absence of unfair clauses must be done *in limine litis* or at any stage of the litigation also in summary proceedings arising from applications for orders for payment, both with regard to national proceedings (and particularly the Spanish one)[30] and the European order for payment procedure under Regulation 1896/2006[31]. Always analyzing the order for payment procedure in the Spanish system, the CJEU ruled that judicial assessment on the absence of unfair provisions in the contract between consumer and professional from which arose the obligation of payment in favor of the latter must be done by the judge of the enforcement procedure, in case it could not be done by the judge hearing the motion for order for payment (*i.e.* the judge of the merit of the case)[32].

In the *Banco Primus* case, the CJEU *ex professo* assessed the problem of balancing opposing value of stability of *res judicata* and consumer protection under Directive 93/13/EEC, elaborating a solution in which precisely the reconstruction of the objective scope of the res judicata constitutes the fulcrum of the balance of the opposing values at stake[33]. Indeed, the Court ruled that res judicata cannot be overcome, even though the decision contrasts with principles enacted by the European legislation, included the Directive 93/13/EEC, but clarified that res judicata is limited to the claims or elements of fact or law that the national judge has explicitly assessed and motivated on[34].

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[28] Under Article 7, par. 1 it is provided that «*Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers*».

[29] *Pannon GSM Zrt. v. Erzsébet Sustikné Győrfi*, 4 June 2009, C-243/08.

[30] *Banco Español de Crédito SA v Joaquín Calderón Camino*, 14 June 2012, C-618/10.

[31] *Bondora AS v Carlos V.C.*, 19 December 2019, C-453/18.

[32] *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano, María Josefa García Zapata, Jorge Luis Albán Zambrano, Miriam Elisabeth Caicedo Merino*, 18 February 2016, C-49/14.

[33] *Banco Primus SA v Jesús Gutiérrez García*, 16 January 2017, C-421/14.

[34] The CJEU remarked that «*In that connection, attention should be drawn, at the outset, to the importance, both for the EU legal order and for the national legal systems, of the principle of res judicata.*

This was the long way path preceding the CJEU's four opinions issued on May 17th, 2022.

All the four opinions concern *ex officio* powers of national judges to assess validity of b2c contracts under the Directive 93/13/EEC in summary proceedings governing requests for orders for payment, and correlated stability of their decisions in case the consumer does not take part to the proceeding and the control over abusive clauses has not been laid down by the Court of the merit on its own, even if national procedural laws qualify such opinions as final.

As already mentioned, the opinion in the joined cases C-693/19, *SPV Project 1503* and C-831/19, *Banco di Desio e della Brianza* followed requests for preliminary rulings under Article 267 TFEU by the Tribunal of Milan (Italy); the opinion in the case C-600/19, *Ibercaja Banco* followed a request for preliminary ruling from the Audiencia Provincial de Zaragoza (Provincial Court, Saragossa, Spain)[35]; the opinion in the case C-725/19, *Impuls Leasing Romania* followed a request for preliminary ruling from the Judecătoria Sectorului 2 Bucureşti (Court of First Instance, Sector 2, Bucharest, Romania)[36]; the

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Indeed, the Court has already had occasion to observe that, in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question […] Moreover, the Court has already recognized that consumer protection is not absolute. In particular, it has considered that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision, regardless of its nature, contained in Directive 93/13», nevertheless getting to the conclusion that «*where there are one or more contractual terms the potential unfair nature of which has not been examined during an earlier judicial review of the contract in dispute which has been closed by a decision which has become res judicata, Directive 93/13 must be interpreted as meaning that a national court, before which a consumer has properly lodged an objection, is required to assess the potential unfairness of those terms, whether at the request of the parties or of its own motion where it is in possession of the legal and factual elements necessary for that purpose*».

[35] In which the CJEU ruled that:

«*1. Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation which, by virtue of the effect of res judicata and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings, where the potential unfairness of those terms has already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the judicial decision authorising the mortgage enforcement does not contain any grounds, even of a summary nature, attesting to the existence of that examination, nor state that the assessment of that court at the end of that examination could no longer be called into question if an objection were not lodged within the aforementioned period.*

2. Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as not precluding national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms where the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, provided that the consumer whose property was the subject of mortgage enforcement proceedings may assert his or her rights during subsequent proceedings with a view to obtaining compensation, under that directive, for the financial consequences resulting from the application of unfair terms».

[36] In which the CJEU ruled that: «*Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national legislation*

opinion in the case C-869/19, *Unicaja Banco* followed a request for preliminary ruling from the from the Tribunal Supremo (Supreme Court, Spain)[37].

These opinions have given rise to a wide-ranging discussion among legal scholars, particularly focusing on the pronounce requested from the Tribunal of Milan, as per the Italian side. The common denominator is that orders of payment following summary proceedings against consumers, even if qualified as final by national civil procedure laws do not have value of res judicata on the issues on which there has not been an explicit motivation by the Court. In addition, the judge has the precise duty to exercise on its own the assessment of the absence of abusive clauses in b2c contracts as soon as she has sufficient elements of fact and law to do so. In other words, the implicit value of res judicata is not binding for consumers on issues necessarily connected to the claim but formally not assessed by the Court.

As correctly highlighted, the CJEU's approach might be considered, alternatively, apocalyptic or integrated[38].

In the first perspective, scholars have pointed out that the pronounces mark a point of no-return respect to the principle of the autonomy of the member States in the field of civil procedure: indeed, despite they formally underline the importance of res judicata, in concrete they state that national final decisions must be overcome if they are not compliant with substantive interests set by the European legislator or the CJEU and therefore national res judicata does not exist anymore[39].

In the second perspective, scholars have tried to underline that the above mentioned pronounces are just the natural and predictable endpoint of the evolution of the CJEU's case law and that they can be reconstructed in terms less disruptive respect to traditional fundamental principles of (not only national) civil procedure. Even recognizing the importance and the impact of the rules enacted by the CJEU, part of the doctrine has attempted to limit their consequences, by underling the circumstance that the Kirchberg's solution should apply only to b2c contracts and only among professionals and consum-

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which does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract concluded between a consumer and a seller or supplier which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may only suspend the enforcement proceedings until a decision has been given on the substance if a security is paid at a level that is likely to dissuade the consumer from bringing and maintaining such an action».

[37] In which the CJEU ruled that: «*Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding the application of principles of national judicial procedure, under which a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of that provision and order the repayment of those sums in full, where the failure of the consumer concerned to challenge that temporal limitation cannot be attributed to his or her complete inaction*».

[38] Giussani (2023).

[39] See De Stefano (2022); Giussani (2023); Rossi (2023); Marchetti (2022).

ers residing within the EU[40]. In addition, it has been emphasized[41] that the ruling calls into question the preclusive functioning of the order for payment under art. 633 and following of the Italian civil procedure code, rather than res judicata itself; that in the summary procedure for orders for payment the judge already has larger *ex officio* powers and duties in the Italian system, in order to balance the absence of processual contradictory, as stated by the Italian Constitutional Court[42]; that the instability of final decisions in case of lack of defensive activity by a consumer only applies to summary orders for payment and not to decision given after a full process on the merit, even in case of judgement by default.

Both the approaches are valid and conclusive, as they underline different facets of the same phenomenon, but I think it is worth to give relevance to the fact that harmonization of civil procedure systems toward better standard of protection of consumers, or in general the direction of a rightful decision[43], is a desirable and physiologic dynamic[44].

Anyway, regardless of any assessment on the merits of the opinions issued by the CJEU on May 17th, 2022, identifying the most appropriate jurisdictional instruments to give concrete implementation to the Court's *dicta* has been (and will be) the national courts' task and challenge[45].

4. THE ITALIAN SUPREME COURT'S OPINION N. 9479/2023: TOWARD A NEW ROLE FOR THE JUDICIARY?

Focusing our attention on the Italian legal system, one relevant episode of the vicissitude has been the recent opinion of the Italian Supreme Court on April 6th, 2023[46], having the declared aim of granting full actuation of the principles enacted by the CJEU, also considering binding effects of CJEU's judgements under Articles 11 and 117 of the Italian Constitution.

The opinion was given in the form of a ruling in the interest of the law under Article 363 of the Italian civil procedure code, pure expression of the function of the Supreme Court to ensure the uniform interpretation of the law among the lower judges (so called "funzione nomofilattica"): under this proceeding, the Court clarifies the correct interpretation of the law to be followed by all lower judges in future controversies but the pronounce does not have any kind of effect respect to the merit of the litigation from which it arose.

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[40] Rasia (2023), p. 80 ff.

[41] On all these aspects, see D'Alessandro (2022a), p. 541 ff, spec. 542.; Id (2022b).

[42] C. cost. 3 November 2005, n. 410.

[43] See on the matter Taruffo (2020).

[44] A constructive and positive approach to the CJEU's opinions is conclusively given by: Rasia (2023); D'Alessandro (2022a); Id. (2022b); Micali (2022); Caporusso (2022a), p. 2113 ff.

[45] For the first pronounces of Italian Tribunals, see Caporusso (2022a).

[46] Cass., sez. un. 6 April 2023, n. 9479, commented by: Consolo (2023), p. 1054 ff.; D'Alessandro (2023), p. 1060 ff.; Carratta (2023), p. 357 ff.; Crivelli (2023), p. 384 ff.; Baccaglini (2023), p. 946 ff.; Scarselli (2023); Capponi (2023a), Vincre (2023); Caporusso (2023); Farina (2023); .

Indeed, under Article 363, paragraph 1, of the Italian civil procedure code, upon request of the Public Prosecutor, the Supreme Court can formulate a principle in the interest of the law when the proceeding is moot or not admissible, and under Article 363, paragraph 3, of the Italian civil procedure code, the principle in the interest of the law can be formulated by the Supreme Court on its own, whenever the appeal proposed by the parties is deemed not admissible. The remedy has been reformed in 2006, in the direction of reinforcing the public function of a Court characterized by a significant, probably unprecedented in a comparative perspective, number of cases to settle[47], mainly due to the fact that that access to the Supreme Court is generally granted pursuant to Article 111, paragraph 7, of the Italian Constitution: the contraposition between public function (so called *ius constitutionis*) and private function of dispute resolution (so called *ius litigatoris*) constitutes indeed one of the main challenges of the Italian Supreme Court, since its institution and until nowadays[48]. This processual instrument, moreover, is a symptom of a phenomenon of progressive mutation of the role of the Court, that is now in the condition recurring certain circumstances to select herself the case that she is willing to decide, almost like an Italian *writ of certiorari*[49], toward the direction of the increasingly regular pronunciation of merely abstract interpretations of the law, that we were used to think to be normally reserved to the legislator, or, on other level, to scholars, in civil law systems[50].

In the above-mentioned opinion, embracing an almost unprecedented method of decision-making, the Court literally created a new form or process for detecting abusive clauses in b2c contracts, even beyond the validity of the res judicata, remodeling the exceptional remedy of the opposition to an order of payment under art. 650 of the Italian civil procedure code.

The first commentators have defined the opinion «revolutionary», as it signs the beginning of a new era, in which the Supreme Court is allowed to discretionally create new substantial and processual norms[51], so determining the definitive trespass of the Italian civil procedure system from the civil law to the common law family[52].

On the merit, the Court carried through to the end the rescaling, rather the redesigning, of the res judicata inaugurated by the CJEU, by assigning to final decisions variable geometry, depending on whether or not res judicata (*rectius*, the preclusion to examine the case) follows the failure of a consumer

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47 See on the remedy, particularly after the mentioned reform: Giordano (2018), p. 161 ff.; Briguglio (2009), p. 110 ff.; Odorisio (2018).

48 Taruffo (1991).

49 See Passanante (2018), p. 61 ff., of course, with an almost provocative tone and all the caveats needed in making such a parallelism.

50 See Passanante (2021), p. 79 ff., spec. 84; Capponi (2020), p. 405 ff.

51 Capponi (2023a); Carratta (2023), p. 357-358; *contra* Consolo (2023), 1054, who underlines that the Court has not exceeded its powers, considering the importance of the matters addressed in this opinion.

52 Scarselli (2023).

to timely oppose an order for payment (so called "decreto ingiuntivo", under the proceeding provided by Articles 633 and following of the Italian civil procedure code).

First of all, as for the summary phase of the procedure for an order for payment, the Court stated that the judge will have in the future the duty to check and detect the presence of abusive clauses in b2c contracts and reject the claim in case there are not sufficient available evidences, in any case with duty to motivate on this assessment and warning the consumer of the possibility of lodging an objection. This part of the opinion is line with the national legislation and case law and surely appreciable even though, as it requires to lower judges a mere formal motivation of their orders for payment without imposing any criteria of effective judgement it might have as a consequence a lack of protection for the weaker party[53].

But the part of the judgment that is more innovative and interesting is probably the one dealing with *ex officio* detection of abusive clauses in case of orders for payment that do not take position on such an assessment and have not been timely opposed by the consumer, so that they should be considered as final by national law (see Article 647 of the Italian civil procedure code).

The Court ruled that: 1) Whitin the enforcement procedure, until the final stage of sale or assignment of the garnished goods, the judge of this proceeding must assess on its own the fairness of the b2c contract. Thereafter, regardless of the outcome of this inspection, the judge will warn the consumer of the possibility of opposing the injunction within 40 days (so introducing an ordinary process on the merit, as provided under Article 641 of the Italian civil procedure code), refraining in the meantime from ordering the sale or assignment of the goods. 2) If the consumer has filed an opposition to the enforcement procedure under Article 615, paragraph 1, of the Italian civil procedure code, the judge should requalify the opposition as an extraordinary late opposition under Article 650 of the Italian civil procedure code. 3) The judge of this extraordinary late opposition to an order for payment has the power to suspend the provisional enforcement of the decree under Article 649 of the Italian civil procedure code.

Stimulated by the CJEU, the Court has brought to a completion, in the field of consumer protection, the overcoming of a traditional principle of the Italian civil procedural system, that is the stability of a final judgment not only respect to the claim adjudicated but also to its accessory and prejudicial issues (even if not explicitly assessed by the ruling)[54]. In this regard, I think that we can stand by the Supreme Court's opinion: indeed, scholars have been critical

[53] Rasia (2023), p. 82.

[54] The principle is consolidated in the case law, see *ex multis* for a recent affirmation Cass. 24 September 2018, n. 22465. On res judicata and issues connected to a contractual relationship between two parties, see Cass., Sez. Un., 12 December 2014, n. 26242 and, for a comment on the matter, Proto Pisani (2016), p. 325 ff. On the so called "giudicato implicito", see Pugliese (1969), p. 785 ff., in particular 864 ff.

on the so-called implicit res judicata[55], and they have been challenging the effective value of res judicata of orders of payments not timely opposed by the parties[56]. Moreover, it is to be mentioned, once again, that in this case it is in discussion the preclusive functioning of the procedure for orders for payment under Article 633 and following of the Italian civil procedure code, rather than res judicata: indeed, missing a proper assessment (and judgement) in the summary proceeding on validity of the b2c contracts, it is possible to argue that res judicata on this issue never came to exist, due to the existence of an *error in procedendo*[57].

As per the remedy chosen by the Supreme Court for detection of abusive clauses within the enforcement procedure following a final order for payment, the solution of re-opening the process on the merit on the model of the late opposition to an order for payment under Article 650 of the Italian civil procedure code had been somehow predicted by some scholars[58]. Running this road surely has several advantages, like the possibility for the consumer to obtain once with *erga omnes* efficacy the suspension of the enforcement attitude of the judicial order, but, on the other side, also has some disadvantages, because the consumer has to file its late opposition to the judge who pronounced the order for payment, chosen by the creditor and therefore probably not coincident with the consumer forum[59]. But, above all, I believe that this kind of remedy would have required an intervention by the legislator, considering that under Article 650, paragraph 3, of the Italian civil procedure code the late opposition must be filed within 10 days since the beginning of the enforcement of the credit. The Supreme Court has by-passed this limit by disapplying the provision and substituting this mandatory term with the general term of 40 days regulating the ordinary opposition to an order for payment under Article 641 of the Italian civil procedure code. The Court derived its legitimation to do so from the general duty of national judges to disapply provisions that conflict with European Union law when no compatible interpretation of that provisions proves possible[60], but the concrete use of this instrument in this particular case seems to overflow the physiological limit of this remedy[61].

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[55] See for a classic critical view, Allorio (1938), p. 245 ff. Recently, Panzarola (2019), p. 307 ff.; Luiso (2019).

[56] See Capponi (2023b).

[57] See again in this regard, D'Alessandro (2022a), p. 543 ff.; See also Consolo (2023), p. 1054.

[58] Carratta (2022), p. 485 ff., spec. 487; Caporusso (2022b), p. 533; Stella (2022), p. 2126 ff., in particular 2128.

[59] Under Article 33, paragraph 2, lett. u), of the Italian law 6 September 2005, n. 206 (so called Consumer code), all controversies arising from contracts entered into by a professional and a consumer must be settled by the Court where the latter has her residence or domicile.

[60] *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre*, 24 January 2012, C-282/10.

[61] The Court when arguments about the substitution of the 10 days term with the 40 days one, simply says that the latter, at the end of the day, is also pertinent with the procedure of opposition to an order for payment and compliant with the effectiveness principle, with words: «*un termine che è pur*

For these reasons, I believe that the best remedy available for *ex officio* assessment and subsequent celebration of the process on the merits of the presence of abusive clauses in b2c contracts, would have been the opposition to the enforcement procedure under Article 615 of the Italian civil procedure code and in general remedies provided within the enforcement procedure. This solution would have fairly balanced the opposite values of the effective jurisdictional protection of the consumer and certainty in legal traffics correlated to the stability of judgement qualified as final by national law. This remedy, moreover, seemed to be the one suggested by the CJEU and would not have required a massive creative intervention in order to adapt the national law to the European rule, nor by the Supreme Court or the legislator[62]. Indeed, in a subsequent opinion issued by the CJEU on May 4th, 2023[63], the Court once again confirmed that the enforcement procedure, and the parenthesis of cognition on the merits designed within it, are the natural processual phase for detection and ruling on abusive clauses[64].

An other possible option relied on the possibility for the consumer to promote a separate proceeding in order to ascertain the presence of unfair clauses in the b2c contract (so called *action nullitatis*), perhaps accompanied in parallel with the filing of an urgent petition to suspend the enforcement of the order for payment obtained by the creditor: this solution was the one suggested by the Public Prosecutor after its request for a pronunciation in the interest of the law pursuant to Article 363 of the Italian civil procedure code.

Eventually, it seems to be clear that *de iure condito* every solution was not perfect and lent itself to criticism and contradictions[65].

It is also to be noted that it is foreseeable that the concrete consequences of the Supreme Court's opinion in the case law will be limited: indeed, the

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sempre tratto dall'interno della disciplina dettata per l'opposizione a decreto ingiuntivo e della cui rispondenza al criterio di effettività non è dato dubitare» (see the opinion, page 32).

[62] This solution is sustained by: Soldi, Capponi (2023); Rasia (2023), p. 83 ff. and in particular 90-91; D'Alessandro (2022b); Vincre (2023), p. 1505 ff.

[63] In *TU, SU v BRD Groupe Société Générale SA, Next Capital Solutions Ltd*, 4 May 2023, C-200/21, the CJEU ruled that «*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted as precluding a provision of national law that does not allow the court which is responsible for the enforcement proceedings and which hears, outside the 15-day period laid down by that provision, an objection to the enforcement of a contract that is concluded between a consumer and a seller or supplier and constitutes an enforceable instrument, to assess, of its own motion or at the request of the consumer, the unfairness of the terms of that contract, when that consumer also has an action on the merits which enables him or her to request the court hearing that action to carry out such a review and to order the suspension of the enforcement pending the outcome of that action, in accordance with another provision of that national law, where that suspension is possible only by way of payment of a security the amount of which is likely to dissuade the consumer from bringing and continuing such an action, which it is for the referring court to verify. Where it is not possible to interpret and apply the national legislation in a manner that is consistent with the requirements of that directive, the national court hearing an objection to the enforcement of such a contract is obliged to examine of its own motion whether the terms of that contract are unfair, and, where necessary, is to disapply any national provisions which preclude such an examination*».

[64] See Capponi (2023c).

[65] De Stefano (2022), paragraph 15.

adoption of a new model for the pronunciation of orders of payment by the judges, with formal assessment on the validity of b2c contracts, will preclude in the future any question and conferee full stability to the orders of payment, even if not timely opposed by consumers.

5. DIALOG BETWEEN THE COURTS AND ROLES OF SUPREME COURTS: THE NEED FOR AN INTERVENTION OF THE LEGISLATOR IN THE MATTER OF CONSUMERS' CIVIL PROCEDURE

Despite the specific conclusions reached in the case adjudicated by the opinion Cass., sez. un. 6 April 2023, n. 9479, it is interesting to observe that one of the possible meanings of the ruling is that the Italian Supreme Court decided to have a say in the matter and to put itself back to the center of the debate with the CJEU and the European and national legislators.

The constatation leads to further reflections on how the opinion, and in general the underlying legal issue, impacts the dynamics concerning the dialogue between the Courts and the role of Supreme Courts, two different faces of the same phenomenon, that is the active role of the judiciary in policymaking or, more in general, in the actuation of the rule of law.

The one of «transjudicial communication» [66] is an old and well-known phenomenon that regards, with different forms and functions the relationship between different Courts, in the international or internal dimensions. Various types of relationship are normally reconduct to this category: one is the mere reciprocal influence, on an horizontal line, typical of Courts that share a cross-cutting knowledge of certain fundamental principles, like in the case of the Supreme Court of Argentina during the nineteenth century or the Italian Constitutional Court in 1975, both quoting or showing to take into consideration the case law of the Supreme Court of the United States, and above all the precedent of *Roe v. Wade* concerning the right to abortion [67]. Another type of dialog involves a true interaction between the Courts, like in the case of vertical dialog between national and supernational Courts, of which the hierarchy existing between national courts and the CJEU in the European system is a paradigmatic example, especially under the mechanism of preliminary rulings under art. 267 TFUE, that requires national courts to ask the CJEU to clarify the correct interpretation of treaties and validity of acts of the institutions, bodies, offices or agencies of the Union [68]. Precisely the European multilevel system of jurisdictional protection of rights has been the playing field of a significant development of the dialogue between the Courts, of which the main players have been the CJEU, the European Court of Human Rights

[66] See Slaughter (1994).
[67] See De Vergottini (2010), in particular p. 17 ff.
[68] On the horizontal and vertical forms of judicial communication, see Slaughter (1994), p. 103 ff.

and the national Constitutional Courts, within a dynamic in continuous fluctuation between authentic cooperation and revindication of each other's prerogatives and positions[69]: in the latter perspective, the case *Taricco* has been theater of the elaboration by the Italian Constitutional Court of the theory of the so called "counter limits", pursuant to which the Court has reserved herself the power not to comply with CJEU's opinions deemed contrasting with fundamental principles of the Italian Constitution[70]. Alongside Constitutional Courts, Supreme Courts (included the Italian Suprema Corte di Cassazione) are also protagonists of the dialogue, at all its levels: a dialogue that is mostly legitimate and fruitful and raises reflections on issues of interpretation of the law and the way more evanescing limits of judicial policymaking in our times[71].

From another point of view, it is to be noted that the study of Supreme Courts, and in particular their functions, structure, and functioning, is a classic topic of comparative civil procedure[72]. For the purposes relevant here, it is particularly interesting to highlight how these courts, placed at the apex of the judicial system and definable as those whose decisions are not (for that reason) normally appealable before other jurisdictional authorities superordinate to them[73], have the peculiar characteristic of pursuing, tendentially alongside functions of dispute resolution, purposes of public interest[74]. Prominent in this perspective is the function aimed at ensuring the uniformity of the jurisprudence of the lower courts[75], which, depending on the methods employed in its exercise, is at the origin of traditional classifications, such as the distinction between "*cassation model*", "*revision model*", and "*appeal model*"[76]. This function reflects, and indeed stands out to the fullest, issues and problems inescapably inherent in the framing of the judicial function in democratic systems, in the delicate balance, sometimes a source of pathologies, of the dialectic between powers of the State[77]. Supreme Courts are bulwark of the jurisdictional protection of rights and constitutional legality, yet exposed to criticism and problematic reconstructive attempts, because of the so called "*counter-majoritarian difficulty*"[78].

Back to the case object of analysis, the Italian Supreme Court, first of all, decided not to activate the so-called counter-limits[79] and to give actuation to

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[69] C. Cost. 31 May 2018, n. 115. See on the matter Biondi (2019), p. 2 ff.; De Amicis (2022), p. 5 ff.

[70] See Lattanzi

[71] See Alpa (2022), p. 971 ff.

[72] See Chase, Varano (2012), p. 214.

[73] See Taruffo (2011), p. 11 ff.

[74] See Jolowicz (1998), p. 37 ff.

[75] Taruffo (2014), p. 35.

[76] See on this classification, Jolowicz (1998), p. 50 ff.

[77] See Kapiszewski –Silverstein –Kagan (*eds.*) (2013).

[78] On this famous expression, see Bickel (1986). On the political nature of the United States Supreme Court, see. Kagan (2023), 199; Marcus (2019), p. 15 ff.; on civil law Supreme Courts, see Gali (2019), p. 44 ff.

[79] This hypothesis, the remission of the case to the Constitutional Court, might have been practiced, in case the CJEU's opinion was deemed contrary to fundamental principles of the national civil

the principles enacted by the CJEU in the case *SPV Project 1503 – Banco di Desio e della Brianza*, binding for Italian national judges pursuant to articles 11 and 117 of the Italian Constitution. The Supreme Court, indeed, in several parts of the opinion makes references to the principle of mutual fair collaboration: from this standpoint, the opinion is a good example of constructive dialogue between the two Courts.

On the other hand, several elements seem to point to the direction of a revindication of autonomy by the Italian Supreme Court. Actually, like we have seen, the Court decided that examination of validity of clauses in b2c contracts, in case the consumer has not lodged timely opposition to an order of payment under Article 633 and following of the Italian civil procedure code, must be done by reopening the process on the merit through the remedy of the late opposition under Article 650 of the same code, *ad hoc* remodeled for this purpose: at the opposite, the enforcement procedure, would probably have been the natural place, precisely suggested by the CJEU to this scope[80]. Also, the solution adopted, might be not optimal, in terms of effective protection of the customer, as it requires the costumer to litigate the case in a *forum* different to the one where he is domiciled[81] and keeps in power the effects of the enforcement procedure (included the foreclosure of the goods) until the process on the merit concludes with an opinion in favor of the customer[82]. Moreover, the Court gave a restrictive interpretation to the principles enacted in the *SPV Project 1503 – Banco di Desio e della Brianza* case and in general the jurisprudence of the CJEU on Directive 93/13/EEC, where it states that only summary orders for payment not timely opposed are instable, despite being qualified as final by the national law. Therefore, it seems reasonable to argue that this regime should not apply to rulings given after a full process on the merit, even if the judge does not assess the presence of abuses clauses and in case of judgement by default of the consumer[83]: among the different solutions proposed by scholars, the Court chose the one that most circumscribes the effects of the CJEU's opinion[84].

On another level, the Court issued its opinion despite the case being moot and came to the creation of a new *ad hoc* proceeding for opposition to orders for payment in the field of consumer protection, by formulating general and abstract rules with a method more similar to the one of a legislator, rather

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procedure system, like the one of res judicata: see De Stefano (2022), par. 3.

[80] Capponi (2023c); Carratta (2023), p. 376 ff.

[81] D'Alessandro (2022b); Consolo (2023), p. 1057; Baccaglini (2023), p. 952.

[82] See Consolo (2023), p. 1057; Baccaglini (2023), p. 953.

[83] On this conclusion, see Baccaglini (2023), p. 953-954. Therefore, it is in my view not correct the application of the principles enacted by the Corte di cassazione realized by Tribunal of Ivrea, 16 May 2023, that stated that the late opposition under article 650 of the Italian civil procedure code is possible even after a full process on the merit in which the judge did not explicitly assess the validity of b2c clauses. See on the case a brief comment in Morotti (2023); in the same sense, see Caporusso (2023), p. 1243.

[84] The need for an *ex officio* assessment of the validity of the clauses in case of judgment by default of the consumer is sustained by Rasia (2023); contrary, D'Alessandro (2022b).

than the one of a Court, which generates reflections on the change, toward a real drift, in the nature and function of the Italian Supreme Court, in accordance with a phenomenon that has already been underway for years[85]. In doing so, the Court referred a couple of times to the remedy of the preliminary ruling under Article 363*bis* of the Italian civil procedure code: a new instrument introduced by the latest reform of Italian civil procedure in 2022, referring to which the Court seems to herald a new season of the so called funzione nomofilattica[86].

In conclusion, the fluctuations of national and European jurisprudence respect to an objectively complex legal problem provide opportunities for dialogue but also revindications between the Courts, as well as for possible interferences and encroachments by the judiciary with respect to the legislators. It seems therefore to be confirmed that the legislator needs to intervene in the field of procedural consumer protection, toward the direction of a better certainty of the law and an effective protection of consumers in the integrated multilevel system[87].

6. CONCLUSIONS: THE CHALLENGES OF EFFECTIVE CONSUMER PROTECTION

The challenge of effective consumer protection in the European system poses itself new challenges to traditional civil procedure principles, like emerged in the CJEU's opinions issued on May 17th, 2022, on the interpretation of Articles 6 and 7 of Council Directive 93/13/EEC of April 5th, 1993, where the need for balance the processual position of the parties has led to overcome the stability of judgments qualified as final by national legislators.

This conclusion implies to rethink, in this field, categories like res judicata, the preclusions typical of the summary proceeding under Articles 633 and following of the Italian civil procedure code, and the distinction between process on the merit and enforcement procedure[88].

The idea that national civil procedure rules must be considered precarious and destined not to prevail when they contrast with superior substantive rights set by the European legislator and the CJEU is certainly worrying to some extent and might mean the end of civil procedure itself. Nevertheless, a more assuring approach is possible as we take consciousness of the fact that, within a reconstructive perspective, the crisis of traditional categories of civil procedure is only apparent, a normal and acceptable consequence of the need of «*dealing with the case justly*»[89].

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[85] See on the matter Sassani (2019), p. 43 ff.

[86] See Capponi (2023a).

[87] In this respect, see D'Alessandro (2022b).

[88] In general on the evanescing distinction between process on the merit and enforcement procedure, see Finocchiaro (2024).

[89] Quoting Biavati (2018).

Moreover, effective consumer protection is the occasion for a dialogue between the Courts of the European multilevel system, that is surely enriching, as it stimulates the circulation of ideas in the direction of higher, shared, standards in human rights recognition. Nevertheless, the dynamic can be occasion of revindications by each Court, sharpening the centrality, sometimes a source of pathologies, of the role of Supreme Courts and determining the emergence of a plurality of solutions, not optimal in terms of certainty of the law. A challenge that requires, at these conditions, an intervention by the European or national legislators[90].

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