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PROTECTION OF SPECIFIC CONTRACTUAL INVESTMENTS IN ITALIAN AND BRAZILIAN LAW

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À Patrícia, com quem sempre sonhei estar, meu melhor investimento específico, pelo amor, por ter me apoiado nesse longo e solitário percurso e por me entender sem que eu precise me explicar,

À minha família, que não exige serem amortizados os seus investimentos específicos em mim, por ter me incentivado a perseguir os meus sonhos,

Agli amici italiani per avermi aiutato a scoprire un grande paese senza mai aspettare che i loro investimenti fossero recuperati.

"Se as coisas são inatingíveis, ora! Não é motivo para não querê-las.
Que tristes seriam os caminhos se não fora a presença distante das estrelas."
(Mário Quintana)

Abstract

This thesis addresses the economic phenomenon of specific investments. "Investments" is a polysemic word with a broad meaning. The commonly used economic definition of "investment" is the allocation of capital in the expectation of producing income. However, the generality of this definition does not allow an appropriate understanding of specific contractual investments, nor does it relate to the notions of financial, accounting and international investment. In a contract, specific investments increase the value of the transaction, but they allow the other party to appropriate this surplus. Academic work in economics has presented contractual solutions to overcome this phenomenon. Despite its economic relevance, few legal rules safeguard this modality of investment. In addition, a comparative analysis showed that the legal grounds for its protection are constructed on controversial bases.

As an exception compared with other legal systems, Italian and Brazilian law have rules that expressly protect specific contractual investments. These norms assume different structures of specific provisions and the general clauses. Some of these rules represent interpretive challenges, and the juridical relevance of specific investments occurs in different forms. Investments can be an important element to consider upon the unilateral termination of an agreement. In addition, the rules regulating investments can prohibit termination after their implementation. They also can provide remedies in case of violation. Specific investments also have repercussions for competition. They stand as a positive factor capable of justifying certain vertical restraints, or as an element to evaluate an abuse of economic dependence. The comparative study of Brazilian and Italian law can give an adequate solution to the matter and at the same time promote mutual enrichment.

While some factors are specific to each of the rules, they can be traced to some elements common to all of them to regulate the end of a commercial relationship. The common elements of investment protection are summarized as follows: 1) the influence of private autonomy to interfere with the recovery of investments; 2) the identification of the protected interests at the end of the relationship; 3) the protected investments; and 4) the elements to configure an abusive act after the implementation of specific investments.

Facing this situation, the definition of the appropriate remedy is complex. The protection must also consider the diversity of interests involved with the premature extinction of the

contractual relationship. Some of the developments and arguments concerning Italian law were useful for systematization in the Brazilian legal system. In Brazilian law, the center of gravity changes to the rules of Article 473 and their relationship to the general clauses of the direct abuse of right and good faith. A function was sought to assign to this rule, with the possibility of it serving as support for the extension of the contractual relationship.

Introduction

This thesis analyzes the phenomenon of specific contractual investments, which are widely studied in economic literature, from a legal perspective. This subject began gaining relevance in the 1970s; based on the concepts developed by R. COASE in his seminal article *Theory of the Firm*, neo-institutionalism theory brought to light the concept of transaction costs and their impact on a firm's decisions. This economic approach developed further concepts, such as that of specific investments. While they increase the value of the transaction, specific investments expose the investing party to the risk of opportunistic behavior because the counterparty could capture them. Economic theory has developed contractual and structural mechanisms to overcome this risk.

A legal view of the phenomenon must adopt a different perspective; it had to address investments before these economic theories were developed. Contractual investments were initially linked to agreements that promoted the distribution of services and goods, and they had no independence in the discussion. They were translated into other legal institutions, such as compensation for the loss of the customer base. The concept's autonomy began to develop in the middle of the last century. Private law approached this issue and gave it autonomy, notably in German law. Due to a higher sensibility to the economic factors, antitrust law also adopted this principle in the evaluation of the conduct of some undertakings. These two legal fields examined the same phenomenon with different lenses. As proposed in this thesis, a unified vision of specific contractual investments requires addressing these two visions and coordinating them.

In this thesis, investment protection does not precisely encompass the economic view on specific investments. The economic literature describes specific investments and proposes solutions to overcome opportunistic behaviors. Some of suggested solutions resort to legal remedies (*e.g.,* specific performance, expectations damages, and reliance damages) to ensure efficient *ex-ante* choices. This approach relates more to economic analysis than the provisions mentioned in *contractual investments*. It not only considers a simpler economic transaction, but it also requires studying another legal field: the remedies in case of contractual breach. This thesis chose to examine a different perspective on this phenomenon.

The thesis focuses on the presence of specific investments with a degree of cooperation. These investments increase the transaction value for the counterparty. Problems arise when, despite this effect, the counterparty unilaterally terminates the contract before the end of the period

necessary to recover them. To face this issue, rules proscribe some legal consequences to protect the investing party. In addition to these statutory provisions, adopting general clauses could also protect investments.

There are some interpretive challenges to protecting investments. The rules have different structures: general clauses and statutory provisions, and they present diverse degrees of specificity. Some of them are destined to a particular contractual type, while others are part of the general contractual discipline. They also involve conflicting interests. The terminating party has an interest in changing partners, whereas the investing party wants to continue in the relationship to recover the investments made. These provisions could also be influenced by contrasting legal principles, not only with different content but also representing divergent views on the law. The interpreter to protect investments must consider all these elements. At the same time, this complexity imposes difficulties, and a systematic view can offer a more coherent and complete interpretation. The thesis proposes their systematic interpretation to protect investments in all their aspects.

It is not only their global interpretation that poses some complications; some provisions have complex wording. A provision in Brazilian law exemplifies this difficulty. Article 473 of the Civil Code withdraws the effect of a unilateral termination in an indefinite-term agreement until the complete recovery of investments. Its strict application would entail legal insecurities. The parties do not know the contractual extension, and the terminating party does not have sufficient information to know the investments made to comply with the agreement or the period to recoup them. As a result, the contractual term would be complicated to identify. Article 473 also hinders the dynamism of a distribution network because it would be more difficult to adjust it to external market conditions. The producer would have to be certain that the investments were recovered to change the distribution channels. Ultimately, the consumers may pay an expensive price for lack of mobility.

The interpretation that is more sensible concerning the repercussions of economic elements indicates that these rules are the point of contact between the economic and the legal worlds. This relationship allows the systematic evaluation of the phenomenon and provides economic treatment to the interpretation of these rules. The regulation of the investments from different perspectives requires coherent solutions to the problems presented. This solution makes it possible to adopt some economic concepts to interpret indefinite concepts of *investment, amortization, recovery, nature of investment,* and *consideration investments.*

This sensibility to the economic phenomenon is further demonstrated in antitrust law. Specific investments can induce not only opportunistic conduct but also the promotion of dynamic competition in the market. This latter effect generates two circumstances of specific contractual investments relevant to antitrust law. They represent a positive counterbalance in the evaluation of competitive restrictions on vertical agreements. The investments could also reduce the relevant market and allow the creation of the abuse of economic dependence in a restricted market. Although they do not represent the central issue in this thesis, they were studied due to their systematic influence on the protection of specific contractual investments.

In addition to an appropriate and practical investment protection, the thesis also addresses the remedies available to the parties. Despite their importance in achieving the protection, these are sometimes neglected. Giver their characteristics, specific investments could provide to the parties a remedy that is still difficult to accept in Brazilian law.

In the scenario of the constant interweaving of economic and legal data, the comparative study of Brazilian and Italian law can provide an adequate solution to the matter and, at the same time, promote mutual enrichment. The interest in studying these legal systems corresponds to the existence of legal rules, of complex interpretation with express reference to the protection of investments. The Italian legal system also serves as a longstanding inspiration for Brazilian law and can indicate the paths it should follow.[1] The synergy of the two legal systems assures a joint treatment of contractual investment protection.

New contributions to Brazilian law can also be drawn from the Italian doctrine. The interpretation proposal considering the normative specialty of business (*l'impresa*), even when the legislator has not demonstrated it when drafting a legal text, represents a relevant step to systematically understand the rules of investment protection and, more broadly, commercial law

[1] The relationship between Brazilian and Italian law is long, fruitful and, I hope, auspicious. The unification of the Brazilian Civil Code, although a result of previous studies of A. TEIXEIRA DE FREITAS, was based on the Italian Civil Code. A significant influence in this process was due to T. ASCARELLI and his teaching experience in Brazil. Works by other great Italian *maestri* continue to exert a strong influence on the Brazilian doctrine. Italian law is probably the most significant source of inspiration to Brazilian Private law, rather than German and French law. The reverse movement is also accurate. According to D. CORAPI (*Il diritto brasiliano: nuovo terreno di indagine per la comparazione*, in Rivista di diritto civile, 2007, fasc. 3, pt. 1), the Italian legal culture contracted a debt of recognition concerning Brazil, which received T. ASCARELLI and E. T. LIEBMAN. The influence of the Brazilian legal culture would have allowed T. ASCARELLI the maturation of a comparative view and the relevance of the interpretation in the formation of the *regulæ juris*. Currently, Brazilian law has found greater autonomy. This observation does not detract from the possibility that Brazilian researchers may still search for Italian doctrinal works. As emphasized by E. GRAU, it is necessary to seek the balance, between the lessons of law comparison and the historical and positive experiences of Brazilian law.

(see especially M. LIBERTINI's works). Attentive to the warnings made, the methodological reconstruction in this study can help interpret the rules in Brazilian law. This task must always be performed considering the jurist's relationship with positive law (*il vincolo del giurista positivo*) and the requirement of construction of the *regulæ juris*.

Based on these premises, the thesis is divided into four chapters. The first specifies the definition of specific contractual investments and refers to the economic analysis of the phenomenon, seeking to highlight its relevance to the legal treatment proposed in the thesis. The second chapter is dedicated to the analysis and systematization of legal rules that can protect investments. The examination of each legal system is performed in a different part of the chapter. This division converges in the possibility of the treatment, in the third chapter, of common aspects of the rules established in each legal system to protect investments at the end of the relationship. The last chapter of the work is devoted to specifying the remedies available for the protection of the specific investments required for the performance of a contract, as well as the different treatments in each system.

Acknowledgments

A section reserved to acknowledgments, in a thesis devoted to specific investments, is necessary. There are several people that, even unknowingly, helped me to develop this work. Some of them might be unnamed in these pages, but they are in my heart. Their investments have improved my research and, thus, this thesis. Specific investments are not only the theme of this thesis but also the action of those that stimulated this writing.

The origin of this thesis can be traced back to my Master at the State of Rio de Janeiro. In a productive academic environment, I was then stimulated to study Article 473, sole paragraph of the Brazilian Civil Code. Since them, the difficulty in interpreting it has chased me. I hope this thesis helps in understanding it better and give a more consistent application to it. My incapacity to give it then a better interpretation does not detract the high public investments of the State of Rio de Janeiro from promoting my education.

After this Master, I then decided to perform a great academic investment. I moved to another country, which I have always admired. This investment has been entirely recovered; I believe Italy has given me so much and I hope someday I could pay it off. The cultural gain was remarkable and impossible to translate in these acknowledgments. The most concrete evidence of the Italian investment in me was made by its government. Thanks to the scholarship received, I could dedicate my time and my efforts to write the thesis.

Sapienza Law Faculty has also invested in me. Its library and structure have enabled better research for this thesis. Their staff, especially F. VANNICELLI, helped me to learn the functioning of the University and facilitated the study. I also would have to thank the professors who have engaged their time to discuss this thesis. I hope their investment will be recouped someday. I should acknowledge Professors M. LIBERTINI, G. SCOGNAMIGLIO, M. FILIPPELLI, P. FORGIONI, A. PAOLINI, M. GARCEA, and R. BROOKS. The first two have allowed me to develop my academic abilities and stimulated me to do better academic work.

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Chapter 1. The economic background of the decision to make specific contractual investments

1.1. The premise of the development of the thesis: analysis of the economic phenomenon for the comparative examination of Italian and Brazilian law

The study of specific contractual investments represents an interface between an economic phenomenon and the law. These areas of knowledge address investments from different perspectives. Economic science describes the question and elevates it to the central element of one of its schools of thought. It also proposes different solutions to overcome the loss of efficiency related to parties' opportunistic conduct. From a legal perspective, specific investments become relevant in different profiles. In contract law, they could become an element to assess the abusiveness of terminating the relationship and to provide further stability to the contractual relationship. In antitrust law, an area that is more sensitive to economic effects, specific investments provide a positive balance to competitive restrictions and the possibility of delimiting a more reduced relevant market. The economic study of specific contractual investments is pertinent to appropriately evaluate the legal provisions. Such study explains the reasons to protect specific investments and the effects of their implementation.

Economic analysis can also establish a unified view of the question, which helps when conducting a legal comparative evaluation. However, the issues related to specific investments differ; they have several facets, and a legislator can adopt different positions on them. The provisions in two legal systems might have different structures, divergent approaches to the problems, and contrasting solutions. In this case, comparative law can clarify these issues. Brazilian law contains some references to investments, but the related topics have not been adequately elucidated. For this reason, a comparison with Italian law provides criteria and application references for a better interpretation of these issues and more realistic solutions. Inversely, but on a more modest scale, it is also possible to use conclusions drawn about Brazilian law to interpret the Italian legal system.

The phenomenon of specific contractual investments must be explored in its economic perspective (Chapter I) so that it can later be assessed from a legal viewpoint with a comparative analysis (Chapters II, III and IV). In this chapter, to define the specific contractual investments, it is necessary to differentiate this concept from other notions of investments. Next, the economic

notion of specific investments is addressed, along with its relevance to the interpretation of the legal rules.

1.2. The legal meanings of investment

Legal provisions in Brazilian and Italian law govern different notions of investment that do not concern the same phenomenon. Furthermore, not all of these notions can be connected to the subject of this thesis, specific contractual investments. It is necessary to examine the meanings of investment that are used in the legal field and then delimit the precise economic sense of the notion used in this thesis.[2]

All of these meanings derive from the concept of *investment*, the economic definition of which corresponds to the present allocation of capital (or, sometimes, another resource, such as

[2] The notions of investment addressed in this work concern private investments; investments in the public economy are not addressed. The motivations for public investment are identified according to the economic policy principles pursued by the State, such as the development of national income, the increase of employment, and the alleviation of regional imbalances. The choice to invest is based not on economic performance, but on the ability to meet the objectives set, which distinguishes this definition of investment from its meaning in private law. See A. GRAZIANI, *Investimento (economia politica)*, in Novissimo Digesto Italiano, p. 33.

time) with the expectation of producing income in the future.[3-4-5] The risk of the operation is the impossibility of knowing whether it will result in future profits.

Based on legal provisions, it is possible to divide the concept of investment into four different categories.[6] They have the same rationale: they represent considering capital in terms of the expectation of reaping future benefits. The investment is considered i) a placement of capital in financial assets, ii) an accounting category, iii) an investment in an entity of another country, and iv) a specific investment for the performance of the contract. There are also other aspects of investment that are of minor relevance.[7]

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[3] A. MARCUS, P. BODIE, and A. KANE define investment as "the current commitment of money or other resources in the expectation of reaping future benefits" (*Investimentos*, 2010, São Paulo: McGraw Hill, p. 3). See Jack HIRSHLEIFER, *Investment Decision Criteria,* in DURLAUF, Seven N.; BLUME, Lawrence, *The new Palgrave Dictionary of Economics*, vol. 10, I, Houndmills, Basingstoke: Palgram Macmillan, 2008. In a neoclassical perspective, investment is usually associated with capital formation, the acquisition or creation of resources to be *used in production* (R. COEN and R. EISNER, Investment [Neoclassical]). Investment would be the capital applied to generate more capital through a production process (see its use as a pop culture reference in M. GOODWIN'S Economix, p. 14). Usually, these investments are in physical capital, such as buildings, equipment, and inventory. With the development of capitalism, investments are also associated with the decision to apply capital in a financial asset. Many books today about investments analyze this choice in the financial market, and the investment decision criteria are studied in depth. Firms and individuals are regularly in a position to decide whether to invest and how to select from the options available. For example, a firm might have to decide whether to purchase a machine or construct a building. Theories can help individuals, firms, and governments choose rationally in a situation that involves a tradeoff between present and future. J. HIRSHLEIFER, Theory of Intertemporal Choice has enumerated the elements to adopt such decision: a) the endowment, in the form of a given existing income stream over time; b) the preference function, which orders all possible time-patterns of consumption according to desirability; and c) the transformation set, which specifies the possibilities for transforming the original endowment into other time-combinations of consumption (Jack HIRSHLEIFER, *Investment Decision Criteria,* cit.). Another theory is the present-value rule, according to which: i) among the opportunities available, adopt the set of investments that maximizes wealth Wo; ii) take any single investment project if and only if its present value Vo is positive.

[4] Black's Law Dictionary conceptualizes investment as an expense to acquire property or another asset to produce resources, as well as the use of capital or money to secure income or profit deriving from its use. The *Grand dicionnaire encyclopédique Larousse* presents a similar definition. The definition used by the *Vocabulaire Juridique* is more specific than those previously mentioned. In this work, investment is the use of funds, or more precisely, the action of using capital in a company given the long-term profit or the result of that action.

[5] In the dictionary, the term "investment" can also have other definitions. It can also mean i) the decision to invest in assets; ii) the invested assets or capital (such as a machine or piece of equipment); iii) in international economy, the legal provisions that govern the decision to effectuate an investment in another country, usually a developing country; or iv) a central element in the macroeconomic models inspired by Keynesian thinking. See *Grand dicionnaire encyclopédique Larousse.*

[6] Some other norms use the notion of investment, but they are either secondary or not relevant to this thesis. In Brazilian law, for example, the Corporate Law (Law No. 6.404/1976) mentions the notion of the establishment of an "investment plan" by the Fiscal Council (Article 163, III).

[7] The term can also encompass about other legal instruments. In Article 1.242, sole paragraph of the Brazilian Civil Code, ordinary adverse possession is disciplined with a shorter statute of limitations if the possessor with a fair title (*giusto titolo*) has established housing on the property and has made *investments* of a social and economic nature. The provision seems to mix the notion of investment with that of improvements (*i miglioramenti degli immobili*). Additionally, with less systematic relevance to this thesis, investments are referred to as the expenditures directed at designing intellectual property. These are not to be confused with the object of this thesis.

i) Investment as a placement of capital in financial assets

The concept of investment as the placement of capital in a financial instrument[8] is one of the most common uses of the term.[9] Its normative regulation is present in corporate law, especially in the discipline of financial markets.[10] Financial law seeks to govern investment activities.[11] Some examples of investment activity can be drawn from the law: a) the activity of acquisition and sale, by the party itself, of financial instruments, with the purpose of realizing the difference between the purchase and sale prices; b) the activity of acquiring or selling securities, also in the party's own name but on behalf of third parties; a commission remunerates this service; c) the activity of investment in financial instruments of the sums entrusted by the client to the intermediary; and d) the personalized advice given to a client regarding a particular financial instrument.[12]

This meaning of investment also has governing rules focused on the relationship with the consumer. Italian legislation has established rules designed to protect consumers who purchase a financial service, which includes any banking, credit, payment, investment, insurance, and private pension service (Article 67-*bis* of the Italian Consumer Code). In Brazilian law, there is no specific legislation concerning this relationship. The Brazilian Consumer Code[13] and regulatory acts issued by the authority to regulate the venture capital market (CVM – *Comissão de Valores Mobiliários*) apply to it.

[8] The *Testo Unico della Finan*za (TUF) establishes the definition of financial instruments in Article 1/2. Article 2 of the Brazilian capital market regulatory legislation (Law No. 6.385/1976) also establishes the concept of financial instruments.

[9] Black's Law Dictionary has a specific term for this type of investment. Under the nomenclature of *investment contract*, this modality of investment is defined as the contract, transaction or scheme by which a person invests his or her money in a joint enterprise and is led to expect profits from a third party.

[10] This meaning of investment is also mentioned in Article 372 of the Italian Civil Code. This article establishes that the tutor must invest the capital belonging to the minor in one of the modalities of financial application. The term "investment" is established in substantive form in paragraph four of the article, and it allows the tutor to choose an investment other than those listed.

[11] In Italian law, the TUF constructs its governing rules by regulating the entities responsible for investment activity. In Brazilian law, Law No. 6.385/1976 governs the venture capital market.

[12] These are examples of the investment activity established in Article 1/5 of the TUF. In Brazilian law governing the venture capital market (Law No. 6.385/1976), there is no definition of investment activity as the placement of funds in a financial instrument. However, the activities ruled thereby (Articles 1 and 2) are similar to those described by the TUF and, therefore, can also be designated as investment activities.

[13] The Superior Tribunal of Justice (STJ) determined the application of the Brazilian Consumer Code to this modality of relationship according to the consumer's degree of vulnerability (STJ, REsp 1599535, 3a T., Rel. Justice Nancy Andrighi, j. 14.3.2017).

In an influential study about the relationship between this meaning of investment and the contributions for forming a company's share capital (*conferimento sociale*), G. FERRI JR.[14] has argued that these contributions distinguish themselves from the activity of financing a company. According to him, the paid-up share capital would lead to the company's employment of the capital to acquire current assets. The profit of the shareholder would derive from the price obtained in the resale of the shares. On the other hand, financing a company consists of the employment of capital in financial assets, which are used in business activity to generate income.[15]

ii) An accounting category

Investment also acquires legal relevance as an accounting category. Companies must prepare annual financial statements following accounting principles and rules established by law.[16] In accounting, the economic definition of investment, as the acquisition of resources in the expectation of future profit, could correspond to the broad concept of the *invested asset*. In other words, it is the assets the company acquires in the expectation of generating future profits through its business activity.

For instance, the acquisition of *fixed assets* might represent a form of investment. They are acquired for their subsequent resale or their utilization in business activity. The relation between the notion of accounting and the subject of this thesis is developed in section 3.3, especially section 3.1. Moreover, the International Accounting Standards (IAS) specifically mention the acquisition of financial assets from other companies as an investment (IAS 28 and 29). When imposing accounting rules on companies, Brazilian company law (Law No. 6.404/1979) also adopts the term "investment" as a financial asset; it corresponds to the equity in other companies and rights of any nature that are not classifiable in current assets and that are not intended to maintain the company's activity (Article 179, III of Law No. 6.404/1979; in the same regard, Article 176, paragraph 5, IV, b, Article 183, III and IV, Article 243).

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[14] G. FERRI JR., *Investimento e conferimento*, cit.
[15] G. FERRI JR., *Investimento e conferimento*, cit., pp. 54-55.
[16] In Italian law, Regulation CE/1606/2002 imposes an obligation to adopt international accounting principles for some companies; for others, this is optional. Companies that do not adopt such principles must be subject to the governing rules stipulated in the *Codice Civile*. In Brazilian law, the governing rules of the financial statement are found in the Corporation Law (Law No. 6.404/1976) and in the Civil Code.

iii) Investment in an entity of another country

Foreign investment is also present in some legal texts and especially in International Conventions. It represents the conditions for entities to invest funds in another country.[17] It is also known as *Foreign Direct Investment*, in which a company from one country makes investments in another.[18] International investment constitutes a challenge for the economies of all countries, both those that are developed and those in development. It can promote a country's economic growth, and these investments can be a crucial instrument for a developing country to become developed. This relevance to a country's growth is the reason there are many policies to incite them and a global effort to facilitate them.[19] Creating this legal field is vital; it is necessary to secure investments because the host country's comportment towards investments made in its territory might be unpredictable. Today, it is a branch of international economic law.

There is no detailed or legal definition of this notion; future academic works must identify it, as many definitions are available.[20] In general terms, it consists of acquiring control of a foreign entity, or at least having a substantial influence on it. According to the definition proposed by the OECD, "lasting interest" in an enterprise is needed to be considered Foreign Direct Investment, and such interest must entail a "long-term relationship", a "significant degree of influence," and ownership of at least 10% of the voting power.[21] The concept of investment can take several legal forms, such as the constitution of a new partnership, joint venture, or shareholder's agreement, and

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[17] The notion can be traced to the English term *invest*, used at the beginning of the 17th century, in reference to the East India Company. This word is derived from the Italian *investere*. Law began to be concerned with international investment in the second half of the 20th century. However, international investment was not immediately a legal category; rather, it was first part of offshore asset protection. The concept gained autonomy with the perception of this protection's insufficiency to secure investments in another country. Concerning the history of this meaning, see Anne GILLES, *La définition de l'investissement international,* Bruxelles: Larcier, 2012.

[18] Lexicon of the Financial Times.

[19] Anne GILLES, *La définition de l'investissement international*, cit.

[20] According to A. GILLES (Anne GILLES, *La définition de l'investissement international,* cit, p. 278), there are two main definitions of international investment. The first corresponds to the mentions in laws and international conventions. There is a formal and substantial resemblance between the two, but they are not entirely unified because they can change due to the legislator's intention or the function of the text. However, they would share the same logic in the creation of a legal category. International arbitration (usually, CIRDI - *Centre International de Règlement des Différends Relatifs à l'Investissement*) would develop the second definition of investment. It would be more specific than the first, and it differs in that it is not destined to create a legal category; rather, it aims to verify arbitration competence. As a conclusion, the author suggests using the economic notion of investment to confer an autonomy to investment in international law.

[21] The Organization for Economic Co-operation and Development (OECD) publishes, for statistical purposes, a benchmark of Foreign Direct Investment (http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf).

it should be distinguished from mere investment in the shares of a foreign company ("portfolio investment"). This modality of investments gains relevance with incentives in the country of destination through regional free trade agreements; multilateral and bilateral investment treaties; investment legislation and regulations; elements of domestic commercial, antitrust, and intellectual property; and tax, labor, and environmental laws.

iv) Specific investment for the performance of a contract

The theme of the thesis was chosen due to an attempt to interpret a provision in Brazilian law that mentions "investment" that was not similar to the notions previously described. In this case, the investment would be used to perform a contract. It does not fall under this category if the company uses it in its regular activity and before the contractual performance (investments for precontractual negotiations).[22] This provision was not isolated in Brazilian law, and it is also present in Italian legislation. Article 3/3 of Italian Law No. 129/2004 establishes that the minimum duration of the franchise agreement must correspond to the period necessary for the recovery of the investments made, adding that this period shall not be less than three years. The Brazilian Civil Code has similar provisions, such as Article 473, when addressing the general limitation of terminating the contract until the amortization of the investments made, and Article 720, which dictates a specific rule for the agency and distribution agreement.

This meaning of investment can be reconciled with what economic theory describes as a specific investment (or asset specificity). The specific investment is not to be confused with the application of funds in financial instruments, nor does it resemble the concept of accounting, which, however, may give essential indications for its use. In order to avoid terminological confusion, given the high number of meanings used, the term "investment" in this text and the literature on the subject is usually accompanied by the adjectives *specific*, *specialized*, *intended*, *contractual,* and *idiosyncratic*.[23] The meaning of investment is explored in the following sections.

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[22] A. LAS CASAS, *Tutele dell'investimento precontrattuale e razionalità economica: profili comparatistici*, Torino: Giappichelli, 2009 examines the pre-contractual investments, made before the conclusion of the contract, and not aimed at its performance.

[23] The economic literature uses the term *idiosyncratic*, not to distinguish this modality of investments from the others, but to indicate its subdivision. The idiosyncratic investment would be a mode of specific investments and would be used directly to enforce the contractual relationship between the parties. Cf. P. JOSKOW, *Asset Specificity and Vertical Integration*, in The New Palgrave Dictionary of Economics and Law, MacMillan, 1998, p. 107; and O. WILLIAMSON,

1.3. The economic background of the decision to make contractual specific investment

The meaning of a specific investment presented in the legal provisions mentioned in item iv) of the last section is associated with specific investment (or asset specificity), and it requires a more in-depth analysis of the economic concepts of neo-institutionalism. Italian legal doctrine adopts this view when examining the protection of specific investments from an economic perspective in works on the abuse of economic dependence (*abuso di dipendenza economica*) (see especially the relevant works by C. OSTI, B. TASSONE, G. COLANGELO, and A. RENDA). This concept, outlined in Law No. 192/1998, represents a central provision for protection against abuse in commercial relations between companies. These studies have established the connection between the abuse of economic dependence and the notions of contractual opportunism and the making of specific investments.[24] In Brazilian law, this construction can be found in the work of P. FORGIONI, *Contrato de distribuição* (see section 2.3.2).

O. WILLIAMSON is one of the founders of the field of study called neo-institutionalism, which is also known as transaction cost economics (TCE). His works stand out in contract economic theories, which consist of several branches of analysis. O. WILLIAMSON's papers continue to be cited in the current debate on contractual investment protection. According to these theories, the need to make specific investments represents a relevant factor for the decision to expand a company; it a choice between *make* or *buy*.

Turning to the analysis of economic elements should enrich the present thesis. Economic science has theorized a phenomenon that, either consciously or unconsciously, the legislator has referred to or that becomes legally relevant through the application of a general clause. This economic analysis is thus a prerequisite to the legal qualification of the phenomenon. It allows the description of the contractual investment and, accordingly, the proper application of the governing rules. This evaluation of the situation also can consist of a complete picture of the economic reality

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The economic institutions of capitalism: firms, markets, relational contracting, New York: Free press; London: Collier Macmillan, 1985. See also section 1.3.3.

[24] The analysis of these opportunistic behaviors in Italian law is credited to an academic monograph published in the late 1970s. In this paper, probably for the first time in Italy, reference is made to non-recoverable investments to address issues related to the dominant company's termination of a distributive contract. The work of R. PARDOLESI, *I contratti di distribuzione*, Jovene: Napoli, 1979, in addition to bringing such themes to the Italian debate, still represents a reference work on distribution agreements.

underlying the operation of making investments. This knowledge leads to a better understanding of the reasons for the execution of contracts that contain the need for making specific investments, the interests involved, and the mechanisms of their operation. This interpretation also facilitates the analysis of the contractual parties' behavior.[25] Empirical research studies have also linked the presence of specific investments to a longer duration of the contract.

The use of economic literature requires some warnings. Transposing the conclusions reached through economic analysis should not be automatic; on the contrary, economic examination is a means for the analysis of legal rules. The application of the general clauses of abuse of economic dependence and good faith imposes the use of legal principles rather than the direct mediation thereof by economic elements. Economic elements are not a verification model; the imposition of duty occurs only from legal rules.[26]

This chapter examines the economic theories used to explain contract reality. The assumptions of these theories are used to understand the agreement with specific investments. These are examined concerning their implications for the contractual relationship, in particular, the opportunistic appropriation of the contractual investments surplus. Given the possibility of a hold-up, several solutions are presented to allow efficient mechanisms to prevent it. This incursion clarifies the operation of the investments in the contract and indicates the need to establish the best level of investments, their interface with legal remedies, and the categories of specific investments.

1.3.1. The change in the economic paradigm of the contract: a brief introduction to the economics of contracts theories

The "traditional" or "neoclassical" microeconomic model is based on the regulation of economic transactions by a complete contract. For each possible current or future situation, this contract establishes the obligations of the parties, and it ensures that their enforcement occurs through the ability to verify the contractual rules by an external authority (usually a judge) and through the possibility of imposing penalties on the defaulting party.[27] In this scenario, the parties

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[25] F. A. F PINTO (*Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, Lisboa: Universidade Católica, 2013, p. 170) shares this warning.
[26] G. VETTORI, *Contratto e rimedi*, Assago: CEDAM, 2009, pp. 491-2.
[27] A. NICITA; V. SCOPPA, *Economia dei Contratti*, Carocci: Roma, 2005, p. 17.

also act in a perfectly competitive market. These characteristics would guarantee an efficient economic system.[28]

Some economic theories have criticized this idealized construction of reality. Neoclassical theory presupposes that economic agents enjoy all the advantages of exchange and cooperation. The agents would have perfect rationality, full availability of all information, and the ability to make accurate forecasts. However, reality is uncertain and imperfect; information is asymmetric, and agents with limited ability must make choices. A legal and judicial system with the capacity to guarantee the enforcement of any contract may also not be confirmed. Therefore, the foundations of neoclassical theory are unreal.[29]

Defended from the early 1970s onwards, new and more realistic economic theories are categorized as *the economics of contracts*.[30] The unifying characteristic of these theories is the abandonment of the theoretical fiction of complete contracts. Their focus is the actual contractual and institutional structure.[31] They explain a large number of previously ignored economic phenomena, including the creation and evolution of public and private institutions.[32] Despite adopting the same perspective, these theories are not a uniform group. They have some characteristics in common, such as the proposal of deconstructing reality, classifying the behavior of the parties as tending to be opportunist, and assuming that the agents have limited rationality. They are also complementary and highlight various dimensions of contracting. However, there are several orientations, and they use different methodologies.

One of the main foundations of the economics of contracts theories is their emphasis on the definition of the contractual mechanism as the structure chosen by the parties to govern the transaction. The mechanism adopted should be able to avoid the risks of opportunism[33] and reduce

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[28] Ibid., cit., pp. 17-8.
[29] Ibid., p. 18.
[30] Ibid., p. 18.
[31] The field of action of contractual norms is also widened. Contractual law norms would derive not only from legal norms and court decisions, but also from practices and even drafting models used by operators. D. NORTH (*Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990, p. 12) made the distinction between *institutions* and *organizations*. The former are the rules of the game. While carrying out their transactions, the parties would be involved in a network of social, cultural, religious, and political relations and norms. On the other hand, the organizations would be the rules formulated by the parties. O. WILLIAMSON, *The new institutional economics: Taking stock, looking ahead*, in Journal of Economic Literature, vol. 38, 2000 also underscores the relevance of the various rules based on the division into framework levels at which the institutions operate.
[32] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 18.
[33] Opportunistic behavior is examined in greater depth in section 1.3.3.1. In summary, opportunistic behavior consists of "cunningly pursuing a selfish purpose." The parties, to carry out their interests, tend to disrespect the agreement or omit/falsify the information they have. Opportunistic agents lie, steal, neglect, obfuscate, distort, and confuse.

transaction costs. Each transaction is examined and compared in order to adopt the most efficient structure. The parties seek to identify and select the contractual or organizational form that minimizes transaction costs.[34] Different contractual and institutional structures are analyzed, and neoclassical theory would have greater difficulty gauging their efficiency.[35] These theories have contributed evidence of the uncertainty of business success.[36]

Modern economic transactions demanded a new economic branch. Founded on the division of labor and its specialization, the economics of contract theories requires forms of cooperation and coordination among agents. By overcoming the complete contract paradigm, the risk of opportunism threatens the efficient realization of mutually advantageous transactions. This possibility leads to high transaction costs, which may induce the parties not to enter the relationship.[37] The advantages of the transactions can be achieved only by the use of a suitable mechanism to encourage the parties to adopt socially efficient behaviors[38] (this matter is analyzed in more depth in section 1.3.4).

Agents' bounded rationality, the scarcity of information, and making specific investments also entail the need for the parties to bear transaction costs. These costs are incurred prior to the completion of the transaction (e.g., the search for available opportunities, collection and preparation of information, identification of efficient business decisions, discussion of contractual terms, adoption of contractual precautions, and safeguards) and during its enforcement (e.g., the conduct of the relationship, the monitoring of benefits and correct compliance with the contract).[39]

The parties may decide on structures that do not allow opportunistic behavior, such as spot contractual relations, in which the exchange occurs simultaneously. In other transactions, more sophisticated measures are required to avoid opportunistic behavior. Alternative instruments include implicit contracts and various institutional and organizational mechanisms (e.g., property rights, use of authority, hierarchical organization). These mechanisms allow the agents to operate more efficiently and to avoid opportunism, or at least to limit adverse consequences (see section 1.3.4).[40]

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[34] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 21-2.
[35] Ibid., p. 23.
[36] G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, Torino: G. Giappichelli, 2004, p. 40.
[37] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 22.
[38] Ibid., p. 21-22.
[39] Ibid., pp. 21-22.
[40] Ibid., pp. 22-33.

In the economics of contracts theories, two different approaches stand out; both analyze the issues related to opportunism and contractual incompleteness from a different angle.[41] However, there is significant overlap between them.[42] The first economic theory, "information economy" or "incentives theory," is based on problems stemming from the existence of informational asymmetry between parties.[43] One is the agent, and the other is the principal; the former would have more information than the latter.[44] Given the difference in the information level of the counterparty, the agent could take advantage of this circumstance and adopt opportunistic behavior.[45] The results of the parties' actions are no longer solely related to their performance or choice; rather, causal factors beyond the parties' control influence the results.[46] At the same time that it helps provide a better understanding of economic reality, this theory has critics because it presupposes the perfect rationality of the agents and ignores the presence of specific investments.[47]

The second approach, called "economics of incomplete contracts," "neo-institutionalism,"[48] or "TCE," emphasizes the problems of contractual incompleteness.[49] This decision would derive from the agents' bounded rationality. This approach emphasizes specific investments made for the performance of the contract because they create a risk of opportunism. In dealing with the division of information between the parties, it is assumed that they share the same information, but it would not be verifiable by an external authority responsible for enforcing the contract.[50]

[41] Ibid., p. 22.
[42] Ibid., p. 24.
[43] This theory is not directly related to the issue of specific investments and, therefore, does not merit further detail in this thesis. However, some of the solutions proposed to overcome this problem address informational asymmetry. Specific and more in-depth analyses are conducted in this thesis when necessary to allow for a better understanding of this theory.
[44] The information asymmetry can pertain 1) to the characteristics of the agent or the environment of the hidden information or 2) to the action performed (hidden action). The first category relates to information before the beginning of the contractual relationship, hence the name *adverse selection*. The second is manifested after the stipulation of the contract and is called *moral hazard*.
[45] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 29-30.
[46] Ibid., p. 30.
[47] Ibid., pp. 23-4.
[48] O. WILLIAMSON designated this name for the second institutionalism school. J. R. COMMONS founded the first institutionalism school. Transaction costs economics provides the theoretical tools to address the issue of specific investments. This theoretical work uses a multidisciplinary approach, combining contributions from economics, sociology, and law. Its exponents include Oliver WILLIAMSON and Douglas NORTH.
[49] The incompleteness of the contract leads to a distancing from efficiency. This consequence generates an attempt to present contractual and institutional mechanisms to overcome the problem.
[50] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 24.

This second approach to contract economics appears to be the most appropriate for the analysis of the phenomenon of specific investments because it highlights the different governance of the transactions. R. COASE's work on economic and company organization contains the embryo of this theory; in work in the 1930s, he introduced several questions about the company and deconstructed the economic presupposition that the market would always promote efficient exchanges.[51] The theories then in effect focused on the market and the price mechanism. According to the author, this approach was unrealistic, especially to explain the emergence of firms and to provide insight into the economic system. Firms and markets would represent alternative transaction structures, and these mechanisms allow different ways of organizing production. The market instrument is the price, while in the company, it is the authoritarian direction of the entrepreneur. Companies are created to reduce the costs of transactions in the market (*e.g.*, negotiation and contract completion costs).[52] The markets only guarantee allocative efficiency if it has lower transaction costs compared to the growth of the company.

The study of specific investments requires an in-depth examination of the assumptions of neo-institutionalism theory: contract incompleteness, the bounded rationality of the parties, informational limitation, and opportunism. An entirely rational agent without a selfish spirit is no longer taken as a parameter. The economic transaction is governed by the limited rationality of the parties and the risk of their opportunism.

1.3.2. New assumptions regarding economic transactions: contractual incompleteness, the bounded rationality of parties, informational limitation, and opportunism

Specific investments constitute a relevant element of the transaction, and they are explained by TCE. Their examination presupposes the understanding of other characteristics of this theory: incomplete contracts, the bounded rationality of the parties, information limitations, and the tendency towards opportunism.

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[51] The work in reference is *The Nature of the Firm*, of 1937, widely quoted and analyzed. It is not the same in which the Coase Theorem was enunciated. The latter is entitled *The Problem of Social Cost* from 1960.

[52] Although Ronald COASE did not use the term "transaction costs," he acknowledged that the significant theoretical contribution of his study may have been the explicit introduction of the concept of transaction costs into economic analysis (*The Nature of the Firm: Influence*, in O.E Williamson/ S. G. Winter, 1993, pp. 61-74).

The analysis of contracts can no longer be based on the contractual completeness paradigm.[53] There are no complete contracts, except perhaps at a high cost. The complete contracts would be contracts in which the parties specify all possible contingencies that may occur during the contract's enforcement.[54] The impossibility that the judge can verify the terms of the contract generates uncertainty regarding a decision in the case of a dispute between the parties. A decision could be the result of a discretionary choice arising from the interpretation of a contract whose terms cannot be adequately verified. The profit cannot be foreseen *ex-ante* when stipulating the contract.[55]

There are several causes of contract incompleteness:[56]

a) the bounded rationality of the parties prevents them from anticipating every possible future contingency;

b) the costs to decide on each unique circumstance;

c) the costs of unambiguously describing each circumstance in the contract;

d) the cost of recourse to the judicial system to obtain enforcement of the contract;

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[53] Legal doctrine analyzes the incomplete contract with different perspectives. The work of G. BELLANTUONO (*I contratti incompleti nel diritto e nell'economia*, Padova: CEDAM, 2000) has great relevance. The author emphasizes that the incomplete contract does not present a novelty; rather, it seems to be a necessary condition for the application of contract law. The author then examines whether the incomplete contract can enrich the legal perspective and provide an indication of the content of the contractual rules. The work analyzes the default rules present in the Italian legal system and their relationship with the rules of contract interpretation. Next, he examines the relevance of incomplete contract theory for the qualification of the contract and the application of general clauses, primarily objective good faith and the abuse of right. In Brazilian law, P. G. BANDEIRA (*Contrato incompleto*, São Paulo: Atlas, 2015) thoroughly examines the notion of incomplete contract. This analysis was carried out from another viewpoint. For the author, the incomplete contract would be defined based on Antonio FICI, *Il contratto di franchising*, Napoli: Edizioni Scientifiche Italiane, 2012, i.e., the contract in which one or some of the elements of the contract are "blank," subject to future supplementation by the criteria set by the parties in advance. This last outlook removes this analysis from the discussions proposed in this thesis.

[54] Among others, see P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p. 107. The complete contract corresponds to the "contract that accurately specifies what the parties' obligations are in any possible state of the world. Under such conditions, there would never be a reason to modify or update the contract, as everything would be anticipated and scheduled in beforehand" (O. HART, *Incomplete Contracts and the Theory of the Firm*, in Journal of Law, Economics, and Organization, 1988, vol. 4, issue 1, pp. 119 and 121). The definition of A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 18 provides another angle on the subject. For them, the incomplete contract would be the contract signed by one or more subjects whose terms are observable by the contractual parties but are not verifiable and enforceable with certainty and forcibly by a third party (a judge or an arbitrator).

[55] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 196-8. The parties can favorably use this characteristic to avoid opportunistic conduct, but it can also generate inefficiency. Some obligations are not verifiable by the judge, which can hinder enforcement. This circumstance causes the party to adopt opportunistic behavior when convenient. At the same time, non-verifiability can allow the creation of clauses that are consciously ambiguous and capable of reducing such behaviors (see section 1.3.4.4).

[56] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 197 provides this listing.

e) the difficulty of enforcing the contract due to the limitation of existing information between the parties on characteristics or states of the world ("non-observability"), or the difficulty of transmitting this information to the external authority ("non-verifiability");

f) the risk of opportunistic behavior can lead the parties to leave verifiable elements out of the contract ("endogenous incompleteness").

Contracts concluded in the market are affected by a reasonable degree of incompleteness. The change of the paradigm of the complete contract also implies modification in the vision of the economic agent, who is limitedly rational[57] and tends to behave opportunistically. These characteristics lead to and aggravate transaction costs. In addition, human beings' cognitive limitation is recognized; they cannot predict all the future events that may occur in the course of an economic transaction, nor do they have all the relevant information to structure the appropriate action plan. They also cannot describe a contract clearly and unambiguously.[58] This cognitive limitation is also attributed to the judge, who enforces the relationship.[59] The construction of the contractual environment changes based on the premise of this limited rationality. The contract is then seen as an interactive and dynamic environment, in which the parties' expectations are updated based on the negotiating behavior of the counterparty.[60] Bounded rationality also generates an asymmetry of information between the parties.[61]

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[57] H. SIMON introduced the notion of limited rationality in his 1955 paper, *A Behavioral Model of Rational Choice*. The author contributed to the literature on company formation. Sharing the idea of an enterprise as an institution capable of minimizing transaction costs, he emphasizes the limits of economic agents. For him, parties are not endowed with full rationality, but with bounded rationality. They would not be capable of complex calculations and of receiving and distinguishing the relevant information for an optimal choice. Rationality would be, at best, the rationality of the procedures for making a choice.

[58] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 19. A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky*"*, cit., p. 255 focuses on the influence of the agent's bounded rationality in two aspects: trust in the contractual partner and the state of the world that occurs at a future stage of contract enforcement. This perspective is different from that of the literature mentioned, which attributes broader relevance to the bounded rationality of economic agents. For that author, the hypothesis of (almost) perfect information can be maintained even in matters related to the present and the spheres of interest of the agent (for example, concerning the understanding of the content and strength of the conditions of the completed contract). It cannot be considered valid regarding the sphere of action of the counterparty or the future evolution of the relevant variables. A. RENDA uses K. POPPER'S notion of contextual rationality. This modality of rationality manifests non-exhaustive information, not bounded rationality. It is limited and, therefore, always fallible.

[59] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 19.

[60] A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky," cit., p. 244.

[61] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 19 emphasizes that the informational asymmetry between the parties represents an object of study for another branch of the literature, information economics. It is not usually

The parties tend towards opportunistic behavior; the economic players cunningly pursue selfish ends. Several situations can be traced to the category of opportunistic behaviors, which range from unlawful behavior to more subtle forms of unfair or deceptive conduct. The contracting parties tend to breach contracts and omit information in their possession in order to fulfill their interests and add to their material well-being.[62] The imprecision of the concept and the amplitude of the situations covered make it difficult to apprehend the phenomenon in a more precise manner. It is not always easy to distinguish the rational pursuit of individual interests (which, after all, is expected of each agent in a competitive market) and the opportunistic attitude.

There are two relevant categories of opportunistic behavior, free riding and contractual hold-up (the notion of hold-up is further analyzed in section 1.3.3.1). Free riding is the pursuit of economic benefits given the counterparty's disbursement availability. An example of this conduct is a participant in a distribution network who takes advantage of the promotional efforts made by another distributor. Hold-up corresponds to *ex-post* opportunism, which usually arises with specific investments, for instance, the moral coercion or threat of termination or non-renewal of the relationship after making specific investments. The economic agent appropriates the quasi-rent generated due to the counterparty's vulnerability.

The consequence of an economic agent's opportunistic behavior is the reduction of economic efficiency. Transaction costs increase as a result of this conduct; the wealth produced by the contractual relationship is unevenly distributed, and the party carries out the investments at a suboptimal level (the consequences of opportunistic behavior are addressed in further detail in section 1.3.3.1). These economic resources could be used in alternative activities, resulting in the loss of substantial opportunities and valuable deals that do not materialize. If the risk of opportunism is high, the parties allocate considerable resources for the implementation of control and oversight mechanisms.

There is an intimate relationship between opportunism and making specific investments so that the effects of opportunism relate to the justifications of the protection of investments indicated in section 2.1. The analysis of specific investments is the subject of the following section.

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included in transaction cost theory. In this case, the relevant asymmetry would occur between the parties and the person responsible for promoting contract enforcement.

[62] Ibid., pp. 18-19.

1.3.3. Specific investments

Specific investments are a central element in the theoretical understanding of the economics of the contract.[63] The works of O. WILLIAMSON[64] and B. KLEIN, R. CRAWFORD, and A. ALCHIAN[65] in the 1970s introduced the notion of the reduced protection of the party due to specific investments. Several other papers have confirmed their conclusions: S. GROSSMAN and O. HART (An Analysis of the Principal-Agent Problem, 1983),[66] P. GROUT (Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach, 1984),[67] J. TIROLE (Procurement and Renegotiation, 1986),[68] and O. HART and J. MOORE (*Incomplete Contracts and Renegotiation,* 1988).[69] The development of this thesis requires the economic view of specific investments.

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[63] According to O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit., p. 56, the importance of specific investments for TCE is difficult to exaggerate. The absence of the specific investments would make much of the work impossible. In the absence of this condition, especially tied to bounded rationality, opportunism, and the presence of uncertainty, the contract world would be significantly simplified. In his view, neglecting specific investments is the primary reason for the concern with the monopoly arising from contractual transactions.

[64] Three works by Oliver E. Williamson may be recommended: i) O. WILLIAMSON, *The Vertical Integration of Production: Market Failure Considerations*, American Economic Review, vol. 61, May 1971; ii) especially O. WILLIAMSON, *Markets and Hierarchies: Some Elementary Considerations*, in The American Economic Review, Vol. 63, No. 2, May, 1973; and iii) O. WILLIAMSON, *Transaction-Cost Economics: The Governance of Contractual Relations*, in Journal of Law and Economics, vol. 22, 1979. The texts, especially the third one, emphasize that the opportunism of the party is relevant in an activity with the presence of specific investments in human and physical capital. This feature is relevant when looking at the transaction costs required to choose the most appropriate structure to govern a particular transaction. In addition to the uncertainty and frequency on which the transaction relies, the choice of the governance model depends on the degree to which specific investments are incurred. The author consolidates the systematization of the specific investments in his book O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit.

[65] B. KLEIN; R. CRAWFORD; A. ALCHIAN, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, Journal of Law and Economics, vol. 21.

[66] S. GROSSMAN; O. HART, *An Analysis of the Principal-Agent Problem*, in Econometrica, vol. 51, 1983.

[67] P. GROUT, *Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach*, in Econometrica, vol. 52, no. 2, 1984. The text compares binding and non-binding employment contracts. Specific investments relate to the time at which they are carried out.

[68] J. TIROLE, *Procurement and Renegotiation*, in Journal of Political Economy, April 1986, vol. 94, no. 2. The work of J. TIROLE aims to expand the presumption of underinvestment proposed by O. WILLIAMSON. The author confirms the conclusions of O. WILLIAMSON.

[69] O. HART; J. MOORE, *Incomplete Contracts and Renegotiation*, in Econometrica, July 1988, vol. 56, no. 4. Based on the notion of an incomplete contract, the authors conclude that the parties cannot specify all contingencies of contracts. In order to overcome incompleteness, the parties could periodically review the contract as soon as they obtain information about the costs of production and the benefits of the exchange. Then, the authors suggest a socially optimal model of contracting, in which one of the parties must make specific investments. The characteristics of this model are highlighted in section 1.3.4.2.2.

Economic agents usually have a choice between making a general or specific investment for the performance of the contract.[70] Specific investments are those intended for a precise contractual relationship. O. WILLIAMSON has defined a specific investment as one "that, once made by one or both parties to an ongoing business relationship, has a lower value in alternative uses concerning the use for which it is intended, to support the specific bilateral trade relationship."[71] It is necessary to invest in physical and human resources to increase their efficiency. These investments have value (at least, they have a higher value) within a specific relationship; the amount invested would be lost if used in an alternative transaction.[72] Specific investment and its relevance become the main factors of the duration of contracts and their continuity.[73] The party that makes specific investments cannot determine the profit that will be obtained with the relationship. Making specific investments, therefore, implies the risk of income appropriation and contractual terms renegotiation.[74]

Specific investments have varying degrees of specificity, which is the degree of reusing the resource in an alternative usage. The higher the degree of specificity, the more significant the decrease in its value in use outside the relationship, or the more significant the increase of adaptation costs.[75] There are several types of specific investments:

(a) site specificity: investments related to the location of another company to reduce inventory and transportation costs. An example case is *Fisher Body and General Motors* (section 1.3.4.2.1);

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[70] O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit., p. 54.
[71] Ibid., p. 141. The author adds that the specific nature of the resource refers to the durable investments made to support some transactions. In the same regard, see also P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p.107.
[71] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 199.
[72] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., 20.
[73] O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit., p. 140. A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky," cit., p. 259 also adheres to the evaluation of empirical studies. For him, essential studies carried out in the coal and gas sector show, at a practical level, a positive correlation between the duration of the contracts and the amount of relation-specific investments (see section 1.3.4.2.2).
[74] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 197-8.
[75] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 19. From another perspective, M. KLASS; R. RAPP, *Litigating the Key Economic Issues under Kodak*, in Antitrust, vol. 7, no. 14 address the switching costs incurred by consumers concerning purchased products. In a decision by the U.S. Supreme Court on the Kodak case, discussed in footnote 321, switching costs correspond to those incurred by the consumers (or the benefit they have) when switching to another supplier.

(b) physical-asset specificity: investment in equipment and machinery with design or other specific characteristics for the transaction;
(c) human-asset specificity: investments in learning by doing and specialized training;
(d) dedicated or idiosyncratic asset: investments intended for a single activity or a specific clientele; for example, the investment in promoting a brand for luxury or niche products.[76]

Investments can also be classified based on the responsibility for making them, which may be borne by only one party (unilateral investments) or both (bilateral investments). One party conducts unilateral investments, exposing it to the counterparty's threat of hold-up.[77] Bilateral investments may appear to differ from the risk of extortion. The reciprocal nature of specific investments could bind both parties to the relationship and would constitute an endogenous enforcement instrument. However, the presence of specific bilateral investments does not entirely eliminate the risk of hold-up; the issue of coordinating investment decisions must also be considered. The lack of the investment decisions' simultaneity exposes the subject that first made investments to the opportunism of the counterparty.[78]

Another distinction that is usually not emphasized is between selfish and cooperative investments (on this distinction, see section 1.3.4.3.3). Selfish investments are those that benefit the party that makes them, but not the other. Cooperative investments confer benefits on the other contracting party and not on the party performing them.[79] This distinction can help with understanding the legal discipline in Brazilian and Italian law. As mentioned above, the parties in

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[76] O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit., p. 141; P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p. 109; and A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 199-200. C. OSTI, *L'abuso di dipendenza economica*, in Mercato concorrenza regole, 1999 proposes a different classification. For the author, specific investments can be classified as follows: (a) physical investment, divided into i) machinery, equipment, or general investments (strengthening a production line or building a specific warehouse for a specific productive scope); ii) the place of production (a manufacturing plant placed near another plant producing raw material); iii) techniques or systems not compatible with other applications (a particular software language, a particular recording system, a lens for a camera); (b) transactional investment: the interruption of a lease relationship of specific machines or the provision of certain services; (c) learning investments: employees' skills that are not used with the same functionality in other productions; (d) second-degree investments: the specificity that does not directly concern the counterparty subject, but its clientele, such as brand loyalty, or loyalty to a product.
[77] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 203-4.
[78] Ibid., pp. 208-9.
[79] Some works in the economic literature make this distinction. Within the scope of the law, S. GRUNDMANN; F. CAFAGGI; G. VETTORI, *The Contractual basis of Long-Term Organization – The Overall Architecture*, in The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law, Oxford: Routledge, 2013, made this categorization.

a contractual transaction act opportunistically. The risk related to making specific investments is the subject of the next section.

1.3.3.1. The risk of extortion after making specific investments

Specific investments expose the investing party to the risk of significant opportunism. Despite increasing the productivity of the contract, investments constitute an opportunistic platform for the counterparty, thus creating the risk of extortion. Because of this opportunistic behavior, the party might not make investments – or, at least, not at an optimal level. This conduct to avoid a loss is magnified due to risk aversion.

Specific investments bring benefits to the parties. The transaction becomes a value-creating relationship, and the positive balance produced can lead the counterparty to perform opportunistic acts to appropriate the "specialized quasi-rent." He extorts the party that performed the specific investment. The existence of a quasi-rent associated with the specific investments also has effects on the party that makes them ("lock-in effect").[80] The investor remains in the relationship at least until the expected profits outweigh the gains obtained outside the contract in alternative use.[81]

As a consequence of the lock-in effect, specific investments also change competitive conditions. Before the relationship of specific investments, the parties have potential suppliers and consumers; the market is competitive *ex-ante*. With making specific investments due to a transaction's performance, the competition is reduced to a small number of competitors or even to a bilateral monopoly.[82-83] These circumstances create a degree of economic dependence for the party making investments. The lock-in effect has allowed some academic works to associate

[80] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 200.
[81] Ibid., p. 200.
[82] P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p. 109. O. WILLIAMSON, *The Mechanisms of Governance*, New York: Oxford University Press, 1996, p. 51 emphasizes that the problem of economic dependence associated with hold-up risk is a "school" problem. Dependence on resources does not come as a surprise to unaware victims. The theory of transaction costs (see section 1.3.1) states that, in discussing the contractual terms, the parties assume this situation of dependency and adopt a structure to overcome it. According to O. WILLIAMSON, the parties will evaluate *ex-ante* alternative transaction governance scenarios, considering the technology, the price of the trade, and the contractual protections applied. This vision has been surpassed by the current Italian and Brazilian legislation and case law.
[83] The extortion power discussed in this section is not to be confused with the power exercised when one of the companies has market power, with the possibility of adopting unilateral behavior concerning the competition. This power should not be addressed from the perspective of the contracting regulation, but in the antitrust discipline as an abuse of a dominant position. This circumstance would be able to remove the relevance of some of the issues raised and add other questions. Cf. C. OSTI, *L'abuso di dipendenza economica*, cit., p. 24.

specific investments with instituting the abuse of economic dependence (see section 2.2.1.1). Dependency is the measure of the cost-opportunity of exiting the contractual relationship.[84] As a consequence of the risk of extortion due to the presence of specific investments, the investment can be conducted at a sub-optimal level or making it can be delayed.[85]

Risk aversion expands these consequences after making specific investments. Behavioral law and economics introduced this notion into the economic debate, claiming that utility maximization is not an ethical principle and that emotional factors constrain the decision-making process. These characteristics of human behavior would not allow one to adequately assess some situations.[86] Due to emotional elements, risk perception is not rationally distributed between the risk of gain and the risk of loss ("the risk aversion"). Economic agents do not act rationally when faced with a risk of loss. Two conclusions can be gleaned from this. The first is the admission of regulatory intervention to avoid this risk; intervention in case of market failure would thus not be the only permissible hypothesis to regulate the economy. The second conclusion is the notion of the endowment effect. Due to a distorted perception of reality, individuals attribute a higher value to assets in their ownership in comparison to the same assets not in their possession ("endowment effect"). There would thus be a higher perception of risk of loss of an asset than its gain.[87]

Making specific investments and the consequential risk of the counterparty's opportunism generate the endowment effect. They produce a much higher repercussion for the party's behavior than would be rational. The party's dependence increases even in situations where switching costs (i.e., the cost necessary to adapt the investments to another transaction) would not incur a prohibitive loss.[88] If it is not possible for the party to be adequately protected through the contract, opportunistic behavior, coupled with the aversion to the risk of loss, entails the disincentive of making specific investments at an optimal level. As a response to these risks, there are many academic proposals for the governance of the contractual relationship to improve the transaction's efficiency.

[84] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 200-1.
[85] Ibid., p. 200.
[86] G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 35.
[87] G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 40.
[88] C. OSTI, *L'abuso di dipendenza economica*, cit., p. 27.

1.3.4. Proposals for the governance of the contractual relationship

The preceding sections have demonstrated the shifting economic paradigm. This microeconomic vision explained the concept of specific investments and the issues related to the decision to conduct them. The economic literature does not limit their description; rather, it proposes measures to protect specific investments through mechanisms that generate greater efficiency. Such measures would prevent the appropriation of quasi-rent from opportunistic behavior and would encourage the parties to invest in socially optimal conditions.

Many diverse solutions have been proposed.[89] They require economic agents to implement governance solutions in order to induce socially optimal investments. These mechanisms may be categorized as i) indirect enforcement instruments, such as the adoption of relational contracts and of implicit contracting based on reputation and trust, on social norms, on self-regulation, and market discipline; ii) proprietary and contractual vertical integration; iii) contractual and legal remedies; and iv) hierarchical mechanisms (such as the use of authority).[90-91] The instruments are not mutually exclusive but complementary.[92] They have uncertain boundaries: there is, for example, the overlap between the remedy of vertical integration and the authority relationship.[93] Considering the purpose of this thesis, the discussion concerning vertical integration and legal and contractual remedies is addressed more thoroughly (sections 1.3.4.2 and 1.3.4.3).

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[89] According to Y. CHE; D. HAUSCH, *Cooperative Investments and the value of Contracting*, cit., some recent papers have shown that the first-best outcome for exchanges, even in the face of specific selfish investments and incomplete contracts, can be leveraged by appropriate contractual designs.

[90] This last modality is less relevant for the development of this thesis and, therefore, it is not developed in depth. Defended by P. AGHION and J. TIROLE, it involves an authority in organizations (P. AGHION; J. TIROLE, *Formal and Real Authority in Organizations*, in The Journal of Political Economy, vol. 105, no. 1, Feb., 1997). This article develops the theory of the allocation of formal authority (the right to decide) and real authority (effective control over decisions) within the organization. It claims that the structure of information determines real authority. The asymmetry of information allows the dissociation between real authority and formal authority. In the view of the authors, there are two main benefits for the formal delegation of authority. First, transferring the formal authority of an agent increases its initiative or encourages him to acquire information. Second, the transfer of authority over activities or decisions that concern the agent rather than the principal facilitates the agent's participation in the contractual relationship. While the increase of the real authority of the agent promotes its initiative, it results in the principal's loss of control. Concerning specific investments, this theory could overcome the incentive for the principal to expropriate the agent's investments, due to the former's excessive information. As the excess of information would harm the principal, the proposal suggests integrating vertically through the information.

[91] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit.

[92] Ibid., p. 222.

[93] Ibid., p. 220.

Opportunistic behavior is one of the three most frequent causes of litigation.[94] In order to avoid it, the contractors may adopt transaction governance mechanisms. These choices presuppose assessing the trade-off between prevention against opportunism and efficient adaptation.[95] At the same time that the parties seek to protect themselves through contractual clauses, their excess of rigidity may inhibit, in case of uncertainty about future events, ways of efficiently *ex-post* adapting the contract.[96] This decision, which involves an efficient solution to the issue of specific investments, is discussed in detail in section 1.3.4.4.

1.3.4.1. Indirect instruments of contractual enforcement

Reinforcing transactions occurs through indirect contract enforcement instruments. These mechanisms do not directly aim to protect investments. They include relational contracting[97] and forms of implicit contracts based on reputation and trust.[98] Social norms, self-regulation, and market discipline are also indicated as indirect factors for the protection of investments. The frequency with which a given transaction is replicated is also classified as a factor to reduce the risk of opportunism.[99]

This type of investment protection depends on the weight that the economic players assign to short-term over long-term profits. With these indirect instruments, the relationship becomes a bilateral monopoly, and there is a powerful incentive to continue the contractual relationship that reinforces itself over time ("self-enforcing contract").[100]

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[94] According to the A. SCHWARTZ, *Relational Contract in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, in The Journal of Legal Studies, vol. 21, no. 2, jun. 1992, the leading causes of litigation in the United States are a) exogenous events modifying the party position, which thus make it difficult to comply with the contract; b) one party taking advantage of the incompleteness of the contract; c) one of the parties asking to be forgiven for the obligation to pay, not because it has become difficult, but because it has no further advantage to him.

[95] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 198.

[96] Ibid., p. 196.

[97] The notion of the relational contract is attributed to I. MACNEIL and S. MACAULAY. For the authors, the transactions are based on complex relationships and, for this reason, the analysis of a commercial exchange needs to consider the essential elements of this relationship; it is not only the exchange of goods. The contract is rewritten and integrated in time, with mechanisms that govern the contract in the future. The contract is long-lived, and it is impossible for the parties to accurately define all the terms of the contract. Relational contracting is an extreme form of the regulation of business relationships, a type of symbiosis between companies that implies a multiplicity of time-based, joint, and non-conflicting services. From this, the ability of the contractual instrument to adapt to different circumstances is extracted. It also implies a multiplicity of time-bound, jointly based, non-conflicting benefits. The greater the mutual trust of the parties, the higher the level of investments by trust and the higher the contractual surplus to divide.

[98] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 231 ss.

[99] O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit.

[100] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 223.

1.3.4.2. Proprietary and contractual vertical integration

Another proposed solution is the decision to integrate vertically. This decision presupposes the assessment of the transaction costs related to the operation performed through the contract or the proprietary integration. The choice to own assets should be evaluated in light of the comparison between the transaction costs of the unified governing rules and those associated with market contracting.[101]

In the early 1930s, the traditional literature considered the company to be a form of organization geared towards production. The primary justification for the vertical integration of production to another market level is the firm's ability to promote economies of scale and product diversification. There would be no contraposition between the company and the contract. According to classical economic theory, the contract would allow efficient results to be achieved. In a seminal article from 1937, R. COASE raised a relevant question that changed this viewpoint. The decision for vertical integration involves the strategic decision between performing a specific operation within the company and resorting to the market. This reflection extends to the present day through neo-institutionalism theory.[102]

When resorting to the market (*buy*), the costs are inferior to the expenses of organizing an activity within the company (*make*). The latter is the alternative institution to the market. This is the choice between *make* and *buy*. The governance structure is an option to mediate a transaction more efficiently. Each choice has its qualities and imperfections, and there is an appropriate mechanism according to transactions' attributes in order to achieve the lowest cost (or the highest gain).[103]

The most pertinent governance structure can be the proprietary vertical integration of a transaction. Faced with the presence of hold-up risk, for example, after making specific

[101] In the present work, the term "vertical integration" is widely used. It includes, in addition to the proprietary concentration, the long-term contractual relationship between subjects in the stages of the production chain (see A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 239).

[102] Led by O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit., neo-institutionalism developed this idea. For this author, the decision to integrate vertically requires an assessment of the costs of a unified governing rules transaction and the costs associated with contracting in the market. For him, the optimal institutional choice of transaction governance must always take place in a second-best context. The underlying institutional problem is that of minimizing transaction costs.

[103] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 23; P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p. 107.

investments, the protection can take the form of unified property vertical integration.[104] Proprietary integration allows the achievement of an efficient level of specific investments because it does not involve some costs associated with market contracting (for example, there is no staff training and no monitoring costs concerning the counterparty's activity). The organization of a company also allows taking advantage of a provision entirely oriented towards its specific requirements. Any quantity or price-cost adjustments can be made immediately, without the parties having to renegotiate an agreement. There are no transaction costs in such a choice, nor is there a risk of opportunism. With these characteristics, the company choice is adequate for operators that seek to reduce the number of contingencies in their activity.[105]

On the other hand, proprietary integration processes do not happen at zero cost; they entail the emergence of new transaction costs.[106] This implies increasing the costs of organizing the structure of the company, such as the cost of managing new productive units or supplying human capital. The lower productive specialization can reduce the quality of the product compared to that found in the market. Moreover, the market does imply necessarily high transaction costs and also has the advantage of labor specialization.

Despite the advantages of vertical integration within the firm, empirical evidence demonstrates frequent recourse to the market for a part of the company's production process.[107] Examples include industrial subcontracting and outsourcing, partnership, comakership, franchising, business networking, and spot contracts. Known as alternative modes, or as hybrid or mixed forms of governance, they assume different structures according to the productive sector.[108] These contracts are not equivalent to the acquisition of the final product in the market.[109] They correspond to hybrid instruments, between contract and vertical integration, and such agreements

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[104] O. WILLIAMSON, *The economic institutions of capitalism: firms, markets, relational contracting*, cit.

[105] A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky*"*, cit., p. 250 states that the choice to not outsource the production process, choosing the vertical integration within the company, allows it to enjoy a service completely oriented towards its specific requirements. The market represents a source of uncertainty, which might be unacceptable.

[106] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 242.

[107] A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta* "pie in the sky," cit., p. 251.

[108] P. JOSKOW, *Asset Specificity and Vertical Integration*, cit., p. 113 claims that empirical studies regarding vertical integration and how specific investments influence the choice of this mode of the governance structure. They show that such investments are statistics and economically critical causal factors that influence the decision for vertical integration.

[109] A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky," cit., p. 251.

aim to avoid the drawbacks of the ownership of the means of production (choice of *make*) and the limiting disadvantages and uncertainties of recourse to the market (choice of *buy*).[110] In short, they seek the positive aspects of the choice of *make* and *buy,* though closer to the latter than the former. An example of this choice is the Fisher Body and General Motors case. Next, the Grossman-Hart-Moore model shows some nuances in the decision to integrate vertically.

1.3.4.2.1. Fisher Body and General Motors case

Widely discussed in the economic literature, the Fisher Body (FB) and General Motors (GM) case illustrates the efficiency of ownership integration as a solution to the hold-up problem.[111] In 1919, GM completed a 10-year agreement with FB. GM undertook the acquisition of car bodies produced by that company. The fixed price was the cost borne by the supplier, plus a fixed percentage markup. The total cost could not exceed the price set for competitors of FB. The completion of a long-term contract, with exclusive supply to GM, served to protect the specific investments made by FB and against any changes in the market.

During the contract, GM's demand for car bodies exceeded expectations. Given this situation, this company assessed the price adjustments as unsatisfactory. The contracted price did not consider the circumstance that the higher the demand for bodywork was, the more its price should decrease because it should reflect the economy of scale obtained by FB. Faced with this, GM asked FB to place its facilities close to its vehicle assembly line. In 1926, GM merged with FB.

In the traditional interpretation of the case,[112] there was excessive contractual rigidity in a long-term contract, which exposed it to uncertain and non-contractible *ex-ante* events. This contract configuration could induce further distractions in the economic choices of the contractors and prevent flexible forms from adapting. In this hypothesis, vertical integration could have solved the hold-up problem by ensuring greater efficiency concerning the long-term contract with rigid contractual clauses. The main lesson from this case is that the duration of the contract may be useful

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[110] Ibid., p. 251.
[111] B. KLEIN; R. CRAWFORD; A. ALCHIAN, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, cit.
[112] Ibidem.

in encouraging specific investments to be made in a short period, but at the same time, it reduces the degree of contractual flexibility necessary to allow its adaptation to new circumstances.[113]

This conclusion, based on the study by B. KLEIN, R. CRAWFORD, and A. ALCHIAN, has been the object of recent criticism. Some authors believed that the case is an example of market failure in contract literature and company theory.[114] In addition, allegedly, there were controversial and unexplained questions. For example, at the moment of proprietary integration, GM was already in possession of about 60% of FB's capital stock. The acquisition could allow GM to exercise control over FB. The explanation for acquiring the rest of the capital would be that GM sought to control not the company, but the human capital of the Fisher brothers, experts in the car body, and remove them from the competition.

1.3.4.2.2. The Grossman-Hart-Moore model

The work of S. GROSSMAN and O. HART (1986)[115] and O. HART and J. MOORE (1990)[116] presents nuances concerning the decision to carry out vertical integration. The authors' work, known as the Grossman-Hart-Moore model (GHM model), is based on the difference between two modalities of contractual rights, specific rights and residual rights, to explain the scenarios in which vertical integration entails benefits. Faced with the cost of specifying asset rights in a contract, the party should acquire all residual rights through vertical integration to reach the socially optimal measure.[117]

[113] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 244-5.
[114] R. CASADESUS-MASANEL; D. SPULBER, *The Fable of Fisher Body*, in Journal of Law & Economics, vol. 43, no. 1, April, 2000.
[115] S. GROSSMAN; O. HART, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, in Journal of Political Economy, August 1986, vol. 94, no. 4.
[116] O. HART, Oliver; J. MOORE, *Property Rights and the Nature of the Firm*, in Journal of Political Economy, vol. 98, no. 6, Dec., 1990.
[117] It is necessary to summarize the reasoning of these works. The authors argue that existing theories of vertical integration are not able to explain the definition of integration, nor the costs and benefits to be assessed. These theories would identify vertical integration as able to provide results similar to those of a complete contract. The authors define integration regarding rights over assets and develop a model to explain when a company must acquire the assets of another firm, thus promoting a vertical integration. The authors define the company as the assets it owns or over which it has control. In the authors' view, there is no distinction between control and ownership. For example, the corporation shareholders are the group that owns the control and delegates it to the board of directors. The distinction proposed by the authors, between contractual rights and residual rights, arises from this perspective. The difference between vertical integration and contracting would be the control of rights not specified in the contract (residual rights). The owner controls all aspects not specified in the contract, whereas the contractor would only have control over the specific rights. The authors conclude that the optimal decision for the parties would be to acquire control of an asset, as it is very costly for a party to specify a long list of rights. The analysis should not be between complete contracts and non-

The GHM model shows how the allocation of ownership rights over assets used in the production process can contribute to minimizing underinvestment due to contractual incompleteness. The model proposes an explanation of the efficient allocation of property rights when more than one agent is involved in making specific investments and competes for the control of resources. In order to maximize the aggregate efficiency and achieve the maximum possible surplus, the issue is to determine the ownership of capital goods according to the individual with the most significant capacity to achieve the objectives.[118]

The results of this theory have been applied to the notion of the modern enterprise to propose a theory of organization and control, as well as situations of incomplete contract between a company and a financier. Some corporate governance proposals are also based on access to property rights and control of the company by individuals with the most specific human capital to manage it.[119]

1.3.4.3. Legal and contractual remedies

Many contractual and legal remedies can protect specific investments. Contractual remedies are the contract rules capable of avoiding the risk of a hold-up, such as collateral, an exclusivity clause, an exchange of hostages, an implementation of a decreasing sequence of investments, a regulation of the renegotiation procedure, and a contract with an option. These mechanisms are specific and do not fully contribute to developing this thesis which instead focuses on the adoption of legal remedies.[120]

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integrated relationships but between the contract that allocates residual rights to one party and the contract that allocates them to the other party. There would still be opportunistic behaviors in the case of vertical integration. The only difference would be that there would be a change in the incentives for this behavior. The authors emphasize that distortions due to contractual incompleteness could prevent the party from obtaining an *ex-post* return required to compensate for its *ex-ante* investment. Allocating property rights, by changing the average return on investments, affects the level of investment. In the absence of vertical integration, on the other hand, the *ex-post* surplus is divided more equitably, and each firm invests economically. In conclusion, integration would be optimal when a firm's investment decision is more important than to the other firm, while a decision for non-integration is desirable when both firms' decisions are essential.

[118] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 260.

[119] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 260.

[120] This is the reason the analysis of the leading theories is performed in this footnote. O. WILLIAMSON (*Credible Commitments: Using Hostages to Support Exchange*, in The American Economic Review, in vol. 73, no. 4, Sep., 1983) proposes the use of hostage as a way to allow the adequate protection of specific investments. The party could transfer the asset control to the counterparty in order to provide sufficient assurance of continuity of the relationship. The use of hostages in commercial transactions is widespread and economically significant. A hostage is an instrument used to ensure compliance with the transaction. In order to be a hostage, it must have a value equal to or higher than the transaction for the hostage-giver and, at the same time, have a value equal to or less than zero for the hostage-taker.

Legal remedies in the event of default are relevant to the problem of protecting specific investments, and they have repercussions for the parties' *ex-ante* decisions. The proposition considers the legal remedies available in American law.[121] There is an intense interaction in this legal system between economic transaction and legal remedies.[122] The remedies assessed are the expectation damages, reliance damages, liquidity damages, restitution, and rescission.

This scenario requires differentiating between two perspectives in the economic assessment of the matter. First, the study concentrates on the relationship between legal remedies with an optimum level of investment. Understanding the influence of legal remedies requires structuring a simple transaction model with the presence of a decision to invest in the relationship and describing

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The latter should be encouraged to return the hostage. R. COOTER; T. ULEN, *Law and Economics*, Berkeley Law Books, 2016, in http://scholarship.law.berkeley.edu/books/2, p. 304 provide an exciting example to understand how a hostage works. They assess, in an imaginary scenario, what the best hostage would be for a Middle Ages king. With the same value, a ring or his son, the authors conclude that the latter would be better than the ring. The king's son would possess insignificant value to the hostage-taker, which would encourage the continuity of the transaction. There would be no risk of not carrying out the transaction and the capture of the hostage. The hostage can be used to allow the accomplishment of a transaction with making specific investments. An example of this possibility would be its use in a franchising agreement. The franchisee would be required to make specific investments to secure the franchise system against the risk of quality decline. Another contractual remedy would be the contract option, proposed by G. NÖLDEKE; K. SCHMIDT, *Option contracts and renegotiation: a solution to the hold-up problem*, in RAND Journal of Economics, vol. 26, no. 2, Summer 1995. This work proposes a solution to the hold-up problem. The article argues that no renegotiation of the contract would be able to achieve the first-best solution. A simple option contract is thus suggested, which grants the seller the right to make the delivery decision and specify the payment if it is made. This structure would allow the implementation of an efficient decision regarding the execution of investment and delivery. R. PITCHFORD and C. SYNDER (*A solution to the hold-up problem involving gradual investment*, in Journal of Economic Theory, vol. 114, no. 1, 2004) offer another solution to the counterparty hold-up after investments. The authors propose an analysis of the problem through dynamic interaction. The seller should make a decreasing sequence of investments that converge on zero. The gradual investments are made with subsequent reimbursement by the buyer. This solution would reach the first-best. B. KLEIN and K. MURPHY (*Vertical Restraints as Contract Enforcement Mechanisms*, in The Journal of Law & Economics, vol. 31, no. 2, Oct., 1988) and G. FRASCO (*Exclusive Dealing: a comprehensive case study*, University Press of America, 1991) also suggest the exclusivity clause remedy. The idea is that the exclusivity clause secures the individual who makes specific investments concerning the possible threat of exit from the counterparty. The protection of exclusivity is also based on the work of R. SEGAL and M. WHINSTON (*Exclusive contracts and protection of investments*, in RAND Journal of Economics, vol. 31, no. 4, Winter 2000). They point out that it would work only with selfish and not with cooperative investment. Exclusivity would ensure that there is no hold-up due to the threat of exit, but it does not ensure that the distribution of the *ex-post* surplus encourages the party to invest. Some authors (G. NÖLDEKE; K. SCHMIDT, *Option contracts and renegotiation: a solution to the hold-up problem*, cit.; A. EDLIN; S. REICHELSTEIN, *Specific Investment Under Negotiated Transfer Pricing: An Efficiency Result*, in Accounting Review, vol. 70, no. 2, April 1996) have argued that the hold-up risk can be reduced through a binding negotiation procedure. They assume that the main problem associated with a hold-up comes from the risk renegotiation. Each author proposes a different procedure for renegotiation.

[121] Other legal systems have similar remedies. The work of G. SMORTO, *Il danno da inadempimento*, Padova: CEDAM, 2005 compares the remedies available in Common law with Italian law. The author concludes that similar remedies exist in both legal systems.

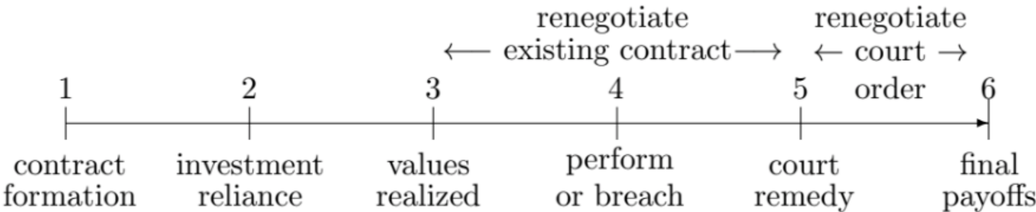
[122] For example, the work of R. COOTER; T. ULEN, *Law and Economics*, cit. shows how private law should be viewed through the lens of economics.

the influence of the available legal remedies on parties' decisions. Second, one must study the reason parties decide not to adopt the legal remedies to solve the investment problem.

1.3.4.3.1. An economic model for making investments

Legal remedies influence the *ex-ante* behavior of the parties in making investments. The simple model illustration can better approximate the result of these legal effects.[123] This model does not seek to replicate a complex contractual environment faithfully; rather, it shows the interaction between the decision to make investments and legal remedies. Under certain conditions, the same rationale can be applied in complex transactions.

In this model, the notion of efficiency does not necessarily coincide with the moment the party decides whether to comply with the contract (the "efficient breach hypothesis"); it should be more widely conceived. Efficiency also relates to the research of contractual partners, joining the contractual relationship, trust in the relationship, and contract renegotiation. Economic analysis cannot identify a single legal remedy that meets the demands for efficiency at all points of the transaction. The question of efficiency in a contract arises at various times, but what constitutes "efficiency" can be understood in three ways: *ex-ante*, *interim*, and *ex-post* efficiency. The characterization of the "efficiency moments" of the contract is visualized in the timeline below. It is a sequence of events in which two or more parties initiate a transaction:



At date 1, the parties decide whether to formalize the contracting. At date 2, the parties establish trust in the relationship and decide to invest in it based on past interactions. Due to the reliance of the parties and stochastic events affecting the costs and benefits of exchanges, the parties

[123] The model is based, with some adaptations and simplifications, on Professor R. W. BROOKS' lecture notes offered at his course on Private Law and Economics, jointly organized by Yale, Panthéon-Assas, and Essec Universities.

are aware of the respective values at date 3. At date 4, the parties may decide whether to comply with or default on it. If one of the parties defaults, the court renders a decision at date 5. The parties may conduct Coasean bargaining, based on the determination of the court, at date 6.

This model is based on generic elements, and an example helps clarify this timeline. The contract takes place between two parties, Abby and Ben; Abby seeks to buy Ben's car. The value of the car for Abby would be $15,000; for Ben, it is $9,000. They reach the car trading price of $12,000. Abby must advance payment, while Ben must deliver the car at the end of the month. Faced with these circumstances, Abby decides to rent a parking space next to her apartment for $100 per month on a 12-month contract ("investment"). Before the delivery of the car to Abby, Caroline appears and offers Ben a sum for it that reflects the importance of the car to her. The price determination Caroline offers consists of random/stochastic value (e.g., Caroline's locomotion need, or the possibility of using the car in business activity). There is a 50% chance that the value is $13,000 and 50% that is $20,000. Depending on the number of parking spaces, the value of the car for Abby increases. With a vacancy, the value for Abby would be $15,000; with two, $18,000; three, $19,500, etc.

The timeline is a stylized illustration of a sequence of precisely planned actions:

1) it begins at an arbitrary point. Before entering into a contract, the parties undertake various costs in finding business partners, discussing the contract and formulating its terms;
2) the timeline involves a commercial and corporate context, factors that may affect the decision of the parties;
3) the timeline shows only one sequence of one-shot events. If the process is repeated, the parties' reputation may produce different results;
4) usually, the investment precedes the time when the state of the world is realized, but there may be a reversal in the sequence. The state of the world rarely becomes clear at a specific time;
5) the contract performance also occurs over time and can start before the realization of a state of the world. The timeline reflects a snapshot; there is no "time" between the indicated dates. The court can observe or verify the formation of the contract, as well as the compliance with or default on the contract.

In the proposed timeline, the parties act at three specific points (dates 1, 2, and 4). By focusing on these three dates, one can identify the three efficiency criteria mentioned above. At the contract formation (date 1), the parties must choose the governance model of the transaction: using the contract or another modality, or even no-contract (*ex-ante* efficiency). At date 2, the parties decide whether to make investments that may reduce their costs or increase the value of the good (*interim* efficiency). The choice to enter into a contract does not imply that the parties will continue to trade; the state of the world and investments can interfere with the decision to make the exchange or not (date 4) (*ex-post* efficiency). The remedies evaluated by the court (date 5) are specific performance, expectation damages, and reliance damages.

Based on this model of a more straightforward structure, some conclusions can be drawn regarding efficiency decisions. The idea of *ex-post* efficiency is based on allocative efficiency. The optimal decision criterion allows for the maximization of well-being when deciding on the conduct (to comply with or default on the contract) based on the highest value. The seller must decide whether the production of the value corresponds to the delivery of the goods contracted from the counterparty or a third party. Interim efficiency refers to the investment decision; investments should take into account the likelihood that the contract will not being complied with; in this case, investments are lost. The value added to the provision (or the reduction of costs) by the investments cannot be less than its value for the party; otherwise, the decision is inefficient. *Ex-ante* efficiency, on the other hand, interferes with the formation of the contract, i.e., to promote the transaction through the contract or other instruments. The assessment of the remedies applied in the following sections must consider these dimensions in order to determine whether they are efficient.

1.3.4.3.2. The interaction of legal remedies with the decision to make investments

This model is a simple way to describe the influence of legal remedies, but the economic literature proposes other models. The structure of models to evaluate how legal remedies function is a branch with remarkable results to solve the problem of hold-up after making specific investments. S. SHAVELL (*Damages Measures for Breach of Contract,* 1980[124] and *The Design of Contracts and Remedies for Breach*, 1984[125]) and W. ROGERSON (*Efficient Reliance and Damages*

[124] S. SHAVELL, *Damages Measures for Breach of Contract*, in Bell Journal of Economics, vol. 11, 1980.
[125] S. SHAVELL, *The Design of Contracts and Remedies for Breach*, in Quarterly Journal of Economics, vol. 99, 1984.

Measures for Breach of Contract, 1984[126]) have presented relevant work concerning the use of legal remedies to solve issues related to making specific investments.[127]

S. SHAVELL examines the quantification of the damage resulting from a breach of contract. The author was the first to note that the choice of legal remedy affects the incentives to make investments or to perform the contractual obligation. The author assumes the neutrality of the parties and the lack of negotiation between them. After examining the remedies available for damages resulting from the contract default, the author concludes that these remedies' availability replaces the execution of a complete contract. The parties behave as if the contract were complete by inducing the remedies to be activated in case of the breach of contractual obligations. S. SHAVELL also notes that the availability of expectation damages guarantees the confidence to make investments at a very high level, but they could lead the victim to make excessive specific investments. This remedy ensures the return on the investment, even if it is made at a higher level than is optimal.

The author explains how legal remedies induce making investments. These remedies force the parties to take into account the damage that the default would cause the counterparty in deciding whether to default on the contract. The same behavior is not observed regarding damages resulting from reliance damages. Often, the default victim chooses a level of confidence that exceeds the level of efficiency (Pareto efficiency level). As each party believes the contractual default, it engages in excessive reliance; therefore, the measures lead to inefficiency.

Following S. SHAVELL's study, W. ROGERSON (*Efficient reliance and damage measures for breach of contract*, 1984) considers the situation in which a buyer or seller must carry out reliance expenses (investments) before performing the exchange of the good or preparing to sell

[126] W. ROGERSON, *Efficient Reliance and Damages Measures for Breach of Contract*, in RAND Journal of Economics, vol. 15, 1984.

[127] In discussing the works presented in this section, Y. CHE; D. HAUSCH (*Cooperative Investments and the value of Contracting*, in The American Economic Review, vol. 89, no. 1, Mar., 1999) have noted the existence of an assumption among some authors (especially the proposals of T. CHUNG, *Incomplete Contracts, Specific Investments, and Risk Sharing*, in Review of Economic Studies, 1991, vol. 58, issue 5) that, if the contract specifies an inefficient level of exchange, the parties renegotiate it to an efficient level. It is assumed that the party that has implemented investments has full bargaining power *ex-post*. As a result, the party would have an incentive to invest efficiently. However, the assumption that bargaining power can be manipulated *ex-ante* and enforced seems incongruous with an environment that makes the contract incomplete. In this regard, Y. CHE; D. HAUSCH, *Cooperative Investments and the value of Contracting*, cit. highlight the work of A. EDLIN; S. REICHELSTEIN, *Specific Investment Under Negotiated Transfer Pricing: An Efficiency Result* and A. EDLIN; S. REICHELSTEIN, *Holdups, Standard Breach Remedies, and Optimal Investment, in American Economic Review*, in American Economic Review, vol. 86, no. 3, June 1996.

it.[128] Without legally enforceable contracts, the reliance on making investments would be low. To overcome this scenario, W. ROGERSON evaluates three legal remedies and concludes that they raise the level of investments. He also compares them to each other at the efficiency level (from best to worst): specific performance, expectations damages, and reliance damages.

1.3.4.3.3. Cooperative investments and their repercussion on the available legal remedies

Some authors have questioned the solutions proposed in the previous section, claiming that specific investments are not a unitary category. Y. CHE and B. HAUSCH, in a paper published in 1999, discuss the limitation of these proposals for a modality of specific investments.[129] The works of S. SHAVELL and W. ROGERSON assume that the seller invests in reducing his costs and the buyer in extending his benefits. These investments are *selfish investments*. Y. CHE and B. HAUSCH claim the existence of two other types of investment, *cooperative investments* and *hybrid investments*.[130] The former does not provide any direct benefit to the investor, while the latter offers benefit to both parties and has elements of selfish and cooperative investment.

According to Y. CHE and D. HAUSCH, cooperative investments have received little attention. Although they are commonly used in practice, the academic literature neglects this reality. There are examples of effective diffusion. In the case study of the relationship between GM and FB (see section 1.3.4.2.1), the location of FB's industry in proximity to the car plant would not only reduce transport costs (thus reducing FB's costs), but would also increase the supplier's reliance (thus increasing the value of the good).

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[128] These are the factual assumptions adopted by the author: i) buyers or sellers must engage in expenditures before the date of exchange either to prepare to use the product or to prepare to sell it (lawyers call such expenditures "reliance"), ii) the value of reliance to the buyer or the seller is to some extent specific to the relationship between them, and iii) the cost of production or the value of the good to the buyer is uncertain at the time of reliance.

[129] Y. CHE; D. HAUSCH, *Cooperative Investments and the value of Contracting*, cit. According to R. BROOKS and S. STREMITZER (*On and Off Contract Remedies Inducing Cooperative Investments*, in American Law and Economics Review, vol. 1, no. 2, 2012), the first authors to study this type of investment in the context of incomplete contracts were W. B. MACLEOD and J. M. MALCOMSON (*Investments, Holdup, and the Form of Market Contracts*, in American Economic Review, vol. 83, issue 4, 1993). In a non-exhaustive list, the following authors have also studied the concept of cooperative investments: B. BERNHEIM and M. WHINSTON (*Incomplete Contracts and Strategic Ambiguity*, in American Economic Review, 1998, vol. 88, issue 4), Y. CHE; T. CHUNG, *Contract Damages and Cooperative Investments*, in The RAND Journal of Economics, vol. 30, no. 1, Spring, 1999. Cooperative investment is also cited in the article of S. GRUNDMANN; F. CAFAGGI; G. VETTORI, *The Contractual basis of Long-Term Organization – The Overall Architecture*, cit.

[130] Cooperative investments could still be considered *cross-investments* (e.g. S. GURIEV; D. KVASOV, *Contracting on Time*, in American Economic Review, vol. 5, no. 5, 2005) and *investments with externalities* (e.g. G. NÖLDEKE; K. SCHMIDT, *Option contracts and renegotiation: a solution to the hold-up problem*, cit.).

Another example is the classic relationship between principal and agent. Cooperative investment is represented by the agent's activity that directly benefits the principal.[131] Another illustration corresponds to research in research and development (R&D). There are also workers' specialization and contractor efforts to customize the components produced according to a particular need of the principal. The contractual types of subcontracting, supply agreement, distribution of vehicles, and franchising are examples in which cooperative investment may occur.

Cooperative investments, as in the case of Xerox's effort to incorporate components with the design of its suppliers into the final product, also exist. This process required the idiosyncratic adaptation of its production lines. A further example is a thermoelectric plant customizing its turbines to accommodate the lowest quality of coal produced at a nearby mine. Alternatively, an automaker may pay consultants to improve the production methods of the suppliers. Examples in the retail market also exist. Kraft supposedly created cross-functional business teams to study the retail market. After six months of study, a team recommended the reorganization of the sale of dairy products to the companies that made the retail sales. With the implementation of the project, the retailer experienced a 22% increase in sales and lower stocks, and Kraft achieved a similar increase in sales through better placement of its high-demand products. Such coordination requires the existence of many commercial transactions with the presence of cooperative investments in different stages of production.[132]

The classification between selfish and cooperative investments is required because legal remedies work differently for each modality of investment, all of which have different answers.[133]

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[131] Y. CHE; D. HAUSCH, *Cooperative Investments and the value of Contracting*, cit., p. 126 clarify that, although in the principal-agent model, the agent's effort is not verifiable, there would be verifiable signs (verifiable signal) of investment (e.g., output quality).

[132] The specialized economic literature used as a simple model to illustrate the cooperative investment setup in the case of Tennessee Carolina Transportation Inc. v. Strict Corp. (196 S.E.2d 711, 1973). This is a simple structure contract, and it allows the visualization of such investments in the transaction. The relationship involved a cargo transportation company with a trailer manufacturing company (wagon), Strict Corp., with an order for 150 new wagons for the price of $854,250. Before production, Strict Corp. (seller) investigated the company's transportation business in order to determine, among other characteristics, the best design of the wagon considering the freight transport, the average distance traveled, the surface of the roads, and the weather conditions. The need for this specificity arises from the adaptation of the freight transport company. If it must carry a light load, the trailer would be better built using a less dense metallic material, such as aluminum alloy. This measure would save fuel over time. Different designs would be better if the company carried a more massive load, such as domestic appliances, or if the routes adopted were mountainous or faced poor weather. The seller's investment in understanding the transportation company corresponds to the specific investment. It cannot be taken full advantage of if it is designed for other clients. These would probably take other routes under other weather conditions. The characteristics of the transaction allow the visualization of the occurrence of cooperative investment. The company's effort to understand the operation of its partner allows it to reduce the operational costs thereof.

[133] Y. CHE; D. HAUSCH, *Cooperative Investments and the value of Contracting*, cit., p. 127.

The reason for the divergence between the two types of investment is the influence of cooperative investments in the party's position. Selfish investments improve the investor's *status quo* in the bargaining game, while cooperative investments have the opposite effect. They worsen the investor's position by improving the *status quo* of the contractual partner. A higher investment by the seller increases the value of the buyer; it increases what the buyer would obtain by default in the transaction. The hold-up problem remains a valid concern for cooperative investment.

If it is not possible for the parties to agree not to renegotiate the contract, the solution proposed by Y. CHE and D. HAUSCH is to abandon it in favor of the spot market. Furthermore, they conclude that the organizational solutions proposed to respond to the demands of the hold-up problem are also related to cooperative investment. Vertical integration (O. WILLIAMSON, 1979) and asset-allocation (S. GROSSMAN and O. HART [1986] and O. HART and J. MOORE [1990]) represent valid solutions because they do not rely on the nature of the investments.

Another result of the authors' work relates to incomplete contract theory. Incompleteness is often attributed to the lack of ability to write contracts in events that the parties can observe but that the court cannot verify. This stance on incompleteness could be criticized, as it would be possible for the parties to "complete" the contract via verifiable signals to achieve the result. With cooperative investments, such verifiable events could not be designed; the presupposition of the incomplete contract (observable but unverifiable contingencies) would continue to provide a reasonable foundation.

Based on this theory of cooperative investment, Y. CHE and T. CHUNG have proposed a solution that diverges from the one adopted for selfish investments.[134] They have analyzed a scenario in which a simple contract with cooperative investments reaches the first-best if reliance damages govern the contract. The authors also conclude that the expectation damages do not induce any cooperative investment. For A. STREMITZER and R. BROOKS, this result is disturbing, considering that the expectation damages would be the default remedy and, even so, could not induce cooperative investment.[135] This conclusion would go against the works of S. SHAVELL and W. ROGERSON. In another study aimed at enriching the scenarios, A. STREMITZER (Standard Breach

[134] CHE, Yeon-Koo; CHUNG, Tai-Yeong, *Contract Damages and Cooperative Investments*, in The RAND Journal of Economics, vol. 30, no. 1, Spring, 1999, pp. 84-105.
[135] R. BROOKS and S. STREMITZER, *On and Off Contract Remedies Inducing Cooperative Investments*, in American Law and Economics Review, vol. 1, no. 2, 2012.

Remedies, Quality Thresholds, and Cooperative Investments, 2012)[136] considered quality standards and demonstrated that the expectation damages induce positive investment cooperation and can achieve the most efficient solution.[137] In this case, the quality specified in the contract must be as high as possible. However, R. BROOKS and A. STREMITZER doubt whether contracts with the highest degree of quality can be written, and, therefore, the results of A. STREMITZER become unattractive to create an economical solution.

In an innovative article that seeks to solve the issue of specific investments' adequate protection, R. BROOKS and A. STREMITZER have proposed a solution for cooperative investments.[138-139] The authors' suggestion consists of broadening the panorama of remedies offered to the parties to the contract. The parties would have two types of remedies, those that affirm the contract and seek an "on the contract" remedy, or the parties may challenge the contract and seek an "off the contract" remedy. The "off the contract" remedies are rescission and restitution. In the authors' evaluation, most projects would focus almost exclusively on "on the contract" remedies. This partial conclusion is verified by reviewing the literature cited above, which based its studies on the remedies of expectation damages, reliance damages, and liquidated damages. Based on these more complex scenarios, the parties could write simple contracts that induce socially optimal levels with cooperative investments and use "off contract" remedies. They argue that the possibility of bringing the counterparty to court produces efficiency in investments, regardless of the quality of the products chosen (a fixed price contract would suffice).

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[136] A. STREMITZER, *Standard Breach Remedies, Quality Thresholds, and Cooperative Investments,* in Journal of Law, Economics, Organization, vol. 28, no. 2.

[137] On the contrary, S. GRUNDMANN; F. CAFAGGI; G. VETTORI, *The Contractual basis of Long-Term Organization – The Overall Architecture* have argued that cooperative investments would be unable to encourage investment at an efficient level.

[138] R. BROOKS and S. STREMITZER, *On and Off Contract Remedies Inducing Cooperative Investments*, in American Law and Economics Review, vol. 1, no. 2, 2012.

[139] S. GRUNDMANN; F. CAFAGGI; G. VETTORI are some of the few legal scholars to address the notion of cooperative investments from a legal perspective. However, they did not consider, in the version of the article published in 2016, R. BROOKS' and A. STREMITZER'S solutions. Those authors affirm, "But if the specific investments were not selfish, but cooperative, it is not possible to design contract mechanisms that would create efficiency incentives. (…) The role of legal remedies against breach has also been explored when a renegotiation is feasible or when it has been excluded" (*The Contractual basis of Long-Term Organization – The Overall Architecture*, cit., p. 68).

1.3.4.3.4. Cooperative investments and time

The previous sections have outlined the legal remedies suggested to overcome the problem of specific investments. S. GURIEV and D. KVASOV have noted that most of the models analyzed consider two-period frameworks and exclude the time factor. According to the authors, the time element should be one of the most critical factors considered concerning specific investments.[140]

The empirical literature has always emphasized the importance of time as a variable in the contract, especially in the presence of specific investments. The examples in the literature on the incomplete contract highlight the time element. P. JOSKOW has argued that the degree of investment is a crucial factor in determining the duration of the contract between coal suppliers and power plants.[141] There is a proportionality, in his study, that the higher the specificity of the investment, the longer the duration of the contract.[142] Other studies (MASTER and CROOKER [1985],[143] GOLDBERG and ERICKSON [1987],[144] and CROCKER and MASTEN [1988][145]) have showed that specific investment is one of the determinants of the duration of the contract. They have also noted that many contracts allow unilateral termination before their end, usually as a unilateral option rather than as a contingency clause.

S. GURIEV and D. KVASOV have emphasized the duality of time. On the one hand, time is an integral part of the environment, a dimension within which transactions develop; on the other hand, time in a contract represents an important variable of its duration. The model the authors propose considers that the parties develop the relationship in continuous time, which differs from the "photographic" model (two-period setting) proposed by the previous authors.

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[140] S. GURIEV and D. KVASOV do not expressly use the term "cooperative investment." However, when they define specific investments, the use of this category can be extracted. For example, the authors state, "At each moment the seller undertakes a relationship-specific investment, the investment reduces the cost of providing the service and increases the value of the service to the buyer" (S. GURIEV; D. KVASOV, *Contracting on Time*, cit., p. 1370).

[141] P. JOSKOW, *Asset Specificity and Vertical Integration*, cit.

[142] The S. C. PIRRONG study goes in this direction (S. C. PIRRONG, C*ontracting Practices in Bulk Shipping Markets: A Transactions Cost Explanation*, The Journal of Law & Economics, vol. 36, no. 2, 1993). For the authors, the wide variation in the duration of bulk shipping contracts across industries can be explained by the degree of specificity in the customer-shipper relationship.

[143] S. MASTEN; K. CROCKER, *Efficient Adaptation in Long-Term Contracts: Take-or-Pay Provisions for Natural Gas*, in American Economic Review, vol. 75, no. 5, 1985.

[144] V. GOLDBERG; J. ERICKSON, *Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke*, in Journal of Law and Economics, 1987, vol. 30, no. 2.

[145] K. CROCKER; S. MASTEN, *Mitigating Contractual Hazards: Unilateral Options and Contract Length*, in RAND Journal of Economics, 1988, vol. 19, no. 3.

A contract with adequate incentives at the time it is signed may become sub-optimal as it is performed; the efficient solution would require constant renegotiation. S. GURIEV and D. KVASOV have presented two propositions: 1) a sequence of contracts with short and definite duration encourages efficient exchanges. This result is based on the absence of renegotiation costs. The authors caution that this assumption may be naive. By inserting the renegotiation variable, the authors suggest that: 2) a contract without a limited duration (with an optimal unilateral termination period) serves as an efficient alternative. For S. GURIEV and D. KVASOV, with a limited duration contract, the threat of hold-up comes from two sources: the continuous renegotiation and the renegotiation at the moment a competitive alternative appears. In conclusion, the authors demonstrate how time clauses (duration of contract and notice period for unilateral termination) promote incentives for specific investments, while other contractual mechanisms fail to overcome the hold-up problem. The structure of contracts on the subject is driven by the duration of the relationship, investments in cooperation, and contract renegotiation.

1.3.4.4. The reason for the impossibility of *ex-ante* protection from opportunism

The forecast of a possible hold-up after making specific investments supposes that the parties could usually prevent it. The extortion power would not be a problem if it were possible for the parties to protect themselves by adopting a complete contract. The parties are then unable to ensure the adequate protection of investments. The primary protection would be the duration of the contract[146] and sufficient remuneration of the relationship. Even in this case, with a renegotiation, the dominant party may terminate the relationship before the counterparty has recovered the investments.[147]

For those reasons, the parties may also voluntarily draft incomplete contracts, which would allow for self-enforcing through reciprocal dependence. The parties seek to protect themselves

[146] Parties to incomplete contracts may decide to enter into a long-term contract in order to discourage opportunistic behavior in the future and favor specific investments in each sub-period. This choice gives rise to a causal relationship, whereby the frequency of the transaction favors cooperation while allowing the parties to increase the frequency of the transaction, linking each other for a sufficiently long period (as in exclusivity contracts or through complementary technology companies that allow for a reciprocal lock-in). This can create a bilateral monopoly, and there is an incentive to continue the contractual relationship that self-enforces over time. See A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 232 and the last subsection.
[147] B. TASSONE, "*Unconscionability" e abuso di dipendeza economica*, in Rivista di diritto privato, 2001, p. 547.

from the problems of uncertainty that characterize the relationships discussed above.[148] They are, in fact, contracts that are more incomplete than necessary. In some circumstances, the parties may intentionally avoid the use of explicit contracts and, therefore, external enforcement. The parties could refrain from linking the contractual terms to the objectively available indicators ("endogenous contractual incompleteness").[149] The enforcement of the contract is based on the parties' actions take and their reputation, not on the intervention of a third party. The agents' autonomous behavior ensures enforcement.[150]

The right of a party to terminate a contractual relationship is a valuable enforcement tool for incomplete contracts and can be used in case of opportunistic behavior.[151-152] Bilateral enforcement does not require any transmission of information outside of the relationship. The effectiveness of enforcement depends on the possibility of imposing economic costs on the opportunist counterpart. This effect occurs when, once the current relationship is discontinued, it becomes difficult for the counterparty to find a new business partner, or when the defaulting party is constrained to incur significant research costs for new opportunities or to support the investments.

In the case of specific investments and incomplete contracts, the party who makes specific investments cannot credibly employ the threat of exit as an enforcement tool because it would be the victim of the threat itself.[153] Contractual rigidity, such as the determination of a fixed and verifiable exchange price, may represent an effective instrument of contractual enforcement and may favor making specific investments. It can stop forms of opportunism, but it can also prevent ways of efficiently adapting contracts, which can induce new forms of opportunism. Examples of this scenario are FB and GM (section 1.3.4.2.1) and Alcoa and Essex.[154] When there is an interest

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[148] C. OSTI, *L'abuso di dipendenza economica*, cit., p. 26.
[149] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 110.
[150] Ibid., pp. 110-1.
[151] Ibid., p. 201.
[152] Ibid., pp. 112-3.
[153] Ibid., p. 201.
[154] The case (Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 [W.D. Pa. 1980]) involved the relationship between two companies: Essex, an aluminum cable producer, located close to the plant of its counterparty, Alcoa, a producer of semi-finished aluminum. With this contract, Essex would have been able to economize on the cost of transport, logistics, and inventory of the aluminum produced. The investment would, at the same time, have allowed Alcoa's opportunistic behavior. Alcoa could increase the sales price to match the price of aluminum offered by the nearest competitor. With this practice, the cost savings obtained with Essex's decision would be captured by Alcoa. To avoid the risk of opportunistic behavior, the companies entered into a long-term contract indexing the price based on the wholesale price of the matter. This contracting imposed contractual rigidity by eliminating the possibility of Alcoa determining the resale price of the final product. After the conclusion of the contract, the price of other

in promoting the contract's flexibility due to the risk of opportunism, the parties may have an incentive to extend contractual incompleteness and to restrict further details for future negotiations.[155] The parties face a trade-off between *ex-ante* risk allocation and the *ex-post* allocation of parties. The economic literature concerning specific investments and their relationship with the legal rules governing specific investments is the subject of the next section, the last one before the Chapter II.

1.4. The relation between the economic literature and the legal rules specific contractual investments

The need to interpret the provisions in Brazilian and in Italian law required an extensive economic overview regarding specific contractual investments. This analysis helps understand the issues involving them. The economic literature deconstructed classical microeconomic theory with a more realistic view of contractual reality, conferring relevance on the presence of specific investments in the transaction. In an environment of parties' bounded rationality and opportunistic behavior, and of contract incompleteness, making specific investments allows the appropriation of the surplus generated. Against this opportunistic act, several works proposed mechanisms aimed at protecting specific investments.

Italian legal doctrine is more sensitive to the economic influence on legal interpretation and first established the link between the interpretation of a particular provision, the abuse of economic dependence, and the issues related to neo-institutionalism theories and, especially, their development of specific investments. This incursion sheds light on the importance of the change in the economic paradigm in contracts, which also required a new legal approach to the subject. This new paradigm can better explain some facets of contractual relationships, especially those that are more complex and long-term and that aim to integrate the firm vertically. The implementation of some rules, such as the abuse of economic dependence, supposes the knowledge of this new economic reality. It also allows focusing on an issue with vital importance: specific investment, which is not usually object of the legal doctrine.

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products used in the manufacturing in the market rose with the oil crisis of the 1970s. The price of Alcoa's products was lower than the average price offered in the market. Despite this, Essex wanted strict compliance with the contract. The Essex hold-up was made possible by an *ex-ante* mechanism designed to avoid Alcoa's opportunism. See B. KLEIN, *Why 'Hold-Ups' Occur: The Self-Enforcing Range of Contractual Relationships*, Economic Inquiry, vol. 34,1996; A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., p. 216.

[155] A. NICITA; V. SCOPPA, *Economia dei Contratti*, cit., pp. 215-6.

However, there are some difficulties concerning the application of the economic literature to the legal rules governing specific investments.[156] First, there is a dissociation between the economic models discussed and the legal provisions that mention investments. After the description of the contractual environment, the economic analysis focuses on the design of efficient governance mechanisms to overcome the issues related to specific investments. There is a tendency to accept the use of legal remedies and their *ex-ante* effects to stimulate making specific investments. These models are generally designed with a simple contractual structure, such as a purchase agreement or a service contract. On the other hand, the legal provisions are applicable to more complex business contracts, such as distribution agreements, franchising agreements, industrial subcontracting and outsourcing, partnership, comakership and business networking. The solutions proposed in the economic articles do not entirely respond to the problems related to these rules.

The contractual and legal remedies proposed cannot apply to more complex and long-term contractual relationships. The simplification of these solutions is explained by the requirement to construct a model that gives an economically efficient response with greater accuracy. The legal remedies suggested adapting better to a reciprocal contract (*contratto signalagmatico)*. The legal remedies (specific performance, expectations damages, reliance damages, rescission, and restitution) work only in the case of contract default. The appropriate remedy to a contractual breach has already been discussed in the legal doctrine in Italy and Brazil. It can even have a significant influence on the economic analysis of law, for example, the monograph by Pietro TRIMARCHI, *Il contrato. Inadempimento e rimedi,* Giuffrè: Milano, 2010.

Second, the rules analyzed in this thesis do not concern contractual default; rather, they relate to specific contractual situations. The contractual breach norms and the legal remedies prescribed cannot protect investments in these circumstances. The rules mentioning contractual investments relate to the duration of long-term contracts, the unilateral termination of the contract, and other abusive acts performed during the relationship. These characteristics are required to

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[156] S. GRUNDMANN; F. CAFAGGI; G. VETTORI (*The Contractual basis of Long-Term Organization – The Overall Architecture*, cit., p. 66 ss.) have examined the influence of specific investments in a long-term contractual relationship. As opposed to this thesis, they enriched their work by analyzing the economic articles about the governance solutions to overcome the risk of opportunistic appropriation of the surplus generated by specific investments. They even mentioned the effects of cooperative investments over the contract. Nevertheless, they did not stress some difficulties in applying these economic proposals to more complex contracts. Their choice might oversimplify the solutions and might not correspond to the assumptions adopted in these economic articles.

search for other economic traits that could influence their presence. They are the reason some economic elements that are not usually highlighted in legal doctrine are emphasized in this thesis. These characteristics explain the choice to select and explain some topics that are not usually present in the economic literature when discussing specific investments: issues concerning the time and how it relates to the development of the transaction, the admission of self-enforcing contracts, and, especially, the notions of cooperative and hybrid specific investments.

The time reference concerning specific investments demonstrates how it plays a significant role (section 1.3.4.3.4). Empirical studies have shown how the presence of specific investments affects the duration of the contract. In order to properly remunerate this investment, the transaction tends to have a long-term duration. There are also some contractual techniques in long-term relationships that could promote making specific investments; for example, a sequence of contracts with a short and definite duration encourages a contract without a limited duration (with an optimal unilateral termination period). Although these mechanisms could promote specific investments, they generate other modalities of opportunistic acts, which are examined throughout this thesis. These last contractual structures are linked with the possibility of an endogenous incompleteness in the contract as a way to promote the efficient performance of the contract given the presence of specific investments. There would be more incentive for the party to continue in the relation.

The recent development in the literature of the notion of cooperative and hybrid investments can also better explain the rules governing specific investments in Italian and Brazilian law. These investment modalities give value to the counterparty, and they influence the contractual relationship in a different way in comparison to the selfish specific investment. As shown in the model designed in section 1.3.4.3.1, selfish investment increases the value of the party performance. In contrast, cooperative and hybrid investments are indeed a value-creating investment for the relationship. They also seem to relate to the contractual transactions referred to in Brazilian and Italian law governing contractual investment. The need to construct and describe a more realistic environment for these norms required the presentation and the development of these modalities of specific investments, which would have repercussions in two legal fields: contractual law and antitrust law, both of which have high sensitivity to the economic phenomenon. Chapter II addresses both implications.

Under the contractual profile, specific cooperative investments manifest mainly in relationships focused on operating at another market level. The parties could construct a self-

enforcing relationship with the presence of short-term contract renewal at the end of the relationship or with the right to unilaterally terminate it. The issues arise when, in order to avoid rigidity in the contractual rules, the parties decide to enter into a contract without specifically governing the investments within it. There is no indication of the destination of the investments upon the end of the contract. After the relationship is extinguished without recovering the investments, litigation might begin. Most of the norms then aim to regulate some contract aspects, such as their duration and the exercise of terminating rights.

Specific investments also have some repercussions for competition. In addition to their impact on the contractual relationship, the rule prohibiting the abuse of economic dependency can also acquire an antitrust repercussion. The Italian legislation under discussion noted this possibility. The competition aspect also manifests itself in other forms, and its relevance stems from the positive effects of the specific cooperative and hybrid investments. Investments raise the overall value of the relationship and may respond to the need to produce new and better goods and services (the "interim efficiency" mentioned in section 1.3.4.3.1). They can also develop dynamic competition and allow technological and commercial innovation. At the same time, the decision to invest must be limited due to allocative efficiency. Specific investments cannot be over-invested or under-invested; therefore, mechanisms should be encouraged to allow for their socially optimal allocation.

Specific investments represent an economic phenomenon and are present in other situations. Competition law, a legal field open to economic analysis, might consider the presence of investments in situations unrelated to contractual implementation. This circumstance does not extend the object of this thesis, and some of the economic references to investments would thus not entirely apply to the specific contractual investments. In addition, this case does not relate directly to the rules in which there is a reference to "investment." Investments are an element of the economic analysis of the antitrust authority, but they concern the discussions proposed in this thesis. For this reason, Chapter II mentions some antitrust cases, such as the investments' possibility to delimit the market, without addressing it in depth. The object of this thesis is the contractual specific investment, which does not correspond to all situations in which there might be a reference to specific investments.

The legal evaluation of investments proposed in the thesis does not coincide with the examination of specific investments in the economic literature. The legal framework assessed

delimits the phenomenon to two legal fields. This finding does not necessarily preclude the relevance of the economic phenomenon; its analysis could better describe reality to delimit the interface between specific investments and their legal reference and provide further elements to understand the issue. The next chapter focuses on analyzing the legal elements capable of giving relevance to investments based on the perspective outlined in this section.

Chapter 2. The legal framework of specific contractual investments' protection in Italian and Brazilian law

The previous chapter examined specific investments with support from the economic literature. This analysis delimited the phenomenon; with this in mind, this chapter establishes its legal framework.[157] The study of economic reality takes on an essential role in legal interpretation; the description of the economic phenomenon outlines the reality to be examined. The dichotomy noted in the previous chapter (see especially section 1.4) is relevant to identify adequate investment protection. It does not concern the contractual remedies employed based on a contract of simple structure (see section 1.3); rather, it addresses the legal provisions destined to protect the investments in cases of opportunistic behavior.[158] These provisions mostly protect integrated distribution contracts with complex content and a long-term duration.

In assessing the legal bases of specific investments, there is an initial appearance of legal irrelevance; they do not fit into the concept of act or activity.[159] In the perspective of business activity (*attività di impresa*), investments would be mere preliminary acts and an organizational activity.[160] At first glance, these notions do fit the expectation of norms that could protect them from opportunistic conduct.

However, investments can find relevance in general clauses, to which the phenomenon of contractual investments has been linked since the mid-twentieth century. In addition to these provisions, there are spatial rules designed to protect them and to govern contractual types. The legal basis for the protection of the investments is grounded in controverted reasons.[161]

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[157] The economic view of the phenomenon should not entirely guide its legal interpretation. In line with the critique developed by P. FABBIO (*La disparità di potere economico e abuso di dipendenza economica, in Contratto e antitrust*, a cura di Gustavo Olivieri and Andrea Zoppini, Roma: GLF editori Laterza, 2008, p. 164) regarding the prohibition of the abuse of economic dependence with a law and economics approach, the evaluation of specific investments should not be made without considering the legal principles and should not be based only on choices of economic efficiency. See also indications of this idea in the previous chapter.

[158] A. NERVI, *Contratti di distribuzione e "recovery period rule"*, in Rivista di diritto dell'impresa, 2014, p. 259-261 warns that the solutions found in the contract for the problem of the recovery of investments usually do not have an adequate solution in the contractual terms, hence the requirement for heteronomous interventions.

[159] C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, Edizioni Scientifiche Italiane: Napoli, 2008, pp. 280-1.

[160] Ibid., p. 281.

[161] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 769-70-70. The author performs a comparative study of the juridical foundations for the protection of investments in American, Austrian, French, German, Italian, Spanish, Belgian, Swiss, and Brazilian law. After this comparative incursion, the author addresses the situation in Portuguese law. This study demonstrates the many bases for investment protection, as well as the difficulty of identifying them. In particular, the discussion on the basis adopted is the result of a heated doctrinal debate. The example of German law, in which this debate is developed, illustrates this. German

A small number of legal rules are geared towards the specific and express protection of investments. Italian and Brazilian law are exceptions with particular regulations.[162] A systematic treatment of investment protection does not follow these norms.[163] They govern specific situations and understanding them correctly requires the appropriate systematic treatment.

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doctrine provides several grounds for investment protection: objective good faith and the protection of legitimate expectations (*tutela dell'affidamento*); the abuse of right, either as an inadmissible exercise of right (contractual termination for the purpose of retaliation), or as a prohibition of *venire contra factum proprium* (termination after the counterparty is encouraged to make specific investments), or as an imbalance in the exercise of the right (termination based on a disproportionate objective); *culpa in contrahendo*; and breach of contract (*violazione positiva del contratto*); the interpretation of the contractual gaps, through paragraphs 157 and 133 of the BGB; the conclusion of a supplementary contract by a conclusive behavior (*comportamento concludente*); the analogous application of the rules on late or untimely termination (*Kündigung zur Unzeit*); rules on the reimbursement of expenses in service contracts (paragraphs 670 and 675 of the BGB or paragraph 87d of the HGB); and the prohibition of distribution and abuse of economic dependence (paragraph 20/1 of the GWB).

[162] In comparative law, the number of legal systems that specifically mention investment protection is low. In addition to Brazilian and Italian law, the exception is Austrian and, possibly, Spanish law. The reference to the rules in Brazilian and Italian legislation is presented throughout this chapter, as well as the proposition of its systematic framework. Italian legislation establishes the minimum duration of the contract of *affiliazione commerciale* in Article 3/3 of Law No. 129/2004. This contract must last for at least three years or the period necessary to amortize the investments. Brazilian law has two provisions that expressly protect investments, introduced in the Civil Code of 2002. Articles 473 and 720, with different application spectrums, establish the investment protection by withdrawing unilateral termination effectiveness if it is not respected in the period to recoup the investments. Alongside these legal systems, Austrian and Spanish law have provisions on the matter. Austrian law has a general indemnity provision for unamortized investments, Paragraph 454 of the UGB, "*Unternehmensgesetzbuc*." This provision establishes the integrated distributor the right to compensation for investments not amortized or not reasonably reusable. This right does not affect the indemnification of customers, nor can it be restricted or excluded by the parties. There is no indemnification in case of termination of the contractual bond due to the distributor. Article 29 in Spanish commercial agency law prescribes that, in the event of the unilateral termination of the contract, the principal must compensate for the damages resulting from the early termination of the unamortized expenses (*gastos*) incurred for the performance of the contract. The interpretation of the provision as the protection of specific investments is not unanimous. In Spanish law, a bill for a commercial code is currently being discussed, in which a rule is established to regulate the amortization of investments. French law does have not a provision to discipline specific investments at the end of the contract. However, French case law has shown a sensibility to compensate the non-recovered investments in case of abusive or brutal termination. Some of these decisions are mentioned throughout this thesis. In doctrine, see L. VOGEL ; J. VOGEL, *Droit de la distribution,* in *Traité de droit économique,* t. 2, Paris: Lawlex Bruylant, 2015; C. DIAS, Claude ; I. URBAIN-PARLEANI, *Les contrats de distribution commerciale à l'épreuve du temps*, Aix-en-Provence : Presses universitaires d'Aix-Marseille, 2014; P. STOFFEL-MUNCK, *Abus de droit, agrément et rupture fautive*, in Revue des contrats, n. RDCO2005-2-011; and T. REVET, *L'indemnisation du distributeur à l'occasion de la rupture du contrat - Quelle rationalité ?*, in RDC 2015, n. 112p1. There is a thesis, presented in 2005, that has addressed same issue as this thesis (F. VENTURI, *La protection des investissements du distributeur intégré en droit interne et communautaire*, Ph.D Thesis, University of Nice, 2005). It discussed investments protection performed by the distributor, through the lens of private law and antitrust law. It envisioned how specific investments could bring stability to the distribution contract. The author based this conception on Community, especially the directive on the automotive sector (Directive No. 1400/2002). However, the direction adopted by Community law was the opposite: the reduction of norms creation the stabilization of the relationship. Swiss law also does not have a rule protecting investments. Despite this absence, they can be protected through different institutes: i) abusive termination; ii) legitimate expectations; iii) breach of contract (*violazione positiva del contratto*) (see I. CHERPILLOD, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011).

[163] It is the reason why C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 281 stated that the absence of explicit normative indications concerning the Italian legal system prevented a correct approach to the issue.

The relevance of the investments could also have occurred through the importation of the notion of recoupment doctrine (or Missouri doctrine), created in United States case law.[164-165] This doctrine is thought to have lost importance with time for two reasons: i) it has been applied only in cases where the termination was not regulated in the contract; ii) and the lack of legislative reception.[166] The Courts, when enforcing it, focused on elements of discriminatory purpose, not on particular economic grounds.[167] American case law's orientation has oscillated concerning controverted questions about this theory.[168]

The difficulty in identifying substantial dogmatic grounds increases with the complex distribution of responsibilities and risks of the contracts in which the specific investments are made. There are also issues related to the delimitation of the interest protected. The relationship

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[164] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Rivista di diritto civile, 2010, p. 658. In Italy, the diffusion of the theory occurred with the work of R. PARDOLESI, *I contratti di distribuzione*, cit., who attributes investment protection to objective good faith (e.g., Article 1.375 of the Civil Code). The author had a critical evaluation of the theory (R. PARDOLESI, *I contratti di distribuzione*, cit., p. 326). It would grant a greater protection to small distributors.

[165] The Missouri doctrine prescribes that, when the contractual terms are silent on the duration of the contract, it must admit the option of unilateral termination on the condition that it does not intervene before a reasonable lapse of time. This period would give the distributor a fair chance to recover the investments. Analogous results have been pursued in France in light of the theory of abuse of right and in Germany, especially through good faith (paragraph 242 of the BGB). In this sense, see R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 324-5. According to A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., p. 256, this theory arises within the scope of agency law and would have been progressively extended to commercial distribution relationships. The author claims it was born from the decision Glover v. Henderson, 120 Mo. 367, 877, 25 SW 175, 177 (1894) and finds its initial applications in the cases Allied Equipment Co. v. Weber Engineered Prods. Inc., 237 F2d 879, 882 (4th Cir 1956); and Beebe v. Columbia Axle Co., 233 Mo. App. 212, 218, 117 SW2d 624 (1938).

[166] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 659. A. NERVI, *Contratti di distribuzione e "recovery period rule"*, cit., p. 261 also notes that American doctrine and case law have not found the right solution to this issue with the use of good faith and unconscionability.

[167] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., pp. 662-3.

[168] In this regard, F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 678. The author states that the comparative analysis does not provide clear indications concerning the identification of the interest protected by recoupment doctrine. The American legal system does not establish the criteria for determining the damage amount in case of contractual default and therefore the interest protected. It leaves to the parties and the courts the choice between compensation that covers the full expectation damages or only the expenses of the victim (reliance damages). American case law, on the subject of the unilateral termination of a franchising agreement, has shown oscillating progress. On the one hand, a court ruled that the damage could be a recognition of the reimbursement of the profits to the affiliate excluded from the franchise system (Shultz v. Onan Corp., 737 F.2d 339 (3d Cir. 1984)). On other hand, case law has also adopted the opposite solution (case Robert Basil Motors, Inc. v. General Motors Corp., No. 03 — CV315A, 2004 WL 1125164, at 57, 10 [W.D.N.Y. April 17, 2004] and Crest Cadillac Oldsmobile, Inc. v. Gen. Motors Corp., No. 5:05 — CV00051, 2005 WL 3591871, at 3 [N.D.N.Y. Dec. 30, 2005]).

termination is not only limited by its duration, but also by other relationship aspects, with the interference of investments in the parties' choice of risk-sharing.[169] Moreover, there are difficulties with the boundary between dense concepts such as abuse of law, objective good faith, and abuse of economic dependence, so much so that the solutions in each legal system differ according to the understanding of these concepts.[170] They may result in different grounds for the same problem.[171]

The legal relevance of specific investments occurs in different forms. Investments can be an element for determining the duration of the contractual relationship and, therefore, adequately protecting the party that made them. Furthermore, the rules can prohibit unilateral contractual termination without their recoupment. This corresponds to the most common modality of its regulation. Under an antitrust perspective, investments are also a decisive factor that can justify certain vertical restraints or act as an element to evaluate the dominance relationship for antitrust purposes.

This chapter intends to establish the legal bases for protecting investments. Although Brazilian and Italian law have provisions aimed at protecting specific investments, there are no rules capable of systematizing this protection. This characteristic considerably hampers the task of building the respective regime, and it leads to numerous questions. In the first part of the chapter, the reasons for its protection are laid out. Next, the legal bases of the discipline of protecting investments in Italian legislation are presented, followed by those in Brazilian law. The last part addresses the possible configuration of an investment protection principle.

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[169] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 771.

[170] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 769-70. The author adds that linking the issue to a legal concept depends on the prior definition of its limits and on the capacity of the legal system to internalize extra-legal conceptions and to be sensitized to its values.

[171] This situation is apparent, for example, with the comparison between the solutions proposed in Italian law and German law. The systematization thereof regarding the problem is briefly explained in note 196. In summary, in Germany, according to the dominant understanding, objective good faith would be the basis for protecting unamortized investments. The abuse of economic dependence would primarily have the scope to allow the company to be reconverted after early unilateral termination of the contract. On the contrary, in Italian law, there is a preference for to adopt the concept of the abuse of economic dependence for investment protection. There is also higher resistance to the control of the autonomy of contracting based on objective good faith and abuse of right, which reinforces the greater prominence of the abuse of economic dependence. This finding does not imply the incoherence of the results found in the comparative analysis. The influence of different formants (*formanti*) on the characterization of legal concepts results in these contrasting solutions. Regarding the comparative analysis, cf. *Introduzione al diritto comparato*, by R. SACCO and P. ROSSI, pp. 55 ss.

2.1. Justifications for investments' legal protection

Before explaining the normative foundations for investments' protection in Italian and Brazilian law, it is necessary to investigate the reasons for this protection and its modalities. These legal systems have rules that protect investments and confer a variety of remedies on the parties. The reasons for this particular protection of investments are divided into economic, moral, and commutative justice.[172]

There is a wide range of rules and legal modalities to protect investments. As this chapter explores, they can derive from the general clauses of good faith, abuse of right, and abuse of economic dependence. The governing rules of contractual types with specific investments are usually based on diversified rationales. There are some specific provisions, which, for example, can limit the right to terminate a relationship, impose the acquisition of non-reusable investments, and force the duration of the contract according to the time necessary to recoup. A compensatory, invalidation, and injunctive claim can be granted to the parties of protection investments. There is no uniform reason to justify the protection of investments because the modalities of their protection present a wide range. A distinction must be made to clarify their justification. The reasons to protect investments are economical and moral. However, the legislator can consider other factors and add a remedy to reinforce the protection. The extension of the contractual term to the recoupment of the investments, or the obligation to reacquire some specific investments, not only aims to protect investments, but also to equilibrate some contractual relationships. In this case, in addition to the economic and moral justification, contractual justice plays an important role.

The first chapter highlighted some economic reasons for the protection of investments. They increase the value of the contractual relationship, and they thus become a value-creating relationship. The process of dynamic competition prioritizes economic transactions capable of producing innovation in the market, which is achieved through investments. However, the

[172] The reconstruction of the reasons for the protection of investments established in this section based on the proposal elaborated by P. FABBIO, *L'abuso di dipendenza economica*, Milano: Giuffrè, pp. 268 ss. F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 771 adds that the complexity of the issue of investment protection presupposes a rigorous economic-legal analysis of the situation, especially the global assessment of the relationship, and it requires a solution guided by general notions of contractual justice. The examination of the specific investments focuses not only on the moment of dissolution of the contract, and the evaluation should examine the development of the relationship contract. For this reason, generalist proposals for the full transfer of risks to the counterparty are not adequate to the complex contractual reality.

opportunistic behavior of the counterparty, in appropriating value provided by investments, requires the adoption of legal protection. This possibility causes damage and encourages the parties to make specific investments at a sub-optimal level. Making investments at a lower level than necessary generates a dispersion of resources; investments should not be made below or above the socially optimal level.

Moreover, in a broader perspective, the absence of an adequate guarantee of recovering investments may lead, in certain circumstances, to a cooling off of the competitive process.[173] The counterparty can take advantage of its condition of relative dominance to influence the market of the dependent company. The lack of open pressures and the fear of extortion may induce the dependent firm to refrain from competitive initiatives that displease the counterparty.[174] The legislation to protect dynamic competition must also respond to the functional investment in innovation and intense forms of business collaboration.[175] These same reasons exclude protection by inducing the stability of the contractual relationship, either from the viewpoint of dynamic competition, or from the notion of competition on the merits.[176]

The opportunistic behavior of surplus appropriation must also be morally condemned. While one party makes specific investments, the other takes advantage of it. In the case of a hold-up, there would be an uneven redistribution of the surplus generated by the contract. Behavioral economics theory can also be fundamental to investment protection because of the loss aversion

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[173] The European Commission's guidelines for EU/330/2010 indicate the positive effects of specific investments, which could even be protected through clauses that restrict competition (see section 2.2.5.1). A. NERVI, *Contratti di distribuzione e "recovery period rule"*, cit., p. 262, acknowledges the justification for protecting investments in the European Commission guidelines. Specific investments justify these competitive restrictions.

[174] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 274. G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 55 adds that he does not see as a positive result the algebraic sum between the gains in efficiency deriving from the absolute freedom granted to the dominant firm and the loss suffered by distributors, primarily due to the uncertainty about the prospect of economic success. The protection against the abuse of economic dependence could also be a form of protecting the market.

[175] R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, Jovene: Napoli, 2004, p. 73. A. Zoppini (*Autonomia contrattuale, regolazione del mercato e diritto della concorrenza*, in Contratto e antitrust, cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008, p. 211) points out that the interest is not to allow full recovery of invested and congruent profits, but to ensure a degree of competition in a dynamic sense, to ensure the flow of innovative proposals in terms of technological content, prices, and contractual and organizational modalities.

[176] R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 139. The stability of relationships would stifle dynamic competition. It would also affect consumers' choice, and the competition on the merits, which would deprive them of a supply of goods and services. The competition to become the dealer between companies inside and outside the dealer network is the only one that can stimulate it. In this regard, R. PARDOLESI, *I contratti di distribuzione*, cit., p. 302.

effects. Moral condemnation of particular conduct is found in some of the normative foundations for the protection of specific investments.

For some authors, contractual justice[177] could justify the protection of investments.[178] The disparity of contractual power and asymmetric information are used as a justification of the party's protection. Contractual justice represents one of the interpretations of the abuse of economic dependence regulation.[179] Protecting investments solely based on equity should be criticized.[180] Similar to the interpretation of the abuse of economic dependence, there are several motives for these critics: i) the principle of contractual justice becomes a generic descriptive formula since it is incapable of providing real, constructive indications; ii) the results may also be misleading; the circumstance of protection of one of the contractors in an asymmetrical relationship does not mean

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[177] From this perspective, contractual justice protection (*giustizia contrattuale*) could be linked to economic reasons and market conditions. G. ALPA, *Il contratto in generale. Principi e problemi,* Milano: Giuffrè, 2014, p. 3 expresses this notion of contractual justice; for him, contractual justice is: i) the relation of economic value between both contractual obligations and ii) the value of the obligation closest to the value of it offered in the market.

[178] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 658 argues that the isolation of the doctrine of the recovery of investments with a competition logic would limit the corrective nature of the instrument and would lead to scarcely justifiable results. He adds that the investments should also be protected due to contractual fairness. However, a broad approach to the role of equity in protecting specific investments should not be accepted. The author's considerations, despite the relevant suggestions for the reconstruction of the theme, are not consistent. He uses generic terms to justify the compensation for lost profits resulting from abusive termination. According to F. PANETTI, the amortization of investments should be assessed based on reasonableness (concerning what?). He employs the same parameter, reasonableness, to the quantification of damages. The reasoning developed by A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., pp. 265-6 is more sophisticated. He asks if the judge would be in a position to discern between the risk autonomously undertaken by the distributor and the risk induced by the producer. If so, he also asks whether it would be possible to accurately trace a discriminating line between what the distributor is obligated to invest on behalf of the manufacturer and what he has decided to do on his own initiative. If it is possible to reach this conclusion, the initial premise (the reasoning according to which each party runs its own enterprise risk [*rischio d'impresa*]) autonomously changes; in this case, one of them would transfer a portion of its risk to the other. Based on this argument, the author claims that the only suitable logic would be to protect the asymmetry of contractual power; therefore, one could not assume that the investment is the result of a free choice of the contractor, but to some extent is imposed by the counterparty. The justification of the recovery period rule is precisely commutative justice because it represents an adequate remedy for a situation of negotiating imbalance and, more precisely, for the hypothesis in which a party has sustained investments under pressure from the counterparty and is now unable to repay them. See also B. AGOSTINELLI, *Il patto abusivo: fenomenologia e rimedi*, Torino: G. Giappichelli, 2012, p. 169. However, this reasoning omits the development of economic theory capable of explaining the motivation for making investments and requiring incentives for their protection from its analysis.

[179] This view intends to give particular emphasis, sometimes a central role, to the abuse of economic dependence on the principles of protection of the vulnerable contractor or substantial contract justice. P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., p. 164 argues that this understanding does not go beyond the affirmation of principle; further implementation of the prohibition does not necessarily take into account the initial assertion of principle.

[180] Concerning this reconstruction of notions of disparity of contractual power, asymmetrical contracting, protection of the vulnerable contractor, substantial contract justice, and their confrontation with a competitive view in the abuse of economic dependence, see P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., pp. 153 ss.

that the interest protected is the protection of the vulnerable party; iii) the solidarity motivations of this protection are based on the lack of knowledge of the principle of competition. There are also doubts concerning whether the protection of the investing party would mean contractual justice. For example, the distributor, who is usually in charge of investing, is not always the vulnerable party in the relationship.[181]

These criticisms cannot exclude commutative justice as a partial reason for some provisions intended to give supplementary remedies to investment protection. Equity constitutes the basis of remedies in some rules, in particular the determination of the minimum duration of the contract (Italian franchise agreement law), or the repurchase of the investments at the price sold to the consumer (Brazilian vehicle distribution law). These provide extra protection to investments. The general recognition of the protection of investments would occur for economic reasons, especially for the stimulation of dynamic competition, but the remedies available could be based on contractual power asymmetry.

2.2. The governing rules of specific investment protection in Italian law

There is no general provision for the protection of investments in Italian law.[182-183] This protection takes place through general clauses and specific rules. Based on these provisions, there is a discussion about the existence of a principle of protecting specific investments (see section

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[181] Concerning the distribution agreement, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 224-239 affirms that the precariousness of the situation with which the distributor may be confronted at the time of the dissolution of the bond and of being deprived of future economic subsistence seems to hurt the jurists' sensibilities. The Portuguese author concludes that this argument would not be persuasive. The difference in power between the producer and the distributor does not relate to the problem because the difference in size between the contractors is not enough to presume distortions in bargaining power. In addition, entrepreneurs must be cautious about their risks. In the same regard, R. PARDOLESI, *I contratti di distribuzione*, cit., p. 309.

[182] In a minority view, R. NATOLI, *L'abuso di dipendenza economica*, in Mercati regolati, vol. V, in Trattato dei contratti, diretto da Vincenzo Roppo, codirettore Alberto M. Benedetti, Milano: Giuffrè, 2014, p. 381 gleans from Article 9 of Law No. 192/1998 a general rule for the protection of investments. The rule would represent its maximum emersion point. It would assign to the company that made specific investments the right to contract stability, lasting for a period at least equal to the time required for the recovery of investments. In his argument, R. NATOLI adds Article 6/2 of the same law to this understanding. The latter provision establishes the nullity of the clause attributive to the right of unilateral termination without reasonable prior notice in the subcontracting agreement (*subfornitura*).

[183] C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., pp. 280-1 indicates how a traditional view evaluates the investments made under a contract. The author emphasizes that investments have legal irrelevance in the traditional discipline. This understanding stems from the requirement to consider them an external entity in relation to the act (*contratto*) and activity (*impresa*) that they affect. Investments also interfere with the notion of a company (*azienda*). They correspond to the assets organized by the entrepreneur for productive activity. Despite their relation with such concepts, investments would not have a specific relevance though these legal concepts.

2.4). This conclusion is based on evidence in community competition law.[184] The objective of these rules is to reach a compromise between two conflicting interests: on the one hand, there is the interest of the party that makes investments and seeks to prolong the relationship; on the other, there is the possibility of the counterparty to react in time to changes in the economic context, which may require a network restructuring.[185]

In community law, Regulation EU/330/2010 (on the block exemption discipline for vertical restraints) and Regulation EU/461/2010 (on the exemption regime for the vertical exemption of the motor vehicles sector), each with its own guidelines, could protect investments.[186] These acts establish antitrust exemptions, including clauses that might promote the protection of the specific investments in a vertical agreement. The permission to acquire a minimum quantity, a non-compete obligation, or an exclusivity clause are examples of such exceptions. They may correspond to appropriate responses to avoid investment loss. These clauses would guarantee the return on investments made by the distributors, especially those in pre-sale assistance services.[187] Antitrust law could also assign relevance to specific investments in the configuration of the abuse of economic dependence. Investments represent a factor that can reduce the relevant market to a product-derived market (aftermarket or secondary market), which, under some circumstances, could facilitate the configuration of an antitrust violation.

In Italian law, the protection of investments manifests in the governing rules of franchise agreement, in Article 3/3 of Law No. 129/2004, in the regulation of the duration of the fuel

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[184] According to P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 273-4, there are two reasons the principle of the protection of investments has become consistent with antitrust. Antitrust law would be a privileged place for the application of the economic analysis of law. Refraining from investing involves the collective well-being and thus can involve antitrust law, which is oriented towards the protection of an efficient market.

[185] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381.

[186] Specific provisions are addressed throughout this thesis. In addition to the regulations mentioned, Directive CEE/86/653, on the commercial agency contract, does not directly address the issue, but it can be considered to regulate investment protection. Article 17 addresses the compensation due in the event of the termination of an agency contract. It presents two options to the Members-States: i) the German regime, which establishes an indemnification due to the new customers brought to the principal's network (paragraph 2); and ii) the French regime, with an indemnity in case of deprivation of commissions that the agent would receive; it does not allow the amortization of costs and expenses incurred (paragraph 3). Although the issue was not included in the wording of the directive, paragraphs 2 and 3 of Article 17 can grant an indemnity due to unamortized investments. Cf. F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 747-52. Italy has transplanted this article and has adopted the first option under Article 1.751 of the Civil Code. It does not rule out the possibility of protection of specific investments by granting compensation for the loss of customer base and by a refusal to exclude any compensation for damages. In community law, Article 3/5 of the Regulation CEE/1400/2002, on the exemption of vertical agreements in the automobile sector, no longer in force, could even have generated civil claims for the compensation of investments. It established a minimum period of notice. See P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 291 ss. argues that this last provision was intended to protect investments.

[187] P. FABBIO, *L'abuso di dipendenza economica,* cit., p. 273

distribution contract (Article 12/28 of Law No. 111/2011) (*approvvigionamento e affidamento degli impianti di distribuzione di carburanti*), and in agribusiness supply chain contracts, Article 66 of Law No. 289/2002.[188] The provisions mentioned do not exhaust all specific rules. In particular, the protection at the end of the relationship takes place through the general clause against the abuse of economic dependence provided in Law No. 192/1998. With subsidiary application, investment protection can also be conducted through the prohibition of the abuse of law and objective good faith (e.g., Articles 1.175, 1.337 and 1.338 of the Italian Civil Code).

The analysis performed in the following sections addresses the *direct* protection of investments. This protection seeks to avoid the premature termination of the commercial relationship and, in some contractual arrangements, to link investments to the duration of the contract. The protection may also occur *indirectly*, as with the EU antitrust rules concerning vertical agreement exceptions. These rules stimulate investment because they are viewed as positive aspects for the market and, therefore, as a justification of protection through clauses that restrict competition.

[188] A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Responsabilità civile e previdenza, 2010, fasc. 2, p. 363 also refers to the rules of the network contract (*contratto di rete di imprese*, legge 122/2010). These rules, however, have little to do with the recovery of investments. In this regard, see M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, in Nuova giurisprudenza civile e commerciale, 2010, p. 95.

2.2.1. The abuse of economic dependence on the protection of specific investments

There is no general norm capable of organizing the rules to govern specific investments. The central norm of their protection in Italian law is the general clause[189] of prohibition of the abuse of economic dependence (Article 9 of Law No. 192/1998).[190-191]

The insertion of this norm into legislation intended to govern the subcontracting agreement (*contratto di subfornitura*)[192] has had systematic repercussions. This protection requires its

[189] In a theoretical discussion with possible repercussions for this thesis, the doctrine debates the qualification of the prohibition of the abuse of economic dependence as a general clause. In favor of this qualification, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 378; G. CERIDONO, *Legge 18 giugno 1998, n. 192. Disciplina della subfornitura nelle attività produttive, Commento alla l. 18 giugno 1998, n. 192. Art. 8. Regime IVA. Art. 9. Abuso di dipendenza economica*, in Le Nuove leggi civili commentate, 2000, fasc. 1-2, pp. 429 ss.; F. MACARIO, *Equilibrio delle posizioni contrattuali ed autonomia privata nella subfornitura*, in Equilibrio delle posizioni contrattuali ed autonomia privata, a cura di Lanfranco Ferroni, Napoli: Edizioni Scientifiche Italiane, 2002, pp. 131 ss.; and T. LONGU, *Il divieto dell'abuso di dipendenza economica nei rapporti tra le imprese*, in Rivista di diritto civile, 2000, fasc. 3, pp. 245. In reviewing some normative categories, M. LIBERTINI proposes the definition of a general clause as a normative structure with an undetermined content that identifies a situation of conflict between interests protected by the law and attributes the power to assess these interests to the judge (*Clausole generali, norme di principio, norme a contenuto indeterminato. Uma proposta di distinzione*, in Rivista Critica di Diritto Privato, 2011). This balancing of interests occurs through the self-integration of the norm. See also S. RODOTÀ, *Il tempo delle clausole generali*, in Rivista Critica di Diritto Privato, 1987. In opposition to classification as a general clause, cf. R. NATOLI, *Abuso del diritto e abuso di dipendenza economica*, in I Contratti, 2010, fasc. 5, p. 525. The author argues that Article 9 is a general rule limited to business relationships. This rule would not have the characteristics and functions attributed to a general clause by the doctrine; it would possess a *fattispecie* and would not allow the judge to create a rule.

[190] German antitrust law (Article 20 of the GWB) introduced the abuse of economic dependence in the first half of the 1970s. It was qualified as the abuse of relative position and was opposed to the abuse of the dominant position (absolute). The prohibition of the abuse of economic dependence originates from an internal development of the latter institute. In German law, the abuse of economic dependence corresponds to the company's behavior to impose its contractual power and to affect the counterparty's freedom of determination, although it is incapable of forcing competitive pressures in the market. See, among many other references, R. NATOLI, *L'abuso di dipendenza economica*, cit., pp. 378-99.

[191] The wording of this provision changed until it reached its current version. In 2001, it underwent modifications. The first corresponded to the introduction of other remedies to protect the dependent company. They would no longer be restricted to the nullity of the agreement, as outlined in the original wording. The dependent company could also exercise a compensatory claim and an injunction. Another amendment, which also dates to 2001, introduced the competency of the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the body that examines antitrust matters in Italy, to promote antitrust sanctions (Article 3-bis). It could apply sanctions when the abuse of economic dependence had relevance for the protection of competition and the market. According to Article 3-bis, the AGCM must issue the warnings and sanctions established in article 15 of Law No. 287/1990 (Antitrust law). The complaint of a third party or independent authority can initiate the procedure for applying these consequences. The competitive relevance of economic dependence is also recognized in case of repeated violation of the rules on late payment (Law No. 180/2011 [legislation derived from the Directive EU/7/2011]) and on fuel distribution agreement. In addition to these rules, there is also the case of agribusiness supply chain contracts. The hypothesis of late payment represents the only hypothesis in which the AGCM examined the *fattispecie* of the abuse of economic dependence. In a 2016 decision, the agency found that Hera Company paid its suppliers systematically within a period of 120 days, not 60 days, as required. As a result, the agency determined an €800,000 fine.

[192] Article 1 of the aforementioned law defines the subcontracting agreement (*contratto di subfornitura*) as the contract in which the entrepreneur that undertakes performing the work on its semi-finished products or on raw materials supplied by the committed company on its behalf, or endeavors to provide the company with products or services

coordination with other elements of the legal system. Although there are dissenting voices,[193] the prohibition of the abuse of economic dependence aims to protect the freedom of movement of the dependent company in the market.[194] Even though the latter is preferable, regardless of the position adopted, it is not an exceptional rule (*norma eccezionale*); rather, it reflects general legal principles and, therefore, can be analogically applied.[195]

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intended to be incorporated or used in the context of the economic activity of the principal or in the production of a complex good in accordance with executive projects, technical and technological knowledge, and models or prototypes supplied by the principal company.

[193] Even 20 years after the enactment of the law, the doctrine still discusses the purpose of the abuse of economic dependence. In seeking to systematize this prohibition, two proposals stand out: the legal institute i) as an expression of the principle of objective good faith (A. ALBANESE, *Abuso di dipendenza economica: nullità del contratto e riequilibrio*, in Europa e Diritto Privato, 1999; A. BARBA, Angelo, *L'abuso di dipendenza economica: profili generali, in La subfornitura nelle attività produttive*, a cura di Vicenzo Cuffaro, Napoli, 1998; L. DELLI PRISCOLI, *Abuso di dipendenza economica e abuso di diritto*, in http://www.orizzontideldirittocommerciale.it/media/11966/delli_priscoli.pdf; T. LONGU, *Il divieto dell'abuso di dipendenza economica nei rapporti tra le imprese*, cit.; D. MAFFEIS, *Art. 9*, in La subfornitura: Legge 18 giugno 1998, n. 192, a cura Giorgio de Nova, Ipsoa, Milano, 1998; A. DI CELSO, *Art. 9. Abuso di dipendenza economica*, in La Subfornitura: commento alla legge 18 giugo 1998 n. 192, a cura di Guido Alpa e Angelo Clarizia, Milano: Giuffrè: 1999; V. PINTO, *L'abuso di dipendenza economica "fuori dal contratto" tra diritto civile e diritto* antitrust, in Rivista di Diritto Civile, 2000); and ii) as a competition protection (P. FABBIO, *L'abuso di dipendenza economica*, cit.; P. FABBIO, *Abuso di dipendenza economica*, in Trattato dei contratti, diretto da Pietro Rescigno ed Enrico Gabrielli, I contratti della concorrenza, vol. XV, Torino: UTET; Robert PARDOLESI, *Nuovi abusi contrattuali: percorsi di una clausola generale*, in Danno e responsabilità, 2012; Giuseppe COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, Torino: G. Giappichelli, 2004; GABRIELLI, Enrico, *Operazione economica e teoria del contratto: studi*, Milano: Giuffrè, 2013; Mario LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, in Contratto e impresa, 2013, fasc. 1; Maria Rosario MAUGERI, *Abuso di dipendenza economica e autonomia privata*, Milano: Giuffrè, 2003; and Roberto NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, Jovene: Napoli, 2004). The first position is prevalent in the doctrine; the legal provision would function as a protection of the vulnerable company. The second opinion defends the institute guaranteeing economic efficiency. The first view argues that the abuse of economic dependence would be neutral for the global operation of the market, but it would have an impact on contractual equity. In addition to the theoretical discussion about its legal reasoning, this conflict has practical effects. The determination by the parties of the applicable law cannot be altered if the second position is adopted. According to Article 6.2 of Regulation EC/864/2007 (Rome II Regulation on the law applicable for the non-contractual obligations), it is not for the parties to choose the applicable law if such a rule was based on the protection of competition. Cf. M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, in Contratto e impresa, 2013, fasc. 1, p. 1.

[194] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 35 ss. The author, in another work (P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., p.166), points out that the reconstruction linking the rule to competition protection would represent a more systematically coherent choice and would have application developments. Furthermore, this choice would be in line with provision of Article 3 of Regulation EU/1/2003 (on the implementation of the rules on competition established in the Treaty on the Functioning of the European Union), which allows the Member States to prohibit the abuse of economic dependence in their antitrust laws.

[195] Irrespective of the legal basis for the prohibition of the abuse of economic dependence, be it contractual justice or market protection, it should not be considered an exceptional rule (*norma eccezionale*). For M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 3, this thesis is reinforced by the legislator, who determined its direct application to relations between companies typically characterized by the imbalance of power, without the need to demonstrate the most rigorous requirements of *fattispecie* established by Article 9 of Law No. 192/1998.

In Italian law, the characteristics of the implementation of abuse of economic dependence – in a law intended for a specific, contractual type and in a legal system with difficulty accepting the use of good faith and abuse of the right to scrutinize the exercise of rights – would differentiate the protection of investments from other legal systems, such as in German law.[196] This difference has repercussions for the relationship between the clauses of the abuse of economic dependence and objective good faith in the protection of investments in Italian law.

With the introduction of the abuse of economic dependence in a law designed to govern a contractual type, there was controversy regarding the extent of the prohibition. The doctrine today practically unanimously recognizes its general character, with application to all contractual types, and not only to subcontracting agreements (*contratto di subfornitura*).[197] The Italian Court of Cassation upheld this guideline in 2011.[198]

Contract typology cannot be a limit to applying the abuse of economic dependence. The institute has received a restrictive interpretation from a significant part of case law.[199] The

[196] F. A. F. PINTO (*Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 3 e ss.) analyzes the fundamentals for investment protection, especially in German and Portuguese law, with a comparative view. The abuse of economic dependence is listed as one of the legal grounds (paragraph 20/1 of the GWB) for the protection of investments in German law. However, this understanding would have minority adhesion in case law. There would also be a refusal of the doctrine to consider that provision as a general instrument for the stability of the contractual relationship. Their protection under the abuse of economic dependence would operate in case of specific circumstances. According to the author, the German legal system would offer three levels of protection against abusive unilateral termination. The first would derive from the application of prior notice periods, provided in paragraph 89 of the HGB (German commercial code); in the second level, protection of unamortized investments would occur through the principle of good faith (paragraph 242 of the BGB); the third would be the prohibition of discrimination set forth in paragraph 20/1 of the GWB, with the establishment of an appropriate deadline for settling the contract and the conversion of the company. The institutes of objective good faith and economic dependence act on different levels, without the violation of one necessarily interfering with another. This diverse performance derives from the different objectives of each norm: in the case of good faith, the social protection of the part that performs investments; the protection of competition concerning the abuse of economic dependence. The protection of the counterparty through the abuse of economic dependency aims at an adequate reconversion of the dependent company, which could protect the investments made. P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 282 adds that contrasting solutions are probably explained in historical perspective. In the author's view, this would represent a systematic incoherence, which is related to the German doctrinal position and case law, as well as to an insufficient in-depth analysis of the issue. This dogmatic option is also attributed to the effects of the remedies assigned by each concept; based on the prohibition of the abuse of economic dependence, one could seek a court order to contract the full recovery of investments, which creates the fear of rigidity of market structures. The application of objective good faith, in which only the remedy of compensation for the equivalent is allowed, would remove this fear.

[197] The practically unanimous doctrine adopts this position. It argues that there should not be a reasonable disparity in treatment between the subcontracting firms and other companies.

[198] The Italian Court of Cassation (Cass., Sez. U., nov. 25, 2011, n. 24906) adopted this understanding, primarily pointing out that the provision's wording makes generic references to the party concerning the abuse, the customer, and the supplier.

[199] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, in I contratti per l'impresa, a cura di G. Gitti, M. Maugeri, M. Notari, Il Mulino, Bologna, 2012, vol. I, p. 52. The author notes that it is an absurd consensus on the restrictive interpretation by a significant part of the case law.

exclusion of this protection occurs due to the principle of self-responsibility (*autoresponsabilità*), negligence, or free determination of the party that invokes this protection. The dependence in commercial relationships with the presence of investments is still a rule for integrated distributors.[200] The subcontracting agreement (*contratto di subfornitura*),[201] sales concession contract (*contratto di concessione*),[202] franchising agreement,[203] relationship between a retailer and its supplier,[204] and agribusiness supply chain agreement[205] must also be mentioned. A license agreement can be protected with this legal instrument; the licensee, who exercises the production technique due to a specific patent, is in a dependent position because the company's activity is usually based on investments with selectivity characteristics.[206]

The doctrine has defined the field of applying the abuse of economic dependence and has identified the operational field of this legal institute with the issue of opportunism in the presence of specific investments.[207] This hypothesis fits into a group of situations called "commercial relationship dependency" (*dipendenza da rapporto commerciale*), in which a company, even though it has several commercial relationships, organizes its activities predominantly concerning a particular producer. Consequently, without the relationship on which it is dependent, the

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[200] The integrated distributor is a company that, while taking the risk of the distribution process, agrees to coordinate its activity with the counterparty's marketing requirements. It is obliged to comply with the latter's conditions on the exercise of the activities, such as the company organization and sales programs. Cf. R. PARDOLESI, *I contratti di distribuzione*, cit.; R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 380. A. NERVI, *Contratti di distribuzione e "recovery period rule",* cit., p. 261 ss. adds that, in a distribution contract, the distributor relies on its duration and its stability because it is encouraged to invest.
[201] The subcontractor often operates exclusively for a single principal. Cf. F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, in Giurisprudenza italiana, 2010, fasc. 12. In case law, see Trib. Bari, 17 gennaio 2005 (ord).
[202] For example, Trib. Roma, 5 maggio 2003 (ord.).
[203] For example, Trib. Taranto, 17 settembre 2003 (ord.); Trib. Isernia, 12 aprile 2003.
[204] For example, Trib. Bari, 6 maggio 2002 (ord.); e Trib. Bari, 2 luglio 2002.
[205] See R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 380.
[206] G. MORESCHINI, *I contratti pendenti nel concordato preventivo*, Giuffrè: Milano, p. 155.
[207] The doctrine more sensitive to law and economics primarily defends this correlation: C. OSTI, *L'abuso di dipendenza economica*, cit., A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky*"*, cit., B. TASSON, "*Unconscionability" e abuso di dipendeza economica*, cit.; COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., pp.3 e ss. Cf. also P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 268; and F. MACARIO, *Equilibrio delle posizioni contrattuali ed autonomia privata nella subfornitura*, cit., pp. 160 ss. In a minority position, R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 380 argues that the rationale of abuse of economic dependence would be to protect those who make specialized investments. He states that the scope of Article 9 would be the need to preserve the specific investments made to execute a contractual program. Specific investments would be the only case of a dependency situation. In the study of 2014, more than 15 years after the enactment of the law, the author argues that the protection of investments would represent all the hypotheses examined by the case law. However, this interpretation is unjustified due to the generality of the provision and the genesis of the prohibition. Investment protection should not be the norm's only use.

reorganization of production would involve excessive risk.[208] The abuse of dependency is not limited to this group of situations: it could also be applied to the hypothesis of assortment dependency (*dipendenza da assortimento*), in which a distributor, to be competitive, chooses one or more brands recognized in the market for his assortment of products.[209]

The prohibition of the abuse of economic dependence requires three elements: the existence of a commercial relationship between companies; economic dependency; and the performance of an abusive act (Article 9/2 of Law No. 192/1998). Economic dependence consists of a situation in which the dominant company can determine an excessive imbalance of rights and obligations, or the dependent party cannot obtain satisfactory alternatives on the market. The law does not define the conduct considered abusive, but it does provide some examples: the refusal to sell or purchase, the imposition of unfairly burdensome or discriminatory contractual conditions, and the arbitrary disruption of a business relationship.[210]

Specific investments are present in several elements for the incidence of the abuse of economic dependence. They integrate, at the same time, the condition of economic dependence in a commercial relationship and the abusive act. The party of the contract with specific investments depends on the relationship. It has switching costs in alternative use, which reduces the possibility or makes it impossible to obtain a satisfactory alternative on the market. The configuration of the abuse requires, among other examples, the existence of unrecovered specific investments. Investments and market conditions also influence the determination of the most appropriate contractual remedy. This generic assertion of applying the abuse of economic dependence is insufficient; its requirements must be assessed in depth concerning the adequate protection of investments.

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[208] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 260 ss. After indicating other definitions, the author adds that the dependence of a contractual relation would occur in the presence of specific investments, long term relationships, and its exclusive character.

[209] Based on German experience, Italian doctrine (see especially P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 260-261) builds categories of the application of the abuse of economic dependence (*Fallgruppe*). The two main categories are of assortment dependency (*dipendenza da assortimento*) and commercial relationship dependency (*dipendenza da rapporto commerciale*).

[210] Indicating abusive conduct, Article 9/2 mentions that these examples are *also* abusive. From this fragment and the general character of the discipline, the doctrine understands that the abusive acts are not typified. Although the spectrum of atypical hypotheses is reduced, due to the tendency of the expansive interpretation of the examples, the atypical nature of abusive acts is admitted. Emptying the goodwill of the distributor when another distributor is placed in the same geographic area is an example of an abusive act. P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 419 criticizes the qualification of this hypothesis as atypical. Case law gives other examples: i) a unilateral change in the conditions of the downstream market (Trib. Torino, 12 marzo 2010, n. 271) and ii) the reduction of orders by the dominant company (Trib. Bassano del Grappa, 9 febbraio 2010).

2.2.1.1. Economic dependence and making specific investments

Economic dependence corresponds to one of the requirements for applying the rule. There are two legal criteria to establish economic dependence between companies: i) the possibility of determining an excessive imbalance of rights and obligations,[211-212] and ii) the real possibility for the dependent company to find satisfactory alternatives on the market. The second criterion coincides with the foreign provisions for the configuration of economic dependence.[213] The first parameter of excessive imbalance between the parties is innovative.[214]

Despite the new element introduced into Italian law, the doctrine understands that the absence of a satisfactory alternative in the market is the determining criterion for the configuration

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[211] The criterion of the excessive imbalance of rights and obligations covers situations that do not immediately apply to the notion of a satisfactory alternative on the market. It has greater indetermination, which makes it possible to perform other functions. Some future applications may even be obtained from foreign precedents. Cf. P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 124 e 125. The author also adds that this criterion requires only a prognostic judgment of the imbalance of rights and obligations. The wording of Article 9/1 confirms this interpretation. For the configuration of economic dependence due to an excessive imbalance, this provision only requires that a party is in the degree of determining it. The doctrine still includes debates about the matter. The majority understanding is that the assessment of the imbalance could be carried initially or during the relationship. The authors who oppose this view understand that excessive imbalance could only occur during the contractual performance. Contractual relations usually have a power disparity, so an original excessive imbalance would sufficiently characterize dependence. Cf. R. NATOLI, *L'abuso di dipendenza economica*, cit., pp. 392 and C. CAMARDI, *Contratti di consumo e contratti tra imprese. Riflessioni sull'asimmetria contrattuale nei rapporti di scambio e nei rapporti "reticolari,"* in Rivista Critica del Diritto Privato, pp. 574 ss.

[212] The application of the excessive imbalance criterion requires assessing whether the dominant company is effectively able to impose unfavorable conditions, and the counterparty would reasonably not accept them if it were free to choose. The element to assess dependency is the situation in which the company finds itself unable to prevent a particular harmful behavior from being performed. Cf. P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 124. This criterion, observes P. FABBIO, *L'abuso di dipendenza economica*, cit., implies a certain circularity of the legal provision. On the one hand, the possibility of excessive imbalance defines the state of dependence; on the other, the abuse is the configuration of excessively burdensome contractual conditions. The difference is that while, in one case, iniquity is assessed as a hypothetical judgment (in the configuration of economic dependence), in the other, it must be real and concrete. It depends on proving that, at the time of the contract's conclusion, the market conditions were such to render the content of the contract excessively unbalanced or the individual clauses unjustifiably burdensome. It must demonstrate that this position has influenced the contractual content in an excessive or unjustified way.

[213] For example, the definition of German antitrust law is the following: "Paragraph 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services *depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power)*" (Article 20/1 da GWB). French law does not establish the criteria to qualify economic dependence with antitrust repercussions (Article L420-2/2 of the *Code de commerce*). However, there are other provisions to allow judicial scrutiny in the case of an imbalance of rights and obligations, such as Article L. 442-1, I, 2º, of the Commercial Code and Article 11711 of the Civil Code. Though they do not qualify these hypotheses as economic dependency, these rules have the same structure as the first criterion to qualify as abuse of economic dependency in Italian law.

[214] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 122.

of economic dependence. This condition is suitable to absorb the other requirement.[215] That criterion is less generic in its assessment, and its foundation is German experience. It would allow a more precise determination of the parameters for its application.[216-217] It is difficult to imagine situations in which economic dependence does not derive from the absence of practicable alternatives in the market.[218] The market alternative should also be satisfactory, i.e., it should be relevant or significant in order to overcome the minimum limit of economic dependence.[219]

The assessment of this criterion requires the use of economic parameters in its application.[220] Dependency should refer to a given market in its assessment; this evaluation, however, does not have the same importance usually attributed to the abuse of a dominant position.[221] The existence of an alternative requires not its sufficiency, but the *reasonableness* of alternatives in the referral market. An alternative in the market is necessary for the company to remain competitive.[222]

There are some indicators of the configuration of dependence due to the lack of a satisfactory alternative:[223] the high switching costs of investments made, the long duration of the relationship, the degree of identification of the dependent company with the supplier, and the existence of exclusivity.[224] In particular, specific investments are central to the configuration of

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[215] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 123, footnote 79.
[216] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 123.
[217] The doctrine qualifies this criterion as essential to the configuration of economic dependency, not an alternative condition. In this regard, see S. BENUCCI, *La dipendenza economica nei contratti tra imprese,* in Squilibrio e usura nei contratti, a cura di Giuseppe Vettori, Padova, 2002, p. 221; M. R. MAUGERI, *Abuso di dipendenza economica e autonomia privata*, Milano: Giuffrè, 2003, p. 139; P. FABBIO, *Interruzione delle relazioni commerciali in atto e abuso di dipendenza economica. Nota a ord. Trib. Bari 6 maggio 2002*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2002, fasc. 7-10, pt. 2, p. 331; A. BARBA, Angelo, *L'abuso di dipendenza economica: profili generali,* cit., p. 328; G. CERIDONO, *Legge 18 giugno 1998, n. 192. Disciplina della subfornitura nelle attività produttive, Commento alla l. 18 giugno 1998, n. 192. Art. 8. Regime IVA. Art. 9. Abuso di dipendenza economica*, cit., 429; L. DELLI PRISCOLI, *Abuso di dipendenza economica e abuso di diritto*, in http://www.orizzontideldirittocommerciale.it/media/11966/delli_priscoli.pdf; C. OSTI, *L'abuso di dipendenza economica*, cit., p. 47; V. PINTO, *L'abuso di dipendenza economica "fuori dal contratto" tra diritto civile e diritto* antitrust, in Rivista di Diritto Civile, 2000, p. 405; M. S. SPOLIDORO, *Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica*, in Rivista di diritto industriale, 1999, fasc. 4-5, pt. 1, p. 191. For the opposite understanding, see D. MAFFEIS, *Art. 9*, cit., p. 79.
[218] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 10.
[219] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 133 ss.
[220] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 10.
[221] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 133 ss.
[222] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 10.
[223] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 128 ss.
[224] The notion of a satisfactory alternative depends on the nature of the contract and does not coincide with exclusivity. Exclusivity or near-exclusivity is insufficient to configure economic dependency. This legal institute also requires considering the possibility of replacing the counterparty with another agent. Cf. F. BORTOLOTTI, *Riduzione delle*

economic dependence. They have a higher value in the relationship for which they were made (*sunk costs*) than in alternative use. This situation places the company that makes them in dependency. They induce the counterparty to act via extortion due to the lack of satisfactory alternatives. The lower value of the investments in alternative use eliminates the existence of a satisfactory alternative.[225]

Concerning the evidence, the dependent company must identify the specific investments made for the contractual relationship. It may have to demonstrate other indicators for the configuration of economic dependence, such as the term of the relationship and the profits derived from that timespan. It would not be enough to indicate a significant extent of investments without demonstrating whether they are specific to that relationship. The dependent company must also indicate the lack of recovery throughout the contractual relationship.[226] The proof of investment specificity entails demonstrating the conversion costs in order to it to apply them to another contractual relationship. If this application generates high switching costs, there is asset specificity. The switching costs act as an indicator of the determination of a satisfactory alternative on the market and, as a consequence, must be shown to be substantial.[227] Even if all the conditions present the qualification as economic dependence, its configuration might be excluded in a case of self-induced dependence.

2.2.1.1.1. The protection exclusion: self-induced dependence

The contract can govern a commercial relationship with specific investments, which are made to achieve a contractual objective. Considering that the contract requires the consent of both parties for its formation, one must verify the participation of the dominated company in the

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commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009, cit., p. 2563.

[225] In Italian case law, see Trib. de Torino, 12 marzo 2010; and Trib. Roma 30 novembro 2009.

[226] G. COLANGELO argues that those are the elements to be proved (*Subfornitura, dipendenza economica ed obbligo di contrarre, Nota a ord. Trib. Catania 9 luglio 2009*, in Danno e responsabilità, 2009, fasc. 10, p. 1001). According to this decision, the dependent party would have incurred in the payment of three major production lines. The court understood that this indication would not be able to establish the company's economic dependence. Other elements must be proven. In similar regard, see also A. DI BIASE, "*Contrazione" delle relazioni commerciali ed abuso di dipendenza economica, Nota a ord. Trib. Catania sez. distaccata Bronte 9 luglio 2009*, in I Contratti, 2010, fasc. 3, p. 257.

[227] Regarding this element, see B. TASSONE, *Non solo moda (ma anche rewriting contrattuale): commento alla prima decisione in materia di abuso di dipendenza economica, Commento a ord. Trib. Bari 6 maggio 2002*, in Danno e responsabilità, 2002, fasc. 7, p. 771.

configuration of its dependency. The dependent company cannot invoke this legal regime if it has produced or contributed to the situation of dependency; the counterparty must have imposed this condition.[228]

The condition of self-induced dependence is not present in the provision. However, it can be drawn from the principle of self-responsibility.[229] It imposes that each party must bear the consequences of its own choices in the market. Companies should accept the effects of inefficient and misguided decisions because they are free and conscious.[230] Dependence cannot be confused with the notion of contractual justice; it requires subjective and objective elements.[231]

Protection against the abuse of economic dependence can be considered justified when it is determined after the completion of the contract due to unforeseeable circumstances. Section 1.3.2 demonstrates that the economic analysis of the contracts must assume the bounded rationality of the parties as a presupposition. This perception prevents them from entering into a contract that contains all contingencies.

The configuration of economic dependence occurs not only in cases of future and uncertain events; this interpretation would considerably limit the application of the rule. There is usually economic dependence of a party in the contractual relationship with specific investments, for example, integrated distribution and the franchising contract. These cases correspond to physiological dependence.[232] The relationship promotes a considered normal scope, which involves making specific investments, and the party becomes dependent on the agreement. The participation in the integrated distribution system is the dependent company's choice, but the necessity of making investments to perform the contract does not imply the exclusion of dependency.[233] There is also dependence in cases in which the party follows a contractual clause, for example, the prior notice term if the contract duration is insufficient for the recovery of the

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[228] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 141. This is perhaps the instrument to assess the efficient level of protection of the dependent company, suggested by M. LIBERTINI (*La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 4).
[229] Concerning the consistency of this principle in Italian law, cf. S. PUGLIATTI, *Autoresponsabilità*, in Enciclopedia del diritto, vol. IV, pp. 452 ss. For the author, self-responsibility does not represent a cause of damages in the legal sphere of another party; consequently, the effects of the act must fall within the sphere of the agent. In examining positive Italian law, he suggests the principle of self-responsibility based on Article 1.227 of the Civil Code. P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 141 ss. adds that this principle is implicit in a system based on the protection of competition because it is related to the freedom of initiative (*libertà di iniziativa economica*).
[230] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 144-7.
[231] Ibid., p. 149.
[232] Ibid., p.148.
[233] Ibid., p. 150.

investments.[234] There might be a significant change in the choices the parties make at the time of contract formation and exercising the right.

The assertion that economic dependence can arise from the absence of investment recovery represents only a generic analysis of the matter. A more in-depth examination should seek to identify the level of the dependent company's efficient protection, considering that very high protection could encourage companies to place themselves in a position of dependency and not seek alternative solutions.[235] For this reason, the notion of self-induced dependence is further elaborated in section 3.1, which examines in detail how contractual risk-taking can determine the contractual dependence and protection of investments. Once the dependency is configured, one must also identify the abusive act.

2.2.1.2. The abusive act of the dominating company

Another element of characterizing the abuse of economic dependence is the performance of an abusive act. The law does not typify abusive acts. Article 9/2 lists three hypotheses of prohibited acts; abuse may consist of a refusal to sell or purchase, an imposition of unjustifiably burdensome contractual conditions, or an arbitrary termination of the contractual relationship. This list does not preclude an atypical hypothesis.

In contracts in which one of the parties makes specific investments, the most common abuse takes the form of an arbitrary interruption of the relationship. This act is identified with the unilateral termination of the contract or the refusal to renew a fixed-term contract (see sections 3.1 and 3.4.1). Given the complexity of the topic, the configuration of an abusive act requires detailed analysis, to be conducted in section 3.4, after presenting an overview of the governing rules in the

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[234] M. DELLACASA provides this perspective of analysis (*Il recesso arbitrario tra principi e rimedi*, in Rivista di diritto privato, 2012, fasc. 1, p. 19) when addressing the control exercised by objective good faith. He adds that there would be a significant change in the choices made by the parties at the time of contract formation and exercise of the right. In doctrine, see A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 357 ss.; G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in I Contratti, 2010, p. 17; M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 329; and C. SCOGNAMIGLIO, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto, Relazione al Convegno "Il nuovo diritto dei contratti: problemi e prospettive, Crotone, 24-26 maggio 2001*, in Europa e diritto privato, 2003, fasc. 4, pp. 807 ss. In order to corroborate this possibility, one can mention two decisions that were annulled by the Court of Cassation for not having carried out the control of the unilateral termination clause, case "Sieni-Credit Swiss": Cass. 14 luglio 2000, n. 9321; and Cass. 2 aprile 2005, n. 6923.

[235] Cf. M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, pp. 3-4.

Italian and Brazilian legal systems and selecting the interests that arise from making specific investments. Two other general legal institutions can protect investments in Italian law, the abuse of right and objective good faith, which are the subject of the next section.

2.2.2. The abuse of law and objective good faith in the protection of investments

The abuse of economic dependence is an instrument aimed at protecting investments in the Italian legal system. In a minority understanding, it is even the scope of the provision of Article 9 of Law No. 192/1998.[236] However, this general clause must coexist with other legal provisions of the same nature that allow control over exercising a subjective right. This circumstance requires establishing the application limit between, on the one hand, the abuse of economic dependence and, on the other, objective good faith[237] (e.g., Articles 1.175, 1.337, and 1.338 of the Civil Code) and the abuse of right (not present in the Civil Code).

Control in the exercise of a subjective right through abusing a right and good faith can be an essential instrument for verifying the illegitimate interruption of a contractual relationship with the presence of unrecovered investments. It is the solution adopted in German law to safeguard specific investments that are not recovered.[238]

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[236] See R. NATOLI, *L'abuso di dipendenza economica*, cit. Footnote 193 explains this understanding.

[237] E. NAVARRETTA, (*Buona fede oggettiva, contratti di impresa e diritto europeo. Relazione su "Contratti di impresa e principio di buona fede," tenuta al Convegno "Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato", Siena, 22-24 settembre 2004*, in Rivista di diritto civile, 2005, fasc. 5, pt. 1, pp. 533 ss.) argues that good faith would act in company contracts. It would allow a corrective intervention in case of imbalance in the exercise of private autonomy. According to the author, this application must be coordinated with the antitrust discipline. When it does not apply, there would be an imposition to use good faith as a means to achieve contractual justice. The market would give normative and factual indicators to assess the application of good faith.

[238] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 282-283. The doctrine on the protection of specific investments in the German legal system has analyzed this debate in great depth, in particular the application of objective good faith and the abuse of right. A comparative examination of the matter was performed by F. PINTO in his work F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., especially pp. 752 ss. German law began analyzing the matter starting in the middle of the 20th century. This long debate reveals a high complexity in the way it is handled. Most of the doctrine and the case law is inclined to recognize compensation for investments, but not the ineffectiveness of unilateral termination. There is no uniformity in the legal grounds for this protection, its requirements, or the scope of the indemnification. Most of the doctrine emphasizes objective good faith and the protection of legitimate expectation as the legal basis (*tutela dell'affidamento*). Another understanding states that the abuse of right, either as an inadmissible exercise of right, or as a prohibition of *venire contra factum proprium* (termination after the counterparty is incited to make specific investments), or as an imbalance in the exercise of a right (termination disproportionate to the consequences). The *culpa in contrahendo* and positive breach of contract (*violazione positiva del contratto*) should also be mentioned. The interpretation of a contractual gap, through paragraphs 157 and 133 of the BGB, and the execution of a supplementary contract through conclusive acts are also adduced as grounds for the protection. The analogous application of the rules relating to late termination (*Kündigung zur Unzeit*) or the rules for reimbursement of costs in service contracts (paragraphs 670 and 675 of the

With a relatively recent decision and the critical doctrinal production that followed it, the orientation in Italian law has a consolidated position regarding judges' evaluation of the exercise of unilateral termination in contracts. In a paradigmatic decision, the Italian Court of Cassation (Cass., 18 September 2009, n. 20106) acknowledged this assessment based on the concepts of objective good faith and the abuse of right.[239-240] This decision not only describes and applies these concepts but also confirms the possibility of protecting the investments. The contract terminations analyzed in the decision occurred in the 1990s, when the abuse of economic dependence was not in force, which is why there was no legal discussion regarding its application.

In March 1997, former Renault dealers pleaded in court i) for compensation for damages resulting from an unexpected termination of concession contracts, ii) for the frustrated expectation of the continuation of the relationship, and iii) for the loss of the customer base (*indennità della clientela*). The contracts had an average duration of 10 years. They argued that Renault had abusively exercised the right to terminate the contract because i) it had requested new investments, giving dealers legitimate expectations of continuing the relationship; ii) the justification for reducing the dealership network was allegedly not valid; the old dealers were replaced by new ones, some of whom were former Renault managers; and iii) the decision was publicized in the local media. The multinational company argued, in summary, that the decision to terminate the contract arose from a complicated and extensive restructuring of the sales network, which was

BGB or the paragraph 87d of the HGB) could also serve as arguments. The abuse of economic dependence (GWB, paragraph 20/1) represents a minority orientation. Concerning the legal consequences of investment protection, there is also a trend towards only compensation the victim, but there is no consensus. As highlighted in footnote 196, good faith and the abuse of economic dependence act at varying levels to protect the investing party. Good faith has the objective of allowing compensation for unamortized investments, while economic dependence, by protecting the competition, would guarantee the adequate conversion of the company that has suffered the contract termination. The latter may even lead to a more effective remedy that benefits the dependent party.

[239] This decision has been subject to a variety of comments in doctrine: "Alibrandi c. Renault Italia": A. PALMIERI e R. PARDOLESI, *Della serie «a volte ritornano»: l'abuso del diritto alla riscossa*, in Contratti, 2010, p. 5; G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 828, con nota di F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit.; A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit.; VETTORI, Giuseppe, *L'abuso del diritto. Distingue frequenter*, in Abuso del diritto e buona fede nei contratti, Torino: G. Giappichelli, 2010; and M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit.

[240] The decision represented a novelty because of its extensive evaluation of the unilateral termination with the legal instruments of the abuse of right and objective good faith. The Court of Cassation also examined the unilateral termination previously in regard to an account credit line agreement (*contratto di apertura di credito in conto bancario*) (Cass. 21 maggio 1997, n. 4538; Cass. 14 luglio 2000 n. 9321; and Cass. 21 febbario 2003, n. 2642).

encouraged to achieve the objectives of European legislation and to provide adequate assistance to customers. It also alleged that prior notice for a reasonable period was granted.

After the District Court of Rome rejected the claim, the Court of Appeals upheld the challenged sentence. This decision rejected the possibility of examining the unilateral termination. The Italian Court of Cassation decision, on the contrary, admitted that the abuse of right[241] and good faith would serve as instruments for controlling the company's right to unilaterally terminate a contract. According to the court, the judge should verify whether this termination corresponded to a fair balance of opposing interests.[242] The same decision also affirmed that the abuse of right is not the same as the intention of causing harm (i.e., subjective notion of the abuse of right), but is the same as the lack of proportionality of the means used.

Acceptance of the notion of the abuse of right has always met with resistance. The application distinction of the abuse of right and objective good faith seems to be based on a less clear distinction. The Court of Cassation referred to objective good faith as a parameter for the application of the abuse of right. Objective good faith would serve as a means of balancing the interests of the parties in light of the principle of proportionality in order to be carried out to pursue objectives different from and ulterior to those consented to.[243] In this decision, the two fundamentals adopted are considered equivalent.[244] However, they represent different concepts in

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[241] The court defined the elements capable of establishing an abuse of right: 1) the ownership of the subjective right (*la titolarità del diritto soggettivo*); 2) the possibility that the concrete exercise of this right could be carried out according to a modality that was not rigidly predetermined; 3) the fact that the exercise, even if formally respectful of the attributive reason for the entitlement, is carried out not according to its reason; and 4) the circumstance that there is an unjustified disproportion between the benefit of the right and the sacrifice to which it is subject to the counterpart. The abuse of right does not constitute a contract breach in the formal sense.

[242] In a critique of the notions employed by the Court of Cassation, R. NATOLI, *Abuso del diritto e abuso di dipendenza economica*, cit., pp. 529-31 suggests that a conceptual confusion has arisen between the abuse of right and objective good faith. This imprecision would produce the application of the abuse of right beyond its scope, i.e., control of the scope of subjective rights, and their exercise. The abuse of right would not be an instrument of contractual justice. Good faith would function as a rule of conduct (general clause) and as a principle. Good faith can become an integrative source that prevails over the determination of the parties. In this sense, contractual justice would have little to do with abuse of right and the abuse of economic dependence, but with good faith.

[243] The proceedings of the Court of Cassation were limited to determining that the Court of Appeals should evaluate the act of termination under objective good faith and abuse of right. In this sense, it established the verification in accordance with objective good faith. M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 85 criticizes this generic recommendation to the Court of Appeals.

[244] The decision understood the two norms as equivalent. However, the doctrine emphasizes that this equation did not occur in clear terms. Cf. M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 87; and G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit.

the doctrine's opinion. This approach criticizes the Court of Cassation's view.[245] Further, the solutions proposed to explain their differences are not uniform.

One argues that the evaluation of the unilateral termination must be performed only through the canon of objective good faith; the abuse of right is not in the legislation and therefore should be considered irrelevant.[246] In another view, the abuse of right has relevance and could be a legal instrument to evaluate the contract termination.[247] The termination carried out in the abuse of right should be considered ineffective, with the possibility of forcing the continuation of the relationship.[248] In another view, the abuse would make it possible to ascertain whether the terminating party's interest was in accordance with the interest behind the right, while good faith allows the assessment of the conduct of the terminating party in compliance with the contract.[249] There is also resistance to the use of good faith as an instrument to correct contractual regulations, giving preference to its application as an integrative factor to harmonize the parties' choices.[250]

In this context, one should examine the potential conflict of these general clauses, in particular in a situation with the incidence of abuse of economic dependence. The abuse of

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[245] See F. GALGANO, Qui suo iure abutitur neminem laedit?, in Contratto e impresa, 2011, fasc. 2, pp. 311-319; A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit.; F. MACARIO, *Recesso* ad nutum *e valutazione di abusività dei contratti tra imprese: spunti da una recente sentenza della Cassazione*, in Corriere giuridico, 2009; G. VETTORI, *L'abuso del diritto. Distingue frequenter, Abuso del diritto e buona fede nei contratti*, a cura di Stefano Pagliantini, Torino: Giappichelli, 2010; and M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., pp. 84 e 85.

[246] M. ORLANDI, *Contro l'abuso del diritto (in margine a Cass. 18 settembre 2009, n. 20106)*, In Nuova giurisprudenza civile commentato, 2010, pp. 129 ss; R. SACCO, *L'abuso del diritto soggettivo*, in Trattato di diritto civile, diretto da Rodolfo Sacco, Torino, 2001; and C. SALVI, *Abuso del diritto*. I) Diritto civile, in Enciclopedia giuridica, vol. I, Roma, 1988.

[247] F. GALGANO, A*buso del diritto: l'arbitrario recesso* ad nutum *della banca*, in Contratto e impresa, 1998, p. 25; R. NATOLI, *Abuso del diritto e abuso di dipendenza economica*, cit., pp. 529-31. Because of the absence of its legal characterization, the concept of abuse of right has divergent definitions among the legal scholars. According to the generally accepted U. NATOLI'S definition (*Note preliminar ad una teoria dell'abuso del diritto nell'ordinamento italiano,* in Rivista trimestrale di diritto e procedura civile, 1958), an abuse of right would occur when a right is exercised in contrast to the objective good faith or the scope in which the law recognized the right. The behavior of the holder is only apparently in accordance with the content of the right.

[248] F. GALGANO, A*buso del diritto: l'arbitrario recesso* ad nutum *della banca*, cit., p. 25.

[249] In a monographic work on the matter, C. RESTIVO (*Contributo ad una teoria dell'abuso del diritto*, Giuffrè: Milano, 2007) presents his opinion. The abuse of right would be a situation in which the right is exercised to pursue an interest other than the one for which it was attributed. The interpreter must verify the interest that the party has pursued and its conformity with the interest that typically underlies it. The hermeneutic operation is subsumption, that is, a verification of the deformity of behavior by the normative model of reference. The problem would be the identification of the interest pursued by the party.

[250] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 17; C. SCOGNAMIGLIO, *Abuso del diritto, buona fede, ragionevolezza (verso una riscoperta della pretesa funzione correttiva dell'interpretazione del contratto?), Rielaborazione della relazione presentata al Convegno "Autonomia privata, recesso e abuso del diritto", Facoltà di Giurisprudenza dell'Università degli Studi di Siena, 20-21 novembre 2009*, in La Nuova giurisprudenza civile commentata, 2010, fasc. 3, pt. 2, p. 142 ss.; and A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Responsabilità civile e previdenza, 2010, fasc. 2, p. 357 ss.

economic dependence is based on market efficiency, while good faith has another foundation, contractual justice. They are interpreted and designed with different principals and have contrasting purposes. The former norm and the abuse of right are general clauses that prohibit the abusive exercise of a right. Faced with this antinomy, the doctrine points out that, if the elements of the abuse of economic dependence are present, it must be applied because it is a special rule (*norma speciale*).[251]

The protection against abuse through the abuse of economic dependence is also more effective than other rules. With the legal modification in 2001, several remedies were assigned to this governing rule to protect the party: injunction, nullity, and compensation (the examination of the remedies to protect the investments is investigated in Chapter IV). The doctrine still discusses what the remedies applicable would be in case of the abuse of right and objective good faith.[252]

The protection of specific investments through the principle of objective good faith and the abuse of right is *subsidiary*.[253-254-255] They could be applied, perhaps, in case of difficulties faced

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[251] R. NATOLI, *L'abuso di dipendenza economica*, cit.; M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 6. The abuse of law and abuse of economic dependence have a common trait in that they have a relation of gender and species. Cf. R. NATOLI, *Abuso del diritto e abuso di dipendenza economica*, cit., p. 529. In the same regard, M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 16. From another perspective, the abuse of economic dependence shows itself to be an institute that is broader than the abuse of law. It addresses situations in which there would be no abusive exercise of a given right, such as the imposition of unjustifiably burdensome contractual conditions.

[252] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 19-20 recognizes that, despite the profusion of doctrinal articles on the delimitation of the abuse of right and good faith, the works addressing the remedies available are scarce. In the author's opinion, the solutions would be evident or strongly conditioned to the concept of construction carried out. He adds that it is difficult to establish a remedy in the case of the abuse of right because the appropriate remedy is related to the underlying interest in the right. In this sense, C. RESTIVO, *Contributo ad una teoria dell'abuso del diritto*, Giuffrè: Milano, 2007, p. 283 concludes that the remedy applicable in the case of abuse of right must consider the interest protected.

[253] In examining the case Court of Cassation Cass., 18 settembre 2009, n. 20106, M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 95 appears to rule out the abuse of economic dependence (apart from the absence of governing rules at the time of the facts) as the relevant discipline. For the author, there would be circumstances capable of dismissing its protection. In fact, the abuse of economic dependence would not apply to all situations in which there is the demand for the recovery of investments. However, this circumstance cannot remove the centrality of the rule, especially the recurrence in which there are economic dependence and specific investments.

[254] Before the abuse of economic dependence was enacted, R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 325 ss. noted that objective good faith, *ex* 1.375 of the Civil Code, was the legal instrument to examine the exercise of unilateral termination.

[255] C. CREA sees the canon of good faith as a factor of the legal relevance of investments. According to an intricate construction, good faith would guarantee legal relevance for investments. This normative instrument would allow the protection of legitimate expectations (*aspettativa legittima e fiducia meritevole di tutela*) to be operative. Making specific investments for contractual purposes would give rise to the legitimate expectation of the duration of the relationship (see C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 279 e ss.). There would be a correlation between making investments and the duration of the contractual relationship necessary to recover them. However, for C. CREA, the mention of legitimate expectation in the case of investments could seem elusive and

by the dependent company in demonstrating its dependence, mainly due to the presence of specific investments and their linkage to the impossibility of finding satisfactory solutions.[256] It is up to the party to invoke good faith to prove its application. German law provides a different manifestation of the relationship between the concepts examined. In this legal system, objective good faith would allow the recovery of investments, while the protection of economic dependence only determines the prolonged extension of prior notice for business reorganization.

The qualification as an abuse of economic dependence places the burden of proof on the dependent company in case of the arbitrary interruption of the relationship. It must demonstrate only economic dependence, the configuration of a typical hypothesis of abuse, and the causal link between abuse and dependence. The presence of specific investments facilities the proof of these elements. Once these elements have been proven, the dominant company must indicate the lack of merits of the economic dependence or show the presence of justified reasons for the interruption (see section 3.4). In the event of an interruption in breach of good faith or abuse of right, the party must also demonstrate the absence of justification for the contract termination, which can be a difficult task.

2.2.2.1. Prior notice requirements in long-term contracts

The abuse of right and good faith allow the examination of the notice to terminate a contract and other unilateral acts in a contractual relationship. However, the Court of Cassation decision was unclear concerning whether this assessment always imposes a reasonable prior notice period and whether it could consider disproportionate a prior notice.[257] In Italian law, there is no general rule establishing the need for a prior notice for contracts of indefinite term, or for the rupture of a commercial relationship. Article 1.373 of the Civil Code, when granting the power to terminate the agreement of continuous performance, does not prescribe giving prior notice.

In business contracts, especially in contracts of duration (*contratti di durata*), Article 1.569 of the Italian Civil Code can be applied analogically. This provision is classified under the supply

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rhetorical. In the case of investments, there is no necessary relationship between the investments and the duration of the contract, as developed in sections 3.2 e 1.3.4.2.

[256] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 26 envisions this possibility.

[257] From the perspective of the abuse of economic dependence, the absence of congruent prior notice also consists of a hypothesis of an abusive act. In this sense, M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 16.

contract type (*contratto di somministrazione*).[258] It stipulates that, in a supply contract with no fixed term, either party may terminate the contract, giving notice within i) the agreed term, ii) the commercial practices or, in their absence, iii) a congruent term concerning the nature of the contract. A similar interpretation can also be made of Article 6 of Law No. 192/1998 governing the subcontracting agreement (*contratto di subfornitura*). It declares the nullity of a clause that allows contract termination without prior notice. This rule must be coordinated with the other general clauses.[259]

In a business contract type, this interpretation allows the application of a rule to other contractual types, provided that the contracts present similar characteristics. This analogical incidence is possible based on a typological view of the business contract and its interpretation of Article 41/2 of the Italian Constitution. This view provides a robust systematic framework for a diverse interpretation of various general norms. It differentiates the application of contractual rules concerning business activity (*attività di impresa*) and other occasional individual acts.[260] As a result of this sophisticated construction, the rules aimed at governing the autonomy of business activity could not be considered exceptional and, thus, they could not be interpreted as exceptional norms (*norme eccezionali)*. The contract should be valued as a moment and an instrument of business activity (*attività d'impresa*); the evaluation of the singular act is systematically subordinated to the legal evaluation activity as a whole.[261]

The application of Article 1.569 of the Civil Code is of little incidence and usually does not take specific investments into account.[262] This conclusion might be justified because the rules that

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[258] M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 93; A. VENEZIA, *Gli strumenti contrattuali per le reti di vendita: guida pratica per la comprensione, l'applicazione e la scelta dei contratti: agenzia, procacciamento d'affari, concessione di vendita, il nuovo franchising (L. n. 129/2004)*, Milano: IPSOA, 2004, p. 254. L. DELLI PRISCOLI, *Abuso di dipendenza economica e abuso di diritto*, in http://www.orizzontideldirittocommerciale.it/media/11966/delli_priscoli.pdf, p. 551 consider it applicable to distribution contracts. O. CAGNASSO, *La concessione di vendita: problemi di qualificazione*, Milano: A. Giuffrè, 1983, p. 119 argues that, in addition to the application of the provision to other contractual types (in the case, a sales concession contract), unilateral termination would suffer the limitation imposed by Article 1.375 of the Civil Code. The termination should be limited whenever there has not been a sufficient term to ensure the investments' amortization.

[259] M. GRANIERI, *Il tempo e il contratto: itinerario storico-comparativo sui contratti di durata*, Milano: Giuffrè, 2007, p. 279 reports this concern. The analogical use of the nullity remedy might face some difficulties.

[260] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 50.

[261] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., pp. 51-2.

[262] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 325 stresses that the provisions in Article 1.569 of the Civil Code would be of little incidence. In the interpretation of M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., pp. 92-93, the article would be of little incidence because it says nothing about the possibility of recovering the dedicated investments.

govern the supply contract are quite different from business reality.[263] The analogical interpretation of these rules in conjunction with the general clauses of objective good faith and the prohibition of abuse of right might overcome this difficulty. In particular, concerning the need for a prior notice period in all business contracts, one can interpret that it should be granted in a congruent period. It should not be conditioned by investment recovery, nor by the business activity reconversion. Section 3.2 addresses the systematic interpretation of the norms regarding prior notice and provides the elements of its determination. An interesting view on specific investment is implemented by Law No. 129/2004, which established some rules concerning franchise agreements.

2.2.3. The contractual term and specific investments in franchise agreements

Some rules govern specific investments within the scope of contractual types.[264] The franchising agreement, or commercial affiliation, is partially regulated by Law No. 129/2004.[265] This law defines a franchising agreement as a contract in which an independent party grants the other, upon compensation, a set of property rights, and it includes the affiliate in a distribution system to market goods and services (Article 1).

Article 3/3 governs the duration of the contract. This article links its term to specific investments. According to this norm, if the contract has a specific term of effectiveness, the franchisor must guarantee the franchisee a minimum duration sufficient to amortize the investments

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[263] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 52 highlights the absence of synchrony between the business world and the governing rules of typical contracts.

[264] M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 95 suggests that the governing rules of the franchise contracts should protect all unrecovered investments. However, this solution should not be accepted. The determination of the franchise agreement regulates a specific hypothesis with an indication of a particular remedy, the minimum duration of the contract. This legislative option cannot be adopted as a general remedy.

[265] According to G. DE NOVA, *La nuova legge sul franchising*, in I contratti 2004, p. 764, Law No. 129/2004 is not about franchising; it is a law designed to prevent fraud, in which franchisee applicants are induced to use money in exchange for nothing. It is the reason there are rules on transparency and contract information, and the lack of norms on the franchise agreement. There is silence about the qualifying elements of the contract, its extinction, the destiny of stocks, the franchisee's obligation to use the franchisor's brand, and his obligation to respect certain quality levels. Due to the nature of these rules, G. DE NOVA concludes that the contract legislator – understood as the one who orders and regulates the contractual relation in an organic manner – is dead.

that is not less than three years.[266] The minimum duration of three years is guaranteed, but it may be longer if the recovery of investments requires a more extended period.[267]

The peculiarity of the relationship between franchisor and franchisees justifies this provision. The protection imposed governs contractual investments not only by economically protecting them against the arbitrary exercise of the right to terminate but by imposing a minimum duration of the contract. The franchisees are assured that their contract will last long enough to recoup specific investments, without the need to pursue the continuation of the contract in the case of abusive termination. This minimum duration differs from the protection proposed by the general clauses mentioned above (see specifically sections 2.2.1 and 2.2.2). Given the peculiarity of the situation, this safeguard could not be applied in a legal analogy to atypical franchising or integrated distribution contracts.[268] Regarding the remedies available to the parties, there is a preference for the interpretation of the rule as capable of conferring a minimum duration of the relationship.[269] However, the collective understanding is that it is the parties' decision to only take advantage of the invalidation and compensatory remedy.[270] There is another specific provision concerning investments in fuel distribution contract types.

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[266] P. PERLINGIERI argues that that legal provision would have incorporated the principle of proportionality, together with that of reasonableness (P. PERLINGIERI, *La contrattazione tra imprese*, in Rivista di diritto dell'impresa, 2006, fasc. 3, p. 347). The same author has other works that discuss the influence of the principle of proportionality on contractual matters (P PERLINGIERI, Pietro, *Il "giusto rimedio" nel diritto civile*, in il giusto processo civile, a. 2011, v. 6, fascicolo 1; P. PERLINGIERI, *Nuovi Profili Contrattuali*, in Il diritto dei contratti fra persona e mercato: problemi del diritto civile, Napoli: Edizioni scientifiche italiane, 2003). However, it cannot be inferred from the provision that the principle of proportionality can extend some contracts due to specific investments. It is an exceptional remedy and, therefore, it does not manifest a general legal principal that can be generalized.

[267] Discussions on the interpretation of this article are explicitly presented in section 4.2.1.1) with the examination of the remedies available to the parties.

[268] In this similar sense, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 333. The author argues that the risk of protection exceeding its purpose renders the analogical application of the three-year legal term to atypical franchising and other relational contracts inadmissible. He also claims that this article has an indicative value for the protection of the investments, although its analogy application would not be appropriate. P. FABBIO, *L'abuso di dipendenza economica*, cit. notes that, in practice, this last understanding would mitigate the burden of proof of the atypical franchisee.

[269] Even without mentioning the remedies capable of assuring a minimum duration of the relationship, it seems to adopt this positioning P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 343.

[270] G. CIAN, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, Padova: CEDAM, 2016, p. 5892 ss.; C. LEO, in DE NOVA, Giorgio; LEO, Carmen; VENEZIA, Alberto, *Il Franchising*, IPSOA, 2004, p. 29; and E. TANZARELLA, *La nuova disciplina del Franchising*, in Rassegna di diritto civile, 2005, p. 573.

2.2.3.1. Specific investments in the fuel distribution agreement

The relationship between specific investments and contractual duration is also present in another special law, which is somewhat difficult to interpret. After the 2008 world crisis, the decree-law 6 luglio 2011, No. 98, converted into Law No. 111/2011, established measures in different economic sectors to promote the development of the country and its financial stabilization. The rationalization of the fuel distribution network is one such measure. Article 28/12, with wording amended by Law No. 27/2012, aims to increase competition and market efficiency through freedom in the fuel distribution agreement (*approvvigionamento e affidamento degli impianti di distribuzione di carburanti*), as well as through the diversification of contractual relations between the concession or authorization holders and the managers in charge of their operation. As a protection measure, contracts must have an adequate remuneration for the investments made and for brand use (paragraph 12).

Among other measures, that legislation requires the holder who transfers a fuel distribution agreement to a new manager to sign an equitable, non-discriminatory agreement (paragraph 14). In this case, the recovery of the facilities must take into account the investments made, the amortization of the fees paid, the goodwill, and the revenues (paragraph 13). The prohibition of acts intended to prevent or limit them reinforces these norms (Article 17/3 of decree-law 24 gennaio 2012, No. 1). This case could also establish the abuse of economic dependence.

The fuel distribution agreement has a limited scope of application. Its importance in this thesis corresponds to its systematic repercussions. The provisions mentioned strengthen the protection of investments.[271] For R. NATOLI, in interpreting paragraph 12, this rule acknowledges a right to the stability of the relationship due to the investments made in case of supply acquisition and commissioning contracts that concern fuel distribution agreements.[272] For the author, contractual stability would occur in parallel with the remuneration of investments. However, it is difficult to extract a contract stability rule from these rules, even in a systematic interpretation of them in light of the concept of the abuse of economic dependence. The law does not establish contractual stability concerning investments, as in Law No. 129/2004; it only requires economic

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[271] The doctrine links this rule to the protection of investments. See R. NATOLI, *L'abuso di dipendenza economica*, cit., 381; and A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., p. 255.
[272] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381.

conditions that are to the adequate remuneration for the investments made. This remuneration may occur through various means, such as risk sharing, exclusivity clauses, or a minimum acquisition price – and not only by the establishment of a relationship duration sufficient to recover investments. This rule differs from the law of *affiliazione commerciale*. In the latter, the minimum duration of the contract is conditioned explicitly by the *amortization* of the investments.

2.2.3.2. Agrobusiness supply chain contracts and the protection of investments

The same law that implemented measures to encourage competition and develop infrastructure and competitiveness (decreto-legge 24 gennaio 2012, No. 1, with its conversion into Law No. 27/2012, mentioned in the previous section) also modified commercial relationships in the field of agribusiness supply chain agreements (*relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari*). These rules introduced *indirect* mechanisms to protect specific investments. Article 62 states that these contracts have to specify the duration, quantity, and characteristics of the product, price, delivery, and method of payment. Under this contractual type, significant investments can be made.[273] These agreements should also follow the principles of transparency, fairness, proportionality, and reciprocity of performance (paragraph 1). The second paragraph introduces prohibitions concerning unfair conduct; they aim at preventing the abuse of economic dependence. M. LIBERTINI has argued that these behaviors could be classified as examples of the abuse of economic dependence.[274]

Such unfair practices were formulated based on a study performed by the European Commission on agribusiness trade practices.[275] It concluded that these practices should be legally governed because they can, in the long, neglect investments and innovation in the sector. Moreover, without their regulation, they could also reduce profits and create uncertainties. Consequently, they could generate indecision regarding business planning, which would lead to a reduction in investments.

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[273] M. MAURO, *Contratti della filiera agroalimentare, squilibrio e rimedi. Il punto sull'art. 62 d.l. 1/2012*, in Agricoltura Istituzioni Mercati, 2015, fasc. 1, p. 59.

[274] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, p. 3. In the same regard, R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381; and A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 255.

[275] This study resulted in the drafting of a Green Paper by the European Commission (GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO-BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE/COM/2013/037).

In implementing this policy, Article 9 of Decree No. 15.164/2012, issued by the *Ministero delle Politiche Agricole Alimentari and Forestali*, governs contracts for the consignment of raw milk to first purchasers. It does not repeat the prohibition of acts that are considered abusive. For example, there is a procedure to define a minimum contract term that can stimulate contractual investments. Under this procedure, the first buyer of raw milk must submit a written offer of the contract to the supplier and indicate the minimum duration of the relationship; this term may not be less than six months (Article 9/5). Once the proposal is made, the supplier can refuse the suggested minimum duration, and this refusal should be formalized in writing (Article 9/6). This measure is imposed given the diversity of parties' contractual power. The dominant party is capable of imposing unilateral conditions and influencing the relationship in favor of its interests, while the weaker party may not be able to reject these unfavorable conditions and even could be forced to end its business due to counterparty's pressure. Among the factors that can determine this contractual power gap, there is a need for the seller to make significant initial investments. Administrative law could also establish some elements of investment protection in Italian law.

2.2.4. The public concession contract and the protection of investments

The Procurement Code (*Codice degli appalti* [Legislative Decree 18 aprile 2016, n. 50])[276] has provisions aimed at protecting investments.[277-278] This relevance stems from the need to govern complex contracts, usually of long duration, with the requirement of high investments for their performance. These characteristics demanded that the legislation seek to regulate some events involved with the investments, such as risk-sharing, contract duration, and indemnification in case of the premature termination of the contract.

[276] The code was enacted given the delegation contained in Law No. 11/2016 for the implementation of Directives EU/23/2014, EU/24/2014, and EU/25/2014. Directive EU/23/2014 addresses investments regarding this type of contract. There is a link between this regulation and risk-sharing. It removes the qualification as a public concession if a sector regulation eliminates the risk by providing a guarantee in favor of the concessionaire for the recovery of investments and sustained costs.

[277] The relationship between investments and the public concession is natural, so much so that the Brazilian law also governs, in a similar regard, the investments made to allow the achievement of the purpose in public concession contracts.

[278] In the regulatory field, the public administration can discipline the modality of recovery and the remuneration for the investments made. For example, *l'Autorità per l'Elettrica Energia il Gas e i Sistemi Idrici* discussed the new criteria for the recognition of costs related to investments in the natural gas distribution network and how they could be recouped. Cf. S. FERLA, *Nuovi investimenti per la distribuzione gas: un riconoscimento tariffario "condizionato"? Serve chiarezza sull'analisi costi-benefici*, in Appalti e contratti, 2016, fasc. 10, pp. 59-62.

The legislative decree addresses investments in the contract and the party's risk-sharing. "Operational risk" ("definition zz") is the risk linked to the management of services granted to the concessionaire, either on the side of the supply or of the demand. With the public concession, there is no guarantee of investment recovery or costs borne for the management of the granted activity.[279] The investments and the costs incurred are not guaranteed to be recovered through the contract.

The notion of economic-financial balance is also related to investments. The project can create value during the contract and generate adequate income on the invested capital. These definitions are reiterated in Article 165 (when dealing with the concession contract) and in Article 180/3 (when addressing the public-private partnership agreement). Despite these references, investments in such cases are not protected; they only serve as a reference for the definition of sharing contractual risks.

In the context of the regulation of public concession contracts, investments play an essential role in determining their duration. If the agreements have a term of more than five years, investments serve as parameters for determining the maximum temporal extension of the relationship (Article 168). The contract must not exceed the time necessary for the recovery of investments and the investment capital remuneration. The pace of recovery is individually set and is based on reasonableness. The investments considered are the initial investments and those made in the course of the relationship. This limitation is meant to avoid impeding access to the market and competitive constraints and can only be overpassed with the Government's requirement of investments.[280] In a recent ruling, the Court of Justice (case *Promoter*) seems to condition its termination of the investments amortization and the remuneration of the capital on demonstrating that the concessionaire made them with the conviction of concession renewal.[281]

The protection of investments is also revealed in the event of terminating the contract due to the public administration's default or by the revocation of the public concession based on public interest. In these cases, Article 176/4 determines the amounts owed to the concessionaire. The public administration must pay, among other sanctions, the value of the investments made, the net

[279] Recital (18) of Directive EU/23/2014 states that the main characteristic of a concession is transferring the risk of not recovering the investments made and the costs borne to carry out the work or services under normal operating conditions to the concessionaire. Other risks related to the concession remain with the Public Administration.
[280] Recital (52) of Directive EU/23/2014.
[281] Court of Justice, C-458/14 e C-67/15. In doctrine, see E. NESI; R. RIGHI, *Osservazioni sulla sentenza della Corte giustizia dell'Unione Europea, sez. v, 14 luglio 2016, in C-458/14 e C-67/15, con particolare riferimento ai suoi effetti sui rapporti concessori in atto, Nota a CGUE sez. V 14 luglio 2016 (cause riunite C-458/14 e C-67/15)*, in GiustAmm.it, 2016, fasc. 11, pp. 42 ss.

of amortization, and the loss of profits, which consists of 10% of the current amount of the revenues resulting from the economic and financial plan linked to the concession for the residual years. A similar mechanism concerns motorway concession contracts (Article 178/7). In relevant systematic evidence, the provision identifies the investments protected: those that are identified in the balance sheet.

2.2.5. The indirect protection of specific investments and their relevance to antitrust law

Most of the provisions discussed in the previous sections attribute a *direct* relevance to investments made during the contractual relationship. Specific investments are elements that can bind the duration of the contractual relationship and prevent premature interruption. Their relevance derives either from rules in which investments are required for the incidence of the norm (franchising agreements, supply acquisition and commissioning contracts in relation to fuel distribution, public concession agreements), or for the application of a general clause (the abuse of economic dependence, objective good faith and abuse of right).

This *direct* protection of investments corresponds to one modality of protecting them. In this case, investments pertain to mechanisms aimed at stabilizing the relationship, adequately achieving the contractual objectives, and their recovery.[282] There is also a broad interpretation of investment protection. In its more general meaning, specific contractual investments comprises all the rules to protect the economic consistency of the investments used to perform contractual obligations. The category of *indirect* protection includes the minimum terms of the contract effectiveness, restrictions on the right of termination (without mentioning investments), and prior notice periods in case of termination or denial to renew.[283] Those are the indirect forms of protection of investments, and the investments are not their exclusive purpose of protection.

Community antitrust law is an *indirect* mechanism of investment protection; it is a privileged field for the protection of investments. This field is more sensitive to the economic analysis of the law, in which efficiency solutions are taken into account. Moreover, the problem of

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[282] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 740.
[283] Ibid., p. 741.

the suboptimal level of investment involves the loss of collective well-being, which transcends the sphere of individual subjects.[284]

The following sections address how community law regards specialized investments. This topic shows the positive evaluation of investments as a pro-competitive factor, as a protection of the contractual party, and as an element that can establish an abuse of economic dependence.

2.2.5.1. Investment protection as an element for the exemption of competition restrictions on vertical agreements

Community antitrust law indirectly protects investments. It attributes relevance to investments by allowing some exemptions from antitrust rules for clauses in vertical agreements. The same reasoning could also be extended to cases of abuse of the dominant position. Regulation EU/330/2010 and the European Commission's guidelines promote this protection. This regulation exempts specific hypotheses from the application of Article 101, 3 of the Treaty on the Functioning of the European Union. These exemptions have the purpose of stimulating investments and thus increasing the degree of the market's efficiency. Investments can generate value to the contractual relationship. The exempted vertical agreements also have contractual provisions that, while partially restricting competition, reduce the possibility of opportunistic behavior.

Article 101, 3 of the Treaty on the Functioning of the European Union provides the non-application of competition restrictions to agreements that i) improve the production or distribution of goods or promote technical or economic progress, ii) allow consumers a fair share of the resulting benefit, iii) do not impose on the undertakings concerned restrictions that are not indispensable to attaining these objectives, and iv) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In order to be considered a cartel, the agreement needs to consistently alter the competition, and their restrictions must produce superior negative effects.[285] The agreements exempted have a superior positive effect on the market.

This exemption can occur through a category of agreements with the nature of recognition.[286] In that case, there would be an assumption of compatibility of the agreement with

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[284] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 273-4.

[285] M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, Milano: Giuffrè, 2014, p. 142. Article 2 of Law 287/1990 incorporated the notion of a consistent change in the competition.

[286] M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 155.

antitrust rules. This assumption would at least exclude the possibility of claiming the company's fault and, with that, the imposition of fines by the competent authority. It is possible, however, to exclude the exemption even in a hypothesis typified in the regulation after a thorough examination of the circumstances.

Regulation EU/330/2010 is a block exemption statute for vertical agreements. It assumes the irrelevance of some vertical agreements based on the assessment of their modest impact on the market (Articles 2 and 3). Above these minimum limits, agreements must be assessed on a case-by-case basis. The European Commission's Guidelines on Vertical Restraints (2010/C 130/01) provide the evidence to perform this case-by-case evaluation. The regulation also stipulates a blacklist of clauses that nullify the entire vertical agreement (Article 4) and a gray list of clauses that nullify them but do not invalidate the agreement (Article 5).

The regulation gives specific relevance to investments.[287] Recital (6) indicates that some vertical agreements increase economic efficiency by facilitating coordination between the parties, which results in an optimization of the level of investment. In this regard, the guidelines on vertical restraints point to specific investments as elements capable of allowing a positive assessment of competition restriction in a vertical agreement.[288]

There are many examples in the guidelines of positive competitive aspects of agreement with specific investments. There are some situations in which a severe restriction (blacklisting) of (re)sale, provided in Article 4 of Regulation EU/330/2010, may be objectively necessary. The first distributor to sell a new brand or the first to sell an existing brand in a new market may have to make substantial investments that are generally irrecoverable (or submerged).[289] In these circumstances, the distributor may not be willing to enter into a distribution agreement in the

[287] The doctrine recognizes this relationship. Cf. P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 269-270; R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 72. The findings of those authors remain applicable, even though they refer to the communication from the Commission of the European Union no longer in force. R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 72 emphasizes that the investments indicated therein coincide with those addressed in the protected investments in this thesis.

[288] The first relation between investments and the guidelines consists of the qualification of an agency contract as a vertical agreement for Article 101, 1 of the Treaty on the Functioning of the European Union. The agency contract gains relevance for antitrust rules if some risks are conferred to the agent. Otherwise, this agreement is not relevant as a vertical agreement. There are two types of risk: i) the financial or commercial risk concerning acts designated by the principal (e.g., specific investments to complete a particular deal) (paragraphs 13 and 15 of the guidelines), and ii) the risks related to the investments to operate in a specific market (paragraph 15 of the guidelines). A risk assessment must be made considering the economic reality, not the contractual form. If the risk exceeds the normality, the agreement should be qualified as an integrated distribution. In this case, specific investments do not acquire importance as an indirect protection. They represent only an indicator of the antitrust relevance of an agency contract.

[289] Paragraph 61 of the guidelines.

absence of protection for a certain period, with active and passive sales in its territory to other distributors. The restriction on the sale of products to other distributors in a given market is thus allowed in the first two years.

In addition to the cases of severe restriction, investments are positive effects in case of a competition restriction in vertical agreements (see section VI, 1 of the Vertical Restraints Guidelines). The overall assessment of a positive effect requires circumscribing the investment modality and the time necessary to implement and recover it.[290] In other words, restrictive vertical agreements may have pro-competitive effects in the form of efficiency gains, which may offset their anticompetitive effects. Some restrictions are necessary to encourage competition types other than price level and to improve service quality. Without these restrictions, in particular, those with a limited duration,[291] the conditions of competition between supplier and buyer would lead to a sub-optimal level of investment.[292]

These positive competition effects contribute to i) solving the parasitism problem, ii) opening or to allowing entrance into new markets, and iii) overcoming the hold-up problem. Parasitism can occur between distributors when one of them invests in the promotion of sales facilities, usually at the retail level, and this attracts customers to competitors. For this reason, the adoption of a non-compete restriction is appropriate in some modalities of agreements.[293] Opening or entering new markets, which generally involves particular investments by the distributor, is also an appropriate reason to justify certain restrictions.[294] As in the hypothesis previously described concerning cases of severe restrictions on competition, the protection of investments is given by territorial protection, such as the prohibition of sales in the new market directed to distributors located in other territories. The problem of hold-up is also a reason to justify imposing vertical restraints.[295] Vertical agreements with competition restriction can serve as a stimulus for the manufacturer to perform specific investments. The admissible restrictions include non-compete clauses, the obligation to purchase specified quantities when the investment is made by the supplier, exclusive distribution, and exclusive allocation of customers or exclusive supply.

290 Paragraph 123 of the guidelines.
291 Paragraph 108 of the guidelines.
292 Paragraph 106 of the guidelines.
293 Paragraph, 107, a of the guidelines.
294 Paragraph, 107, b of the guidelines.
295 Paragraph, 107, d of the guidelines.

There are some conditions for the investment to result in positive competitive effects: i) the investment must be specific; ii) it must have a long-term recovery period; and iii) investments should be asymmetric. The risk of underinvestment must be real or significant, and the investment must be specific to a contractual relationship. It is specific when, after the end of the contract, it cannot be used to supply other customers and can only be sold with a financial loss. The investment should be a long-term one that is not recoverable in the short term. In addition, the investment must be asymmetric: one party must invest more than the other.

In addition to general considerations regarding the positive effects of investments, the guidelines also assess them in some specific cases of vertical restraints. In the case of single-brand agreements, in which the buyer is obliged or induced to concentrate its orders on a particular type of product from a single supplier, restrictions on competition are allowed, such as a non-compete agreement or an agreement to buy specific quantities during the specific investment amortization period.[296] In case of substantial investments, a non-compete agreement is justified for five years.

A gain in efficiency also occurs in a restriction of competition in a vertical distribution agreement with an exclusive allocation of clients.[297] The supplier agrees to sell its products only to a distributor for resale to a group of customers. This allocation of customers leads to efficiency gains, especially when distributors are required to make investments in equipment, skills, or know-how to adapt to the needs of their customer group and for new or complex products.

The same applies in the case of selective distribution, in which there is a small number of authorized distributors based on selection criteria associated with the nature of the product.[298] Efficiency gains, propelled by investments, allow selectivity restriction, even if it is associated with a location clause, which protects the distributor from others opening an establishment nearby.[299]

The franchise agreement also allows restrictions based on making specific investments. This agreement is characterized by the presence of licenses of intellectual property rights related

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[296] Paragraph 146 of the guidelines. The document details the elements necessary for the configuration of specific investments: a specific investment in a contractual relationship could, for example, be the installation or adaptation of equipment by the supplier, when this equipment can only be used later to produce components for a particular buyer. Investments of a general nature or specific to the market are usually investments that are not specific to a contractual relationship. However, when a supplier creates new capacity specifically associated with the activities of a particular buyer, such as a company producing metal containers and installing new capacity to manufacture such containers on or near a producer of foodstuffs, the new capacity can only be economically viable when the production is intended for this particular customer and, in this case, the investment would be considered specific to a contractual relationship.

[297] Paragraph 172 of the guidelines.

[298] Paragraph 174. See also M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., pp. 244 ss.

[299] Paragraphs 179 and 185 of the guidelines.

to trademarks or signs and know-how for the use and distribution of goods and services. Restrictions on sales (contractual territory and selective distribution) provide incentives for franchisees to invest.[300] The same holds in the case of exclusive supply, in which the presence of specific investments justifies the existence of a reciprocal non-compete obligation.[301]

There are also other European regulations with a favorable view on specific investment. Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements also promotes restrictions to stimulate specific investments. It sets that intellectual property rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes.[302] Technology rights licensing may require the licensee to make significant sunk investments in the licensed technology and production assets necessary to exploit it. Article 101 cannot be applied without considering such *ex ante* investments made by the parties and the risks relating thereto.[303] For this reason, some restrictions on these agreements are admissible.

2.2.5.2. Antitrust rules on integrated motor vehicle distribution agreements

Another example of the relevance of investments for antitrust law is the exemption of categories of vertical agreements and concerted practices in the motor vehicle sector. Regulation EU/461/2010,[304] in force until 31 May 2023,[305] grants the automotive industry a block exemption for vertical agreements on the purchase, sale, or resale of motor vehicles, as well as vertical agreements for the provision of repair services and maintenance for vehicles and the distribution

[300] Paragraph 191 of the guidelines.
[301] Paragraph 198 of the guidelines.
[302] Paragraph 7 of the guidelines.
[303] Paragraph 8 of the guidelines.
[304] Recital 4 states that the automotive sector should continue to benefit from a block exemption to simplify administration and reduce costs and to ensure compliance by the companies. It also considers it relevant that vertical agreements in this sector can improve economic efficiency within a production or distribution chain by providing the optimization of sales and investment levels (Recital 7). There is an express relationship between the exemption of some restraints and the level of contractual investment.
[305] Resolution EU/1400/2002, succeeded by Resolution EU/461/2010, had a legal rule from which even civil claims of compensation for unamortized investments could be extracted. Article 3/5 established the prior notice period for the termination of the motor vehicle distribution agreement. In historical analysis, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 751-2 states that Article 3/5, i), b) (which establishes the obligation to pay compensation for the termination of the agreement) would result in compensation for investments not amortized. This provision is not reproduced in the new regulation.

of spare parts. Regulation EU/461/2010 will dissipate, after which Regulation EU/330/2010 will govern the automotive sector.[306] The considerations concerning investment protection in Regulation EU/330/2010 apply to contracts in the motor vehicle sector, and there are few other indirect protections of contractual investments.

The distributor of the motor vehicle sector makes high investments that are difficult to convert into alternative use; its economic dependence derives from this situation. Despite this situation and contrary to the previous regulation (i.e., Regulation EU/1400/2002), no special conditions are imposed for the direction protection of these vertical agreements, even in the case of termination.[307] There are, however, some provisions that protect indirect contractual investments.

According to the guidelines on the application of Article 101, 3 of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, the competition history in this market demonstrates that certain restrictions emanate from contractual obligations and indirect means, for example, a supplier that uses threats, intimidation, warnings, or penalties, which produce anticompetitive results. As a suggestion to prevent indirect competitive constraints, the regulation proposes adherence to a code of conduct for transparent contractual relations. This code suggests the introduction in the agreements of a minimum period before their termination and, especially, granting a compensation for specific investments made in the event of early termination. Adhering to this code of conduct can be considered a relevant factor for assessing the supplier's behavior.[308]

Moreover, the supplier and distributor of vehicles may enter into an agreement that obliges the distributor to purchase motor vehicles only from the supplier, with a limitation on the duration of the non-compete obligation for five years. This competition restriction is admitted provided that the parties do not hold a market share of more than 30% of the relevant market.[309] Despite this restriction, the exemption can prevent the parasitism problem for the parties, especially when a

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[306] Regulation EU/461/2010 recognizes that, in the distribution of new vehicles, there would be no significant deficiencies in the competition in comparison with other sectors. There would not be any justification for stricter rules (Recital 10). However, agreements for the distribution of spare parts and the provision of repair and maintenance services must still take into account specific characteristics of the aftermarket for motor vehicles (Recital 11).

[307] The previous regulation had specific rules regarding termination in these vertical agreements, which deserved the attention of the doctrine as a way of directly protecting the investments. V. P. FABBIO, *Note sulla terminazione dei rapporti di distribuzione automobilistica integrata, tra diritto comunitario e nazionale*, in Rivista di diritto commerciale, 2004, *passim*.

[308] Paragraph 7 of the guidelines.

[309] Paragraph 26 of the guidelines.

distributor benefits from investments (e.g., in facilities or training) made by another distributor.[310] It is possible to renew the contract beyond the first five years, provided the explicit authorization of the distributor.

2.2.5.3. Antitrust relevance of the abuse of economic dependence. The delimitation of aftermarkets and specific investments

The relevance of specific investments for community and Italian antitrust law also manifest in another perspective. Specific investments can define the relevant market, especially aftermarkets, that facilitate the configuration of an antitrust violation. With these contractual investments, a lock-in situation occurs in the contract (section 1.3.3.1); this allows the counterparty to adopt an opportunistic behavior with antitrust relevance. Such relevance occurs in different ways.

According to one proposal, there is no distance between the abuse of economic dependence and abuse of the dominant position.[311] The same situation could happen in the case of markets derived from the main product (aftermarket), especially repair and replacement; there would be high switching costs and irrecoverable investments.[312] It is necessary to investigate whether specific investments could reduce the notion of a relevant market to such a degree to concentrate its attention on a contractual relationship.[313]

While the notion of abuse of the dominant position is well recognized, the antitrust impact of abuse of economic dependence is less well understood. This issue requires assessing the market relevance in the case of specific investments. Article 9/3-bis of Law No. 192/1998 establishes this

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[310] Paragraph 29 of the guidelines.

[311] G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 42.

[312] Ibid., p. 42.

[313] G. COLANGELO adopts a position capable of reducing the notion of the relevant market enough to include a contractual relationship. The author (*L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 153) argues that, in the face of the loss of collective well-being with an opportunistic conduct, antitrust intervention should occur. This situation resembles a monopoly power. It has a distributive impact and loss of efficiency, and it would mean a market failure. The author's proposal gives a joint view of contractual power and market power. There are some difficulties accepting this theory. It has a very specific interpretation of the market delimitation, and it represents a risk. Antitrust intervention would risk becoming selective. The reasoning could lead to an indiscriminate jurisdiction of the antitrust authority, which would introduce further distortion of competition and iniquity. The antitrust authority would be forced to select the practices considered illegal, while small and medium-sized enterprises would continue to adopt them in the market. In this regard, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 469.

abuse as relevant to the market.[314] It acknowledges the intervention of the AGCM and highlights the possible application of Article 3 of Law No. 297/1990 (Italian antitrust law). The abuse of economic dependence in a commercial relationship with the presence of specific investments may be relevant to the market and, for that reason, antitrust measures can be imposed. It is necessary to identify the hypothesis in which this situation would be suitable, and its examination requires evaluating the relationship between the abuse of economic dependence and abuse of the dominant position.

With the delimitation of the relevant market based on a concrete hypothesis of abuse, the doctrine seeks to indicate the abusive behaviors that are pertinent to antitrust law.[315] That behavior must, first of all, be sizeable in the relevant market in accordance with the *de minimis* rule. This assessment requires establishing whether the dominant position consists of true market power or only contractual power. The dominant market position has for on horizontal dominance and vertical dominance. Situations of vertical dominance include abuse of the dominant position and economic dependence; however, the latter is not always relevant to the market. There might be an abuse of economic dependence concerning only a contractual power, without market power. In this case, economic dependence does not correspond to an antitrust violation. Market relevance happens only in exceptional circumstances; the relationship between the abuse of economic dependence with relevance to the market and the dominant position must be clarified.[316]

The legislation shows some interference in the configuration of these situations. There are three possible hypotheses: i) the full overlap between the dominant position and economic dependence, ii) economic dependence is relevance to the competition and the market but does not

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[314] Article 3 of Regulation EU/1/2003 provides that the Member States are not prevented from approving and applying more restrictive national legislation in their territory. It is within this context that the implementation of the hypothesis of antitrust violation that finds no correspondence in the European antitrust rules is allowed.

[315] M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 286. The delimitation of the relevant market serves to identify a specific market power and, therefore, cannot dispense a relational criterion. The relevant market must be determined in accordance with the following logical rationale: i) the individuation of the business initiative to be evaluated; ii) the individuation of the type of demand and supply that this initiative may affect, directly or indirectly; and iii) the determination of the group of companies that are currently or potentially interested in this type of demand and supply, and hence the foreseeable competitive reactions (M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 97). The abuse of the dominant position imposes the evaluation of whether, after a given business initiative, the other players concerned suffer or if they can effectively react. This approach is based on an accurate reading of the Commission's communication on the definition of the relevant market to apply community law to antitrust matters (European Commission Communication 97/C 372/03).

[316] Ibid., pp. 287-8.

have the requirements of abuse of the dominant position, and iii) economic dependence without relevance to the market.[317]

In this scenario, the doctrine establishes seven hypotheses of the configuration of a relationship of power/subjection between companies: a) the situation of hegemony in relation to the competitors; b) the power situation regarding its competitors, which derives from a dominant position in a contiguous market and the players' reverential fear of the more vulnerable market; c) the power situation regarding competitors at a horizontal level, which derives from the availability of an exclusive, non-duplicable resource, placed on the downstream or upstream market and appropriately enjoyed by the dominant party through vertical integration; d) the situation of market power regarding companies operating on other market levels, which must consider the dominant company a necessary partner; the dominant company does not operate directly in the relevant market but can exercise decisive influence over it; e) the vertical power position of the producer of highly renowned goods in relation to distributors that need to dispose of the product in their assortment in order to develop effective competition at another market level; f) the vertical power situation inherent to the markets derived from its products, in particular, those of technical assistance and spare parts of products of a particular brand operating in the market; this power can be exercised in relation to companies operating in the downstream market; g) the vertical power situation deriving from the sole holder of the demand present in a smaller market (assistance and repair) and requiring the formation of small, specialized companies; in this regard, there are also the aftermarkets, although these differ from those indicated in situation f); and h) the power situation that a larger company can acquire in confronting a small company when the latter has operated as the only (or almost only) client for a particular period and has thus become a dependent customer.[318]

Based on this classification, the following systematization is proposed: i) in hypotheses a) and b), there is a dominant position, but no economic dependence; ii) in hypotheses c) and d), there is an interference between both, and the dependent party can resort to claiming one or the other; iii) under e), f), and g), there is a complete, albeit only occasional, interference between the two governing rules; the economic dependence has relevance to the aftermarkets only in exceptional

[317] Ibid., p. 288.
[318] Ibid., p. 291.

cases; and iv) in hypothesis h), there is economic dependence without relevance to the market and no dominant position.[319]

Based on this distinction, some conclusions can be drawn concerning specific investments. In principle, the situation of economic dependence in which the dependent company makes specific investments to perform the contract usually has no antitrust relevance (situation h)). The power situation in the contract is not the same as with market power; this type of dependency has more a modest impact than the other situations' repercussions on the proper functioning of the market. This power cannot be extended, like the one that results in the case of generalized market power, which can harm an indeterminate number of subjects. These considerations do not rule out the influence of competition as a legal principle (*bene giuridico della concorrenza*) in economic dependence; the dependence of a commercial relationship represents a movement in the competition and influences its development.[320]

The possible and exceptional antitrust relevance of specific investments has a particular impact on situations f) and g). These investments might not even be specific *contractual* investments, the objective of this thesis. There might be an antitrust impact in aftermarkets derived from the specificity of the product sold.[321] One must acknowledge the modest repercussions on the

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[319] Ibid., p. 291. In the same regard, P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 461-473.

[320] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 475-6. The author then clarifies that this is a generalized abstraction. There are some hypotheses in which a violation of the market could be envisioned. He suggests that the dependence of a commercial relationship may allow the dominant company to force the counterparty to anticompetitive conduct in another market of remarkable size; or that a single dominant undertaking could result in a series of similar abuses with synergistic effects on competition (P. FABBIO, *L'abuso di dipendenza economica*, cit., note 127, p. 476).

[321] The discussion on derivative markets must not be made without mentioning the American Supreme Court's decision on the Kodak case (Eastman Kodak Co. v. Image Technical Services Inc., 903 F.2d 612 [1990: Kodak I], 504 U.S. 451 [1992: Kodak II], 125 F.3d 1195 [1997: Kodak III]). It discussed the commercial practices with which Kodak excluded some independent operators that used to repair its photocopiers from the aftermarket of maintenance and repair services. The company refused to provide the parts needed to perform such services. Users had to resort exclusively to Kodak's subsidiaries. This conduct was viewed as a tie-in and an attempt to monopolize the market of spare parts. Kodak argued that a product could not form part of a relevant market and that competition in the primary market precluded any verification of monopoly power in the secondary market. The Supreme Court, with the majority vote of Justice Blackmun, understood that the absence of power in the primary market did not rule out the possibility of verifying it in the derivative market, and that the increase in prices therein did not affect sales in the primary market. Consumers had difficulty calculating the value of the switching costs and maintenance costs of their acquisition; if they knew the change in the company's maintenance policy, they could have chosen another photocopier brand. In those circumstances, the relevant market was the market of spare parts and maintenance, and its analysis dispenses with competition in the primary market. Justice Scalia dissented from this opinion, accompanied by Justice O'Connor and Justice Thomas. They argued that Kodak had no market power but circumstantial power, and that a lock-in on the secondary market only constituted a disruption of competition. For G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 37, Kodak's decision did not establish the concept of a lock-in effect. In addition, this concept was belied in another later case, Independent Service Organizations Antitrust Litigation (Xerox) (203 F.3d 1322 (Fed. Cir. 2000). The connection between the opportunism of the installed basis and the refusal to sell spare parts was not made clear. This conduct would not be

collective well-being of the abuses committed in these markets, and that they could not generate antitrust protection in all the situations. The strategy adopted by small and medium-sized enterprises to gain profits from the position acquired could be permissible and would not be relevant to antitrust law.[322] The companies that control the aftermarket also suffer indirect competitive pressure in the primary market; furthermore, in some cases, the market control has small geographic dimensions and little economic significance.[323] There would be antitrust relevance only in cases of general practice adopted uniformly by companies active in the primary market that take advantage of the derived market, or if the derived market is of great economic importance concerning the primary product market.

In this regard, the European Commission has examined the relevance of the aftermarket and proposed a test to examine its significance based on the conclusions reached in the Pelicano/Kyocera case.[324] Kyocera had a relatively small market share in the printer market; it was considered non-dominant in the secondary cartridge market, even though it had a high market share. One of the main arguments for adopting this position was the proportionally high price of the secondary product compared to the primary product (70% of the printer's value). This circumstance indicated that the potential consumer would examine the overall cost that would be incurred before choosing the equipment.

According to the criteria established, after distinguishing between the primary and secondary markets, the existence of market power in the secondary market requires assessing whether the increase in the price of the secondary product would change the pattern of consumer behavior concerning the main product within a reasonable period. The threat of changing the product in the primary market would alter the behavior in the secondary market and exclude dominance despite the high market share in the secondary market. The rationale assumes that the consumer, when buying the primary product, takes into account the factors related to secondary products; at the same time, the primary market must be competitive enough for consumers to be able to switch products if there is a price increase in the secondary good.

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related to Kodak's abusive extraction of profit by setting prices for spare parts, as it could be achieved without excluding independent traders. The opposite view to the Kodak case prevailed with the case Queen City Pizza v. Domino's Pizza (124 F.3d 430 (3rd. 1997). For antitrust purposes, it must be ascertained whether the vulnerable contractor can freely choose from among a sufficient range of possible counterparties and if the contractual imbalance was predictable and therefore accepted.

[322] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 468.

[323] P Ibid., p. 469.

[324] Rejection Letter of 22 September 1999 in Case No IV/34.330 – Pelikan/Kyocera.

In the proposed test, the European Commission clarified that dominance in the secondary market is linked to i) the interdependence between the primary market and the derivative market and ii) the conditions in the primary market, i.e., the reaction of consumers in the primary market in view of the potential change in the secondary market.[325] In order to assess the degree of independence of the markets, factors related to the secondary product should be taken into account (the price and cost of shelf life of the primary product, the price transparency of the secondary products, the price percentage of the secondary product in relation to the primary product value, whether the primary product is bought or rented, whether the secondary product is to be repurchased in the foreseeable future, whether price discrimination between old and new consumers is possible, and the potential for new consumers). The analysis of the conditions of market competitiveness would primarily follow the approach of analyzing the reaction of consumers to the price increase of a specific primary commodity.

These criteria were applied in the EFIM case in 2009 and confirmed by the Court of Justice in 2011.[326] Based on this case, the Court of Justice developed a test to be applied to evaluate the configuration of market power in the secondary market. The questions to be answered are as follows: i) whether the consumer can make an informed choice, including pertaining to the useful life of the product, from among the various products on the primary market; ii) whether they are prone to make that choice; iii) if prices are increased significantly in the aftermarket, iii.i) whether a number of consumers would adapt their buying behavior in the primary market; and iii.ii) whether this would occur within a reasonable period. If the answers are positive, there would be no dominance in the secondary market. A negative response does not turn the primary producer into a dominant one in the aftermarket; another, more in-depth analysis must be made.

In the cases analyzed by the European Commission, some conclusions have been reached. The non-dominance of the producer in the secondary market, as in the Kyocera/Pelicano case, would lead to the independence of the primary and the secondary markets. The more reduced the relationships between those two markets are, the higher the likelihood of being found dominant in the secondary market is. Secondary market dominance cannot be established if there is competition in the primary market and if there are low exchange barriers. The test also requires considering the

[325] A. CAPOBIANCO, *Competition Issues in Aftermarkets – Note from the European Union*, in https://one.oecd.org/document/DAF/COMP/WD(2017)3/en/pdf.

[326] Rejection of complaint of 20 May 2009 in case COMP/C-3/39.391 EFIM and Judgment of the General Court of 24 November 2011, Case T-296/09, confirmed by the Court of Justice, Case C-56/12 P.

difference between current and new consumers. The above criteria might not apply if there is discrimination between future and former consumers. The absence of a discrimination policy allows future consumers to avoid opportunistic behavior.

If market interdependence and dominance in the secondary market are verified, the Commission should conduct a competitive examination of practices adopted in the relevant market. The effects on the primary and secondary markets may be relevant. There would be some justification of efficiency for the conduct in the secondary market; however, the burden of this proof is conferred on the company that produces the good.

Few other cases have been examined by the European Commission on this issue. In some, the Commission concluded that companies may have abused their dominant position in the aftermarket. These cases have resulted in offering deals to the companies under investigation.[327] In others, the commission concluded that there was be no abuse of aftermarket dominance.[328] The last case examined in 2014 analyzed whether there would be a concerted practice or agreement between several producers in order to discontinue the supply of spare parts by producers of watches and clocks to independent repairers, who invested in equipment and training. This could constitute a violation of the competition rules in the secondary watch repair market.

The Commission adopted the view that there is a separate market for replacement parts and maintenance services, especially as buyers of prestigious watches are not able to gauge the overall price of these watches. However, the Commission ruled out the configuration of abuse and collusive agreement. This decision was based on the grounds of the coherence of the manufacturers' business strategy to suspend the supply of spare parts to implement a selective system of watch and clock repair.

Specific investments are an element that can delimit the secondary market, especially after sales products and services, in which the manufacturer can act abusively. The notion of specific investments is not sufficient for the definitive characterization of the secondary market. The European Commission has established complex requirements for such a configuration, which must

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[327] Novo Nordisk case (1996); Digital case (1997); and IBM Mainframes Maintenance case (2011) (Commission Decision of 13 December 2011 in case 39.692 IBM Maintenance Services).

[328] Pelikan/Kyocera (1999) (Rejection Letter of 22 September 1999 in Case No IV/34.330 – Pelikan/Kyocera); Info-Lab/Ricoh (1999) (Rejection letter of 7 January 1999 in case IV/E 2/36.431 – Info-Lab/Ricoh); EFIM (2009); and Luxury Watches (2007/2014) (the Commission first rejected a complaint in 2007; the decision was annulled by the General Court on 15 December 2010 [case T-427/08], and subsequently, the complaint was again rejected by the Commission in 2014).

be observed in order to find a competitive violation; otherwise, it may lead to the selectivity performance of the European Commission and the transformation of contractual power into market power.

2.2.6. A systematic framework of investment protection in Italian law

The previous sections presented many provisions that could protect specific contractual investments. This protection acted on two levels, in contract and antitrust law. This heterogeneous scenario might impose some difficulties in their application; there is no general rule that regulates this issue, as in Austrian law. The provision may even have overlapping scopes of application. Considering this fragmented discipline, a systematic framework in Italian law imposes a more coherent legal application. The section aims to formulate a systematic view of the issue. It is concretized in Chapter III to determine the discipline of the abusive termination of the relationship.

The distinction between direct and indirect protection, mentioned in the previous sections, helps in this task. Direct protection imposes a particular protection of specific investments. They are general clauses and specific provisions, and the former helps systemize the latter. This task is conducted in this section and in the next chapters. Indirect protection does not prescribe behaviors; it takes into account investments as an element to attribute positive effects to competition and might be an indicator of the exception of some restrictions in vertical agreements. The presence of specific investments might also constitute, with other factors, a secondary market and facilitate the definition of the abuse of economic dependence with market repercussions.

In addition to these functions, indirect protection also can give systematic indicators to interpret direct protection. These indicators can especially be drawn from the European Commission guidelines. They present some elements to consider in vertical agreements to attribute positive effects to a competition restraint based on economic analysis. These elements include specific investments. The indications contribute to determining the typology of the investments referred to in provisions in Italian law. These rules, along with the general clauses, are applied in case of a hold-up, which is precisely one of the indirection protections outlined in the guidelines. This connection between the requirements in the guidelines to protect investments is specified in

section 3.3. Another connection between the antitrust guidelines and some provisions in Italian law is their interpretation through the legal principle of competition in its dynamic aspect.[329]

The norms in the Italian legal system do not have a general rule to systemize direct protection; rather, it presents heterogeneous elements for their application and hampers their systematic discipline. The legal consequences determined in the norms of the abuse of economic dependence, of the abuse of right, the duration of the franchise agreement, and the requirement of adequate remuneration in consideration of the investments in fuel distribution agreements (*approvvigionamento and affidamento degli impianti di distribuzione di carburanti*) are different. There are also general clauses (abuse of economic dependence, abuse of the right to objective good faith) and other specific rules. To avoid different approaches to these issues, the scope of general clauses (*l'ambito di incidenza*) must be specified and coordinated.

The three general clauses mentioned [330] might apply to the same conduct, the abusive act to terminate the commercial relationship. The objective good faith and the abuse of right are constantly present in judicial decisions and doctrinal debate; they even are classified as macro general clauses (*macrocausoli generali*).[331] As observed before, the boundaries between these two norms are difficult to trace. There are many orientations in the doctrine, and the case law does not help establish their limits. These circumstances reflect the difficulties in their systematic placement in the legal system (*collocazione sistematica*).[332] M. LIBERTINI has highlighted that, today, we are witnessing a conceptual superfetation that interferes with the solution of the same problems. They would overlap each other as possible criteria for solving some conflicts.[333]

However, these general clauses – abuse of economic dependence, abuse of the right to objective good faith – have different application scopes (*l'ambito di incidenza*) and legal bases (*fondamento normativo*). The first norm involves the influence of the competition principle,[334] which could generate some application developments shown in the next chapters. The other two refer to a single overarching principle, which is that of social solidarity (*solidarietà sociale*). These

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[329] M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 291. In the same regard, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 242.
[330] For a definition of a general clause, see Mario LIBERTINI, *Clausole generali, norme di principio, norme a contenuto indeterminato. Uma proposta di distinzione*, in Rivista Critica di Diritto Privato, 2011, paragraph 14.
[331] *Ibid*, paragraph 13.
[332] *Ibid*, paragraph 15.
[333] *Ibid*, paragraph 14.
[334] The abuse of economic dependence would represent, for some, the protection of competition and efficiency, and for others, it would exclusively represent problems of contractual fairness with the application of the principle of objective good faith. Either way, it manifests a general principle.

clauses also have different scopes of application in the case of specific investments at the end of the contractual relationship (*l'ambito di incidenza*). The abuse of economic dependence is a special norm (*norma speciale*), unlike good faith and the abuse of right. The latter norms are general (*norme generali*) in relation to the abuse of economic dependence. The concept of a general norm is a relational criterion, and it refers to a relation between a general and a specific norm. In this case, the abuse of economic dependence is more specific.

The prohibition of the abuse of economic dependence stands out as a central (rather than a general) element of the protection of investments in Italian law, whereas the application of good faith and the abuse of right is subsidiary. They apply when the conditions of the abuse of economic dependence are not present. As the previous section outlined, the abuse of economic dependence is a central provision because it is usually applied in the presence of significant, specific contractual investments. It is not a general rule because it is more specific than the other rules (objective good faith and abuse of right).

This rule assigns several remedies in case of abuse and can coordinate the specific discipline of private law. The prohibition of the abuse of economic dependence cannot be understood as an exceptional norm.[335] Rather, it represents a manifestation of general principles and is, therefore, liable to an analogical application. M. LIBERTINI has argued that this feature is reinforced by legislators' attitude to apply that prohibition to relationships between companies, typically characterized by an imbalance of power, without the need for proof of the more stringent requirements established in the rule.[336] These provisions are Article 17/3, of the decree-law 24 gennaio 2012, No. 1, conversion into Law No. 27/2012, on the fuel distribution agreement, from Law No. 180/2011, on the repeated violation of the delayed payment rules. This nature of the prohibition of the abuse of economic dependence allows its application to contractual relationships between companies even if another, more specific provision already governs them. The abuse of economic dependence would apply to the norms indicated in previous sections regarding franchising, fuel distribution agreements, supply contracts, agency contracts, and agribusiness

[335] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., p. 2. With a different understanding, F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, cit. In Italian case law, see Trib. Roma, 4 luglio 2011. F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 223 also criticizes the orientation of generalizing the application of the figure of economic dependence abuse in Portuguese law.

[336] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., 2.

supply chain contracts – all business contracts with economic dependence. This application could provide the investing party with other remedies to protect its interests better. These application repercussions are the subject of the next two chapters.

Concerning the franchising agreement, the application of the prohibition of the abuse of economic dependency does not influence the requirement that the affiliate must be "economically and legally independent" (Article 1 of Law No. 129/2004).[337] However, the prohibition of the abuse of economic dependence would not apply in the event of specific legislation that provides superior protection to the vulnerable contractor because such a norm has a higher degree of specialty.[338] The discipline of the abuse of economic dependence does not focus on integrating information duties, but it can control the content of the contract and, specifically, protect specific investments.

In the development of this systematic application, one could attribute the remedies connected to the abuse of economic dependence to the franchisee.[339] The affiliate would be awarded the remedies for their inhibitory injunction, compensation, and nullity, primarily to protect investments.[340] This finding assigns the franchisee a greater range of remedies to ensure the protection of investments. The remedy applicable in case of failure to comply with the minimum term of effectiveness of the relationship must have remedies aimed at extending it.[341] These remedies are the appropriate tools to respect the literal provision of the contract. The provision of Law No. 129/2004, alongside the other rules that directly protect investments, also serves as a principle indication (*indicazione di principio*), and it provides indicators of the protection of investments. In this regard, the provision Article 3/3 would be indicative of i) the protection of the specific investments, and ii) the specific remedy (*rimedio specifico*) would be the appropriate instrument to protect investments made in commercial relationships with similar characteristics.[342]

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[337] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 326-329.
[338] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 326-329; M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., p. 9
[339] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 327; and M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., pp. 7-8.
[340] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 328.
[341] As explained in section 4.2.1.1.iv), the doctrine understands that, in case of the violation of Article 3º/3 of Law No. 129/2004, is attributed as a remedy to the invalidation and compensatory remedy (cf. G. CIAN, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, cit., p. 5892 ss.; C. LEO, in DE NOVA, Giorgio; LEO, Carmen; VENEZIA, Alberto, *Il Franchising*, cit., p. 30 and E. TANZARELLA, *La nuova disciplina del Franchising*, in Rassegna di diritto civile, 2005, p. 572 ss.). P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 343 acknowledges that this is a collective understanding.
[342] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 344-5 shares these assumptions.

Nevertheless, the indicators of the principle extracted from special rules (*norme speciali*) must be carried out with care to avoid reversing the legal system.[343] The modality of protection in the provision (a stipulation of minimum duration of the contract in line with the extent of the investments and their recovery) is specific to the franchise agreement; it is not permissible to extend it to similar contractual realities. The franchise agreement has governing rules aimed at protecting the vulnerable party, mainly because of informational asymmetry. The franchisee cannot obtain the information necessary to evaluate the seriousness of the commercial formula offered and its economic convenience.[344] In order to achieve this objective, detailed information regarding the obligations of the franchisor (Article 3/4) is set forth, including the indication of investments, the method of calculation and payment of royalties, the characteristics of the services offered to the franchisor in terms of technical assistance and commercial value, and the value of the investments and of the eventual entrance fee (Article 3/4, 1). Because of the characteristics of the franchising agreement, in particular, a significant information obligation exists concerning the investments to be made, and the protection of the duration of the relationship should be reserved (the three-year minimum duration of the relationship and its link to the investments) to this type of contract.

Some behaviors extracted from the general clauses mentioned could be reinforced with some special provisions. Article 1.569 of the Civil Code establishes a congruous period of notice to terminate a supply contract with an indeterminate term. As argued before, this rule may be applied in a trans-typical manner and together with the general clauses in order to impose the duty of observing the period necessary for the reorientation of the company that is the victim of an abrupt, unilateral termination, as developed in section 3.4.

Within the scope of the public concession contract, the governing rules of protecting its investments is reserved for public concession because this contract has particular characteristics. Principles of public law govern it that exclude the possibility of its analogical application to business relationships. This circumstance does not detract from verifying the elements present in law to delimit the investments protected and, eventually, to use them as a distinguishing criterion

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[343] For M. LIBERTINI, *Il vincolo del diritto positivo per il giurista*, in Scritti in onore di Angelo Falzea, vol. 1 (teoria generale e filosofia del diritto), Milano: Giuffrè, 1991, p. 366, there is a link between the law and the interpreter (*il vincolo positive del diritto e dell'interprete*). The requirement of axiological coherence also imposes a systematic view of the law. Its various principles must strike a certain balance; the *regulae juris* cannot be contradicted, and normative disparities must be rationally referable to choices of principle. The legal system is a dynamic reality; any innovation must be redirected to the system.

[344] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 329.

in private law, as well (see section 3.3). After the systematization of the rules in the Italian legal system, this thesis addresses the rule protection regarding specific contractual investments in Brazilian law.

2.3. The governing rules of specific investment protection in Brazilian law

Brazilian law presents a characteristic that differs from that of the Italian law. The prohibition of the abuse of economic dependence does not act as a central rule in investment protection. Brazilian law instead turns its attention to the rules safeguarding investments through limitations on the unilateral termination of a contractual relationship. The main provisions consist of two general clauses present in the Brazilian Civil Code, the abuse of right (Article 187)[345] and objective good faith (Article 422),[346] as well as Article 473, sole paragraph.[347] Investment protection requires a systematization of the general clauses mentioned and the specific rules addressing the termination of the contract and the investment recovery.

Article 473 constitutes a norm of intricate interpretation. As a result of its complexity, it has rarely been used by Brazilian courts; when applied, case law usually removes its autonomy, and it becomes a rule that is only capable of reinforcing the general clauses that limit the unilateral termination of the contract. The provision regulates a particular situation: the unilateral termination of an indefinite term contract with specific investments. It also attributes an unusual legal remedy: the rule determines the withdrawal of the legal effects of the act if it is exercised before the period for investment recovery. A contract with those characteristics can only be terminated once the investments made are amortized. The presence in this rule of undetermined legal concepts (*concetti indeterminati*), such as the "nature of the contract," "considerable investments" "[investments] for its [the contract] performance," and "the nature and the extent of the investments," makes its interpretation more difficult. There is also no consolidated interpretation of them because the rule represents an innovation introduced with the Civil Code promulgated in 2002. The provision was

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[345] Article 187. The holder of a right also commits an illicit act if, in exercising it, it manifestly exceeds the limits imposed by its economic or social purpose, by good faith or by good conduct.
[346] Article 422. The contracting parties are bound to observe the principles of probity and good faith, both in entering into the contract and in this performance.
[347] Article 473. Unilateral termination, in the cases in which the law expressly or implicitly permits it, is made by notice given to the other party. Sole paragraph. If, however, given the nature of the contract, one of the parties has made considerable investments for this performance, unilateral notice of termination will only produce effects after a period compatible with the nature and extent of the investments.

not the object of previous law, and this rule also requires its systematization with Article 720 of the Brazilian Civil Code.[348] This latter provision established a norm that is substantially similar to the sole paragraph of Article 473 but is intended for agency contracts. Its differences from the general rule are examined in order to systematically interpret these provisions.

The Brazilian legal system contains other rules specific to contractual types. The franchise agreement, also disciplined in the Brazilian legal system,[349] does not tie the duration of the contract to the presence of investment; at the same time, the transparency obligations require the franchisor to indicate the necessary investments in the offer to join the franchise system.[350] The law on distribution in the motor vehicle section has rules governing the compensation in case of the non-renewal of the contract. It also indicates the destination of the specific investments and limits the termination of a contract with an indefinite term.

The indirect protection of investments also occurs through other instruments in some specific Brazilian laws. There are no guidelines for a regulation exempting some competition restriction on vertical agreements. In commercial representation agreements (*contrato de representação comercial)* (Law No. 4.886/1965), whose characteristics are similar to agency contracts, Article 34 provides for granting a 30-day prior notice period, in addition to guaranteeing high flat-rate compensation in case of the termination of the contract by the counterparty (Article 27, j).

As in Italian law, the relevance of specific investments also has repercussions in administrative law. Article 3 of the Public Concession Law (Law No. 8.987/1995) establishes that, in the case of a public service concession preceded by the performance of public works, investments must be remunerated and amortized through the exploitation of the service or the work for a specified period. The law requires that the public concession term considers the amount of the investments made for the operation.

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[348] Article 720. If the contract is for an undefined term, either of the parties may terminate it with 90 days' notice, provided that a period has passed that is compatible with the nature and size of the investment required of the agent. Sole paragraph. In the case of disagreement between the parties, the judge decides on the reasonability of the period and of the amount owed.

[349] The criticism adopted by G. DE NOVA (footnote 265) concerning Italian law, that the franchise agreement is not typified therein, also applies to Law No. 8.955/1994. The purpose of this legislation is to increase transparency in the formation of the contract and to protect the vulnerable contractor, and not to govern the content of the contract.

[350] As in Italian law, Article 3, VII of Law No. 8.955/1994 establishes that the franchisor must provide the interested party with an offer containing the estimated total amount of the initial investment required for acquisition, deployment, and operation, as well as the estimated amount of the facilities, equipment, initial inventory, and the payment terms.

Brazilian antitrust rules have a more plastic character and allow the configuration of anticompetitive practice in a hypothesis similar to the abuse of economic dependence, but without an express typification in law. There is, however, no such specification of the elements for the configuration of an antitrust violation in this hypothesis, which may make it challenging to apply it to a case or to more delicate situations.

The subject of specific investments returned to the center of legal discussion with the bill for the new commercial code and the new Provisional Measure of "Economic Freedom" enacted in 2019. This bill adopts a unique position with no apparent justification by eliminating the relevance of specific investments. The decision to exclude this protection should be criticized. The exclusion adds to the other disapproval of jurists about its text. Moreover, this Provisional Measure, which introduced some provisions regarding business contracts, does not change the discipline, but it attributes high relevance the contractual terms and their autonomy.

After this overview of the Brazilian legislation, the following sections intend to provide further depth to the analysis of the main instruments of the direct and indirect protection of investments, primarily by limiting the termination of the contractual relationship. The fragmentary nature of the rules requires their systematization.

2.3.1. The abuse of law and objective good faith: instruments for examining the arbitrary interruption of the contractual relationship

Prominent concepts in the protection of specific investments in Brazilian law consist of the general clauses of abuse of right and objective good faith. They allow the assessment of the arbitrary exercise of the interruption of the contractual relationship. Article 187, inserted in the general part of the Civil Code, defines the abuse of right as the exercise, by the holder of the right, of manifestly exceeding the limits imposed by its economic or social purpose, by good faith or by good customs.[351] There are, therefore, three limits to the abusive exercise of the right. One

[351] Although the norm refers only to the exercise of a right, the doctrine also defends the extension of the provision to hypotheses of the illegal exercise of a subjective position (*situazione giuridica sogettiva*). Cf. J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, São Paulo: Marcial Pons, 2016, p. 612. The provision is praised by Portuguese doctrine, from whose code the rule was transplanted. Article 187 resembles the wording of Article 334 of the Portuguese Civil Code, with the difference that, in the Brazilian code, the classification of an abusive act was adopted as an illicit act that, in the view of A. MENEZES CORDEIRO, would reduce systematic inconsistencies (A. MENEZES CORDEIRO, *Tratado de Direito Civil Português*, t. IV, Coimbra: Almedina, 2012, p. 13). On the other hand, the abuse of right provision can be specified in other behavior, such as the contradictory exercise of a right,

corresponds to objective good faith, which is also subject to the Civil Code of 2002 in Article 422. There is no requirement of the subjective element for the configuration of the abuse of right.

In order to overcome its amplitude, the doctrine[352] seeks to give concreteness to objective good faith by identifying its three essential functions: i) an interpretative canon, ii) a rule for the creation of related legal duties, and iii) a rule of limitation for the exercise of subjective rights.[353] These functions complement each other and affect the relationship together.[354] They function as a limitation to the exercise of right combined with the theory of the abuse of right to impose restrictions on the exercise of subjective rights,[355] and especially to examine the arbitrariness of the interruption of the contractual relationship.[356] Depending on the interest protected, several remedies derive from their violation: the ineffectiveness of the exercise, only partial effectiveness, indemnity effectiveness, and the suspension of the subjective right.[357] These two general clauses are usually applied together, and there no criterion is unanimously accepted to distinguish them in their application in a contractual relationship.

Some contractual provisions originated from the slow construction of case law and from the invocation of objective good faith as a limiting exercise of rights. Article 473, sole paragraph, and Article 720 are rules that, by limiting the exercise of unilateral termination of the contract for an indefinite period, were initially formulated as ramifications of objective good faith.[358]

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dysfunction, and excessive exercise. Cf. J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., p. 612.

[352] For example, G. TEPEDINO; M. C. BODIN DE MORAES; H. H. BARBOZA, *Código civil interpretado: conforme a Constituição da República*, vol. II, Rio de Janeiro: Renovar, 2007, p. 17. In relation to the application of objective good faith to business contracts, see G. TEPEDINO; A. SCHREIBER, *A boa-fé objetiva no Código de Defesa do Consumidor e no Código Civil, in Código de defesa do consumidor e o código civil de 2002: convergências e assimetrias*, São Paulo: Revista dos Tribunais, 2005, pp. 216-231.

[353] The Brazilian doctrine adopts the three-branch division elaborated in German law by Franz WIEACKER when referring to paragraph 242 of the BGB (F. WIECKER, *El Principio General de la Buena Fe*, Madrid: Civitas, 1986).

[354] G. TEPEDINO; M. C. BODIN DE MORAES; H. H. BARBOZA, *Código civil interpretado: conforme a Constituição da República*, cit., p. 17.

[355] G. TEPEDINO; M. C. BODIN DE MORAES; H. H. BARBOZA, *Código civil interpretado: conforme a Constituição da República*, cit., p. 20. Brazilian doctrine seeks to precisely establish the relationship between the abuse of law and objective good faith. The confluence of the two instruments would indicate the meeting of two legal traditions, German and French. For R. F. PINHEIRO, good faith translates into and composes the foundation for the theory of the abuse of right (*O abuso do direito e as relações contratuais*, Rio de Janeiro: Renovar, 2002, pp. 247-8). The doctrine goes further: the legal exercise is limited not only by objective good faith, but by other principles, vectors, and characteristics of contractual relations. In this last regard, cf. again G. TEPEDINO; M. C. BODIN DE MORAES; H. H. BARBOZA, *Código civil interpretado: conforme a Constituição da República*, cit., p. 20.

[356] J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., p. 663. See also P. A. FORGIONI, *Contrato de Distribuição*, São Paulo: Revista dos Tribunais, 2014, pp. 299-300.

[357] J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., p. 610.

[358] The specialized doctrine, for the most part, defends the sole paragraph on the objective good faith as the foundation of Article 473 (see C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação.*

These general clauses allow the assessment of the decision to interrupt the contractual relationship; the doctrine and the case law set this purpose. In order to avoid their application, it is

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Considerações genéricas sobre o art. 473 do Código Civil, in Revista Forense, 2012, p. 309; R. R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, in Comentários ao Novo Código Civil, coordenador Sávio de Figueiredo Teixeira, Forense: Rio de Janeiro: 2011, p. 365; R. X. LEONARDO, *A denúncia e a resilição: críticas e propostas hermenêuticas ao art. 473 do CC/2002 Brasileiro*, in Revista de Direito Civil Contemporâneo, 2016; P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 314; J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., pp. 663 ss.; Francisco de Assis VIEGAS, *Denúncia contratual e dever de pré-aviso,* Belo Horizonte: Fórum, 2019, p. 164) or a representative figure of it (legitimate expectation and *nemo datur venire contra factum proprium*, D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, in Araken de Assis et alli (coords.), Direito Civil e Processo. Estudos em homenagem ao Professor Arruda Alvim, p. 31; only legitimate expectation F. F. R. MAIA, *A limitação da eficácia da resilição unilateral dos contratos como manifestação positiva do princípio da confiança: o parágrafo único do artigo 473 do código civil*, in Revista IOV de Direito Civil e Processo Civil, 2010, *passim*; and P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, in Cadernos Jurídicos, 2015, p. 195). Without disagreeing with this foundation, P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 317 and C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, in Revista Forense, 2012, p. 309, based on the work of the former author, develop the idea that the purpose of the provision is to avoid causing harm unrelated to the normal risks of the agreement (*creare una alea straordinaria*). In an isolated stance, R. R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 364 argues another ground for this rule: the social function of the contract, a still-controversial rule, which determines that contractual freedom must be exercised based on and within the limits of the social function of the contract (Article 421 of the Civil Code). The principle of the social function of the contract, also foreseen as innovation in the Brazilian Civil Code, is quite generic and, so far, has not been shown to be a specific application in the legal system. Cf. C. N. KONDER, *Para além da 'principialização' da função social do contrato*, in Revista Brasileira de Direito Civil, v. 13, p. 39-59, 2017. In addition to the uncertainties that apply to the social function of the contract, which is not comparable to the rule of *meritevolezza di tutela* under the Italian Civil Code, the construction of the rule as a social function adds little to its interpretation. On the other hand, it is necessary to distinguish between the protection of investments and their application through the *venire contra factum proprium*. It serves as the basis for investment protection only in a specific situation, from which an even more extensive responsibility arises. According to this specification of good faith, contradictory behavior occurs not with the relation of investments and the subsequent interruption of the relationship; rather, this behavior only occurs with a specific incentive of the counterparty to incur expenses in the course of the contractual relationship, thereby indicating that it would maintain the contract for a reasonable period. In the case O'Leary -v- Volkswagen Group Ireland Limited ([2016] IEHC 773), the High Court of Ireland evaluated the motor vehicle manufacturer's decision to terminate some distribution contracts. Concerning the claim to reinstate the plaintiff as an authorized dealer, based on the violation of promissory estoppel, the court denied it. The court understood that the manufacturer's representative did not act to his detriment on the strength of the promise made. It considered that the representative had not encouraged dealers to invest in their business. Even if he did, it was only encouragement; the decision to do so was made by the individual dealer. On the other hand, concerning the damage claim, the court considered the producer liable for reimbursing the expenditure incurred by the plaintiff in performing works to his premises following upon a meeting, but with due allowance being made for any value accruing to the plaintiff arising out of the carrying out of those works. The court understood that the producer did not inform of the possibility of reorganizing the distribution system in a timely way, which could prevent the dealers from making investments. The omission would not derive from conduct to incite investments, but from the omission to prevent them from happening due to the normal course of the relationship. From a civil law perspective, the liability would derive not from the *venire contra factum proprium,* but fro the investment protection. If the conduct is only the premature termination that prevents the recovery of investments, there would no contradictory behavior. In this case, responsibility no longer arises from an investment requirement, but from the untimely manner in which the termination of the contract occurs. Cf. also F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 789. To the same effect, M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 26-27, in Italian law, by admitting that certain conduct must be integrated with the exercise of unilateral termination for the adoption of adequate protection; this would be the case of termination after having expressed the intention to continue the relationship or having induced the counterparty to invest.

necessary to grant an additional period as prior notice with the exercise of the right to terminate the relationship. The necessity and time span depend on the characteristics of the relationship, especially its duration and the presence of specific investments. The specific investments are protected through granting the necessary term for their reallocation, as well as the redirection of the business activity. The prior notice period is not generally regarded as necessary for the recovery of investments. The abuse of right and the requirement to act following objective good faith protects specific investments at the end of the relationship. The investments' relevance, however, stems from their correlation with the rule established in the sole paragraph of Article 473.

2.3.2. The investment protection in Article 473 of the Civil Code: more than a limitation of the right to terminate the contractual relationship

The interest in addressing specific investments in the Brazilian legal system mainly arises from the need for an adequate interpretation of Article 473 of the Civil Code. Its wording has particular contours; there is no similar previous rule, nor is there in comparative law. Comparison should be made with the special rule, Article 720, the wording of which is partly similar. This last norm applies to the agency agreement. At the same that these traits hinder the application of Article 473, its peculiarity makes it necessary to address the issue of the specific protection of investments.

The context of the application of Article 473 should be clarified.[359] The general discipline of the contract in the Civil Code contains this rule; there is no limitation to a contractual type. The application of this provision requires the following elements: i) a contractual relationship of indeterminate term; ii) the existence of investments, according to their nature and extent; and iii) the nature of the contractual relationship. It limits the exercise of the right of contract termination. This rule conditions the right to terminate upon the recovery of investments. These circumstances

[359] The interpretation of Article 473 is a complex task, given its novelty, as well as the lack of similar legal instruments. This difficulty is reflected in doctrinal positions, which are not clear regarding the problems involved with the question. For example, for C. P. U. MIRANDA, *Comentários ao código civil: v. 5 (arts. 421 a 480), Dos contratos em geral*, coordenador: Antônio Junqueira de Azevedo, São Paulo: Saraiva, 2013, p. 149; P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 193, the contract will remain in force until all of the investment has been recovered, respecting the literality of the provision; at the same time, they state that it is necessary to grant a prior notice period of a reasonable period, and that the sole duty of Article 473 is to avoid the abrupt termination of the contract. The link between the investments and the duration of the relationship is different from the imposition of giving prior notice for a reasonable period. The incoherence of its interpretation highlights the difficulty in applying it.

require that it be examined in comparison with other legal instruments capable of limiting the unilateral termination of the contract: the abuse of right and objective good faith.

The content proximity of the limitation of the exercise of the right of termination to these general clauses, as well as the complexity of Article 473's vocabulary, have overshadowed its application. The doctrine mostly affirms that the provision's purpose is to prevent surprising the counterparty with unilateral termination. According to this understanding, the function of Article 473 coincides with granting prior notice to the contract,[360] which is already required by the application of good faith and the abuse of right. A few works still attribute application autonomy to the rule of Article 473.[361]

Another problem faced to interpret this provision concerns the presence of indeterminate concepts. There is no indication in the article of how to interpret it, or of under what circumstances this provision should be applied. There are four aspects of the text that should be clarified. The first

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[360] The doctrine identifies that provision with granting prior notice: G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, in Judith Martins-Costa (coord.), Modelos de Direito Privado, São Paulo: Marcial Pons, p. 322; F. DIDIER JR., *Contrato empresarial. Contrato prorrogado por prazo indeterminado. Possibilidade de denúncia vazia. Aviso prévio. Licitude. Enriquecimento sem causa. (parecer)*, in Revista de Direito Civil Contemporâneo, 2017, pp. 305-330; F. F. R. MAIA, *A limitação da eficácia da resilição unilateral dos contratos como manifestação positiva do princípio da confiança: o parágrafo único do artigo 473 do código civil*, in Revista IOV de Direito Civil e Processo Civil, 2010, pp. 118-136; and Francisco de Assis VIEGAS, *Denúncia contratual e dever de pré-aviso,* Belo Horizonte: Fórum, 2019, p. 164 ss. There are other authors who, despite not adducing this equivalence, have a position that the rule is destined to impose the duty to give prior notice: G. TEPEDINO, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, in Comentários ao Novo Código Civil, coordenador Sávio de Figueirado Teixeira, Forense: Rio de Janeiro, 2008, p. 375; C. P. U. MIRANDA, *Comentários ao código civil: v. 5 (arts. 421 a 480), Dos contratos em geral*, coordenador: Antônio Junqueira de Azevedo, São Paulo: Saraiva, 2013, p. 420; G. TEPEDINO, *Validade e efeitos da resilição unilateral dos contratos*, in Gustavo Tepedino, Soluções Práticas, São Paulo: Revista dos Tribunais, 2011.

[361] The position adopted by P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 315 attributes an autonomous purpose to the provision, which has had repercussions for other doctrinal works, as well as judicial decisions (see the decision of the Superior Court of Justice regarding the application of the provision, STJ, Special Appeal No. 1.555.202, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 13.12.2016). The granting of a term compatible with the nature and extent of the investment assures the distributor (her monographic work addresses the distribution contracts, hence the express reference thereto) the time of permanence in the market that enables the recovery/amortization of the investments made, whether i) by obtaining profits (already realized or to be realized) that amortize the irrecoverable investments, or ii) by granting time to recover the investments (for example, with the redirection of business activities). The author (*Contrato de Distribuição*, cit., p. 312) also points out that Article 473 would impose the obligation of reasonable time to avoid the abrupt termination of the contract. In practical terms, the contract would continue to radiate its effects until such period has ends. The victim contractor would be able to adopt remedies provided in order to satisfy its interests as a creditor of an obligation (for example, the specific execution, and the means that are proper to it, such as the imposition of a fine for the delay [*astreinte*], search and seizure, etc.). The author adopts a conclusion substantially similar to that of this thesis, as is developed in Chapter III. Although this understanding is praiseworthy, some points can be criticized. In my view, the reasons for overcoming the literal wording of the provision, which links the unilateral termination of effects to the recovery of irrecoverable investments, has not been appropriately sought. The author also did not seek to reconcile the provision with business reasons to terminate the contract and allow the extinction of the relationship when there is a need to adapt the company to market conditions.

is to determine the typology of investments capable of allowing the suspension of the effects of the termination. The second is the nature of the contract in which that provision can be applied. Third, the parameters for the establishment of a period of recovery of investments must be determined, and finally, the appropriate remedy provided by this provision must be specified.

The history of the provision assists in solving the questions concerning the purpose of the provision and the elements for its application. The Civil Code bill supervisor, Professor M. REALE, inserted the provision into the draft of the obligations book. The rule was envisaged in Bill No. 634, 1975, presented to the Chamber of Deputies in 1975 (as well as the corresponding Article 720).[362] He had already expressed an interest in the problem of specific investments and had contact with issues related to the contractual protection of the motor vehicle distributor. He was one of the drafters of the law that governs this contractual type.[363] The justification employed for inserting what is now Article 473 consisted of the limitation of the abuse of economic power.[364-365]

The project supervisor clarifies this link in considerations made in a published legal opinion about a judicial controversy.[366] That rule would relate to the hypothesis of abuse of economic power because it is an act that implies obtaining illicit advantages to the detriment of the counterparty. It would also violate constitutional and legal provisions, prohibiting the arbitrary increase in profits (currently corresponding to Article 173, paragraph 4 of the Brazilian Constitution).[367] He then explained that, although the abuse of economic power and the abuse of right are different concepts, they are combined for protection in some situations. This correlation would occur when, in the

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[362] Article 472 of the bill presented in 1975 has the same wording as the current provisions (Article 473). On the other hand, the article presented in the bill regarding the current Article 720 diverges in its wording because it did not include its sole paragraph. This sole paragraph confers the possibility of the judge deciding the term and the amount due (see the wording of Article 729 of Bill No. 634/1975).

[363] This information is found in his opinion: M. REALE, *Estrutura normativa da lei n. 6.729 sobre concessões comerciais entre produtores e distribuidores de veículos automotores,* in Revista da Faculdade de Direito da Universidade de São Paulo, v. 91, 1996.

[364] Explanatory statement by the Supervisor of the Review and Drafting Committee of the Civil Code*:* M. REALE, *Supervisor da Comissão Revisora e Elaboradora do Código Civil*, in Revista da EMERJ, n. especial, pt.1, fev./jun. 2002, p. 24.

[365] The abuse of economic power consists of an act restricting competition in Brazilian law. Present in the Constitutions of the Republic of 1946 and 1967, Law No. 6.886/1945 exemplified forms of the abuse of economic power, such as the domination of national markets or the total or partial elimination of competition; the unjustified rise of prices in cases of natural or actual monopoly, with the aim of arbitrarily increasing profits without increasing production; the creation of monopolistic conditions or the exercise of abusive speculation in order to promote the temporary rise of prices; the formation of an economic group by the aggregation of companies to the detriment of the free deliberation of buyers or sellers; and the exercise of unfair competition. The hypotheses of the abuse of economic power are currently regulated in the Constitution of the Republic (Article 173).

[366] M. REALE, *Resilição dos contratos por tempo indeterminado*, in Miguel Reale, Questões de Direito Privado, São Paulo: Saraiva, 1997, pp. 33-46.

[367] M. REALE, *Resilição dos contratos por tempo indeterminado*, cit., p. 45.

exercise of economic activity, one company harms another in order to obtain arbitrary advantages. This would be the case of using the right to terminate an indefinite-term contract with a period compatible with the amortization of contractual investments.

This historical correlation suggests two conclusions. First, in terms of the relationship between this provision and the market discipline, it prohibits, with a civil law instrument, an act with consequences of relevance to the market (although it might not constitute an antitrust violation). Its relation to the protection of the abuse of economic dependence and the protection of the market can represent the key to interpreting the rule.[368] The second, related to the first, indicates the purpose of the provision: to prevent the counterparty from gaining illicit advantages by interrupting the relationship. The provision aims to prevent the counterparty from adopting opportunistic conduct by prematurely extinguishing the relationship and appropriating the surplus generated in the relationship produced by specific investments. This reading, from an economic standpoint, brings the protection rule closer to the concept of the abuse of economic dependence and the law and economics reading of the phenomenon presented in Chapter I.[369]

With this connection, the application scope and the parameters to interpret the provision are clearer. Article 473 is a provision designed to limit the interruption of the contractual relationship, together with the general clauses cited. The situation protected is peculiar and therefore requires specific protection given the possibility of appropriating investments with the arbitrary interruption of the contractual relationship. The article reinforces the protection of the contractor who makes specific investments. The historical analysis also points out the need to read the provision through an economics lens. The comparative study conducted in this thesis facilitated

[368] D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 31 also compares the rule with the prohibition of the abuse of economic power and the abuse of right. In this regard, he argues that Article 473 would aim to preserve the weakest party from the abuse of economic power. The provision's purpose would be to prevent real spoliation from the counterparty. On the other hand, without entirely agreeing with the arguments presented, the relationship between the abuse of economic power (*abuso de poder econômico*) and the unilateral termination of the relationship are also emphasized in the work of A. TOMASETTI JÚNIOR (*Abuso do poder econômico e abuso de poder contratual: regime jurídico particularizado; denunciabilidade restrita da relação contratual a tempo indeterminado; contrato de fornecimento, aumento arbitrário de lucros ilícitos, constitucionais e de direito comum; providências processuais corretivas*, in Revista dos tribunais, São Paulo, v. 84, n. 715, p. 87-107, maio 1995).

[369] On another perspective, C. SANTOLIM, *A proteção dos investimentos específicos na resilição unilateral do contrato e o risco moral: uma análise do artigo 473, parágrafo único, do Código Civil*, in Revista Síntese, 2013, p. 11 seeks to relate the provision to moral hazard, a notion developed by the economic interpretation of the contract. The concern the author raises is against the interpretation of the provision according to which it would be possible to directly link the duration of the contract to making investments. This interpretation could generate a moral hazard by allowing the overinvesting party to dilate the length of the relationship and thereby the opportunistic adoption that the counterparty cannot verify .

the adoption of a competition view, especially in its dynamic profile, such as the Italian doctrine concerning the abuse of economic dependence as a safeguard of the proper functioning of the market.[370-371] Contract law cannot be immune to competition law. The reference to market protection (*tutela del bene giuridico della concorrenza*) does not imply a simultaneous occurrence of an antitrust violation, but rather the requirement to consider it in the concretization of general clauses.

This view presents some benefits for interpreting the provision. This rule might cause negative repercussions for competition if it is applied literally, and this possibility makes it difficult to change and adapt the distribution system according to market conditions. This reading shed light on the applicable remedies in case of a violation of the rule provided for in Article 473 of the Civil Code. The justification for protecting the market could allow another range of remedies for the provision, without freezing the distribution channels. This norm literally establishes the legal effect of suspending the termination until the recovery of the investments. The investing party does not decide in all cases whether to continue the relationship.[372]

Another positive aspect of this interpretation is the indication of a legal principle to interpret the indeterminate concepts in the rule. This principle is a systematic tool to apply this provision, and a principle of competition protection might be the right instrument for this task. The social solidarity principle, which is usually linked to good faith, might not be the correct response to interpret this rule; it cannot provide appropriate answers to the problems a complex distribution network face.

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[370] This doctrine is cited in footnote 193. There are several reasons in Italian law to acknowledge the principle of competition protection, which would apply to all topics related to economic relations. This principle would affect some sectors in Italian law, such as economic regulation, consumer law, unfair competition, and intellectual property. First, in Italian law, mainly due to the European Union's influence, the notions of market and competition are consistent and diffused. Then, the competition would be protected in the Italian Constitution. Lastly, this interpretation would have legal systematic coherence. See Philipp FABBIO *La disparità di potere economico e abuso di dipendenza economica, in Contratto e antitrust*, a cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008.

[371] A similar approach exists in Italy. M. LIBERTINI, *Concorrenza*, cit. establishes hermeneutic instruments for the protection of the legal principal of competition in its dynamic aspect. In the Italian legal system, the author has identified rules to determine the normative concept of competition, which promotes the dynamic process of competition between companies. With rules of great semantic openness in that legal system (such as antitrust rules and unfair competition rules), this normative notion of competition could specify them. This argumentative construction can prove fruitful in Brazilian law. Competition should not be guarded as a value in itself, but as an instrument for the promotion of collective well-being. This conclusion does not prevent the legal principle of competition (*bene giurdico della concorrenza*) from being identified.

[372] In this regard, for example, C. R. GONÇALVES, *Direito civil brasileiro*, vol. III, São Paulo: Saraiva, 2017, p. 206, for whom the contract must last according to the investment period as if it were a fixed-term contract.

While praiseworthy, this reading might confront some difficulties in Brazilian law. The first issue is related to the normative structure of Article 473, which is an article with undetermined concepts. It is not a general clause, which attributes the function to balance opposing interests to the judge and, after this procedure, to determine the legal effects. The limitation of the remedy to withdraw the effects of the termination is not among the remedies available. It is the consequence of the presence of the elements in the rule. The comparison with the discussion involving the general clause of the abuse of economic dependence might not be applicable. Despite this difficulty, a principle of competition protection allows the adequate interpretation of these undetermined concepts and provides a coherent, systematic view of the provision. It helps interpret the undetermined concepts in order to limit the literal application of the provision when there are no adverse competition effects.

An even more significant difficulty is the absence of a more mature view on a principle of constitutional protection (*tutela del bene giuridico della concorrenza*) in its dynamic aspect. There is a tendency to identify competition as the freedom to establish prices in the market, which does not exist as a principle.[373] Some works on the matter do not link the protection of competition, as extracted from the principles of the Brazilian Constitution, to the protection of dynamic competition.[374] However, some indicators exist to construct this principle. P. A. FORGIONI has presented relevant arguments that could approximate the reasoning suggested in the thesis. In this regard, in presenting the elements to evaluate the abusiveness in the exercise of the right to unilaterally terminate a distribution contract, the author highlights the effectiveness of the distribution system as an essential criterion.[375] The same author also emphasizes the interpretative interconnections between unfair competition and antitrust law.[376] These considerations make it possible to conclude that the link between Article 473 and the legal protection of competition is feasible under Brazilian Law. Market discipline, therefore, could guide its interpretation, especially

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[373] Among others, see Luís Roberto BARROSO, *Estado e livre-iniciativa na experiência constitucional brasileira*, Revista brasileira de direito público RBdP, v. 12, n. 45, p. 9-19, abr./jun. 2014; Alexandre DE MOREAS, *Constituição Federal Comentada,* Rio de Janeiro : Forense, 2018; Nelson NERY JUNIOR, *Constituição Federal comentada e legislação constitucional,* São Paulo : Revista dos Tribunais, 2017.

[374] For example, E. R. GRAU, A ordem econômica na Constituição de 1988, São Paulo: Malheiros, 2014. The monograph of P. A. FORGIONI (A evolução do direito comercial brasileiro: da mercancia ao mercado, São Paulo: Revista dos Tribunais, 2016, pp. 138 ss.), presented as an ordinary professor contest at the Universidade de São Paulo, discussing the perspective of Commercial law in Brazil, also did not propose to identify the legal principle of competition, nor its dynamic aspect.

[375] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 276.

[376] P. A. FORGIONI, *Os Fundamentos do Antitruste*, São Paulo: Revista dos Tribunais, pp. 251 ss.

in determining its application conditions. The next chapters highlight its usefulness for the problems related to its application.

On the other hand, the interpretation mentioned above of the rule as a duty to give prior notice ignores the peculiarity of the provision's wording. In practice, the duration of the contract does not change even in the face of this rule; the case law does not apply to the provision, assuming the continuation of the relation.[377] The works that seek to provide a systematic approach to the provision have no interpretative solutions to overcome the requirement of suspending the termination effect and the forced continuation of the contract.[378] The issue can be clarified with a further systematic examination of the rule. In addition to its application in combination with the abuse of right, good faith, and the protection of competition and the market, the provision should be interpreted under another provision of the Brazilian Civil Code; Article 720 has similar wording coupled with some particularities.

2.3.3. Article 720 of the Civil Code: from an article intended for a specific application to the systematic interpretation of investment protection

Article 720[379] has great semantic similarity with the sole paragraph of Article 473 of the Civil Code. That provision is among the rules of the contractual type of agency contract.[380] It sets forth that, in the agency contract for an indefinite term, either party may unilaterally terminate the contract, provided a period compatible with the nature and extent of the investment required of the agent has elapsed. Alongside these elements, which repeat Article 473, Article 720 has two other aspects. It establishes a prior notice period of 90 days, which must be combined (and could overlap)

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[377] Section 4.3.3.1 highlights that the Superior Court of Justice applies Article 473 as a legal tool to compensate for losses caused by the unexpected termination of the contract, and not the possibility of their protection for the continuation of the relationship due to the investments made.

[378] The valuable work of P. A. FORGIONI, *Contrato de Distribuição*, cit. does not indicate how to overcome this impasse and which protection would be most appropriate.

[379] Article 720. If the contract is for an undefined term, either of the parties may terminate it with 90 days' notice, provided that a period has passed that is compatible with the nature and size of the investment required of the agent. Sole paragraph. In the case of a disagreement between the parties, the judge decides on the reasonability of the period and of the amount owed.

[380] In the Civil Code, this contract is called *agency and distribution contract*. However, based on the examination of the normative indicators, one can deduce that it is an agency contract. The Civil Code does not govern the distribution agreement. In this regard, A. B. N. COSTA, *Efeitos legais do conflito tipológico entre o contrato de agência e de representação comercial autônoma*, in Revista de Direito Privado, dez. de 2018. M. REALE, supervisor of the Civil Code bill (*Estrutura normativa da lei n. 6.729 sobre concessões comerciais entre produtores e distribuidores de veículos automotores,* cit., p. 66) argues, in his published opinion, for the existence of a denomination coincidence between the distribution contract and the agency contract. The position he adopts is isolated in the doctrine and can explain this curious nomenclature in the code.

with the amortization period of investments. The other aspect would be the possibility that, in case of the parties' disagreement, the judge decides on the reasonableness of the term and the amount owed. Concerning Article 473, objective good faith is indicated as fundamental for the provision.[381]

In sum, Article 720 imposes two requirements for the exercise of the right to terminate: i) the granting of 90 days' notice, which cannot be reduced;[382] and ii) the lapse, between the formation of the contract and the date of the prior notice, of a period compatible with the nature and extent of the investments made.[383] The provision also determines that, in the event of disagreement between the parties, the court decides on the reasonability of time and the amount owed. This determination needs to be interpreted in accordance with the fluency of two parallel deadlines.

In a systemic interpretation of the provision, the reference to a divergence between the parties can only relate to the extension of the time for the recovery of investments; in this case, the literal determination of the provision to suspend the effects of the termination until the recovery of investments present in the *caput* of the article becomes more flexible. In this line of reasoning, it is possible to determinate the period necessary for the recovery and its conversion into damages in court. As a form of protection of investments, the sole paragraph of the provision grants the possibility for the party (the agent) to request its compliance or its conversion into losses and damages in court. There is no rigid determination in suspending the termination until the recovery of the investments.

This interpretation of the provision, with a greater variety of investment protection, may also be applied concerning Article 473. The feasibility of this interpretation and its difficulties are addressed in sections 2.3.9 and 4.3.2.1, on the systematization of the governing rules of the termination of the contract for the protection of specific investments.

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[381] In a criticism of the attribution of an excessive role to the principle of objective good faith, G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 320 states that termination in disagreement with this provision would have the prohibition of the *venire contra factum proprium* as its basis. The author argues that there is a legitimate expectation of the parties continuing the relationship. In his view, it would not be necessary in that case to have recourse in good faith to justify the application of a rule governing the protection of investments or the granting of a 90-day notice period. The understanding contrary to the use of the *venire contra factum proprium* is argued in footnote 358.

[382] In this regard, G. TEPEDINO, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, cit., p. 373. The author argues that the parties may agree on a more extended period of prior notice but cannot reduce it; the legislator considered 90 days to be the minimum necessary to avoid the harmful effects of the abrupt disruption of the contractual relationship. See also G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 324.

[383] G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 321 argues that the two deadlines are not different.

2.3.4. The motor vehicle distribution agreement and specific modalities of investment protection

It is not only the Civil Code that sets forth rules concerning specific investments; specialized legislation also guarantees this protection. Brazilian law governs the distribution of the motor vehicle sector.[384] The distribution agreements are regulated in two ways: under contracts and under competitive profiles.[385-386] This law is generally considered an instrument to correct the power asymmetry between the parties.[387] However, this conclusion may change with the new Provisional Measure of Economic Freedom (section 2.3.7).

This legislation has been an object of different critics, which could even lead to its revocation. Some concessionaires have argued that it does not confer enough protection to the members of the distribution network.[388] In another view, this legislation is regarded as not adapted

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[384] Miguel REALE, supervisor of the Civil Code project and one of the drafters of the law of distribution of motor vehicles, frames this law as special law and, therefore, an analogy of its provisions would not be possible. It would restrict the freedom to contract (*Estrutura normativa da lei n. 6.729 sobre concessões comerciais entre produtores e distribuidores de veículos automotores,* cit., p. 75). The Superior Court of Justice case law tends to attribute a specific application to this legislation and refutes its analogical application. J. A. T. GUERREIRO, *Aplicação analógica da lei dos revendedores*, in Revista de direito mercantil, industrial, econômico e financeiro, v. 22, n. 49, p. 34-40, jan./mar. 1983 criticizes this reasoning. However, it is legislation aimed at a specific contractual type. This circumstance – legislation directed exclusively at a specific sector – qualifies it as a special rule, but it does not exclude the possibility of interpreting a provision of law as an indicator of a principle of the legal system. This systematization is further detailed in sections 2.3.4 and 2.3.9.

[385] M. REALE, *Estrutura normativa da lei n. 6.729 sobre concessões comerciais entre produtores e distribuidores de veículos automotores,* cit., p. 65 emphasizes some interests protected in the aforementioned special legislation. According to the author, it conveys relevant objectives from individual and collective interests, justice, and the balance between the rights and interests of both groups involved in the regulated economic relationship.

[386] Orlando MERLUZZI, *Rede de Concessionárias, Setor Automotivo, Tendências, Montadoras: Hora de repensar o modelo de distribuição de veículos no Brasil*, in https://oleodieselnaveia.com/2018/06/10/montadoras-hora-de-repensar-o-modelo-de-distribuicao-de-veiculos-no-brasil/ (2018).

[387] Herculano PASSOS, *O setor da distribuição de veículos a serviço da mobilidade,* in http://herculanopassos.com.br/site/wp-content/uploads/2016/02/cartilha_Frente_DistribuicaoVeiculosAutomotores_Mobilidade.pdf (2015). In European law, Regulation CE 1400/2002, no longer in force, determined some limitations to contractual termination. This rule was viewed as a protection of the weaker party. However, for legislators, this norm was to protect competition dynamism, not the party. According to Philipp FABBIO, *La disparità di potere economico e abuso di dipendenza economica, cit*., this last view would preferable. Although praiseworthy, this reading would be challenging to apply to Brazilian legislation. There is a consensus that it was created to protect competition, but the weaker party. Moreover, its provisions are difficult to harmonize with some competition principles and rules.

[388] A former congressman, Herculano PASSOS, *O setor da distribuição de veículos a serviço da mobilidade*, cit,. articulated arguments in favor of the manutention of this law. He argues that it stimulated investments, created stability in this sector, and guaranteed transparency and security to customers. He also states that the automobile price, which is substantially higher in comparison with other countries, is not influenced by the distribution system. He then compares Brazilian legislation to that of the United Stated and Europe. The industry lobby would have affected these laws, which made them inadequate for the comparison. Another congressman, Valdir Colatto, in 2017, also presented the same critiques. He intended to reform the law and increase the concessionaire protection (bill No. 8054-A/2017).

to Brazilian car distribution. While the motor vehicle market in Brazil has modernized, the distribution has not adapted to either a globalized or an internet-connected market. One of the reasons for this is old legislation.[389] The law was conceived when there was weak competition, and the assumptions no longer reflect reality. This inaptitude to governing new realities has also generated an increasing quantity of litigation. It has also contributed to high automobile prices because there is a prohibition against commercializing new cars and spare parts other than those of the manufacturers and concessionaires.[390]

Concerning the contractual aspect, distribution agreements may be fixed-term or indefinite-term contracts (Article 21). The law limits the contract duration and, as an indirect consequence, it protects specific investments. If the contract is for an indefinite period, it acquires particular stability; it cannot be dissolved by the will of one of the parties. It can only be terminated in the case of agreement and resolution due to default (Article 22). If the contract has a fixed term, its minimum duration is five years (Article 22, sole paragraph). If, after the deadline, the parties decide to extend the contract, it becomes a contract for an indefinite term (Article 22, sole paragraph).

Depending on the modality of contractual termination, different legal consequences result, with repercussions for the protection of investments. If the manufacturer does not extend a fixed-term contract (of less than five years), he must repurchase the inventory of new vehicles and

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This proposal would make it even more difficult to terminate the contract. It was rejected in the Congress Committee on Economic Development, Industry, Trade and Services. According to it, the congressman's factual assumptions were not accurate.

[389] The doctrine emphasizes that, as a rule, the distributor operating in the automobile market must make hefty investments that are difficult to convert into alternative uses. The inexistence of protection would hamper competitive initiatives (P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 292). This is why the Brazilian legislature decided to limit the parties' autonomy for the duration of the contract.

[390] O Globo, *Governo aponta 'Lei Ferrari' como entrave à redução do preço do carro*, December 2012. This conclusion was reached in the Senate Economic Affairs Committee (CAE). The Deputy Attorney General of the Republic and coordinator of the Third Chamber of Consumer and Economic Order of the Federal Public Ministry, Antonio Carlos Fonseca da Silva, even defended the entire revocation of this law. He listed 10 reasons to revoke it: i) given the influence on "Brazil's cost," the effects of the tax burden and higher production costs would not fully justify the higher prices in the country, according to a Senate study; ii) the risk of cartels; iii) the restriction of competition for spare parts; iv) the reduction of intra-brand competition; v) the reduction of inter-brand competition; vi) the market concentration among the largest automakers, specifically among the four largest automakers (Volkswagen, Fiat, General Motors and Ford), only decreased from 100% to 82% between 1995 and 2010, after the deconcentration occurred in the period, during which 13 new brands entered the market; vii) poor quality and a delay in safety features due to a lack of competitiveness incentives; the quality of vehicles is lower than in industrialized countries (an estimation of about 20 years behind those countries concerning popular models' security); viii) distinct international experience; in Europe, new regulations since 2002 have reduced the incidence of exclusivity in distribution networks, barring manufacturers from having more than 30% of the market; ix) incompatibilities between the law and competition law: the Brazilian competition authority has already addressed representations about the conduct of the economic agents of the automotive sector several times, recognizing the anticompetitive character of the indicated facts; x) difficulties proposing punctual changes.

components at the sales prices offered to the distributors and purchase the equipment, machinery, tools, and facilities at market price. These investment protections require that he had ordered the acquisition or was aware of it in writing, without immediately opposing it in a document. It also excludes the protection of real estate purchased to perform the contract (Article 23). If the contract with an indefinite term is terminated by the manufacturer's default, the obligation is more onerous (Article 24). The stock of vehicles must be repurchased at the sales price offered to the consumer; the producer has to pay damages at the rate of 4% of projected revenues for a period corresponding to the sum of 18 months plus three months for each year of concession; other redress is agreed upon between the manufacturer and its distribution network.

This specific legislation protects the investments in different manners: i) excluding the possibility of the unilateral termination of the contract, ii) determining the repurchase of the specific investments in case of a decision not to renew a fixed-term contract, and iii) determining the damages in case of default by the manufacturer. In cases i) and iii), there is only an indirect protection of investments. The limitation to terminating the relationship to a determined term, as well as the imposition of a minimum term of five years, indirectly protects the investments. The same applies to the flat-rate determination of damages in case of contract default regarding the specific investments. The highest amount in case of default is derived from the verification of sunk costs for investments that become unusable.

The direct protection of investments is registered concerning the hypothesis of the non-renewal of a fixed-term contract. The legislation presupposes that a failure to renew the fixed-term contract, even with its minimum duration of five years, entails damages for the counterparty, especially concerning the investments specifically required.[391] The indication of specific investments to be repurchased in the event of the manufacturer's decision not to renew the contract represents protection specially designed for this type of commercial distribution. Its analogous application to other provisions should not be accepted. This observation does not dismiss the rule

[391] The specific protection of investments in the law of the distribution of motor vehicles removes the requirement to comply with Article 720 of the Brazilian Civil Code, especially with the 90-day notice period. In an opposite view, R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 337 supports this possibility. However, there are several grounds for counterarguments against this position. The application of a provision from an agency agreement to a specific distribution contract is difficult to accept. The legislation on the distribution contract has specific protection of the investments concerning an indefinite-term contract. It imposes greater stability with the hypotheses of its termination being limited. In the event of non-renewal, the law determines the repurchase of specific investments, but also the requirement to send prior notice equal to or greater than 180 days before the end of the contract.

as an indication of the protection of specific investments in the Brazilian legal system (see, especially, section 2.3.9).

2.3.5. Antitrust law and the indirect protection of investments

Law No. 12.539/2011 (antitrust law) established antitrust rules in Brazil.[392] The restrictive practices established in Article 36 of Brazilian law[393] resemble those in community law with more

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[392] In Law No. 12.529/2011, little has changed the rules on anticompetitive practices. It maintained the system created by Law No. 8.884/1994. Its major modifications were limited to administrative changes (restructuration of the Secretariat for Economic Monitoring – SEAE in its acronym in Portuguese, the body of the Ministry of Finance, the increase of the material resources available to the Administrative Council for Economic Defense [CADE] and the increase of its investigative powers) and changes in the calculation of fines for infractions of the economic order.

[393] Art. 36. The acts that, under any circumstance, have as an objective or may have the following effects are considered violations of the economic order, regardless of fault, even if they are not achieved: I - to limit, restrain, or in any way injure free competition or free initiative; II - to control the relevant market of goods or services; III – to arbitrarily increase profits; and IV - to exercise a dominant position abusively. § 1 Achieving dominance in a market by natural process and by being the most efficient economic agent in relation to competitors does not characterize the tort set forth in item II of the *caput* of this article. § 2 A dominant position is assumed when a company or group of companies is able to unilaterally or jointly change market conditions or when it controls 20% or more of the relevant market, provided that such percentage may be modified by Cade for specific sectors of the economy. § 3 The following acts, among others, to the extent to which they conform to the principles set forth in the *caput* of this article and its clauses, characterize violations of the economic order: I – to agree, join, manipulate, or adjust with competitors, in any way: a) the prices of goods or services individually offered; b) the production or sale of a restricted or limited amount of goods or the provision of a limited or restricted number, volume, or frequency of services; c) the division of parts or segments of a potential or current market of goods or services by means of, among others, the distribution of customers, suppliers, regions, or time periods; d) prices, conditions, privileges, or refusal to participate in public bidding; II - to promote, obtain, or influence the adoption of uniform or agreed business practices among competitors; III - to limit or prevent the access of new companies to the market; IV – to create difficulties for the establishment, operation, or development of a competitor company or supplier, acquirer, or financier of goods or services; V – to prevent the access of competitors to sources of input, raw material, equipment, or technology, and distribution channels; VI - to require or grant exclusivity for the dissemination of advertisement in mass media; VII – to use deceitful means to cause oscillation of prices for third parties; VIII - to regulate markets of goods or services by establishing agreements to limit or control the research and technological development, the production of goods or services, or to impair investments for the production of goods or services or their distribution; IX - to impose on the trade of goods or services to distributors, retailers, and representatives, any resale prices, discounts, payment terms, minimum or maximum quantities, profit margin, or any other market conditions related to their business with third parties; X - to discriminate against purchasers or suppliers of goods or services by establishing price differentials or other operating conditions for the sale or provision of services; XI – to refuse the sale of goods or provision of services for payment terms within normal business practice and custom; XII – to hinder or disrupt the continuity or development of business relationships of undetermined term because the other party refuses to abide by unjustifiable or anticompetitive terms and conditions; XIII - to destroy, render useless, or monopolize the raw materials, intermediate, or finished products, as well as to destroy, disable, or impair the operation of equipment to produce, distribute, or transport them; XIV - to monopolize or prevent the exploitation of industrial or intellectual property rights or technology; XV - to sell goods or services unreasonably below the cost price; XVI – to retain goods for production or consumption, except to ensure recovery of production costs; XVII - to partially or totally cease the activities of the company without proven just cause; XVIII - to condition the sale of goods on the acquisition or use of another good or service, or to condition the provision of a service on the acquisition or use of another good or service; and XIX - to abusively exercise or exploit intellectual or industrial property rights, technology, or trademark.

flexibility: collusion, abuse of a dominant position, and market concentration.[394] The reference to specific investments is also relevant in Brazilian antitrust law; it requires the evaluation of the competitive effects of business practices for the configuration of an antitrust act.[395]

As seen before, specific investments represent an essential element for assessing the positive effects of a restriction inserted in a vertical agreement[396] and an abusive practice. Vertical agreements result in a reduction of transaction costs. These agreements may establish restrictive practices for competition with the objective, as doctrine points out, of preventing members of the distributive network from becoming free riders, or of making specific investments to avoid the appropriation of the surplus generated by the counterparty.[397] Brazil's antitrust rules protect specific investments, at least indirectly, by attributing positive effects to vertical integration. The specification of the protection of the investments can occur from the evaluation of the abuse of economic dependence in Brazilian law, which is not governed by a specific provision.

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[394] Article 36 of antitrust law, in characterizing restrictive competition practices, refers *to acts in any form manifested* that could harm competition. Despite its peculiar wording, it envisages the typification of foreign legislation (see P. A. FORGIONI, *Os Fundamentos do Antitruste*, cit., pp. 134 ss.). The author notes that the Brazilian legal system is hybrid. At the same time that it characterizes infractions by object and effects, it typifies them. In the Brazilian case, the illicit antitrust configuration is based on the existence of acts, having as effect or object, typified in Article 36: i) limiting, distorting, or otherwise hindering free competition or free economic liberty; ii) dominating the relevant market of goods or services; iii) arbitrarily increasing profits; and iv) abuse of the dominant position. In addition to this typification, paragraph 3 of the provision exemplifies anti-competitive behavior; however, these are not *per se* unlawful practices. It will always be necessary to examine their anti-competitive effects. According to the author, this systematization would avoid hermeneutic efforts to characterize a particular practice, for example, the need to establish a dominant position in a given market in order to have an abuse of a dominant position. In Europe relevant doctrine that is attentive to the problem conceives of the circumstances of agreement and abuse of the dominant position as a *continuum*. The object of the prohibition is always the exercise of market power, either individual or collective, that is used, or can be used, to achieve anti-competitive purposes. In this regard, cf. M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 270.

[395] Article 36, *caput* of Law No. 12.529/2011.

[396] Considering the characteristics of the Brazilian economy, P. A. FORGIONI, *Os Fundamentos do Antitruste*, cit., pp. 410-1 criticizes the importation of theories developed in other realities to the efficiency of vertical agreements and the disregard of national economic policy and constitutional principles. According to the author, vertical agreements have the potentially harmful effect of closing the market by artificially creating barriers to the entry of new competitors. In the Brazilian context, vertical agreement, especially with the presence of a clause that determines exclusivity, can mean the presence of the company with greater economic power over the new consumers. For this reason, the author points to the need to examine vertical agreements more carefully and, in particular, to exercise caution with American references with a higher tolerance for vertical agreements.

[397] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 378-9.

2.3.5.1. Abuse of economic dependence: the design of the concept in Brazilian law

There is no express, normative provision to prohibit the abuse of economic dependence in Brazilian law.[398] Nonetheless, the absence of a rule has not prevented doctrine from attributing legal relevance to it.[399] Based on an analysis of Brazilian case law, in particular, the evaluation of distribution contracts, P. FORGIONI has claimed its normativity through the application of general clauses of the abuse of right and objective good faith[400] and antitrust rules.[401]

In the proposed analysis, emphasis is given to the requirement to equate the protection of the dependent company without generating a disincentive to system efficiency. In P. FORGIONI'S interpretation, this option would represent a policy aimed at making a pulverized market feasible. In the context of the distribution agreements, the protection of economic dependence would allow the consideration that the protection of the distributor is adequate for preserving legal security and

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[398] The term *abuse of economic dependence* has other meanings within the Brazilian legal context. The doctrine and case law attach lesser importance to the phenomenon, as conceived in German law and transplanted into the Italian and French legal systems. The term might have a sense of subordination in labor law (see M. C. S. OLIVEIRA, *A resignificação [i.e., ressignificação] da dependência econômica*, in Revista dos tribunais, São Paulo, v. 100, n. 914, p. 321-350, dez. 2011) or a weaker contractual position. The elaboration of P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 225 ss. acquires importance in this context. It recognizes the absence of a specific rule in Brazilian legislation capable of protecting the situation, but it indicates rules in the Brazilian legal system that may allow for protection against this abuse. With a more fluid notion of the concept, G. S. DINIZ, *Dependência econômica nos acordos verticais*, in Revista de direito privado, v. 15, n. 59, p. 91-120, jul./set. 2014 also argues for the relevance of the abuse of economic dependence in antitrust law. The author cites examples of decisions of the Brazilian antitrust authority (*Conselho Administrativo de Defesa Econômica*); however, they are closer to other typified practices than to illegal practices resulting from an abuse of economic dependence.

[399] Based on the German doctrine, and, later, the development of the Italian and French doctrines, P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 227-30 indicates that the following economic factors constitute abuse of economic dependence: a) relational power: considered the most critical factor, it is characterized by the presence of a long-term contract and investments made by the counterparty; b) purchase power: the supplier is in a situation of economic subjection to the distributor, the holder of high purchase power; c) dependence on a famous brand (or assortment): the products of the brand are so well known and have such penetration that the distributor cannot fail to offer them to their customers without significant detriment to their competitive ability; d) crisis period: during a crisis, the lack of viable alternatives to the flow of production can put the supplier in a situation of economic dependence on the distributor.

[400] From a contractual perspective, the abuse of economic dependence manifests itself at two principal moments: the first, when the strength of a party leads to highly favorable contractual conditions (whether written or not); the second, in which the abuse appears in the course of a contractual life, either through the imposition of a change to the business conditions or in the breach of the agreement. Cf. P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 267.

[401] In the antitrust field, P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 242 emphasizes that there are situations in which the abuse of economic dependence is harmful not only to distributors, but to the market as a whole, and therefore causes a competitive violation. Therefore, the activity that presupposes that the abuse of economic dependence is solely a contractual problem would not be entirely accurate. The author warns that both phenomena can be mixed in the legal environment. The delimitation of the abuse of economic dependence with relevance to the market proposed by M. LIBERTINI (section 2.2.5.3) promotes a better understanding of this situation, with the possibility of being transplanted to Brazilian law.

would encourage making idiosyncratic investments.[402] This aspect connects the protection established in Article 473 and the abuse of economic dependence.

The repercussion of the abuse of economic dependence in a civil perspective has been shown in the previous sections, especially using objective good faith; however, the boundaries of its antitrust profile are not clear. The prohibition of the abuse of economic dependence can be derived from Brazilian antitrust law. In order to assess an antitrust violation, it does not require that the company causing the damages to well-being is in a dominant position; it suffices that the act causes losses to the market (Article 36, I of Law No. 12.529).[403] As a result, it does not matter whether the act was carried out by an agent with a market dominance or not. This interpretation can be reinforced with the typification in item XII of § 3º of Article 36 of the antitrust law ("XII – to hinder or disrupt the continuity or development of business relationships of undetermined term, because the other party refuses to abide by unjustifiable or anticompetitive terms and conditions").

The characterization of an antitrust offense as an abuse of economic dependence requires an examination of the situations of their possible relevance. Competition is adversely affected when i) the economic agent has a dominant position in the inter-brand market, or ii) the peculiarities of the case can isolate an intra-brand market as an independent.[404] The systematic classification made concerning community law can be applied to Brazilian law (see section 2.2.6). This construction would prevent contractual power, in the case of a hold-up, from becoming a market power.

In case i), the economic agent holds a dominant position in the inter-brand market; it is also possible to characterize the violation concerning the abuse of a dominant position. When acting at another market level, the company can commit an abuse of economic dependence (see situations c) and d) described in section 2.2.5.3).[405] In case ii), the consumer could depend on the particular product, as shown in the U.S. Kodak case.[406] When making specific investments upon the acquisition from a particular producer, consumers would have high costs to change products and would be subjugated to possible changes in the policies in the derived market. The execution of

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[402] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 242.
[403] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 245. In analyzing Brazilian antitrust law, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 321 notes that this concept is exported from European national experiences, in particular, German and French, and taken further by the general clauses of the local antitrust law in Brazilian law.
[404] P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 246-264.
[405] In this case of harm to competition in the intra-brand market and the dominant position in the inter-brand market of the company, it seems challenging to entail a specific investment situation, and therefore it is not subject to further examination.
[406] P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 246-264.

specific investments for the performance of the contract is not always confused with economic dependence, but they serve for the market delimitation in antitrust law.

There is a possibility of configuring economic dependence due to the consumer making specific investments in Brazilian antitrust law. The problem relates not only to consumers; the case also applies to requirements made to a company that operates in the secondary market and is unable to change its activity in the sector. The conclusions reached by the European Commission and the Court of Justice help with this task, especially to prevent this assessment from reducing the relevant market too much and thus generating the selectivity of the activity of the antitrust authority. It is necessary to consider elements that can promote an assessment as to whether a) there is interdependence between the primary market and the secondary market and b) if there are competitive conditions in the secondary market. The EFIM test may fulfill this requirement of specifying the issue in Brazilian law. These considerations also could delimit the notion of the abuse of economic dependence, which, as described in Brazilian doctrine, presents an excessively fluid conception and a greater difficulty of operation.

An arbitrary increase in profits (established as an example of unlawful practice, Article 36, III of Brazilian antitrust law) is also admitted as an antitrust violation. It can relate to the abuse of economic dependence.[407] This rule may sanction the specific abuse of agents against subjects in a position of economic dependence. Arbitrariness would correspond to the increase in counterparty profits without efficiency gains of the system. This interpretation, however, would run counter to the position of certain government authorities that seek to classify the distribution contract only within a private scope with great relevance to the market.[408] This provision also connects Article 473 of the Civil Code, which was established to prevent this modality of an illicit practice, to the proper functioning of the market.

2.3.6. Public concession contracts and the indirect protection of investments

Although it is governed by different principles, Brazilian legislation on the concession and authorization of public service assigns particular importance to specific investments (Law No. 8.987/1995). It establishes a relationship between contract duration and the concession of a public

[407] P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 326 ss.
[408] P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 326 ss.

service preceded by the performance of public works (Article 2, III). In particular, it determines that the execution of the service or work must be governed by a fixed-term contract with a remuneration linked to the amortization of the investments conducted.[409]

Moreover, in establishing transitional provisions, it sought to protect public concessions with a precarious nature that were enacted before this law. They would remain valid upon the new effective date of the legislation for the period necessary to evaluate which are indispensable and organize a public tender to replace them. A subsequent amending law established the continuation of these precarious concessions; however, in the event of its extinction, the concessionaire would be indemnified with respect to investments that have not been amortized by the revenues derived from the concession, according to tax and company law (Article 42). The law circumscribes the indemnity modality in case of the extinction of a precarious public concession; above all, the law establishes the calculation of the amortization of the investments made. Having examined the most relevant provisions concerning specific investments, their systematization in Brazilian law becomes essential to their consistent application.

2.3.7. Provisional Measure of "Economic Freedom"

In 2019, a provisional measure, a temporary law enacted by the executive with the necessary posterior confirmation from Parliament, intended to drastically change Brazilian economic regulation; it aimed to establish an economic bill of rights. Among these modifications, the Brazilian Civil code received some norms destined to regulate business contracts, with possible repercussions for investment protection.

In alignment with the economic approach of the new Brazilian government, this normative act introduced economic rights and guarantees. This measure was named the Provisional Measure of "Economic Freedom." It established rules for the protection of freedom of initiative and the freedom of the exercise of economic activity.[410] The provisional measure also concerned the

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[409] Other provisions determine the relevance of specific investments. Given their minor practical repercussions, they are not addressed in the main text of the thesis. For example, this law establishes that, as collateral for a long-term loan agreement to stimulate making investments, a portion of the future operating credits could be fiducially attributed (Article 28-A).

[410] Some influential legal scholars (Carlos Ari Sundfeld [FGV-SP, coordinator], Eduardo Jordão [FGV-RJ], Egon Bockmann Moreira [UFPR], Floriano Azevedo Marques Neto [USP], Gustavo Binenbojm [UERJ], Jacintho Arruda Câmara [PUC-SP], José Vicente Santos de Mendonça [UERJ] and Marçal Justen Filho [ex-UFPR]) presented a proposal in 2019 to reform economic rules in Brazil. This proposal resulted, with some modifications, in the current

parameters of the public regulation of the economy.[411] These rules regulate the principle of the freedom of initiative, which is established in the Brazilian Constitution.[412]

This new regulation of freedom of initiative has a liberal economic view. Its principles are the presumption of freedom in the exercise of economic activities; the presumption of good faith of the individual; and the subsidiary, minimal, and exceptional intervention of the state on the exercise of economic activities (Article 2). Civil and commercial law must be interpreted accordingly with this new discipline and, especially, with these principles (Article 1, § 1º).

The provisional law also attributes some economic rights to legal entities; in particular, there are some rights related to business contracts.[413] It assigns a presumption of good faith in the acts practiced in the exercise of economic activity. In case of doubts about the interpretation of civil, commercial, and economic law, they are to be solved in a way that preserves the party's autonomy (Art. 3, V).[414] Their independence is also assured in another provision; Article 3, VIII

provisional measure. According to this group, public regulation is an important factor to hinder entrepreneurship, innovation, free competition, and the advancement of productivity.

[411] L. R BARROSO, a Minister of the Constitutional Court, has important academic works about the freedom of initiative and freedom of enterprise. In one of his articles (*Estado e livre iniciativa na experiência constitutional brasileira*), after a historic overview of the Brazilian public administration and the reasons it was unable to provide adequate public services, he stated that the Brazilian Constitution, enacted in 1988, reinforced a public economic model in which the government would directly conduct economic activity. This public option was confronted with some economic and ideological changes, especially the State discredit, to conduct economic activity. In his 2014 article, he alerted of the necessity of new state regulation of economic activity. It must be noted that the notion of competitive freedom is understood as the liberty to determine prices. This orientation does take into account some development of this concept in Europe, as explored by M. LIBERTINI.

[412] According to the proposal referred to in section 2.31, freedom of initiative was not regulated, while laws govern other principals inserted in Article 170 of the Constitution. This circumstance highlights the need for this regulation.

[413] Because of its novelty, there is not significant academic discussion about this new normative act. André. LUPI (*Os contratos comerciais na declaração dos direitos de liberdade econômica (MP881/19),* in Revista Brasileira de Políticas Públicas, v. 9, n. 1, 2019) has a positive view of the new legislation. He argues that has this liberal approach is essential to the Brazilian economy. He affirms that this law was also based on doctrinal and economic studies. F. TARTUCE (*A Medida Provisória da "Liberdade Econômica" e a Desconsideração da Personalidade Jurídica (Art. 50, CC): Primeiras Impressões*, in http://genjuridico.com.br/2019/05/06/a-medida-provisoria-da-liberdade-economica-e-a-desconsideracao-da-personalidade-juridica-art-50-cc-primeiras-impressoes/) also praises the modifications of the new economic bill of rights. On the other hand, there are some methodological and practical critiques concerning the alterations in the civil code. For example, A. SCHREIBER, (*Alterações da MP 881 ao Código Civil – Parte I*, in http://www.cartaforense.com.br/conteudo/colunas/alteracoes-da-mp-881-ao-codigo-civil---parte-i/18342) states that the alteration in Article 421 would prevent the application of contractual principals to the contract. He also argues that some modification in the Civil Code would not transform the current legislation because it has no utility. G. TEPEDINO (*Editorial*, in Revista Brasileira de Direito Civil, v. 20, n. 2, 2019) also criticizes these changes as confusing, not technical, and unnecessary.

[414] In the presentation of the normative act, the Ministry of Economy (*available in http://www.economia.gov.br/noticias/2019/04/mp-da-liberdade-economica-reduz-intervencao-do-estado-nas-atividades-economicas*) pointed out that the objectives of this provision are to avoid judicial decisions that disregard contractual terms and that utilize an analogous legal application. It explained the adoption as an application to franchise contracts of a law inserted in a protective law of commercial representation. These two objectives could create a more secure commercial environment. However, the determination of a subsidiary law interpretation cannot transform the

describes the respect of contractual terms and the application of subsidiary law. This subsidiary application occurs except to protect the public administration's rights or third parties outside of the contract. Legal entities may also benefit from some guarantees of economic freedom. These guarantees are directed towards preventing public regulation from limiting the freedom of enterprise (Article 4).

Some provisions were also introduced in the Civil Code regarding business contracts. Article 421 has substantially changed.[415] It had established that contract freedom should be exercised according to the contract social function. The new regulation added that it should also observe an economic bill of rights, especially the minimal intervention of public regulation. It established the principle of intervention in the contract as an exception, which inserts a contradictory rule into the same provision. Moreover, the contract interpretation in case of doubt should benefit the party who did not elaborate its terms (a *conra proferentem* rule) (Article 423). Article 480-A and Article 480-B also established rules directed at business contracts. The party can freely stipulate the parameters of their interpretation and the judicial revision. In these contractual relationships, one must presume the party's symmetries and respect the party's risk allocation (Article 480-B).[416] These modifications have received some harsh criticisms. Other than the methodological and ideological critics, there is an understanding that the modifications in the civil code did not transform business contracts. There would already be a presumption of power symmetry; the parties can determine the contractual interpretation, and they can allocate the risks.

The new regulation of the freedom of initiative could influence investment protection in two significant ways: the allocation of the contractual risk and the possibility to safeguard investments and interpretation of the provisions mentioned in this chapter. One of the main goals of this regulation was to guarantee the agreement terms, especially in business contracts. Brazilian case law is not known for respecting contractual agreements, which causes economic insecurities. This provision does not *per se* exclude investment protection in case of the regulation of the relationship termination. The contracting party might not have the same contractual power in spite

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legal theory. Article 4 of Law-Decree No. 4657/1946, altered by Law No. 12.376/2010, prescribes the legal analogy in case of law omission. It can criticize an unappropriated law application and not the bases of legal theory.

[415] The previous wording was, "The freedom to contract shall be exercised by virtue, and within the limits, of the social function of contracts".

[416] According to A. LUPI (*Os contratos comerciais na declaração dos direitos de liberdade econômica (MP881/19), cit.*), this presumption could not apply. In franchising agreements, there is power asymmetry between the contracting parties, which should be considered.

of the new presumption. As Chapter III demonstrates, there are limits to party's regulation. There is specific protection derived from norms related to the social solidarity principle (abuse of right and good faith). The termination of the contract, although regulated in the agreement, cannot be abrupt or abusive. This termination could even be considered an extraordinary risk; then, it could not accept protection-specific investments.

The more delicate issue is the interpretation of civil and commercial law in light of the new discipline. It imposes some difficulties concerning the legal interpretation outlined in this chapter (especially Article 3, V of the Provisional Measure). Articles 473 and 720 have non-technical and confusing wording, and their literal application poses many problems. To solve them, this thesis suggested a systematic view of this provision, connecting the protection of competition and the principle outlined in the provisional measure. An interpretation without mentioning all the factors presented in the previous sections would make it difficult to apply those rules. Not only would a literal interpretation not inappropriate, but, most importantly, it would generate inefficiency. The non-protection of specific investments produced adverse effects on efficiency, especially for dynamic competition. As pointed out before, primarily in Chapter I, the protection of investments is required for their implementation in a contractual relationship. A socially optimal level of investments can be achieved only with this protection. In this case, the law of subsidiary application would create an adverse effect. Economic reasons impose the appropriate protection of investments; otherwise, the new regulation would generate the same problem it meant to solve. New rules in commercial law are not limited to the Provisional Measure of Economic Freedom; rather, all of Brazilian Commercial law might change with a new commercial bill.

2.3.8. Old ideas and the new commercial code bill

The work to systematize the rules governing specific investments would not be effective when the new commercial code bill becomes effective,[417] which the parliament can vote on this

[417] The news article (O Globo, *Projetos para novo Código Comercial causam polêmica*), from February 2018, stated that two projects are currently being processed in the Parliament, both of which have the same essence. After the respective legislative processes, they will be unified. Their new versions were presented in 2016 after suggestions made during the parliamentary debate. In order to facilitate a debate about it, the bills are referred to in the singular.

year.[418] Drawing on the Italian law as an essential inspiration, Brazilian law unified civil and commercial law with the Civil Code of 2002.[419-420] The bill, drafted in 2011, surprised the academic community. After the initial repercussions, and with the production of numerous works on the subject,[421] discussion of it still seems to be the object of controversy. Many difficulties with accepting it remain, either due to the vigorous reaction against the technical content of the bill[422] or because of the institutional instability of the current Brazilian political climate, which is not disposed to discuss a bill with such repercussions.[423]

This bill presents a radical understanding of the protection of specific investments. According to it, specific investments would not be protected, thus disregarding the economic literature that underpins its protection. In opposition to the current legal system, the bill has a

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[418] In a news article in a critical Brazilian newspaper (*Projetos para novo Código Comercial causam polêmica*), of February of 2018, it was affirmed that the bill could have been voted on in the months following the publication of the news.

[419] Augusto Teixeira de FREITAS and the Italian Civil code were the main inspirations for the change in Brazilian law in 2002. With reason, G. B. PORTALE (*Dal codice civile del 1942 alle (ri)codificazioni: la ricerca di un nuovo diritto commerciale*, in *Rivista del Diritto Commerciale e del diritto generale delle Obligazioni,* n. 1, 2019, p. 89) criticizes the understanding of a complete unification between the civil and the commercial code. Although the position of M. REALE is in favor of accepting the complete unification of these codes, the Italian author points out that there is no continuity between the business book (*diritto dell'impresa*) and other sections of the code. There was only a formal unification of the code.

[420] According to Valor Econômico, *Novo Código Comercial ganha força com governo Bolsonaro,* 2019, as of today, some commissions in the Senate have approved this bill. It still needs to be voted on by the Senate and the House of Representatives. The Brazilian President has shown interest in this agreement and plans to stimulate a fast approval of this project.

[421] With the presentation of the bill, some doctrinal works were published with the purpose of discussing it. The following monographic works on the matter should be highlighted: *Fundamentos e tramitação do projeto de Código Comercial,* of Fábio Ulhoa Coelho (2016); *Novas reflexões sobre o projeto de Código comercial,* coordinated by Fábio Ulhoa Coelho, Tiago Asfor Rocha Lima e Marcelo Guedes Nunes (2015); *Os desafios do direito comercial: com anotações ao projeto de Código comercial,* of Fábio Ulhoa Coelho; *Reflexões sobre o projeto de Código comercial,* coordinated by Fábio Ulhoa Coelho, Tiago Asfor Rocha Lima e Marcelo Guedes Nunes (2013); and *Princípios do direito commercial: anotações ao projeto de código comercial,* Fábio Ulhoa Coelho (2012).

[422] The doctrine presents several arguments against the bill: i) the inadequacy of the moment; ii) the need for prior discussion regarding the introduction of a commercial bill; iii) the need to not introduce novelties detached from the demands or resulting from practices that are not appropriate for business relations; iv) the subordination of the importance of commercial practices (*usi commerciali*); v) the excessive protection of the weaker party in the commercial relationship (see Haroldo Malheiros Duclerc Verçosa e Rachel Sztajn, *Novo Código Comercial: os empresários vão pagar essa conta;* from same authors, *Projetos de Código de Direito Comercial: não lemos e não gostamos!*, *Professores da USP rechaçam projeto de Código Comercial*). The news quoted in footnote 418 reported that both experts and economic operators see the bill as a source of legal uncertainty that creates more bureaucracy for business. The lack of transparency in its discussion is also criticized. The high cost of adaptation of the market is worth noting: in a study carried out in 2014, without considering the changes promoted later, the new law would cause an impact of 180 billion reais (approximately €40 billion). There are also some relevant opinions in favor of this bill: Arnoldo WALD, *Novo Código Comercial será importante para o desenvolvimento econômico,* in https://www.conjur.com.br/2018-dez-14/wald-codigo-comercial-importante-desenvolvimento.

[423] It is worth remembering that Brazilian legislative history does not require a proper legal discussion for the adoption of complex legislation, such as a code. The Brazilian Civil Code was approved without much legal discussion in 2002 based on a bill drafted in the 1970s.

provision that allows the termination of an indefinite-term contract indefinitely that would not entail the payment of any indemnity. This compensation should not occur in cases of investments that have not yet been recovered (Articles 285 and 286).[424] The indemnification could only occur with a breach of contract. These provisions would have the purpose of eliminating the application of Article 473 of the Civil Code. The impossibility of compensation for investments is also reiterated concerning some contractual types, as in the supply and collaboration agreement.[425] It also includes mention of the investment as an example of parasitic behavior (art. 93).

2.3.9. The systematization of the protection of specific investments in Brazilian law

Investment protection in Brazilian law requires a systematic coordination of the provisions. This task aims to determine their interactions and the scope of the application of each. The provisions relating to specific investments are dispersed in the legal system in different legal sectors, which requires their systematization to the greatest extent possible. Brazilian legislation and Italian law consider specific investments in two ways: as an act capable of increasing the value of the relationship within which it is made and, therefore, with favorable economic effects; and as an object of protection at the end of the contractual relationship, in the event of the relationship's premature extinction.

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[424] Article 285. The contract without a term of effectiveness or for an indefinite period may be unilaterally terminated at any time, irrespective of the reasons, observing, if there are any, the other conditions of the law or instrument. In its original wording: "O contrato sem prazo ou por prazo indeterminado pode ser resilido unilateralmente a qualquer tempo, independentemente de motivação, observadas, se houver, as demais condições da lei ou do instrumento."
Article 286. Unless otherwise agreed by the parties, if the contract with no specific term or for an indeterminate term is terminated by one of the parties, the other party may not claim indemnification for terminating the relationship, even if sufficient time for the recovery of investments made or profit-making has not elapsed, unless it proves the fault of the benefited party. In its original wording: "Resilido o contrato sem prazo ou por prazo indeterminado por uma das partes, a outra não poderá reclamar indenização pela cessação do vínculo, ainda que não tenha transcorrido tempo suficiente para a recuperação de investimentos feitos ou obtenção de lucro."

[425] Article 311. Supply is the business contract by which the parties agree on one or more clauses of a succession of commercial contracts that they wish to enter into. Sole paragraph. The investments of the entrepreneur in his company that are necessary for the performance of the contractual obligations or in the expectation of the return that he estimates to have due to the supply are made at his sole risk. In the original wording of the sole paragraph: "Os investimentos do empresário em sua empresa, na expectativa do retorno que estima ter em razão do fornecimento, são feitos por seu exclusivo risco."
Article 315. Unless otherwise provided by this Code or by law, upon termination of the collaboration agreement without fault of the supplier, the associate is not entitled to any compensation for investments made in order to perform his contractual obligations. In the original wording: "Salvo disposição em contrário neste Código, na rescisão do contrato sem culpa do fornecedor, o colaborador não tem direito a nenhum ressarcimento pelos investimentos feitos com vistas ao cumprimento de suas obrigações contratuais."

In the first case, antitrust law considers specific investments as a positive element in the assessment of a restriction of competition in a vertical agreement. The evaluation of these effects by the European Commission, contained in the guidelines on vertical restraints (2010/C 130/01), can be considered *mutatis mutandis* in their assessment in Brazilian law. The configuration of the abuse of economic dependence also benefits from evaluating specific investments, which, when appropriated by the counterparty to the distributor, may set up a competitive constraint subject to antitrust rules. Investments would also have relevance in delimitating the configuration of secondary markets. Even if there is not an antitrust violation, there would be a requirement to examine the question for the proper functioning of the market. It also corresponds to the point of contact of this modality of protection of the investments and their protection at the end of the relationship.

This direct investment protection at the end of the relationship requires its systematization in the Brazilian legal system. The evaluation of the arbitrary interruption of the commercial relationship, in which specific investments are made, occurs through the general clauses of the abuse of right and objective good faith. They are applied as a requirement to grant a prior notice period to allow the reconversion of business activity and to compensate for specific contractual investments. Article 473, which is also intended to affect contractual relations for an indefinite term, completes this protection. It has the function of protecting the party that makes investments, generally in a situation of economic dependence concerning its counterparty. Its role is complementary to the objective good faith and the prohibition of the abuse of right. It must not only repeat the rule derived from the general clauses mentioned above.

Objective good faith and the abuse of right can be used interchangeably in evaluating the termination of a contractual relationship. These general clauses would also serve as an instrument to coordinate the application of Article 473. This provision generates three consequences in the legal system: legal permission to protect the situation through a specific remedy (*rimedio specifico*), the requirement of a more extended period of prior notice, and the application of its protection to other temporal modalities of the contractual relationship. The prohibition of the abuse of right and good faith does not establish the remedy to be adopted in case of its violation; however, the compensation remedy is typically adopted. Article 473 establishes a novelty by permitting the suspension of the effects of the withdrawal from an indefinite-term contract. The situation protected by Article 473 is unique: premature termination of the relationship causes severe damages to the

counterparty and may even constitute a competitive constraint. It can discourage investments at the socially optimal level, and the distribution channels might be frozen. Hence, the modality of protection is not typical in Brazilian law: an imposition to continuate the bond, even with the counterparty's decision to withdraw from the contract.

Article 473 should not be interpreted literally. The legal and automatic suspension of the termination of a contract with specific investments is not systematically adequate, nor does it represent the best way to safeguard specific investments. It would cause severe competitive damages with the immobilization of distribution channels, and it does not represent the protection envisaged by the introduction of the norm of the Civil Code. The systematic protection of specific investments in the code requires the examination of this provision with Article 720. While governing the agency contract, this last rule requires prior notice and a term for the recovery of investments. As a remedy, the party would not have the imposition of continuing the relationship; rather, it would have compensation and injunction claims. The fact that this provision is intended for the agency contract does not rule out this interpretation, especially with the coordination with the general clauses and as an indication of principle. The legal suspension of the effects of unilateral termination does not represent the appropriate remedy. The continuation of the relationship after termination should require a comparative evaluation of interests that considers the circumstances of the contract. Its aprioristic determination may entail the immobilization of distribution channels and be an indirect consequence of the socially optimal effects, and it would oppose the objective of the rule.

Concerning the application to other temporary modalities of contract, the protection of Article 473 could also be extended to formally fixed-term contracts and cases of the non-renewal of contracts (see section 3.1.1).[426] An analogical application of Article 473 to contractual structures other than the unilateral termination of the contract (*recesso del contratto*) is possible. The automatic renewal of short-term contracts and even the interruption of frequent commercial relationships deserve the same protection. Applied with the general clauses mentioned above, the rule represents the protection of investments, and nothing prevents its incidence to the premature termination of the contractual relationship.

[426] Even without using this reasoning, P. FORGIONI (P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 322) also defends the application of the provision accordingly.

The other consequence of the introduction of Article 473 consists of the need for more extended prior notice. The provision establishes two circumstances that are relevant to granting prior notice with a longer term: the possible configuration of a situation of economic dependency and the making of investments.[427] It is possible they have even been one of the objectives of the provision; a more extended notice period could make the economic redirection of the business and the protection of specific investments highly possible.

Concerning the scope of the application of the norms, Article 473, together with the prohibition of the abuse of right and the principle of objective good faith, would apply to most contracts. The other provisions would apply under the specific contract typified. Article 720 would apply to the agency agreement; the vehicle distribution agreement would have its own set of governing rules.

The law that governs the contract for the distribution of motor vehicles strengthens the need to protect specific investments. The machinery, tooling, and facilities would be specific to the contract; however, the measures adopted are exceptional compared to other provisions. This law also determines the value that should be considered for the investments in the market, which should correspond to the state in which they are found and the need for the producer to determine the investments (the investments ordered by the manufacturer or those it was aware of are to be protected). The written requirement represents an exceptional determination for the protection of this contract. The reacquisition of investments is an exceptional remedy and, therefore, cannot be applied analogously.

Provisions regarding public concession contracts are also a specific set of governing rules, and these rules cannot easily be extended to relationships of private law. There are no specific rules that can be considered an indication of principle. The mention of specific investments is generic and cannot establish the hermeneutics of protecting investments effectively. The link established between the duration of the contract and the specific investments corresponds to a choice based on public interest, and it cannot be applied to the other contractual relationships. The same considerations apply to amortization under corporate and tax rules. This legislative option stems

[427] The comparison can be made with the protection of the relationship against the brutal rupture of the relationship (*rupture brutale des relations commerciales établies* in French law), examined in section 3.2.4. French case law points out several circumstances in the determination of sufficient notice to allow the company to adjust, including the state of economic dependence and the making of specific investments.

precisely from the reduction of the indemnity to be paid by the government; its analogous application to relationships of private law is invalid.

2.4. The consistency of the principle of protecting specific investments

The normative indicators in Italian law, which are outlined in the previous sections, would note the existence of the principle of protecting the specific investment.[428] This principle would guarantee the recovery of investments and would prohibit any hold-up attempts by the counterparty.[429] In a sophisticated construction, its configuration would be based on the elements of antitrust law (indicated in section 2.2.5), the abuse of economic dependence, and Article 3/3 of Law No. 129/2004, which relates to the franchising agreement (section 2.2.3). There would be economic reasons for investment protection: to maximize the usefulness of the contract for both parties, to avoid investment at the sub-optimal level, and to prevent the competitive cooling resulting from the abstention of competitive initiatives by the potential retaliation of the dominant company against the one that made investments.

The Italian legal system includes indicators that allow the construction of the privileged protection of investments, primarily due to the economic reasons described in chapter I of this thesis. It is important to clarify that the principle of protection of investments should, at the same time, be implemented in light of the legal principle of competition in its dynamic aspect.[430] The legal system should encourage making investments because it increases the value of the relationship, leading the competitive dynamic process to flourish and guaranteeing greater activism of the company responsible for the investments. In another perspective, the protection of competition may also prevent overinvestment protection, especially in situations in which the investment would only increase the value of the relationship of the party that makes it. The situation described in section 1.3.4.3.1 of chapter I should be avoided. The same reasoning could also be applied in the Brazilian legal system, especially given the presence, as a general rule, of a provision in the Civil Code that regulates the matter (Article 473).

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[428] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 268 ss. See also G. MORESCHINI, *I contratti pendenti nel concordato preventivo*, cit., pp. 154-160; and R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381.

[429] P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., pp. 168-9.

[430] In Italian Law, about the legal value of competition (*principio giuridico della concorrenza*), see M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, cit., p. 192 ss. The argumentative construction proposed by M. LIBERTINI would allow the detailing of the discipline of the companies acting in the market.

Despite the normative elements indicated and the well-constructed arguments used, the configuration of the principle responsible for protecting investments must not be admitted. There is an identification of the legislation's propensity to recognize specific investments as deserving of protection and even as promoting their recovery (see section 3.4.2.1). However, by defending the existence of this principle, the same risks exist with the defense of the principle of protecting the vulnerable contractor or a super-principle of objective good faith (*super principio di buona fede*).[431]

The formula for the principle of protecting specific investments could only have a declamatory meaning, without deriving from uniform rules from it. In other words, the principle of investment protection would not be able to provide indications of the content of specific rules based on clear teleological choices.[432] The legislation regarding specific investment protection is highly fragmented; it offers different forms of remedy for the protection of investments. There is no uniform direction of its protection from the legislator and no normative indications suitable to shape the content of a principal. The rule that allows the protection of specific investments is the principle of the protection of competition in its dynamic aspect. It would be the compass in Italian legislation, capable of guiding the reading of the norms regarding specific investments.

The principle of protecting investments indicates an empty formula and would be manifested through the tendency to guarantee the recovery of investments.[433] However, the protection of investments does not coincide with the prolongation of the relationship, nor is it possible to construct a specific rule derived from this principle, as it can assume different characteristics depending on the interests involved (e.g., the establishment of a minimum duration of the contract, the reacquisition of the investments, the impossibility of unilateral termination).

The normative data point to different protections aimed at the recovery of investments. The provision in the franchise agreement law in Italian law would guarantee a minimum duration of the contract. The objective determined by the clause of the abuse of economic dependence is different; neither the existence of a minimum duration of the contract nor a reasonable duration can be drawn

[431] Incidentally, in relation to the principle of objective good faith, A. BELFIORE, *La presupposizione*, Torino: G. Giappichelli, 1998, in Il contratto in generale, Trattato di diritto privato, diretto da Mario Bessone, v. 9, tomo 4, p. 30 criticizes the tendency to unify the formulas of propriety and good faith and to combine the rules of objective good faith, and concludes that it would constitute a fundamental principle of the legal system. This stance would indicate only a declamatory formula concerning the principle. It would also reflect the conviction that unitary consideration of provisions could establish a principle and therefore generate rules not specifically applicable to one of the provisions in question.

[432] Concerning one of the definitions of a legal principle, see M. LIBERTINI, *Clausole generali, norme di principio, norme a contenuto indeterminato. Uma proposta di distinzione*, cit., p. 366.

[433] P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., pp. 168-9.

from it. The investments may also represent only a parameter for the proper balance of the retribution for performing the contract (v. g. *contratto di approvvigionamento e affidamento degli impianti di distribuzione di carburanti*) and not represent the guarantee of its recovery. The same holds true for Brazilian law. Considering the impossibility of establishing how this principle would operate and the different modalities of how to protect the investments, it is not possible to extract an autonomous principle of investment protection of the investments.

Chapter 3. The common elements for contractual investment protection in Italian and Brazilian law

The previous chapter addressed the rules that could protect specific investments in Italian and Brazilian law. These norms are structured through different legislative techniques: from general clauses (e.g., objective good faith and the abuse of economic dependence) to regulatory provisions with different degrees of specialty. These provisions also protect investments from different perspectives; they can determine the minimum duration of the contract, the extension of the relationship, the need for prior notice, and the type of compensation. Their heterogeneity imposes their systematization to define the application to the case.

This heterogeneity fragments the rules (see Chapter II). It also constrains the choice to address only the issue of the contractual specific investment protection at the end of long-term contracts, a form of *direct* protection of contractual investments. Although there are specific elements for each of these rules, some factors are common to all. The general clauses (of the abuse of economic dependence and objective good faith) entrust the selection of legally relevant interests for a final judgment of the conduct's lawfulness to the interpreter. On the other hand, the legislator selects these interests in the regulatory provisions. In these specific provisions, he may, for example, define the concept of abuse as unilateral termination in a contract of indefinite duration without enough time for the recovery of investments (see, for example, Article 473 of the Brazilian Civil Code). In the case of the general clauses, this solution has to be constructed by the interpreter (see section 3.4).

Considering this legal complexity, this chapter examines the elements common to them. In turn, it evaluates the peculiarities of some provisions and indicates the available remedies. The common elements of investment protection at the end of the relationship are as follows: 1) the factors that influence the private autonomy and the principle of self-responsibility in assuming contractual risks and their interference in investment recovery (section 3.1); 2) the protected interest regarding the making of specific investments (section 3.2); 3) the type of protected investments (section 3.3); and 4) the configuration of an abusive act (section 3.4). These factors establish the destiny of the investments made in a contractual relationship that has ceased prematurely and cannot be reassessed in an alternative way.[434]

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[434] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 786-7 lists the elements as those the German doctrine would consider necessary to the liability for the investments

The elements listed above are not watertight, and the evaluation should consider them together. The assumption of risks and the self-responsibility are not only related to the temporal modality of the contract, nor the contractual type. It permeates, for example, the typology of the investments protected, especially whether they were hetero-determined. In another example, unilateral termination arbitrariness represents a factor capable of extrapolating the concept of risks undertaken by the parties. The division proposed aims at a better systematization of these questions.

A problem the last chapter faced was the system location (*localizzazione sistematica*) of the norms able to protect investments. Chapter II demonstrated a preference for a competition protection reading of these provisions in Brazilian and Italian law. The analysis of these elements must be carried out considering the protection of competition in order to stimulate dynamic competition. The protection of competition is an axiological choice that guides the content of lower-level norms. This principle is the factor capable of unifying the common elements of investment protection in Italian and Brazilian law.

3.1. The assumption of risks and the recovery of investments

Economic operations conducted with the presence of specific investments are diverse; this variety does not preclude the formulation of general considerations about the role of the freedom of initiative and private autonomy[435] in the interference of investment protection. Their protection needs to be balanced with the principle of self-responsibility, which is not mentioned in the rules.[436]

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made: i) the producer has determined the investments; ii) that the contract terminates prematurely, not allowing its full amortization; iii) the impossibility of giving them alternative use after the extinction of the bond; and iv) the distributor could rely on the continuity of the relationship.

[435] Reference is made to the concept of business autonomy (*autonomia d'impresa*) as an instrument, not as a value in itself. Business contracts (*contratti d'impresa*) should be understood as agreements with an instrumental relationship with the productive activity and as a functional element of the efficiency of the markets. Their regime should not be similar to civil law contracts. Concerning the reconstruction of the category of business contracts, see the exceptional text of M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., pp. 46-8. The refusal to read autonomy as a value in itself is also shared by Brazilian doctrine. Cf. G. TEPEDINO, *Evolução da autonomia privada e o papel da vontade na atividade contratual*, in Revista do Ministério Público do Estado do Rio de Janeiro, n. 53, p. 141-154, jul./set. 2014.

[436] Cf. section 2.2.1.1.1. The reasons to consider the principle of self-responsibility in the application of the abuse of economic dependence could be extended to other legal instruments. The application of objective good faith and the abuse of right might also take this principle into account.

The application of this principle requires evaluating the regulation of interests in the contract and how the risks are allocated.[437]

The influence of private autonomy helps exclude some notions of investment protection. It cannot be confused with the stabilization of the relationship,[438] nor can it function as "social insurance."[439] This protection cannot lead to a unidirectional view of the issue, which is only destined to prevent the weaker contractual party from suffering the pressures of the producer. The protection either cannot mean preventing the producer from organizing its network in whatever way it deems economically appropriate to the contingencies of the market; there are always two interests concerning this protection that should always be considered.

Likewise, the asymmetry of power in a contractual relationship and economic dependence does not imply an automatic transmission of business risks (*rischio d'impresa*) to the

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[437] Contractual risk in its generalist and civilistic definition refers to contingencies and circumstances that may make it more difficult or impossible to perform the contract, as well as the complex mechanisms that operate on the risk, transferring it from one contracting party to another (see G. ALPA, *Rischio*, in Enciclopedia del diritto, vol. XL, Milano, l989, p. 863). As defined by the author, the contractual risk indicates any future events, whether predicted by the parties or not, that alter the contracting economy. See also E. GABRIELLI, *Il rischio contrattuale*, cit., p. 115. The Italian doctrine (G. ALPA, *Il contratto in generale. Principi e problemi,* Milano: Giuffrè, 2014, p. 174) also employs the concept of risk formulated by E.W. PATTERSON (*The apportionment of business risk through legal provisions* in 24 Colun L. Res. 1924, p. 336), according to whom the following factors should be considered: i) event; ii) cause; iii) uncertainty; iv) damages, and v) impact on contractors. G. ALPA also points out, concerning the concept of contractual risk, that the economic evaluation of the subject on which the risk should fall may differ from that of its legal assessment (G. ALPA, *Il contratto in generale. Principi e problemi,* cit., pp. 174-175). The concept of economic risk can be determined not for normative reasons, but for the social utility attributed to a given topic.

[438] This consequence – the stabilization of the relationship – becomes riskier because of the need to use general clauses in operation to protect specific investments. For example, in Italian law, the abuse of economic dependence makes an injunction claim available to the party that is the victim of abuse. After criticizing as unrealizable the trust conferred by the general clauses on the interpreter to give voice to the pluralism of values, M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., pp. 86-7 states that contractors can allocate contractual risks as they see fit. The author warns that assigning this decision to a third party, through the application of general clauses, without offering a valid parameter of control, may constitute a risky operation. This is an issue inherent in incomplete contracts. The same risk exists in Brazilian law. Article 473, with various undetermined concepts, allows withdrawing in case of the non-recovery of investments.

[439] These are the concerns raised by P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 268 ss. R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 139 also expresses similar worry. For the author, one must prevent the imbalance of the parties from creating a right to the stability of economic relations, with the consequence of immobilization of the dynamic competition. The same finding would have consequences for consumers' choices, which would be deprived of offers on goods and services, and the competition among the companies within and outside the dealer network that it could stimulate. On this last point, see also R. PARDOLESI, *I contratti di distribuzione*, cit., p. 302.

counterparty.[440-441] The investing party also must bear the overall risk of its business and of investments' frustration. There is no guarantee of business profitability, nor is there the possibility of eliminating operational risks and ensuring the recovery of investments. Investment protection cannot become a tool to transmit risks to the counterparty.[442] Although it might not be possible to transmit the entire risk to the counterparty, this conclusion does not imply the impossibility of transmitting the risk of investments' non-recovery under certain circumstances, mainly due to an abusive act.

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[440] A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., pp. 265-6 expresses his concern that the judge would not be in a position to distinguish between the risk autonomously undertaken by the distributor and the risk induced by the producer. A third party could not accurately outline two situations in which the distributor is obligated to invest on behalf of the manufacturer and what it decided to do on its initiative. This impossibility could lead to the protection of the investments and to the removal of the assumption that they autonomously run the business risk (*rischio d'impresa*). One of them would transfer its risk to the other party. The author understands the protection of the weaker party to be a logical solution. Accordingly, it should be assumed that the investment is not the result of the free choice of the contracting party, but is to some extent imposed by the counterparty. The recovery period rule is justified insofar as it is necessary to use the remedy in a situation of contract power imbalance; more precisely, to the hypothesis in which a party has sustained investments under pressure from the counterparty and is unable to recoup them. However, this conclusion runs counter to the justification of investment protection (see section 2.1), which has little to do with protecting the vulnerable contracting party. There are economic reasons that lead to its protection. As asserts P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 149, this premise would end up admitting the principle of substantial contractual justice unrelated to considerations of subjective and objective circumstances, in which the relationship takes shape and in contrast to the freedom of initiative and competition.

[441] In an in-depth study of distribution contracts, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 222 criticizes legal considerations for presuming the existence of an imbalance between the parties based on the asymmetry of the parties' position and for proposing legal corrections to that reality. From the economic point of view, the author argues that the existence of mechanisms of incentive and sanction should be preserved from external interference by allowing the proper balance of the interests of the parties in the distribution agreement.

[442] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 275 ss. In the same regard, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 771 states categorically that a solution that would imply the global transmission to the producer of the risk of frustration of the investments made should not be accepted. This same conclusion is valid even if it is based on the greater vulnerability of the distributor. These reasons also lead to agreeing with the analogy made by F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit. The author argues that the absence of recovery of investments without adequate compensation could mean the imputation of economic risks only to the weaker party and its decision to perform a business activity. This would resort to all contractual agreements between companies in the category of random contracts (*contratto aleatorio*). This reasoning would forget the logic that permeates the regulation of contractual activities of companies. It aims at a division of economic risk between the parties, not its random distribution. Moreover, the weaker party could contribute to the assumption of certain risks, including not recovering the investments.

3.1.1. The party undertaking the risk of not recovering the investments

The protection of investments requires verifying which party has undertaken the risk of their non-recovery. There is no legal provision containing this element, which does not prevent it from being considered.[443] It could be an element of self-induced dependence in case of the abuse economic dependence or the contractual time aspect (e.g., fixed-term or undetermined-term contract). The tension between investment protection and the freedom of economic initiative is expressed in the determination of the risks assumed.

The economic operation is related to concluding a long-term commercial contract, primarily those responsible for outsourcing the production process, which consists of transmitting the obligation to bear the costs related to investments and the risks inherent in the development of the activity to third parties.[444] The party that adheres to the contract does so at its own risk. At the beginning of the relationship, it can calculate the advantages and disadvantages of the agreement. In principle, it should bear the effects of external changes in the market and adverse results from contractual terms. The investing party supports the overall risk of its business and, therefore, the risk of frustrating the investments made.[445] It is even more congruent when the distributor makes the choice to implement investment despite a refusal from the producer or the proposal of another alternative.[446] There is no protection if the distributor does so in order to obtain an exclusivity even if it implements investment to promote the distribution network.[447] There is also no guarantee of profitability for the party. The counterparty cannot be held liable for the impossibility of recovering

[443] The doctrine related to the field of law and economics, in addressing the abuse of economic dependence, also points out the need to evaluate the risk undertaken by the parties in order to apply this rule. Cf. A. RENDA, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky," cit., p. 280 (menciona a noção de *affidamento indebito*).
[444] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 741; and R. PARDOLESI, *I contratti di distribuzione*, cit., p. 333.
[445] Ibid., p. 771-2.
[446] French case law has examined this situation, concluding that the distributor should bear the risks (Court of Cassation, November 9th, 2010).
[447] In other French case law, see Court of Mets, Janvier 16th, 2008.

the value of the investments made. Investments are an essential tool to integrate a distribution network.[448] French law has made this distinction.[449]

The producer does not have responsibility for the loss of the utility of specific contractual investments at the end of the contract. Otherwise, investment protection could lead to the petrification of distribution systems and the safeguarding of inefficient intermediaries. It also disregards the reasons that may lead to the slower or faster recovery of investments.[450] Likewise, the producer cannot become responsible for the profitability and the recovery of investments in a company whose management it does not control.[451] If this were the case, the investing party would be encouraged to engage in opportunistic behaviors, and the investment protection would contradict its assumptions. There is no simplistic solution to attributing the risks inherent in investing in a contractual relationship. The producer does not undertake the risk of the counterparty. In principle, the latter might not be responsible for their frustrations, but some factors can interfere with their recovery and the risk assumption initially established.

3.1.2. Contractual clauses to protect investments

The investing party in a contractual relationship should bear the risk of its non-recovery. Due to this reality, it can take precautions to protect investments with adequate contractual coverage. Risk management mechanisms can avoid problems in protecting specific investments.[452] However, this is not an argument to always attribute those risks to the investing party.

The technique of backward induction is not a measure to evaluate the adequate protection of investments.[453] The technique consists of asking the destination of investments in case of their

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[448] Ibid., p. 772. This conclusion does not change even if investments are made because of the contract and their instrumentality in reaching its objective. In F. PINTO's view (F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 772), investments represent an instrument to integrate a distribution network. According to the author, the party at the beginning of the relationship can calculate its advantages and disadvantages. One cannot examine only the end of the relationship without considering the benefits of the contract to the party.

[449] The assessment of Brazilian and Italian law is presented in Chapter IV. French case law has consistently admitted the compensation for the investment loss of utility. See Tribunal de Grande Instance, June 12th, 1992; Court of Cassation, April 5th, 1994. From another perspective, it admitted that the distributor is responsible for its own choices and risks, Court of Paris, December 20th, 1990, Court of Cassation, October 7th, 2007, Court of Paris, October 5th 2004.

[450] Ibid., p. 772.

[451] Ibid., p. 773.

[452] Ibid., p. 741.

[453] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 741 presented the proposition, extracted from U. HANSEN (*Der Investitionsschutz im Vertriebsrecht*, pp. 106 ss.).

premature interruption. A high degree of contractual detailing and predictability of the future cannot be mandatory, nor are they possible. From an economic perspective, the reasons for not protecting specific contractual investments at the time of the contracting were outlined in section 1.3.2. The parties are not usually able to enter into complete contracts and foresee all future eventualities. The costs of discussion and drafting the contract may not justify the inclusion of contractual coverage.

Moreover, the investing party is not usually in a position to impose this risk-sharing. Experience shows that, except for sectoral and particular cases (especially when high investments are required), the contracts do not include specific negotiation mechanisms aimed at protecting against the risk of using unrecovered investments.[454] The option offered to them is between accepting the agreement and not adhering to it.[455] In contracts in which investments are made, one of the leading economic functions is to translate the investment risk to the counterparty; it is not natural to admit a markedly different negotiating arrangement.[456]

For these reasons, the discipline of investments in a contract can be the object of rare intervention.[457] In some cases, in distribution contracts, for example, they limit the establishment of a general obligation for the distributor to make the necessary investments or to equip itself with the means (material and human resources) necessary to enable it to perform an effective distribution and assistance for customers. Investments are an ordinary activity for the company, and it does not

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Accordingly, the party is in a position to protect itself from the non-recovery of investments through the mechanism of backward induction, i.e., the reasoning process in reverse: from the end of a problem or a situation (in this case, the hedge against the risks arising from the investments), a sequence of ideal actions could be programmed to overcome it.

[454] Ibid., p. 741.

[455] Ibid., p. 742.

[456] Ibid., p. 742.

[457] Ibid., p. 742. Research was executed in some contractual agreements available. The American Securities and Exchange Commission (SEC) assesses some agreements to evaluate eventual violation in the financial market. One of these agreements is a distribution contract: "INTERNATIONAL DISTRIBUTION AGREEMENT EXCLUSIVE DISTRIBUTOR WITH MINIMUM PURCHASES", between Skullcandy, Inc. and 57 North AB, signed on 13 Novemeber 2006, available in https://www.sec.gov/Archives/edgar/data/1423542/000119312511017025/dex1025.htm. In its terms, there is no general obligation of investment by the distributor. Similarly, there is only mention of investments concerning the percentage of revenues in advertising, which should not be confused with specific investments. In another distribution agreement also made available by the SEC ("EXCLUSIVE DISTRIBUTOR AGREEMENT," between Laser Shot, Inc. and Lamperd Less Lethal, Inc, signed on 30 September 2005, available in https://www.sec.gov/Archives/edgar/data/1169394/000108503705001442/laseragt.htm), there is only a limitation clause in the event of termination of the contract due to the investments made.

merit further detail. An exception to this perception is franchise agreements; the business uniformity franchises pursue requires a detailed description of the investments.[458-459]

Usually, although there are no contractual terms to directly protect investments, there are modalities of clauses that might have a function in protecting them. The spectrum of possibilities is broad. The primary modality to determine their recovery is through expressly contractual terms. This discipline could have the consequence of excluding legal investment protection. The following systematization intends to indicate how the parties can mold their interests over investment protection.

> 1) The contract may expressly set forth the sharing of costs and risks associated with investments. The agreement may have a clause that disciplines the amount of investments necessary, the party's responsibility for their recovery, and parameters for their amortization. This possibility is rare.[460] With the decision of the manufacturer to outsource production, it is not in its interest to take risks that arise from implementing specific contractual investments and their recovery.
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> 2) There might also be clauses that do not detail all aspects relating to investment recovery.[461] They are partial mechanisms to regulate investments:
> i) producers might finance the acquisition of investments; this clause would exclude the financial risk of investment recovery;
> ii) costs and expenses are shared between the parties;

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[458] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 741-2. In this regard, Italian and Brazilian law on franchise agreement establishes the need to indicate the amount necessary for the investment in the contract.

[459] The American SEC also makes a franchise agreement available ("ROCKY MOUNTAIN CHOCOLATE FACTORY FRANCHISE AGREEMENT," available https://www.sec.gov/Archives/edgar/data/785815/000095013405013229/d26962exv10w4.htm). The agreement has no disciplinary obligation of the investments. However, several obligations are attributed to the franchisee, consisting of specific investments (location determination for the exercise of the activity, entry fee, employee training, consumer assistance, advertising, and submission to quality control).

[460] Ibid., p. 74.

[461] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 759 notes that, in Germany, the exclusion of the risks inherent in investments is excluded; it would be permissible only to reduce the value of an eventual liability.

iii) the counterparty's obligation to repurchase the specific equipment; this is a form of hostages to promote optimal investment in the contract.[462]

There are different contractual mechanisms to protect investments, and they should be carefully considered. Their presence in a contract is an instrument to avoid legal insecurities related to investment protection. However, these clauses might not automatically rule investments' legal protection. A party might not be in a position to discipline its investments, especially when a clause is substantially disproportionate to the economic operation of the contract. The risk division can be partial and therefore incomplete to exclude legal protection.[463]

3) There are also indirect mechanisms in the contract to protect investments, one of which is a contractual term. Investment protection is usually entrusted to this mechanism.[464] It is a decision on the intensity and duration of the relationship. Determining an optimal contractual duration involves a balance between the benefits and the potential costs in different scenarios; next, it involves the assessment of numerous variables.[465] The first decision is to establish a contract with a fixed-term and an indefinite-term. A fixed-term relationship can last for a long time; it also might have a provision intended to govern its renewal. If the parties choose to perform a fixed-term contract, the risk of recovering investments supposes that the recovery will occur throughout its duration. The parties assume that the contractual term is sufficient to recoup the investments. If the deadline proves insufficient for the recovery of the investments, the party can decide not to enter into it; in this case, it should bear the consequences of this choice. However, their agreement might require specific investments and have a short term, which

[462] Ibid., p. 771. This last possibility is also determined in Brazilian law, in the regulation of motor vehicle distribution contracts (Article 23, II). It establishes the re-purchase, by the manufacturer, of the equipment, machinery, tools, and facilities.

[463] The High Court of Ireland assessed an example of this clause. Its decision concerned the controversy of the case O'Leary -v- Volkswagen Group Ireland Limited ([2016] IEHC 773), about the motor vehicle manufacturer's decision to terminate some distribution contracts. Article 27 of the contract stated, "Each of the contracting parties shall bear its corporate risks arising out of this Agreement and the implementation thereof. The Supplier shall, therefore, in particular, not accept any responsibility for expenses incurred by the Dealer in the performance of this Agreement or for commitments entered into by the dealer in pursuing its business." For the court, this clause could not be used to exempt the defendant from a liability for misinformation.

[464] Ibid., p. 771.

[465] Ibid., p. 772.

makes it impossible to recoup them. Short-term contracts are standard in commercial practice.[466] The parties may also enter into a contract with an undetermined term. This modality promotes the self-enforcement of the relationship. The decision to attribute contractual incompleteness regarding its duration allows the enforcement of the obligations (see sections 1.3.4.3.4 and 1.3.4.4). This strategy is susceptible to risk related to an abusive termination. A contract with an undetermined term does not establish the contracts' risk. Since this modality usually allows the contract to be terminated at any moment, the investment recovery and the related parties' risk depend on when it occurs.

4) The parties may also insert clauses aimed at the indirect protection of investments (those mentioned in sections 2.2.5.1 and 2.2.5.2). They could be non-compete clauses, obligations to purchase specified quantities of the product, exclusive customer allocations, or exclusive supply. These clauses create competitive restrictions on vertical agreements, but Regulation EU/330/2010 may exempt them because they prevent the risk of underinvestment. They also allow investments to be recovered more quickly and with less danger of opportunistic behavior occurring. They have to be considered in the protection of investments, but they are unable *per se* to exclude legal investment protection.

3.1.3. Contractual duration and the protection of investments

As the last section noted, the time aspect of the contract in which investments are made is of great importance in determining contractual risks, especially those related to the recovery of investments. The contractual term is a crucial instrument to define contractual risks related to the recovery of investments. The investments to be protected are those carried out under a long-term contract.

The time dimension of the contract has ambivalent considerations.[467] It is an essential aspect of the contractual economy, and the contract duration affects the earning derived from it. At the

[466] Ibid., p. 775.
[467] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 226.

same time, a longer duration can create economic dependence: this is one of the factors to configure this condition. It exposes the party to abusive exploitation.[468-469]

The relationship duration also encompasses another tension between the need to confer stability and the need to make it more flexible. On the one hand, an extended term can give the parties the stability necessary to conduct their performance at a socially optimal level. It assures them that its earnings will be proportional to its investments. On the other hand, a stable contract might not adequately adapt to changes in the economic environment. These modifications, which are inherent in a market-oriented economic, may disturb the balance of the original program.[470] The contractual term is a complex element that determines it.

From another perspective, investments play a relevant role in determining the duration of the contractual bond.[471] There is a correlation between the duration of the relationship and specific investments. Based on empirical economic studies, sections 1.3.3 and 3.2 discussed this finding. The extent of specific investments results in the relationship lasting longer in order to recoup. This correlation occurs in a franchise agreement. Given that a franchisee must make specific investments, such as physical investments and employee training, this element represents the main factor for the agreement of temporal duration.[472-473]

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[468] Regarding the franchise agreement, R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., section 10.3.4, Kindle version argue, based on empirical data, that opportunism at the end of the contract or its non-renewal is not the main reason for terminating the relationship. They claim that if this were the case (with the resumption of the most lucrative franchises), the network would have branches systematically under the control of the franchisor; this is not the case. With these opportunistic behaviors, franchisors would suffer from reputational problems in an economic context in which the decision to adopt franchising is more lucrative than organizing it as a company.

[469] Ibid., p. 228.

[470] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 227.

[471] F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli: Jovene, 1996, p. 13 emphasizes that one of the elements for the calculation of the time duration of economic transactions is the function of the recovery of investments.

[472] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 205-7. The other elements for the duration of the franchise contract would be the uncertainty of the surrounding environment (the companies with less experience in the activity have more doubts about the initial configuration of the franchise agreement and therefore tend to offer shorter contracts to preserve the possibility of changing it); and renegotiation costs (contracts with longer duration have lower contractual renewal costs). The duration of the franchise contracts tends to increase with the rise in the number and variety of units that make up the franchise system. In this regard, see R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, Cambridge: Cambridge University Press, 2010, (section 10.3.4), Kindle version; and J. BRICKLEY; S. MISRA; and R. L. VAN HORN, *Contract Duration: Evidence from Franchising*, The Journal of Law & Economics, vol. 49, no. 1, April 2006, pp. 173-196.

[473] The franchise agreement also serves as a model for the evaluation of the duration of investment contracts. In a survey conducted in 1998 by the International Franchise Association (IFA), it was found that the vast majority of franchising contracts have a different set term of effectiveness. Its duration ranges from five to 30 years. The average duration is 10.3 years, depending on the sector. It was also found that 91% of franchise contracts had a clause including

The relation between contract duration and investment recovery must be specified. In a fixed-term contract, the parties set a deadline for their relationship. A fixed term can also be inferred from contractual circumstances or the purpose sought in the agreement. The parties can count on stability and the certainty of the relationship.[474] This allows them to schedule investments and their recovery over time.[475] The risks involving specific investments are previously known. In principle, this modality excludes the protection of investments. Their protection could only occur when investments are required after contracting because this demand would be a supervening element.[476]

With an opposing technique, an indeterminate-term agreement has *a priori* unknown duration. At the beginning of the relationship, the parties do not know when the effects will come to an end.[477] The parties decide to remain free to withdraw from the relationship at any time.[478] This freedom brings uncertainty concerning contractual investments: neither party is encouraged to invest or to do so at an optimal level.[479] They are in a precarious position, and the application of legal regimes designed to protect them is admissible.

There are also hybrid structures concerning the term of effectiveness. With an undetermined term contract, there might be a clause establishing its minimum duration or a restriction on the termination. Alternatively, a fixed-term contract with conservatory remedies can induce

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their renewal. In this regard, see R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., section 10.3.4, Kindle version.

[474] There are advantages and disadvantages due to the term of effectiveness stipulated in the contract. In a study on the distribution agreements, which may be extended *mutatis mutandis*, to other contracts with investments, see F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 228. The author states that longer-term contracts are more likely to be renegotiated and create a hold-up problem. Contracts with shorter duration reduce the protection of the counterparty, in particular, the recovery of investments, and have higher trading costs, while also inducing more efficient behavior.

[475] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, Giuffrè: Milano, 2012, p. 62. In the fixed-term contract, the party can generally recognize the configuration of the dependency, as well as the possibility of not recovering the investments and avoiding it by directing it to another commercial partner. Cf. P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 148-9.

[476] A fixed-term contract usually assigns the risk of amortization of the investments to the party responsible for its implementation. However, there are circumstances, in particular, the determination of making investments successively to its beginning, that can be protected. P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 147 contends that the dependency may be configured in a contract by the exigency of unforeseen circumstances or circumstances that the parties did not consider for justifiable reasons. The example, although not explicitly concerned with the protection of investments, allows envisioning its protection in the hypothesis that the new investments are not amortized over the life of the contractual relationship. In this regard, see also R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 141.

[477] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 62.

[478] Ibid., p. 62.

[479] Ibid., p. 62.

contractual flexibility according to the changing circumstances.[480] Therefore, the categories of fixed-term and indefinite-term contracts do not encompass all the modalities of relationship duration. With these hybrid structures, the issue does not describe them but indicates the regulation that might be applicable. The law usually only contemplates indefinite-term and fixed-term contracts (e.g., Article 1.539 of the Italian Civil Code, or Article 473 of the Brazilian Civil Code). The following are other hybrid schemes and the suggestion of adopting a corresponding regime in case of termination.[481]

> 1) A fixed-term contract with the possibility of unilateral termination. The applicable regime would be the contract for an indefinite term.[482]
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> 2) Contracts with a clause of automatic renewal. Business contracts can have a fixed-term (usually of a short duration) and a clause with an automatic extension of the contract for an equal or different period, unless any of the parties oppose it with notice sent in advance. This contract modality could also establish a maximum limit for extensions or renewals. Contracts with an automatic renewal clause constitute a *tertium genus*, an intermediate category between fixed-term and indefinite-term contracts. For this reason, they share characteristics of both modalities. This clause represents a substantial advantage because it helps forecast and organize the phases of a long relationship in advance. It also gives minimum stability that is comparable to a fixed-term contract. At the same time, it allows flexibility in the relationship since there is the possibility to terminate it at scheduled intervals. These characteristics make it difficult to associate it with a regime of an undetermined or fixed-term contract. When considering contract termination and investment

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[480] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 228-9.

[481] The central applicable norms for the protection of investments – the prohibition of abuse of dependence, good faith, and the abuse of right – do not require a specific contractual structure for its application. Article 9 of Law No. 192/1998, in Italian law, typifies *the arbitrary interruption of the relation* as a hypothesis of abuse, which may encompass hybrid figures. On the other hand, there are special rules that, by making use of the term *fattispecie*, govern a specific contractual structure. In this case, the analysis of these hybrid figures serves as an instrument for the analogical application of these rules.

[482] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 229.

protection, its regime would be of an indeterminate-term contract.[483] Although it has a degree of predictability, the investing party might know when the contract will end, especially if the investments require more time to recoup.

3) A chain of contracts. This results from the parties' reiterated agreement. The successive contracts bound together, and they are materially identical but formally distinct.[484] What distinguishes it from the previous structures is that there is no extension if the parties mutually do not want one. The subsequent contract requires an agreement of both parties each time the previous one reaches the end. There is a risk that a chain contract might be used to defraud a regime of unilateral termination, and the regime of indefinite-term might apply if the contract repetition occurs over an extended period. The overall relationship might be an indefinite-term event if shorter agreements create it.[485] A chain of contracts usually arises due to the execution of a framework agreement (*contratto quadro*). A framework agreement usually does not oblige the parties to conclude future execution contracts. In case they decide to so, its contents would be previously determined.[486] As Chapter IV discusses, a reduction or a refusal to continue the relationship may constitute the termination of the relationship.[487]

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[483] Ibid., pp. 275-282. The author adds that, in German law, contracts with an automatic extension clause are classified as a contract of indefinite duration.
[484] Concerning the franchise agreement, there is a tendency to renew the contract with a renewal clause. In a USDOC-sponsored survey in 1988, 93% of franchising contracts (out of a total of 12,999 contracts) were renewed. The ratio of non-renewed contracts is subdivided into three groups: i) one-third resulted from the franchisee's decision, ii) one-third by agreement, and iii) one-third by a decision of the franchisor. See R. BLAIR; F. LAFONTAINE, *The Economics of Franchising*, cit., section 10.3.4, Kindle version.
[485] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 289. In Italian law, when examining the application of the discipline of the unilateral termination of the agency contract, established in Article 1.750 of the Civil Code, the case law considers that this provision cannot be extended to contracts for a fixed term. It states that it would be necessary to prove the succession of contracts and imperative law defraudation in order to avoid the application of this provision (see Cass. Civil No. 3595/2011).
[486] Despite this consideration, there is resistance from the jurisprudence when examining this structure in applying some protective norms. For example, when analyzing a case of the abuse of economic dependence (Trib. Bari, 17 maggio 2005), the court did not apply this rule because the relationship examined was not composed of a relation of duration, but of successive contracts. At the end of the relationship, the execution contracts were no longer stipulated.
[487] In a favorable sense, see Caso Diesel (Trib. Catania, Sez. Dist. Bronte, 9 luglio 2009; Trib. Bassano del Grappa, 09 febbraio 2010). For R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., pp. 139-140, the first jurisprudential pronouncements about the abuse of dependence (Trib. Bari, 6 maggio 2002 and 2 luglio 2002) indicate that the interruption of the relationship can occur with the refusal of the deal. Cf. also C. OSTI, *Primo affondo dell'abuso di dipendenza economica, Nota a ord. Trib. Bari 6 maggio 2002*, in Il Foro italiano, 2002.

4) Contract with a trial period clause. This modality of relationship has the regime of fixed-term contracts if the parties decide to constitute a definitive relationship.[488]

The qualification of an agreement as fixed-term, indefinite-term, or a hybrid scheme has repercussions for the applicable regime and the recovery of investments. It represents an important decision concerning the allocation of risks in the contract. The next section addresses the factors, including the contract duration, that affect the recovery of investments.

3.1.4. Factors impacting the risk of the non-recovery of investments

The previous sections addressed the elements to consider when evaluating investment protection and its relationship with assumptions of risk. The investing party should bear the risks of not recouping them. In order to avoid this, the contractor might stipulate a clause to expressly govern their regime. Other contractual mechanisms can also affect the risk of not recovering investments; contractual duration is of them.[489] The temporal element is necessary to apply for investment protection, but it is not enough to determine the assumption of this risk, and other elements should also be considered. These indicators can rule out this protection or reinforce it. The assessment of the assumption of the risks involving the implementation of the investments must be made at two moments: a) at the beginning of the contractual relationship and b) at the moment the abusive act is performed.

a) Factors impacting the risks of the non-recovery of investments at the beginning of the contractual relationship

[488] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 282-288.
[489] A fixed-term agreement excludes legal investment protection. The parties know the duration of the relationship in advance and the time necessary to recover the investments. The party assumed the risk related to the incapacity of the contract to recoup them. In fixed-term contracts, the risks of non-recovery of investments are attributed to the party making them. It knows at the beginning of the relationship the value of the investments and the period it will have to amortize them. In this case, the contracting party must perform the calculation to evaluate if the term is enough to recover investments, as well as to generate the profit derived from the activity of the company. The same conclusion does not apply to indefinite-term and hybrid schemes (see section 3.1.3). In an indefinite term contract, the party makes investments without undertaking the risk of the impossibility of recovering them before the end of the contractual relationship. The same analysis can extend the protection to hybrid schemes, such as chain contracts, or agreements with an automatic renewal clause.

At the outset of the relationship, there are elements concerning the assumption of the risk of not recovering the investments. These elements can *remove* their protection, and they are usually are related to the contractual terms and how the party's private autonomy might influence investments to recoup.[490] The following factors are indicators of this risk acceptance that rule out legal protection:[491]

i) A contractual term sufficient for the recovery of investments.

ii) A change of the contractual economic scope in such a way as to hinder the recovery of investments.

iii) A clause governing specific investment. A contractual clause setting out the prior notice period may not be enough to configure the risk of non-recovery of investments.[492]

iv) A risk that could be recognized and avoided, especially in relationships of a similar level of contractual power.[493]

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[490] This assessment can be highly complicated, mainly because there is no clause that governs expressly specific investments. In this regard, doctrine emphasizes the difficulty in the *a posteriori* reconstruction of the history of the contract and the intention of the parties (cf. T. Ascarelli, *Certezza del diritto e autonomia delle parti*, in *Problemi* giuridici, I, p. 136; and M. BESSONE, *Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, Milano: A. Giuffrè, p. 293).

[491] Some of these indicia were adapted from the work of P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 141 regarding self-induced dependence.

[492] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 16 provides this perspective of analysis when addressing the control exercised by objective good faith. He states that there would be a significant change in the choices made by the parties at the time of contract formation and exercise of the right. In doctrine, see also A. GENTILI, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Responsabilità civile e previdenza, 2010, fasc. 2, p. 357 ss.; G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in I Contratti, 2010, pp. 11-23, M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 329; and C. SCOGNAMIGLIO, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto,* cit., pp. 807 ss. To corroborate this possibility, mention is made of two decisions that were annulled by the Court of Cassation for not having carried out the control of the unilateral termination based on a contractual clause. See "Sieni-Credit Swiss": Cass. 14 luglio 2000, n. 9321; and Cass. 2 aprile 2005, n. 6923, in Dir. prat. soc., 2005, 21, p. 54.

[493] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 146 narrates a legal case that illustrates an example of the acceptance of that risk. The case is called the "case of bottles" (or *Flaschenkästen*). A company, Alpha, that designs and markets bottles for drinks and the corresponding boxes entrusted other companies with the production of these elements. In order to allow the production of a new product, the company turned to Beta and offered to bear the necessary expenses for the adaptation of its facilities for the new production. However, after a few months, Beta terminated the contract, forcing Alpha to look for another producer, which would take at least three months to adapt its facilities. The protection was denied to Alpha for not having taken the necessary caution in negotiating a term of prior notice for the unilateral termination of the contract.

Other indicators facilitate the assessment of risk assumption. They do not have the consequence of excluding protection, but they can lead to it, along with other elements:

i) A clause assuming the duration of the investments for a period necessary for their recovery and, therefore, presuming to remove the risk assumption.

ii) A clause of indirect protection of investments, such as an exclusivity clause in a given territory, acquisition of specific quantities of the product, exclusive allocation of customers, or exclusive supply when the investment is made. They are intended to allow the recovery of investments in vertical agreements and are authorized, despite promoting restrictions on competition, by the European Commission guidelines to Regulation EU/330/2010.

iii) Civil law doctrine proposes elements to evaluate the assumption of risks. It mentions two factors, the qualification as a contractual type[494] and the interpretation of its obscure clauses and their integration. An instrument of this evaluation is the interpretation based on uses.[495] Both techniques show the underlying economic transaction, and they identify the obligations and risks of each contractor.[496] These elements can construct a framework of interests that make up the contracting economy.[497-498] Based on these

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[494] The contractual type constitutes an abstract risk distribution model and, therefore, the choice of type suggests criteria according to which the contractors repair the damages caused by supervening events (M. BESSONE, *Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., p. 291).

[495] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 65. The interpretation according to the uses can be extracted directly, without the need for more complex construction, of Article 113 of the Brazilian Civil Code.

[496] M. BESSONE, *Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., p. 326.

[497] A. BELFIORE, *La presupposizione*, cit., p. 2-3.

[498] M. BESSONE (*Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., p. 285 ss.) emphasizes circumstances that are likely to disturb the contractual performance and are more numerous and more delicate than one might suppose. In order to determine the risks to each of the contractors, it is necessary to address issues related to the qualification of the contract, the interpretation of the obscure clauses, and the integration of its content. Moreover, it would not always be easy to distinguish between i) situations existing at the time of the consensus and later events, and ii) the causality of an event as a result of contracting party activities or as the effect of other factors. Although the author has formulated these elements based on a specific study intended to evaluate the compatibility between certain circumstances and the performance of the contract, that study can be transplanted for the analysis addressed in this thesis. The author warns that it is not easy to describe these elements without creating a pale imiatation of reality . The issues the author indicates can also be presented from another perspective. The legal system may assign juridical relevance to interests depending on the agreement of the parties or the autonomous assessment of the legislator regarding the merits of such interest. Analogy (*ex* Article 12.2 of the Preliminary Provisions of the Civil Code [*Disciplina preliminare al codice civile*]), fairness, and good faith are presented as three criteria that the legal system assigns to govern the distribution of contractual risks resulting from the contractual terms not setting forth provisions in relation to issues not governed by

elements, the economic balance and the distribution of risks would occur according to the criterion of normality.[499] A risk distribution model, according to this criterion, endorses the consequences of a future event in the most coherent way for contractual economics.[500] This analysis must balance a concrete analysis, and, at the same time, consider what is normal in business traffic.[501]

b) Factors impacting the risks of the non-recovery of investments at the moment the abusive act is performed

Risk assessment is not limited to these factors related to private autonomy and the risks assumed at the beginning of the relationship. One must also consider that, in the words of R. PARDOLESI, private autonomy consists of a weak response when there are distortions of allocation due to the exercise of contractual power.[502] In incomplete contracts, none of the conventional risk management techniques would be innocent or immune from the risk of *ex-post* abuse.[503] Although it is inherent in the contractual relationship, opportunism distorts the parties' choice of high flexibility in the contract. One cannot assume that the contractual risk is the same as the risk of endorsing a counterparty that can impede the recovery of investments. On the other hand, incomplete contract theory cannot lead one to believe that any incompleteness is excusable and

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an accurate provision of law. In particular, objective good faith (in guaranteeing the compliance with the contractual regulation by the operation defined by the parties, see S. RODOTÀ, *Le fonti de integrazione del contrato,* Milano: A. Giuffre, 2004) and equity would allow the parties' performance. Cf. A. BELFIORE, *La presupposizione*, cit., p. 2 ss. A. BELFIORE criticizes M. BESSONE (*La presupposizione,* cit., p. 70 ss.). The arguments adopted relate especially to its unitary address of the figure of the presupposition (*pressuposizione*); it does not affect these observations.

[499] M. BESSONE, *Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., p. 337. According to the author, good faith constitutes an adequate means of controlling the compatibility between circumstances created and the economic balance of the contract.

[500] Although stated within the context of assessing the limit on the default of the parties, M. BESSONE argues that good faith serves to induce the margin of sacrifice up to which the parties must obey (*Criteri di distribuzione del rischio,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., p. 399)

[501] M. BESSONE, *Il ruolo del giudizio di buona fede nella valutazione delle circostanze che turbano i pressuposti dell'iniziativa,* in Mario Bessone, *Adempimento e rischio contrattuale*, cit., pp. 338-9.

[502] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 324.

[503] F. MACARIO, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto,* in Gregorio Gitti e Villa Gianroberto, Il terzo contratto: L'abuso di potere contrattuale, Bologna: Mulino, 2009, pp. 217 ss. Cf. also V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 806-7. A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., pp. 265-266 adds the fear of the judge's ability to discern between the risk autonomously assumed by the party and the risk induced by the party's requirements. Even if a judge could recognize and identify this assumption of risk, he could not accurately trace the discriminatory line between what the party was forced to invest to meet the requirements of the producer and what it decided to risk on its initiative in its interest.

that the investing company always deserves legal protection.[504] The party that puts itself in a situation of dependency or undertakes the risk of not recovering investments made should not be protected. One must seek to determine the efficient level of protection so as to prevent the company from putting itself in a position of dependency and not looking for alternatives.[505]

The opportunism and risk it might endure in the non-recovery of investments demand a new form of analysis. In Italian law, in cases of the abuse of economic dependence, the issue of risk assumption in the agreement is less relevant. In most hypotheses, the abuse could not be determined nor prevented at the beginning of the relationship. The protection of investments imposes evaluation at unilateral termination, which ends the relationship with the non-recovery specific investments to the extent that the doctrine states that the techniques used to assess such abuse, and the contractual risks arising from the supervening event (*evento sopravveniente*), would be diverse.[506]

The requirement of business reasons to avoid qualifying a unilateral termination as arbitrary (see section 3.4) protects the contractual economics initially established. This requirement allows the party that made specific investments to have the continuity of the relationship preserved until the amortization of the investments.[507-508] As section 3.4.2.1 argues, the interruption of the

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[504] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 276.
[505] M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., p. 4.
[506] F. MACARIO, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto*, cit., pp. 217 ss. makes an interesting comparison between the abuse of economic dependency and the techniques used to assess the contractual risks arising from a supervening event capable of changing the economy of the contract. The economic context narrated in Chapter I of this thesis describes the situation in which the party can be found when making specific investments in the contractual relationship. It can be, until the amortization of the investments made, in a lock-in situation in the contract. Their amortization can be verified only *ex-post*. The contract and, in particular, the requirements made by the counterparty in the course of the relationship, induce the partner to make investments; the abuse by the counterparty, in most cases, cannot be determined *ex-ante*. Its assessment only occurs at the time of the abusive act. Therefore, there is no question of risk-taking through the contract, as examined in light of objective good faith. The examination of the abuse of economic dependence does not primarily examine the conditions of the contractual economy, but the lack of satisfactory alternatives in the market before the impossibility of recovering the specific investments made. The assessment of abuse occurs through external factors that are sufficiently objective and controllable. The economic analysis is shifted to the comparison between the balance of the entity of the specific investments made and the profits obtained during the contractual relationship. The normative criterion would point not to the inside of the contractual relationship, but to the outside, to the market conditions. In a relevant comparison made by a scholar dedicated to the long-term contracts and the protection given to the parties, he argues that the abuse of economic dependence would diverge from those rules intended to govern supervening events, such as the abuse of right and good faith.
[507] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 394 goes beyond this finding. The author argues that the abuse of economic dependence becomes the central norm of long-term contracts. It would be a trans-typical rule of the control of supervening circumstances and contractual risk management aimed at ensuring the economic stability of the operation between the parties at the time of their stipulation.
[508] It is also the position of G. BELLANTUONO (*I contratti incompletti nel diritto e nell'economica,* cit., *passim*) concerning the decisions of the Italian Court of Cassation regarding the determination of ineffectiveness of the unilateral termination by the bank in a credit advance on a current account agreement. The author argues that good

relationship could occur only with the presence of a business reason; even in this case, it would be possible to give the counterparty the possibility of compensation for unrecovered investments.

In this regard, the business risk of undertaking an argument would prove too much. The risk of implementing investments does not include the risk of the counterparty's behavior preventing their recovery in the absence of a cause.[509] The risk undertaken under the contract does not cover situations in which one party relies on its counterparty. The risk of non-recovery of investments would occur *ex-post*.[510] From this arises the need to require the performance of an abusive act as a factor for the configuration of the protection of the investments because the investments are not recovered. The abuse is determined after the termination of the contract, due to unforeseeable circumstances or that, for other reasons, the parties did not consider at the time of stipulation.[511-512]

The abusive act would change the structure of the risks undertaken by the parties. The standard risk of the contract presupposes the counterparty's cooperation.[513] The parties established the possible future scenarios with the contract, and unilateral termination would be an extraordinary event (*alea straordinaria*) that would justify the transfer of risk from the investment party to its counterparty.[514] The risk of the non-recovery of investments is transmitted to the counterparty with

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faith would impose on the bank an obligation to economically justify the decision to immediately terminate the contract. With this judicial intervention, it would be possible to encourage banks to take more information about the company's conditions and reduce the risk of an early settlement of the company.

[509] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 282-3. On the contrary, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 775. For him, after the decision to bind indefinitely, there should be no expectation of continuity beyond the duration determined by the possibility of termination.

[510] F. MACARIO, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto*, cit., p. 217 ss.

[511] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 141-152 ss. See also F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 679, which extends the argument to allow also the protection of the profits expected from the implementation of investments. For him, the contract would no longer allow the sharing of the risks but would adopt a random distribution thereof.

[512] For P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 316-7, long-term contracts project interests in the future. At the time they become bound, the parties settle their claims and calculate the future unfolding of the obligations. These calculations take into account various factual scenarios, as well as future and reasonable consequences of the demanding context upon the contracting. Investment protection would be related to losses not related to the standard business segment. It could be argued that the distributor assumes the risk of unilateral termination at the time of conclusion. However, the protection of investments in Brazilian law (especially in Article 473 of the Civil Code) would constitute a guarantee against abrupt termination and qualify it as an extraordinary risk. According to the author, the Code considers abrupt termination a risk that goes beyond the typical framework of the contract and would cause unnecessary economic sacrifice. The author's ideas reach conclusions that are similar to those defended in this thesis.

[513] P. FABBIO, *L'abuso di dipendenza economica*, cit., 283. This analysis can be equated with the Italian doctrinal development regarding the assessment of circumstances capable of disrupting the performance of the obligation.

[514] See P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 316-7.

the abusive exercise of the right of termination. This leads to the premature dissolution of the relationship and, consequently, to the withdrawal of the opportunity of the party to recover the investments. The abusive exercise would unduly shift the risk of the non-recovery of investments.

For example, concerning Italian law, the abuse of economic dependence does not primarily examine the conditions of the contractual economy, but the lack of satisfactory alternatives in the market before the impossibility of recovering the specific investments. The assessment of abuse occurs through external factors. The analysis shifts to a comparison between the entity of the specific investments made and the profits obtained during the contractual relationship. The criterion points not to the inside of the contractual relation, but to the outside, to the market conditions.[515]

In addition to the risk shift in the case of abusive termination, one must also consider supervening events and their interference in the risks related to investment recovery. This situation requires verifying the causality of the supervening event. It should not be a result of the activities of the investing party. There might be a casual element between the event and other factors unrelated to the contract. This event changes the contractual economics and therefore might a factor in agreements in which their terms exclude legal protection to guarantee it.

Likewise, the argument that, in the case of unilateral termination in an indeterminate-term contract, the party accepts introducing a factor of randomness into the economic operation, is not convincing.[516] The implementation of investments added to the clause that allows the unilateral termination creates a paradoxical situation in the coexistence of elements of rigidity and flexibility within the same relationship.

The contractual risks should be read in light of the assessment of the abusive conduct of the party that interrupts the contractual relationship. This assessment does not consider the terms of the contract; it leads to a risk examination based on the principle of competition, especially in its dynamic aspect. The reading of the contract and the risks undertaken should not discourage the dynamism allowed by specialized investments but allow the company's activism in the market.

The abusive exercise usually occurs in an indefinite term contract after the exercise of a unilateral termination right. However, there are several hybrid regimes of the commercial relationship. Unilateral termination in an indefinite-term contract is not the only structural act that

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[515] F. MACARIO, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto*, cit., p. 217.
[516] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 33.

can be considered abusive. For systematic purposes, throughout this thesis, the unilateral termination of an indefinite-term contract is the example of an abusive exercise. That choice arises from the fact that unilateral termination represents an abusive act by antonomasia. The mention of unilateral termination encompasses all the structures mentioned in the previous subsection. Likewise, the qualification of "abusive" does not refer to the conduct itself, but to the context and the modalities in which it is exercised.[517]

3.2. The delimitation of the interest protected with making specific investments

The previous sections examined the relationship between risk assumptions and investment protection. It is not enough to indicate the factors capable of preventing this protection. The study requires circumscribing the interest related to making specific investments. The answer to this issue is contingent on comparative evaluations involving the presence of investments, and its determination has practical consequences. It is essential for fixing the time before which it would not be possible to terminate the relationship without entailing an abusive act (see section 3.4), the length of a prior notice period, the period of contractual extension as a result of an injunction remedy (*rimedio specifico*) (see section 4.2.1.3)), and damages liquidation in case of the premature termination of the contractual relationship (see section 4.2.2).[518]

The determination of the protected interest also stimulates allocative efficiency. It is not a question of adhering to utilitarian and economic reasoning in determining the damage; instead, it is instead a form of promoting investments in optimum circumstances.[519] The protection of

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[517] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 290-1. On the contrary is F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, cit., p. 2564, for whom the interruption of the commercial relationship requires restrictive interpretation since it is an exceptional hypothesis. It represents a restrictive interference in supplier choices. It would not be possible to apply it in case of excessive reduction of orders, as understood by decision Trib. Catania 9 luglio 2009. Cf. G. COLANGELO, *Subfornitura, dipendenza economica ed obbligo di contrarre, Nota a ord. Trib. Catania 9 luglio 2009*, in Danno e responsabilità, 2009, fasc. 10 refutes this argument.

[518] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 288 also agrees with these practical consequences, arguing that the verification of that interest entails the congruent duration and also the quantification of the damage with the purpose of compensation by the equivalent sum. For a similar view, see M. CENINI; A. GAMBARO, *Abuso di diritto, risarcimento del danno e contratto: quando la chiarezza va in vacanza. Nota a Cass. sez. III 18 settembre 2009, n. 20106*, in Corriere giuridico, 2011, fasc. 1.

[519] The importance deriving from the circumscription of the protected contractual interest can be evidenced by an analysis made regarding contractual liability from the perspective of the economic analysis of the law. The compensation for damages from contractual liability consists of the reparation of the expectation interest (*interesse positivo*) or the reliance damages (*interesse negativo*). Cf. P. TRIMARCHI, *Il contratto: inadempimento e rimedi*,

investments at a higher standard than is adequate may stimulate overinvestment. This possibility, in addition to unduly transferring certain risks to the counterparty, may generate a loss of the general benefits deriving from the investments and also run counter to the very reason for its protection. The reverse situation is also valid. If the circumscribed interest is lower than the adequate consistency, this determination may lead to underinvestment (these scenarios were analyzed in sections 1.3.3.1 and 1.3.4.3.1).

Determining this interest is challenging and presents many difficulties. The first task is to isolate the interest related to specific investments from others concerning the end of the relationship to avoid confusion with other discussions. In section 3.2.1, these interests are briefly addressed. The repercussions of investment protection differ from those of other interests. After this clarification, the next sections (sections 3.2.2 and 3.2.3) suggest a delimitation of the consistency of the interest involving specific investments. Section 3.2.4 evaluates the conclusions reached in light of the jurisprudence of the French Court of Cassation.

3.2.1. Multiple interests involved at contract termination

The adequate delimitation of the interest related to specific investments demands identifying other interests violated in case of the premature termination of an undetermined-term commercial relationship.[520] This operation aims at avoiding confusion between the interests affected at the end of the relationship. The protection of one interest does not exclude other protections.[521] This thesis focuses on specific investments because of their peculiarities. This section provides a brief overview of these interests; this topic is highly nuanced, and the objective of this section is to avoid confusion.

When a contract with specific investment ends abruptly, some interests are affected. An abusive termination of an undetermined-term relationship may cause damages, such as consequential damages, compensation for the loss of the customer base, and non-recovered

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Giuffrè: Milano, 2010, pp. 88 and 99. The author warns that the establishment of compensation in a value other than expectation interest entails an incentive of violating conduct to encourage default.

[520] M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 90 notes that the decision of the Court of Cassation (Cass., 18 settembre 2009, n. 20106) concerning the abuse of right and good faith, would have confused those interested. One of the author's main criticisms was the operation of the general clause in good faith in general terms, without interrogating the legal system. This position would have disregarded the diversity of interests related to the subject.

[521] Ibid., p. 92.

investments. To avoid these damages, there is also a need to give a prior. Investment protection occurs not only with the compensation of non-recovery investments; there are forms of *direct* and *indirect* protection of investments at the end of the contract. Their compensation is a direct protection, and indirect protection might act with prior notice.

The understanding adopted in Germany (explained in footnote 196) clarifies the various levels of investment protection in the case of arbitrary unilateral termination.[522] These are the interests involved at the end a relationship with specific investments: a) an interest to grant sufficient prior notice to achieve the objectives of the company's conversion and liquidation of inventories and some investments, b) the additional compensation for investments not amortized, and c) the indemnification of other interests (for example, consequential damages, compensation for the loss of customer base). These interests overlap, creating conceptual confusion.

It is possible to apply this reasoning to Italian and Brazilian law. When the commercial relationship is prematurely terminated, there would be a) an interest in receiving any prior notice to allow the reorientation of the company's activity, especially considering the presence of investments not recovered, the establishment of a minimum period in some regulatory provisions (for example, Article 1.700 of the Italian Civil Code or Article 720 of the Brazilian Civil Code, both regarding agency contracts) and general clauses (*e.g.*, good faith, abuse of right and abuse of economic dependence); and b) a compensation corresponding to investments not amortized.

At the first protection level, the counterparty must give adequate prior notice. This indirectly protects investments since it can extend the contract in order to amortize them, or to find a new activity and event to allow a new use for them. As an essential element of the abuse, investments can influence the determination of the notice duration. Its period can be established in

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[522] Ibid., pp. 90 ss. performs a similar construction and exemplifies the interest's diversity in a provision established in the Belgian law of sale concession. The law of 27 July 27 1961, as amended by the law of 13 April 13 1971, determines the granting of prior notice in case of unilateral termination by the producer. This notice may be substituted for a corresponding indemnity. In any case, in addition to prior notice, the concessionaire's right to additional compensation is evaluated. It should consider i) any increase in the producer's clientele, ii) the expenses for the benefit of the counterparty incurred by the concessionaire in the course of the contract, and iii) the costs borne for the settlement of the contract. There is also a distinction of interest made in the Spanish commercial code bill, established in Section V of Chapter V on the termination of the distribution agreement. A series of measures is determined after unilateral termination: i) the granting of notice (Article 543-20), ii) the amortization of specific investments (Article 543-21), iii) collaboration in settlement of the contract (Article 543-23), and iv) compensation for loss of the customer base (Article 543-24). The provision regulating investment amortization presents two protections: i) the prohibition of unilateral termination if there has not been a reasonable time to the amortization of the investments, and ii) it can only do so if the producer pays the corresponding indemnity.

law or in the contract; if there is no specific duration, the general clauses impose this prior notice. Next, one should evaluate the damages suffered, mainly the investments not amortized.

The complexity of investment protection is the interference with other interests at the unilateral termination of the relationship. This influences the granting of prior notice (interest a)) and the damages incurred (interests b and c). Prior notice is not only based on specific investments; they represent an essential factor, but they do not represent the only element to impose this notice. Indeed, the additional period might end even though the investments are not recouped. These non-recovered investments are then an object of a compensation claim. This distinction is essential to identify the consistency of the interest related to specific investments.

3.2.2. Different profiles of the interests protected with specific investments

After this elucidation, the consistency of the interest arising from the implementation of specific investments must be addressed. This topic has many nuances, and it involves the consequences of an arbitrary disruption of a relationship with specific investments and has practical repercussions. It helps in establishing the configuration of an abusive act (the minimum length of the relationship before its termination), the appropriate length of prior notice, and the liquidation of damages without the amortization of specific investments.

A simplified example aids in understanding the issue. Imagine that a dealership spends €50,000 with the purchase of a machine that can only be used to assist vehicles of the brand it represents (specific investment). The vehicle manufacturer terminates the indefinite-term contract after 11 months and grants one month of notice. After this year, the machine is valued at €10,000 due to the impossibility of using it in another the relationship. The firm suffers a loss in the value of the specific contractual investment after the end of the relationship. Some questions can be derived from this situation: Was the termination abusive? Was the length of the prior notice appropriate? If these responses are positive, what are the damages incurred? The answers require verifying whether the investment was recovered throughout the relationship. To identify an investment recovery, it is necessary to answer whether the earnings derived from the business activity were enough to recoup this loss.

Especially when addressing the abuse of economic dependence, the doctrine examines this institute from diverse perspectives. Due to these different profiles, conclusions of difficult

conciliation are sometimes reached. The doctrine addresses three different aspects that are complementary to understanding the consistency of the interest protected.[523] It discusses the influence of i) the amortization of specific investments in the exercise of business activity, ii) the contractual stability due to specific contractual investments, and iii) the configuration of expectation or reliance interest (*interesse positivo o negativo*) to compensate for unamortized investments. There are situations in which the doctrine indicates the liability regime of the abuse of economic dependence (contractual liability, tort liability, or pre-contractual liability) and, based on assonance, concludes the configuration of particular interest. The amount of compensation is also confused with the requirement of the relationship's duration. These last orientations can mislead the delimitation of the protected interest.

As the topic of section 3.4, *infra,* an abusive termination occurs when the relationship with specific investments ends without their recovery. The earnings derived from the contract performance are not sufficient to recoup the investment value loss with the end of the relationship. This reasoning obscures some elements to assess the investment recovery, which requires the evaluation of the entire relationship. There are two main aspects of this analysis. The first is a) the investment that the unilateral termination makes irrecoverable (*sunk cost*). Investment generally has a reuse value that is substantially inferior at the end of the relationship due to its specificity. The other aspect is b) the period necessary for its amortization.[524-525] The determination of aspect b) requires evaluating the relationship between the income produced by the asset in the business activity and its application to the recovery of the sunk value.

Aspect a) is easier to evaluate; it should be calculated considering subsequent use. If the investment cannot be converted into an alternative use, aspect a) should correspond to the difference between the acquisition price and how much is recovered from the sale of the asset.[526] If the investment is used for another purpose, it is necessary to add the costs for its remodeling to

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[523] The authors who address these issues do not necessarily name it as the consistency of the protected interest. However, this stance can be extracted from considerations regarding the delimitation of the damage generated in case of the arbitrary interruption of the legal relationship.

[524] These aspects correspond to the description of this issue by R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 326 ss.

[525] Common law evaluates if the unilateral termination occurred after a reasonable period. This understanding is based on Section 2-309 (2) of Uniform Commercial Code ("Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed it may be terminated at any time by either party"). The definition of a reasonable period occurs with the verification of the recovery of investments. There is even a formula for this analysis (see footnote 540). Cf. R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., (section 10.4.1), Kindle version.

[526] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 327.

the investment value and then to deduct the new value with its new use.[527] If the result of these operations is negative, the unilateral termination should be considered abusive. Considering the example mentioned above, aspect a) could be defined as €40,000 (*sunk cost*), which corresponds to the difference between the initial cost and its use in new employment.

Criterion b) imposes more difficulties; it considers whether the income generated by a specific asset should be destined only to cover the irrecoverable value of the asset (aspect a)),[528] or whether the income should be partially attributed to the business activity and partially to the recovery of sunk costs (aspect a). Parameter b) also takes into account the time required for the recovery of the investment. It must be defined by verifying the destiny of the revenues produced by the asset and how it can reduce or lengthen the time required for the adequate termination of the relationship.

The definition of aspects a) and especially b) requires analyzing some issues addressed in the doctrine: i) the amortization of specific investments in the exercise of a business activity; ii) the contractual stability due to specific investments; and iii) the configuration of expectation or reliance interest (*interesse positivo o negativo*) to compensate for unamortized investments.

i) The amortization of specific investments in the exercise of a business activity

There are two main methods for calculating the amortization of the investments, that is, the period necessary for investment recouping: the *financial* and *economic* amortization methods. The functioning of these methods is explored in section 3.3.4. *Financial amortization* (or, more properly, *accounting depreciation*)[529] implies that the duration of the contract should be at least

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[527] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 327 adds that if the asset has not yet been reused, the initial value of the fixed asset should be multiplied by the probability (0 to 1) of its reuse. The value of investment conversion costs, if any, are applied, hence the conclusion that the higher the fungibility of the investment, the lower the value of the irrecoverable damage. One should not forget to consider the investments that the distributor is induced to make in the course of the relationship.

[528] The consideration of R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329 is more complex, but because of the construction of the model, it is simplified. The estimation of the average yield is approximate. The adoption of obtaining the average yield of commercial units operating in a similar context responds to the need that the amortization process cannot be given to management choices and, therefore, suffer oscillations. For the author, the estimate of the average income can also be extracted from the company's balance sheet and cannot be used at the average yield of a similar unit. The value of the income may, due to the characteristics of the company's management, be adapted to its reality. The author's concern is to establish an objectively verifiable criterion that is adaptable to the characteristics of the business and the investments made.

[529] The accounting depreciation method is used to write off the value of a fixed asset due to its decline in value. Accounting amortization is only destined for intangible assets and loans.

equal to the period necessary for the income to cover the exit resulting from the investment. This notion is used in accounting and tax law, and it corresponds to the technique of periodically lowering the book value over a specific duration (usually over the asset's useful life) for accounting and tax purposes.

Economic amortization requires that the income derived from investments is not limited to covering their costs.[530-531] The company has to have some profits due to its activities. Ph. FABBIO seems to prefer this method to evaluate the amortization of investments.[532] He has criticized the view that proposes restricting income influence. According to the author, the understanding limiting the interest would be difficult to accept, but it has the positive aspect of eliminating practical and conceptual difficulties. It does not adhere to reality, in accordance with the phenomenon of the business as a productive activity, and it is compatible with the principle of business responsibility and risk.[533] This view prevents the undertaking of reasonable business risk (*rischio normale d'impresa*). The author argues that the interest protected should be extended. Investments are made in the scope of business activity and related to productive purposes; they are

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[530] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381.

[531] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p.475 exemplifies this inadequacy: "La valeur résiduelle des dépenses spécifiques doit aussi être prise en considération. Supposons par exemple une dépense spécifique imputable au contrat de 100 amortis comptablement sur cinq ans (soit 20 par an d'amortissement) et posons que la recette annuelle générée par le contrat dénoncé s'élève à 25 par an. Si le contrat cesse en fin de troisième année, l'amortissement comptable n'a assuré que le remboursement de 60 de l'investissement dont le montant était de 100. Ainsi, sur une base comptable, au bout de trois ans, les dépenses spécifiques cumulées sont de 60, les recettes spécifiques de 75 et l'excédent d'exploitation de 15. Il importe alors de vérifier que cet excédent est justifié par un coût raisonnable du capital. Cependant, et tous les comptables le savent, la durée économique d'un investissement diffère toujours de sa durée de vie réelle dans l'entreprise. Si la durée est plus courte, cas d'obsolescence accélérée, l'entreprise a pu réaliser des provisions qui doivent être déduites de la dépense spécifique. Si, et c'est le cas le plus général, la durée de vie réelle dépasse la durée de vie comptable, la valeur économique résiduelle de l'investissement est supérieure à sa valeur résiduelle comptable ; il faut alors en tenir compte pour redresser à la baisse le montant de la dépense spécifique". In summary terms, they argue that the accounting duration of an asset is different from its real length, which impact its value at the end of the relationship.

[532] There are some authors that support the adoption of this method: P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 285. See also R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381. See also A. DI BIASE, "*Contrazione" delle relazioni commerciali ed abuso di dipendenza economica, Nota a ord. Trib. Catania sez. distaccata Bronte 9 luglio 2009*, cit., p. 257; B. TASSONE, *Non solo moda (ma anche rewriting contrattuale): commento alla prima decisione in materia di abuso di dipendenza economica, Commento a ord. Trib. Bari 6 maggio 2002*, cit., p. 777; and C. OSTI, *L'abuso di dipendenza economica*, cit., p. 53. In this regard, L. RENNA, *L'abuso di dipendenza economica come fattispecie transtipica*, in Contratto e impresa, 2013, pp. 381-2 stresses that it is not enough to break even n between specific investments made and revenues, but it is necessary to obtain substantial profits. He recognizes that a fundamental objection would be difficult to establish concerning whether the sub-contracting party has achieved considerable profits and their quantity. While recognizing this difficulty, he suggests verification through a technical expert who uses the principles and rules of economics. In Swiss law, I. CHERPILLOD, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011 adopts this position.

[533] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 286.

destined to produce income.[534] The adoption of an economic amortization would also be based on the normative data. It derives from the prohibition of the abuse of economic dependence and a systematic view of Italian law.[535] Adoption such methods do not result in a guarantee of income for the company.

Some provisions of the *Codice degli appalti*, the Italian governing rules of public concession contracts, corroborate these arguments. Article 168 addresses the duration of this contract; it also indicates a parameter to evaluate the amortization. The law states that the recovery of investments must be carried out with a *reasonable* criterion, allowing *a return on the invested capital*. This provision determines that the amortization should also constitute a return on the invested capital, not only a financial amortization of investments.

The method of economic amortization is preferable. The income generated must be considered in the amortization of the investments; otherwise, a paradoxical situation may result.[536] The income that should be considered is the company's revenue (see section 3.2.2.).[537] Financial amortization requires a shorter contractual duration to configure its abusiveness in comparison with the other method because it has a higher amortization rate. As another consequence, the financial amortization leads to the reduction of the damages generated due to the abusive termination without the recovery of investments. The consequences of adopting this method – a shorter period required before the termination of the contract and more reduced damages – have repercussions for the stimulus to implement specific contractual investments. The party might not want to invest because the incentives are low and the risks high; in order to assure investments at a socially optimal level, the investing party has to receive a share of surplus derived from the performance of the contract.[538]

Although there are normative reasons to consider the economical amortization method, there is no mathematical formula to determine the percentage of revenues into the amortization calculation.[539] As a parameter, *reasonableness* might be adequate for this calculation; some rules

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[534] Ibid., p. 287.
[535] Ibid., p. 287.
[536] Ibid., p. 286.
[537] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p.475 defend the adoption of the company's revenue to calculate the investments amortization.
[538] B. TASSONE, "*Uncoscionability" e abuso di dipendeza economica*, cit., p. 566.
[539] In more massive contracts, especially public concessions, there are complex formulas for determining the return on investment. Each contract may have the most appropriate measure to evaluate the investment income, studied by the economic regulation and financial administration. In general, at least in Brazilian reality, it is gleaned that the primary method of financial balance in concession contracts consists of the rate of return (ROR). It establishes contract rates considering the present value of the entry (profitability) and exit (investments) of the contract in order to allow a specific return for the enterprise, which cannot be less than the opportunity cost. Cf. E. B. MOREIRA, *Direito das*

do mention it, as shown in section 3.3.4, *infra*. More detailed rules would fail to present an adequate solution. For example, the formula used in American law to calculate the recovery of investments would lead to an unsatisfactory result in Italian and Brazilian law because it has different assumptions.[540]

ii) Contractual stability due to specific investments

The amortization of investments based on the economic method aids in indicating the consistency of the interest. The amortization rate is based on reasonableness; however, these parameters are insufficient to calculate the specific investment amortization. There are two other issues to be faced: the determination of the duration of the contractual relationship based on the investments and the configuration of expectation interest or reliance interest (*interesse positivo o negativo*). These two aspects overlap.

The protection of specific investments led part of the doctrine to defend the notion that its implementation would entail a *reasonable* or *minimum* duration of the contractual relationship.[541] Some provisions in the Italian legal system would attribute the right to contractual stability to the investing company; there would be extended investment protection. Consequently, the contract would have to last at least long enough to recover the investments. This requires the relation duration to be a reasonable period. Article 9 of Law No. 192/1998 (abuse of economic dependency)

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concessões de serviço público: inteligência da Lei 8.987/1995: parte geral, São Paulo: Malheiros, 2010, 2010, p. 402; R. V. de FREITAS; L. RIBEIRO, *O prazo como elemento da economia contratual das concessões: as espécies de "prorrogação"*, in Contratos administrativos, equilíbrio econômico-financeiro e a taxa interna de retorno: a lógica das concessões e parcerias público-privadas, Belo Horizonte: Fórum, 2016, p. 290.

[540] The parameters used in the Missouri Doctrine are based on the formula below (see R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., [section 10.4.1], Kindle version). In this formula, C means the cash flow in the duration of the contract, I the investments, and δ the discount rate. There are many inconsistencies in the assumptions made in this thesis. Investments are considered only physical investments, not other specific investment modalities. The formula also does not require recovering the salvage value from the calculation basis, which is the value recovered from the sale of the assets. The recovery factor consists of the cash flow generated by the time needed to recover the investments, which would include the income and the accounting costs of depreciation and amortization.

$$\sum_{t=1}^{T} \frac{C_t}{(1+\delta)^t} - I = 0$$

[541] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381. The author does not expressly defend the configuration of expectation interest (*interesse positivo*) to allow a reasonable duration of the contract. He even states in a subsequent passage that the contract could last for a period reasonable to recoup the investment or *necessary to the reoriented activity of the company* (R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 397). This last sentence may not express the same idea of the reasonable duration of the contract. These two objectives are different and should not be addressed as the same.

would represent the maximum emersion point of this systematic view. There are also indications in the provisions mentioned in the thesis regarding franchise contracts and fuel distribution contracts. The theory would also be based on another provision of Law No. 192/1998 on the subcontracting contract (*contratto di subfornitura*). Article 6/2 determines the nullity of a pact that does not establish a reasonable duration of prior notice.[542] In Brazilian law, this theory could also be argued based on Article 473 of the Civil Code, and on good faith and the abuse of right.

Anther orientation argues the existence of a minimum contractual term due to an implicit covenant in the case of making specific investments.[543] If it is of indefinite term, the contract would have to last for the period necessary for the amortization of investments. Although it is not outlined in the contractual terms, this minimal duration would derive from the need to recoup specific investments and would be a consequence of investing due to the contract. These investments would create contractual stability.

These opinions are questionable; there is no legal provision from which this stability could be drawn. Neither the abuse of economic dependence nor regulatory provisions would be the basis for this argumentative construction. On the contrary, accepting the performance of an indefinite term contract eliminates the possibility of reasonable duration, except concerning the franchise agreement in Italian law.[544] There is also no normative indication of the absence of reasonable

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[542] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381. This argument is also adopted by F. PANETTI, Francesco*, Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 679.

[543] M. CENINI; A. GAMBARO, *Abuso di diritto, risarcimento del danno e contratto: quando la chiarezza va in vacanza. Nota a Cass. sez. III 18 settembre 2009, n. 20106*, cit., p. 116 might agree with this opinion. They perform a piece of hypothetical thinking. They emphasize that, at the time of the contract's conclusion with a requirement to make specific investments, the party trusts that it will benefit from the relationship for some time. The contract duration would be implied. This logic would be corroborated with Article 3/3 on franchise agreement. In their interpretation of the paradigmatic decision of the Court of Cassation (Cassazione civile, sez. III, 18 settembre 2009, n. 20106), this decision would adhere to the thesis that the dependent company would have a legitimate expectation of the full recovery of the investment in the commercial relationship and, therefore, the expectation interest (*interesse positivo*) to obtain the profits. However, in practice, the interest protected by the rules on contracts should not be that of the protection of the competitor, but that of competitive dynamism. The protection of competition would exclude the expected profits and be limited to investments not yet recovered, classified as reliance damages (*interesse negativo*). In Spanish law, cf. A. G. HERRERA, *La Duración del Contrato de Distribución Exclusiva*, Madrid: Editorial Tirant Lo Blanch, 2006, p. 564 ss; F. SAENZ, *La indemnización por clientela em los contratos de agencia e concesión*, Madrid: Civitas, Madrid: Monografías Civitas, 1995, pp. 521 ss. In French law, see P. STOFFEL-MUNCK, *Terme du contrat*, in Revue des contrats, n. RDCO2004-3-009, p. 647. This author mentions the existence of an implicit term in the contract in case of specific investments. This reasoning was based on a decision of the French Court of Cassation (Cass. com., 20 janv. 1998, Bull. civ. IV, no 40).

[544] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 240.

duration of the contract, regardless of the contract's modality and its contractual dynamics. Contracts in which specific investments are required cannot be reduced to a single category, nor to the same reality. The indiscriminate requirement of the duration of the relationship in the function of investments is not adequate to the parties' autonomy and the economic operation underlying the contract.

This situation must be distinguished from others: the assessment of the unilateral termination according to the duration of the relationship, the requirement of prior notice, and the specific remedy aimed at prolonging the contractual relationship. To evaluate the abusiveness of the termination, parameter b) indicates the need to consider the time required to amortize the investments. It is an examination of the abusiveness considering the recovery of investments as a parameter. There is no requirement for a specified duration of the contractual relationship. Once the arbitrary termination has been verified, it is possible to claim some contractual remedies, which may prolong the relationship to allow the company to be reconverted and not the reasonable duration of the contract. This confusion is clarified with the precise indication of the interests protected in the next section.

iii) The configuration of expectation interest or reliance interest (*interesse positivo o negativo*)

The defense of the reasonable duration of the contract is sometimes confused with the configuration of an expectation interest (*interesse positivo*). This interest would allow the extension of the contractual relationship in conformity with the investments.[545] On the other hand, a reliance interest (*interesse negativo*) would not allow the relationship to be extended beyond the period determined. The reasoning for this is based on the premise that expectation interest has the function of placing the injured party in an economic situation equivalent to what it would experience if the contract were precisely performed. However, the configuration of an expectation or reliance interest is not enough to guarantee a reasonable duration of the contract. In order to determine the consistency of the protected interest, some arguments related to its configuration with specific investments should be assessed.

[545] Although this discussion is present in section 3.2, the identification of this interest usually follows the understanding that claims the effectiveness of unilateral termination to ensure the continuation of the relationship as possible remedies. In this regard, see M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 31 ss.

iii.i) The configuration of expectation interest (*interesse positivo*)

There are sophisticated and articulate arguments for the defense of expectation interest (or the configuration of lost profits with arbitrary termination) due to the non-recovery of specific investments.[546] The expectation interest would place the victim in such a position if the abusive act had not occurred, and it would include the loss of profits during the period in which the contract should last.

Some of these arguments share the aspect of inadequacy of the opposing theory.[547] Another argument is linked to the requirement of the duration of the contractual relationship for a reasonable time.[548] One also states that, in the case of competition damage (*danno concorrenziale*), it must be compensated as expectation interest with a determination of loss of profits.[549] Another opinion reverberates in American case law. In the case *Oldsmobile*, the practical consequences would have allowed the protection of several distributors from abusive acts if this theory had not been accepted.[550] This same view also claims there would be normative indicators in the Italian Civil

[546] The defense of expectation interest is also done in a transverse way, through the adoption of a liability regime in case of the abuse of economic dependence. In this case, there is no indication of the interest protected. This orientation claims that the pre-contractual liability regime would be incapable of conferring adequate protection; the solution could be the i) tort liability (*responsabilità extracontrattuale)* on the basis of the prohibition of unfair competition (*ex* 2.598 of the Italian Civil Code) (A. MUSSO*, La subfornitura: Legge 18 giugno 1998, n. 192: titolo 3, dei singoli contratti, suplemento*, Bologna: Zanichelli, 2003, p. 531); ii) general tort liability (*responsabilità extracontrattuale)* (B. Tassone [*unconscionability*]). However, A. ALBANESE, *Abuso di dipendenza economica: nullità del contratto e riequilibrio*, in Europa e Diritto Privato, 1999, cit. p. 1201 argues that it would be a glaring error to understand that this, from a legal qualification of the same situation of liability, depends on the application of a different quantification of the damage.

[547] Among the supporters of the expectation interest (*interesse positivo*) argument, there is a sense of the inadequacy of the protection only of the reliance interest or of not allowing the economically dependent company the profits that would result from the continuation of the relationship (A. MUSSO*, La subfornitura: Legge 18 giugno 1998, n. 192: titolo 3, dei singoli contratti, suplemento*, cit., p. 531; B. TASSONE, "*Unconscionability" e abuso di dipendeza economica*, cit., p. 550 ss.; A VILLELLA, *Abuso di dipendenza economica ed obbligo a contrarre*, Napoli: Edizioni scientifiche italiane, 2008, pp. 181ss.; G. NICOLINI, *Subfornitura e attività produttive: commento alla L. 18 giugno 1998, n. 192,* cit., pp. 133-5). This same impression is reflected in the denial of the pre-contractual liability regime (see A. M. DI CELSO, *Art. 9. Abuso di dipendenza economica*, cit., pp. 260-1).

[548] According to F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 680, this requirement of duration concerning investments would be based on Article 3/3 of Law No. 129/2004, which provides for the equitable recuperation of the franchise agreement. As stated in 2.2.3, this rule is exceptional and cannot be extended to contract types with the presence of specific investments.

[549] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., 682. Although it adopts a more sophisticated view, P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 507-509 also contends that the competitive harm would be to the expectation interest *(interesse positivo*).

[550] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n.*

Code relating to the procurement contract (*contratto d'appalto*) (Article 1.671), the contract for services (*contratto d'opera manuale*) (Article 2.227), the mandate contract (Article 1.725), and the contract for intellectual services (*contratto di prestazione d'opera intellettuale*) (Article 2.237).[551]

One also argues that expectation interest with specific investments would result from the asymmetry of the parties' powers. In an environment of parity between them, there would be a presumption of the counterparty's advantage concerning the right to unilaterally terminate the contract.[552] In this case, the party could be protected with the reliance interest (*interesse negativo*) consisting of the reimbursement of the expenses and the occasions of lost profits due to the legitimate expectation of the continuation of the contract. The situation would be reversed in a case of economic dependence and power asymmetry, mainly generated by the implementation of specific investments. It would not be realistic to hypothesize that the dependent company negotiated the normal termination against granting more favorable conditions. The protect interest would be the expectation interest.

iii.ii) The configuration of reliance interest (*interesse negativo*)

Contrary to the previous orientation, there are also arguments for the configuration of reliance interest (*interesse negativo*) with making specific investments. Reliance interest is the placement of the injured party in a similar situation similar to the one it would experience if it had not stipulated the contract. This type of protection means compensating for unnecessary expenses for having stipulated the contract. One of the main arguments corresponds to the absence of an expectation of obtaining profits with the implementation of specific investments.[553]

20106, cit., p. 679. The case mentioned corresponds to Crest Cadillac Oldsmobile, Inc. v. Gen. Motors Corp., No. 5:05 - CV00051, 2005 WL 3591871, at 3 (N.D.N.Y. Dec. 30, 2005).

[551] F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit.

[552] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 33.

[553] M. DELLACASA defends this theory in case of arbitrary termination in which there is no economic dependence and, consequently, in the hypothesis that there is no specific investment to the point of configuring an economic dependence (*Il recesso arbitrario tra principi e rimedi*, cit., p. 33). The positioning regarding the extension of the protection of unrecovered investments can also occur with the emphasis on the modality of pre-contractual liability in case of the abuse of economic dependence (F. PROSPERI, *L'abuso di dipendenza economica*, in La responsabilità d'impresa, a cura di Guido Alpa e Giuseppe Conte, Milano: Giuffrè, 2015, p. 371; A. ALBANESE, *Abuso di dipendenza economica: nullità del contratto e riequilibrio*, cit., pp. 1200-1). This regime would be aimed at protecting the reliance interest (*interesse negativo*). The Portuguese author F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 807-8, argues for reparation of the damage that would not have

In another argument, one adduces that protection based on the defense of the market's dynamism, the basis of the abuse of economic dependence, would lead to the protection of the reliance interest. The protection is directed towards the competitive market and not to the specific company, which can obtain protection within the limits of the investments not amortized in the contractual relation. Therefore, it cannot cover the expectation interest (*interesse positivo*), which is mainly the profits derived from the extension of the relationship. The damage would only cover specific investments not yet recovered.[554] The civil tort (*illecito civile*) would be an insufficient instrument because it does not guarantee dynamic competition.

iii.iii) The inadequacy of these opinions

The orientations in the previous items usually emphasize the inadequacy of dualistic protection. The protection limited to the investments not recovered would not compensate the investing party. The excess of protection, based on the presence of reliance interest, could transform a contract of indeterminate-term duration into a fixed-term contract due to the specific investments made.[555] It might enlarge the consistency of this interest. Due to this difficulty, this thesis proposes observing the problem from another perspective.

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occurred if the injured party had not programmed its business elements in light of the legitimate expectation it had placed on the continuation of the contractual bond. This position is explained by the grounds to justify the responsibility for the non-amortization of the specific investments. He defends the position that this damage is due to the legitimate expectation (instrument of *confiança legítima*, a source of civil responsibility in the Portuguese law) generated for the contract continuation. According to this author, the legitimate expectation of the continuation of the relationship does not correspond to the profits that the investing party would have gained with the performance of the contract. R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329 argues that the injured interest would not be the expectation interest (*interesse positivo*). Its protection would not go beyond the damage suffered by the intermediary for having predisposed the structures necessary for the commercialization of the goods.

[554] A. ZOPPINI, *Autonomia contrattuale, regolazione del mercato e diritto della concorrenza*, in Contratto e antitrust, cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008, p. 246. The author stresses that protection of the prohibition of abuse of economic dependence is to protect the dynamic competition, not the competitors. See also M. CENINI; A. GAMBARO, *Abuso di diritto, risarcimento del danno e contratto: quando la chiarezza va in vacanza. Nota a Cass. sez. III 18 settembre 2009, n. 20106*, cit., pp. 116-7. These latter authors have a complex opinion. Although they indicate that the protection of the individual contracting party in the case of specific investments should occur through expectation interest, they argue that the protection of competitive dynamism, linked to the norm of the abuse of economic dependence, would require the protection only of unrecovered investments (reliance interest). They recognize the limitation to reliance interest only would entail a change in the behavior of the parties and inefficiency from the social point of view; however, they admit that this last conclusion would not be valid when there are significant exogenous variations in the market.

[555] An example of the inadequacy of the proposals, cf. reflection of B. TASSONE, "*Uncoscionability" e abuso di dipendeza economica*, cit., p. 566. For the author, even if the problem of the liability regime is solved concerning the abuse of economic dependence, the issue of establishing is which spaces to apply a criterion of expectation interest in situations that would not allow a continuation of the relationship. In fact, in order for a party to be appropriately

This duality needs to be detailed further. The expectation interest (*interesse positivo*) would allow claiming the prolongation of the relationship with the investments, or the compensation of losses and damages, including the loss of profits corresponding to the period that the contract should last. In Italian and Brazilian law, there is no evidence that making specific investments would create an expectation to the extent of transforming an indefinite-term contract into a fixed-term contract. The investing party obtains profits that correspond to this duration if the contractual extension required is not respected. The defenders of this position seek to transform rules of an *exceptional* nature, Article 3/3 of Law No. 129/2004, into an indication of a general principle based on the prohibition of the abuse of economic dependence. It cannot apply to other business relationships.

A contractual relationship based on the reliance interest also results in a superficial assessment of the contractual relationship. As described in sections 3.1.2 and 1.3.4.3.4, there are several nuances regarding the duration of the relationship, with different factors regarding risks concerning the duration of the contract. The duration is not determined only by specific investments. Contractual investments represent a relevant factor; however, other elements also condition the duration of the contract.[556] Inducing the continuation of the relationship without considering the complexity of the economic transaction can generate inadequate protection from the risks the parties undertake. The asymmetry between the parties does not alter this scenario. There are reasons to consider the complexity of factors that determine the continuation and duration of the contractual relationship.

Similarly, it does not seem appropriate to compare the situation of terminating the contract after making specific investments with some provisions of the Italian Civil Code (Articles 1.671, 2.227, 1.725 and 2.237). The contractual types do not refer to situations in which the parties are compensated for implementing investments not recovered. These contractual types correspond to contracts with a specified term or purpose. Despite these characteristics, the law assigns the right

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encouraged to make specific investments at an optimal level, it must be able to receive a share of the surplus that would derive from a contract execution with a cooperative spirit.

[556] Concerning the franchise agreement, as R. BLAIR and F. LAFONTAINE show, investments represent an economically important factor in determining the contract value and duration (see R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., formula 10.2, Kindle version). However, there are other elements that may intervene and affect the value of the contract: i) the existence of restrictions on the franchise with regard to the right to transfer franchising; ii) a non-competition clause may reduce the activities to be developed, and the presence of such clauses may reduce the value of human capital expected by operating a franchise; and iii) the presence of buy-back clauses, in which the franchisor establishes the parameters for the repurchase of the franchisee's investments.

of unilateral termination in these contractual types in an exceptional way. The provisions also grant the reimbursement of expenses incurred and profits. The investments established therein are not necessarily specific. Given that the legislator exceptionally allows the termination of fixed-term contracts, it establishes the reimbursement in the expectation interest.

On the other hand, the reliance interest (*interesse negativo*) is quite limiting; it does, however, consider the circumstance in which the investing company finds itself after the end of the relationship.[557] It is necessary to consider that the victim company, in addition to being economically dependent on the relationship, performs a productive activity, which is dismantled with the end of the contractual relationship. This protection would be difficult to reconcile with the concept of corporate responsibility and risk. The company's risk does not include the risk of an abusive counterparty's behavior, which, without cause, prevents the company from recovering investments and exercising activity.[558] The defense of a reliance interest could even aggravate the company's situation; it could cause an incentive for abusive conduct, especially against the economically dependent company.[559]

3.2.3. A proposal for framing the interests protected with specific investment

The previous section reached some essential conclusions on the delimitation of the protected interest; the method appropriate to assess investment amortization is economic analysis. A requirement of a reasonable duration or minimal duration does not derive from making investments. Lastly, it is difficult to qualify the interest as expectation or reliance interest, and there are strong arguments against its classification as one of these categories.

There is no single, uniform interest derived from implementing investments. Consequently, investments do not prescribe a specific duration of the contract. Making specific investments in

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[557] Concerning the work of R. PARDOLESI, F. PANETTI, *Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, cit., p. 676 criticizes the reduced circumscription of protected interest by stating that it stems from the influence of the self-restraint of American case law on the subject of the recoupment doctrine.

[558] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 282 e 287.

[559] M. CENINI; A. GAMBARO, *Abuso di diritto, risarcimento del danno e contratto: quando la chiarezza va in vacanza. Nota a Cass. sez. III 18 settembre 2009, n. 20106*, cit., p. 117, despite defending it, indicate that protection only by reliance interest (*interesse negativo*) would cause some problems. For them, in a system in which compensation is limited to reliance interest only, contractual incentives would change for both parties and would be socially inefficient. In this case, the victim company of the unilateral termination does not internalize the absence of the loss of profits due to this abusive act.

accordance with the agreement terms does not create an expectation of contractual duration. The interest should be considered from the different points in the relationship and reflect the different levels of investment protection (section 3.2.1). These characteristics demand an outlook on the practical repercussions of terminating the contract without investment recovery. A complete description of the repercussions is developed in the next chapters, but their delimitation is essential to identify the interests related to specific investments.

1) The length of the prior notice

Specific investments are essential elements to determine the length of prior notice in cases of terminating an undefined-term contract. However, they are not the only one; the party must also consider other elements, such as the duration of the relationship, the presence of exclusivity, and the market (see Chapter IV for a detailed analysis). The provisions imposing it intend to avoid the brutal termination of the contract. This determination *indirectly* protects investments. The interest in granting a prior notice does not result from the non-recovery of investments, but from the need at the end of the relationship to sell specific investments, to readapt the business activity, and to find new partners.[560] One cannot resort to specific investment to delimit this interest.

Some opinions in Italian doctrine might help to clarify this notion. R. PARDOLESI, in his *I contratti di distribuzioni*, notes that the termination would not be illegal in itself without the non-recovery of investment, but because of the harm inflicted on the interests of the party that refused the *chance* to recover their investments.[561] M. LIBERTINI has also argued that, in assessing compensation for competitive damages, the damage caused would include another category of damage: the deterioration of the firm's strategic position in the market.[562] The author warns that

[560] Article 5.1.8 of UNIDROIT Principles 2016 establishes that a contract for an indefinite period may be terminated by either party by giving notice a reasonable time in advance. They explain that the importance of their relative investments in the relationship is an factor to identify this reasonable time.
[561] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329 mentions that this position differs from his own, which, according to him, would also lead to the protection of reliance interest (*interesse negativo*). In his view, with the decision to terminate the contract without amortization of the investments, there would be financial exposure to a relationship that was presumed to be projected in time.
[562] M. LIBERTINI, *Il risarcimento del danno per la violazione di norme generali sulla concorrenza (antitruste e concorrenza sleale)*, in Risarcimento del danno da illecito concorrenziale e da lesione della proprietà intellettuale. Atti del Convegno SISPI, svoltosi a Castel Gandolfo, 20-22 marzo 2003, Giuffrè, Milano, 2003, pp. 176-7. The author traces this type of damage back to the idea of the loss of a competition chance (A. GENOVESE, *Il risarcimento del danno da illecito concorrenziale*, Edizioni Scientifice Italiane, Napoli, 2005). The author notes that what the situation shows is not so much the loss of a particular and concrete chance, but the deterioration of the company's position in

this element cannot be determined and settled with merely retrospective criteria; rather, it requires adopting forward-looking criteria that take into account the need and the opportunity to invest in reestablishment programs aimed at eliminating the handicap suffered. This situation occurs with an injury inflicted on the company in economic dependence. The relation to the competition damage affects the company as an expression of its freedom of movement in the market.[563]

The termination should take into account a reasonable period for the reorientation of the activity. A reasonable period should be granted that is just long enough to give the distributor a fair chance to recover the investments.[564] It differs from the concept of a reasonable duration of the contract.[565] The discussion of whether the interest is expectation or reliance is based on incorrect assumptions; unilateral termination is not guided by the same parameters as the contract's default. A party cannot expect that the contract will have a determined length, but that prior notice allows it to reorganize its activity.[566] As is the subject in Chapter IV, if the party does not give adequate prior notice, the investment party could claim loss of profits corresponding to the adequate prior notice period. In other words, if the necessary notice period is not given, the corresponding damages must be paid, which include the loss of profit that would have been obtained by continuing the relationship during the notice period.

2) The length of the relationship before its termination

As argued before, there is no interest directly derived from specific investments that would extend the relationship, and there is no proportionality between the contract duration and these investments, except in cases of franchise agreement. However, the presence of investments is an element to determine the abusiveness of unilateral termination. The termination of the contract is considered abusive if there are non-recovered investments. This does not mean that there is a

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the market. This concept also resembles the requirement that compensation is not the replacement of the injured good (*bene giuridico*) with a sum of money, but a suitable remedy to enable the injured party to re-medicate its programs of activity.

[563] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 508.

[564] This is, in R. PARDOLESI's (*I contratti di distribuzione*, cit., pp. 324-325) reading, the interpretation of the Missouri doctrine.

[565] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 239 highlights this discussion.

[566] M. FRANZONI, *Il danno risarcibile*, vol. 2, in Trattato della responsabilità civile, diretto da Massimo Franzoni, Milano: Giuffrè, 2004, p. 336 notes that it is not the substantive characteristics arising from the obligation that should characterize the expectation interest (*interesse positivo*), but the expectations of the counterparty, which is maximized in relationships with a fixed-term contract.

proportionality between the duration and investments; they are a parameter to evaluate the termination. This reasoning reflects the consequences of an abusive termination. The party cannot pretend to extend the relationship proportionally to investments but can require the performance of adequate prior notice. This topic is studied in Chapter IV.

3) The damages incurred

Another level of investment protection is compensation for their non-recovery; this is a direct protection of investments. If the relationship ends abruptly, the party must compensate for the investments not recovered. The difficulty is defining the amortization rate to precisely verify their amortization. Using the reasonableness parameter, it might be difficult to accurately calculate the investments. Chapter IV addresses these issues.

French case law has extensively dealt with this subject and may assist in establishing the factors necessary to determine prior notice and the delimitation of the protected interests. This presents an excellent comparison to systemize Italian and Brazilian case law. French law also presents a civil law system. In addition to these general characteristics, it has a provision that makes the nuances explicit: it aims at preventing the party from abruptly terminating the relationship.

3.2.4. The example of French case law on the abrupt rupture of a contractual relationship

The consistency of the protected interests can be clarified with a comparative examination of French case law regarding the arbitrary interruption of commercial relationships (*rupture brutale des relations commerciale établies*).[567] The provision, which is in the French Commercial Code, does not resemble the general clause of the abuse of economic dependence; it has a broader scope.

[567] The study of case law in France allows the understanding, with greater clarity, of the interests involved at the end of the commercial relationship. However, doctrine criticizes the case law development of the legal rule (see Luis VOGEL and Joseph VOGEL, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, AJ Contrat, 2016, p. 460). In addition to the insecurity, giving long notice periods of two to three years would remove the possibility for French companies to react quickly to economic changes and make them less competitive. X. HENRY (*Les principes jurisprudentiels mal établis de la rupture brutale de l'article L. 442-6, I, 5° du code de commerce,* in Revue Trimestrielle de Droit Commerciale, 2018, pp. 523 ss.) also criticizes the insecurity derived from the application of the orientation from case law. M. BEHAR-TOUCHAIS contends that relationship equilibrium is done in detriment of legal security (M. BEHAR-TOUCHAIS, *La rupture d'une relation commerciale établie,* in Petites affiches, n.203, p. 9).

Its application does not require configuring economic dependency,[568] and it protects the interest of the recovery of the investments.

Article L. 442-1, II of the French Commercial Code establishes the liability of a contractor who brutally, albeit partially, terminates an established business relationship without giving adequate prior notice.[569] A modification in 2019 has added a limit to the length of the prior notice to 18 months.[570] This rupture is excusable in the case of the counterparty's default. The elements to be considered in cases of prior notice are varied; above all, they concern the duration of the commercial relationship and the contractual uses. Prior notice is an element of public interest, and it does not rule out the possibility of governing the modalities of breach or compromise regarding the indemnification suffered.[571] Even its determination in the contact does not preclude the judicial review of its sufficiency[572] or even its excessiveness.[573]

The brutal interruption of the commercial relationship is defined by the absence of written notice or when it is insufficient for the counterparty to reorganize its activity or research new markets. There is no duty to state the reasons for the decision.[574] However, considerations regarding the elements involved in the motivation may be relevant to remove the characterization of abusiveness of the rupture of the relationship.

The protection of investments occurs through their consideration in calculating the period of sufficient notice. It is one of the elements to be considered in granting a term of continuation of

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[568] In this regard, French Court of Cassation, Mars 17, 2004, n. 02-14.751; French Court of Cassation, January 27th, 2007, n. 04-16.779; and Court of Amiens, October 22th, 1999. It is possible, however, to note a relation of the provision with the completion. The chapter to which Article L. 442-6-I.5 belongs is "*Des pratique restrictives de concurrence*." In this regard, G. COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, cit., p. 119 notes the relationship between this rule and Article 420-2, in which economic dependence is established. The author suggests that the abuse of dependence could be activated even without changing the market structure.

[569] In the original wording : « II. - Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par toute personne exerçant des activités de production, de distribution ou de services de rompre brutalement, même partiellement, une relation commerciale établie, en l'absence d'un préavis écrit qui tienne compte notamment de la durée de la relation commerciale, en référence aux usages du commerce ou aux accords interprofessionnels. En cas de litige entre les parties sur la durée du préavis, la responsabilité de l'auteur de la rupture ne peut être engagée du chef d'une durée insuffisante dès lors qu'il a respecté un préavis de dix-huit mois. Les dispositions du présent II ne font pas obstacle à la faculté de résiliation sans préavis, en cas d'inexécution par l'autre partie de ses obligations ou en cas de force majeure. »

[570] About this modification, see F. SIMON, *Rupture brutale des relations commerciales établies: le nouvel article L. 442-1, II, du Code de commerce*, in L'ESSENTIEL Droit de la distribution et de la concurrence, n. 6.

[571] French Court of Cassation, December 16th, 2014, n. 13-21.361.

[572] French Court of Cassation, October 22nd, 2013, n. 12-28704.

[573] French Court of Cassation, October 22nd, 2013, n. 12-19.500.

[574] French Court of Cassation, July 1st, 2003. In a different opinion, see M. FABRE-MAGNAN, *L'obligation de motivation en droit des contrats,* in Mélanges Ghestin, LGDJ, 2001.

the relationship. The main element is the duration of the business relationship. There is even a ratio between the contract duration and the notice period length: one, or one and half month for each year of a contract.[575] There are other factors considered: the nature of the goods or services, the notoriety of the product or service, the standard practices of the market in which the parties operate, the importance of the party that caused the rupture for the volume of the business[576] (and a possible situation of economic dependence),[577] the exclusivity of the victim,[578] the existence of investments made by the victim of the economic rupture,[579] the professional domain (for example, a seasonal fashion collection),[580] the need for the victim to reorient its activity and find new partners,[581] and the non-competition clause.[582]

The calculation of the notice period requires considering several elements, and it also varies according to the circumstances. Examples are varied. For 14 years, in which it represented a significant part of the revenues of the victim, the Court considered 12 months to be adequate notice.[583] A contract with a duration of 10 years with economic dependence was terminated, and its prior notice of 18 months was considered adequate.[584] For a nine-year contract with a decrease of the revenues generated in the last five years, the appropriate notice period was considered to be three months.[585] For a one-and-a-half year contract, prior notice of six months was considered adequate, considering the particular relation of the relationship, the relevance of the business, and the difficulty in the conversion.[586] In the case of an oligopolistic sector, such as that of civil aircraft, the Court held that a three-year contract had to have a notice period of 24 months. It was considered that the other potential client of the victim was already in a relationship with another company.[587]

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[575] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p.475 criticize the tendency to relate the notice period only to the contract duration. This practice would disregard contractual diversity. However, they acknowledge that this proposition creates legal insecurity.
[576] Cour de French Court of Cassation, Commercial chamber, July 7th, 2004, n. 03-11.472
[577] French Court of Cassation, October 4th, 2016, n. 15-14.025; French Court of Cassation, November 2nd, 2011, n. 10-25.323; French Court of Cassation, May 3rd, 2012, n. 11-10.544.
[578] Court of Appel of Douai, September 29th, 2005, n° 03-268.
[579] French Court of Cassation, January 7th, 2004, n. 02-12.437. L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p.475 propose to adopt specific investment as the main parameter to determine the notice period length.
[580] Court of Appel of Paris, June 28th, 2004.
[581] French Court of Cassation, March 11th, 2014, n. 13-11.097. About the existence in the commercial sector of new commercial partners, see French Court of Cassation, March 25th, 2014, n. 13-14,215.
[582] Court of Paris, 23 fevr. 2007, n. 04/16524.
[583] Court of Appel of Lyon, September 25th, 2008.
[584] Court of Appel of Paris, October 8th, 2008.
[585] Court of Appel of Toulouse, May 13th, 2009.
[586] Court of Appel of Paris, November 12th, 2008.
[587] Court of Appel of Toulouse, September 16th, 2009, n. 08/04848.

The company that is the victim of a brutal rupture may claim losses and damages corresponding to the loss of the gross profit margin during the entire period of notice that should have been granted, which is calculated based on the balance sheet of previous years,[588] as well as other losses suffered, such as the dismissal of employees,[589] closure of operating locations, or investments not yet amortized.[590]

The application of this legal provision differentiates the interests involved from the end of the contractual relationship. It explains the purposes for granting a prior notice period after the end of the contractual relationship: the reorientation of the company, the reduction of damages, and the search for new business partners. The determination of this period considers many factors and not only the investments made. This posture underscores the complexity of contractual relationships. Investment, although relevant, does not correspond to the only factor of relevance for the duration of the relationship and the reorientation of the company. On the other hand, investments may also constitute damages if they are not amortized; this interest, however, should not be confused with the requirement to extend the time of the contractual relationship.[591]

3.3. The protected specific contractual investments

The previous sections have identified how the parties' autonomy influences investment protection. They circumscribed the risks undertaken and the interests involved at the end of the business relationship. The investment protection must be coherent and reflect the balance of the contractual risks and interests. It also requires a global examination of each situation.[592] Failure to do so would lead to undue transmission of contractual risks to the counterparty. The relationship between contractual terms and the protected specific contractual investments cannot be transformed into a vague discourse. The contractual type does imply that these investments should be protected. Each contract requires a different and specific assessment of the risks linked to

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[588] French Court of Cassation, April 28th, 2009, n 08-12.788.
[589] French Court of Cassation., June 11th, 2013, n. 12-20.846.
[590] About the additional damages, see Court of Appel of Paris, Mars 4th, 2011, n. 09/22982.
[591] Some decision demonstrates this situation (French Court of Cassation, April 5th, 1994, Volkswagen c/ Gauthier; French Court of Cassation, January, 20th, 2002, Renault c/ Bronner). They considered that, despite a long notice period, of one year, the termination was not in conformity with the recovery of specific investments. This abrupt termination has caused damages, consisting of these non-recouped investments.
[592] In a similar regard, cf. F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 790.

making investments.[593] The selection of protected investments must be careful; otherwise, it may indirectly transfer the operational risk to the counterparty and assign it undue liabilities.

The determination of protected investments can change the contractual risks and the economy of the operation, mainly by reversing the decision to partially outsource the activity. The inadequate protection can modify the elements necessary for evaluating transaction costs between performing the activity through business, instant contract, or long-lasting contracts. There is an investment specificity in accordance with a particular contract and delimiting the protected investments must be done in consideration of the economic evaluation of the contractual risks assumed.

The general concept of investment, explored in section 1.2, does not help with the task of identifying those protected because of its generality. In that section, the investment was identified as the allocation of capital with the expectation of obtaining a future benefit. There are several expenses designed to promote compliance with a contractual relationship, which, although it falls within the concept presented, would not receive the legal protection referred to in Chapter II. For example, the acquisition of property with specific characteristics, in which the business activity is located, would not intuitively qualify as a protected investment. However, it is an expenditure aimed at obtaining future benefits. This conclusion might change when there is an express requirement from the producer for the purchase of specific equipment. With the premature extinction of the contractual relationship, the substantial value of a specific investment might be lost or at least have a reduction in value.

Investment protection should not only consider the contractual terms; some criteria can be extracted from the notion described by transaction cost economics and from the legal provisions discussed in Chapter II. These normative indications can delimit the object of this protection. It is even possible that the protection of investments carried out in a given legal rule diverges from the general criteria stated.

The delimitation of the protected investments in this section seeks to define the following elements: i) the range of investments protected, ii) the investments' specificity for a particular

[593] For example, the thesis proposed by Carsten-Thomas EBENROTH (*Absatzmittlungsvertrage im Spannungsverhaltnis von Kartell- und Zivilrecht*) allows broad and vague protection of the investments made in a distribution contract, based on which such study was conceived. This possibility can be accepted in general, but it does not imply transposing it to other contractual types. In this case, there would be an undue transfer of risks from the investing party to the counterparty. This is the opinion of F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 795.

relationship, iii) the recovery of investments through the performance of the contract; iv) the hetero-determination of investments by counterparty, and v) any further elements required by law. These elements allow the identification of the parameters mentioned in section 3.3.2, a) the amount of the investments and b) the time required for their recovery. They determine the configuration of an effective loss for the investing party because specific investments were not recouped throughout the relationship.

3.3.1. The relationship between specific investments and accounting categories

As Chapter I addressed, specific contractual investments are based on the definition presented by transaction cost economics. This qualification is vital in order to determine some features of these investments, especially to give them adequate protection. Chapter II promoted a link between legal investment protection and this economic theory. The first chapter also stated that specific contractual investments were not to be confused with the notion of investment accounting. Although they represent different concepts, accounting categories aid in determining the protected investments and can primarily facilitate their proof.

The term "investment" has a broad meaning. In a general definition, it means the allocation of money or other resources in the expectation of future benefits. In accounting, although there are some account *investments*, specific contractual investments can be identified with the notion of an *asset*. As established in Chapter I, the accounting notion of *investment* (e.g., *investment property, equity in other companies*, and *financial investments*) does not correspond to specific investments, and it does not deserve the legal protection discussed in this thesis. Further, it does not help determine protected investments.

The asset modalities are *capital asset* (*fixed asset*) and *current asset*. *Capital asset* can be *tangible* (for example, equipment) or *intangible*, which includes patents, copyrights, franchises, goodwill, trademarks, and trade names. A *tangible asset* is subdivided into *fixed assets* (real estate, durable consumer goods, and equipment) and *current assets* (stock of goods, money, cash

equivalents).[594-595] The function of fixed assets is their use in productive activity and their application for several product cycles.[596] They presuppose gains that are more considerable than the sum spent for their acquisition,[597] which is a characteristic of the investments. These modalities oppose the notion of *current expenses*, which are operational expenditures of business activity.[598] They have cyclical occurrence according to the usual period of the production cycle of an organization (purchase of consumer material [*e.g.*, paper, fuels] and periodic payment for the right of use [*e.g.*, rent]).[599]

Based on these concepts, the protected specific investments would generally correspond to *fixed assets*. Examples of fixed assets are equipment and real state, and they are used in many production cycles. The qualification of an asset as a *fixed asset* is not enough to qualify it as a contractual specific investment. Its protection stems from the frustration of the economic utility due to the end of a long-term contract.[600] A *fixed asset* has also to be specific to a contractual relationship. There is a need to provide other elements to enable their protection. Despite the relationship between those two concepts, there is no reason to aprioristically exclude other expenditures from qualifying as specific investments.[601] Case law, especially examined in Chapter IV, protects investments that are not fixed assets (*e.g.,* publicity expenses).

On the other hand, some expenses could not be framed as investments because they are not classified as *fixed assets;* they do have the elements necessary to its legal protection. There is no special protection in case, after the end of the relationship, shares are repurchased by new shareholders, there is a financial loan to acquire a property,[602] there is a bail subscription and

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[594] In accounting, International Accounting Standard (IAS) 1 presented the rules concerning the financial statement. IAS 16 instituted rules regarding some assets, property, plants, and equipment. It classifies those assets as investments. IAS 2 adresses stocks.

[595] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 790-1.

[596] D. HASTINGS, *Análise Financeira de Projetos de Investimento de Capital*, Saraiva: São Paulo, 2012, pp. 25-6.

[597] D. HASTINGS, *Análise Financeira de Projetos de Investimento de Capital*, cit., p. 27.

[598] This connection is also extracted from provision 29 of Law No. 12/1992 on the regulation of agency contracts in Spanish law (see footnote 162). This rule mentions the "expenses" (*gastos*) as an object of protection, and the doctrine can attribute the meaning of the protection of contractual investments to that expression – and not of any expenses.

[599] D. HASTINGS, *Análise Financeira de Projetos de Investimento de Capital*, cit., p. 27.

[600] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., pp. 790-1. Generally, a current asset would not fall under the protection of the investment. However, it could also be protected, but with a different legal basis. For more detail on the subject, see section 3.3.1.

[601] See I. CHERPILLOD, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011.

[602] The conclusion might be different if the investing party was induced to loan an amount to acquire the specific investments required.

advances of cash that were not invested in immobilization and could be recovered,[603] there is a requirement of a reasonable amount in a bank account, there is a request for the maintenance of a minimum turnover and current accounts, or the investments made after having for the sole purpose of improving the cleanliness of the premises[604] or complying with brand standards.[605-606]

As stated in section 3.2.2, the legal protection of specific investment requires an economic amortization, and it differs from accounting depreciation.[607] Accounting depreciation is defined as an accounting method of allocating the cost of a tangible asset over its useful life, and it is used to account for a decline in value. Since these accounting categories do not help select the protected investment, there is a need to define the elements to qualify them. This qualification requires not only considering the economic theory mentioned but also elements in the law.

3.3.2. The legal criteria for the selection of protected investments

Some accounting concepts supply tools for the qualification of specific investments; they are usually fixed assets. Specific investments should also be specific to the contractual relationship. Notions from economics and accounting provide the elements for qualification as specific contractual investments and thus grant them legal protection. However, this qualification might not be enough to identify protected investments. Some rules determine the conditions for their protection.

The general clauses applicable to protecting investments, notably the abuse of economic dependence and objective good faith, do not make express reference to investments. Some specific provisions can help delimit the concept of those that are protected. In Italian law contains a provision aimed at protecting specific investments: Article 3/3 of the franchise agreement law. This rule conditions the duration of the contract to the amortization of the investments. It does not require any additional element to protect these investments, nor is an indication contained in Article 3/4, *a,* which determines, in a franchising proposition, information about the investments' extent.

[603] French Court of Versailles June 4, 2006.
[604] French Court of Paris, February 14, 2003.
[605] French Court of Paris, October 3, 2007.
[606] Some of these examples were extracted from L. VOGEL and J. VOGEL, *Droit de la distribution,* in *Traité de droit économique,* t. 2, Paris: Lawlex Bruylant, 2015, p. 372.
[607] Accounting amortization is destined to intangible assets and loans. For this reason, the preferred expression is *accounting depreciation.*

This last provision has broad wording and can even include expenses not covered by the provision containing the minimum duration of the contract. Except for the norms intended to protect the investments in a public concession contract, the other provisions in Italian law on the subject also do not help select the protection investments.

The reality in Brazilian law is different. There are some elements capable of delimiting the protected investments,[608] and these indications can provide general and specific parameters. Articles 473 and 720 of the Civil Code establish, through indeterminate concepts, that the protection of investments depends on their *nature* and *extent*. The concept of the nature of the investment does include many indications. The only conclusion is the existence of investments protected and those not protected. The criteria for their determination are developed in section 4.3.2.2. The other element for characterizing the investment is its *extent*. These provisions require that the investment to be substantial.

The law regulating motor vehicle distribution contracts (Law No. 6.729/1979) selects protected investments. Although the rules established therein are exceptional and do not admit a legal analogy, they point out some indications of principles (*indicazione di principio*) regarding the typology of protected investments protected in Brazilian law. They could indicate elements for the particularization of the concept of the *nature* of the investment in Articles 473 and 720 of the Civil Code. In case of a failure to extend the relationship, the law establishes the manufacturer's obligation to *acquire* the equipment, machinery, tooling, and facilities used in the contract concession.[609] The real estate used in its activity is excluded from this protection. The obligation to repurchase the equipment is exceptional (*natura eccezionale*) and cannot be extended to other contractual types, given the peculiar characteristics of the contract for the distribution of motor vehicles. The provision, on the other hand, indicates capital assets, broadly described, as protected investments. These assets are all those *specific* to the contractual relationship. Real estate, which is excluded from this legal protection, does not cover this characteristic and, therefore, is not protected. The acquisition of property, although it represents a significant value expenditure, is not

[608] Brazilian public concession law establishes alternative criteria (in the absence of an indication of the concession instrument) for the determination of the amortization of investments: notions of tax and corporate laws. These parameters are concrete, but, for reasons previously discussed, they cannot serve as a guiding criterion. Tax and corporate law define the elements for their purposes and may not allow the adequate protection of interests.

[609] The wording of Article 23, II of Law No. 6.729/1979: "to purchase the equipment, machinery, tools and facilities for the concession, at the market price corresponding to the state in which they are located and whose acquisition the manufacturer had determined or had had knowledge of it in writing without to make immediate and documented opposition to it, excluding the concessionaire's properties from this obligation."

specific to the relationship, nor does it lose significant value in alternative use; it could be used in another activity. Another critical indication concerns the value of these investments. They would correspond to the market value of to its state at the end of the relationship.

The rules in Brazilian and Italian law do not add much to the delimitation of the protected investment. This conclusion contributes to address the notion of investment in these two legal systems together, without the danger of creating conceptual confusion. The economic concept of specific investment provides the elements to apply the general clauses. The elements contained in rules mentioning investments are generic, and therefore, no new criteria can be drawn for their indication. They serve only to confirm the need to protect specific investments. In addition to being specific, they should have a substantial value. The market value should calculate their worth at the end of the relationship. Community law provides more specific elements to select protected investments.

The European Commission's guidelines for Regulation EU/330/2010 (on the application of Article 101[3] of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices) provide criteria to exempt some competition restrictions. Community antitrust law presents global elements for the protection of investments that can be transplanted to Italian law. They could even serve as an indication for Brazilian law, considering the economic approach to this topic. Those guidelines protect the welfare of consumers and the market, and their indications detail the protected investments. Their inspiration comes from economic literature, especially transaction costs economics. It provides further evidence of the importance of adopting an interpretation based on law and economics.[610]

The guidelines on vertical restraints note the qualities of investments that merit antitrust protection against the hold-up risk.[611] There are other references to investments in these guidelines, but the elements that characterize them are not clear. The guidelines attribute the following qualities to protected investments: i) the specificity to a contractual relationship, ii) the requirement for long-term recovery,[612] and iii) the need for the party to have invested more than the other (investment asymmetry). These qualities prevent contractual partners from a real or significant

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[610] Economic theories can provide some indication to apply those rules, but their interpretation should not be based solely on economic aspects. With adherence to this possibility of reconstruction, see A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 267.
[611] Cf. paragraph 107, d, which provides criteria for the identification of the investments that merit protection.
[612] French case law has stated the impossibility of compensating the investment valued as not substantial (Court of Paris, June 7th, 1999).

underinvesting risk. Examples of investments include specialized equipment, such as machinery, equipment, and training to satisfy a particular requirement of the distributor's customers. The element of specificity is also expressly established by the doctrine of economic analysis. The other elements, asymmetry and long-term recovery, are assumptions adopted by economic theory for the hold-up, although they are not usually elucidated.

Investments should be specific to the contractual relationship.[613] Making investments for a contractual performance generates a lock-in effect given the loss of its value in an alternative use (sunk cost). This characteristic may stimulate the counterparty to adopt opportunistic behavior with an appropriation of the generated surplus. The guidelines characterize the investment specificity with a significant loss of value after the termination of the relationship. The investments could not be used to supply other clients and may be sold at a significantly lower price.[614] The value loss can be demonstrated by evaluating its market price in a new application of the investment. It may even no longer be used or require some costs to adapt the investment to the new purpose (switching costs).[615-616] If one cannot assess the specific investment use in another activity, the reversibility of the investment considers this prognosis based on a percentual probability. R. PARDOLESI has suggested the latter solution.[617] He proposes a formula to calculate the value of the entity of the

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[613] In doctrine, in addition the economic literature cited, see P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 284.
[614] Cf. paragraph 107, *d.*
[615] Article 1.227 of the Italian Civil Code could be applied to the case in order to impose the reversal of the investments in alternative use according to an ordinary diligence. M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 27 proposed this interpretation. Brazilian law does not have a similar provision. However, the doctrine extracts this obligation from the good faith objective in its manifestation as a duty to mitigate the loss. Cf. in this sense, see M. J. FRADERA, *Pode o credor ser instado a diminuído o próprio prejuízo?*, in Revista trimestral de direito civil: RTDC, v. 5, n. 19, p. 109-119, jul./set. 2004, *passim*.
[616] In the Brazilian legal system, the question of the reversibility of investments acquires repercussion from a study conducted by P. FORGIONI (*Contrato de distribuição*, cit., p. 232-3). The author creates a classification of investments protected by Article 473 of the Brazilian Civil Code, divided into two categories, recoverable and irrecoverable investments. The former would be those that could be recovered through the performance of the contract or their use in another activity. The irrecoverable investments represent a loss with their use outside the relationship for which they were implemented. Given the different characteristics of these categories, the irrecoverable investments would be amortized by obtaining profits. Recoverable investments would require prior notice. The classification has the merit of allowing the adequate visualization of investment protection. However, the proposition adds an investment category based on the economic literature. Recoverable investments do not require specific address because they are not specific. The specificity is the condition necessary for its protection, and not the possibility to be recovered. Moreover, recoverable investments compose an organizational requirement of the company, which must employ the means necessary for the exercise of its activity. Their fate is indifferent to the termination of the contractual relationship. The granting of a prior notice period, intended for the reorientation of the entrepreneur, is not directly linked to recoverable investments. There is only an indirect relation with the activity developed and the redirection of the business activity. Similarly, the classification may also distort reality. Specific investments classified as irrecoverable are not necessarily irrecoverable in the sense employed in this thesis. Specific investments can be partly recovered; it suffices that there is a significant loss of value for them to be considered specific and, therefore, to be protected.
[617] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 326 ss.

investment, taking into account its possible future use. This possibility of reuse should be translated into a percentage, which should be multiplied by its value in the future. In the evaluation of the new use, the partial reversibility of the investment is admitted.

An example of this specificity is the use to manufacture a specific brand component and its impossibility for the production or resale of alternative products. The following example might also be qualified as a specific investment: i) a customized software for the distributor that enters the network of contracts,[618] ii) in a franchise agreement, measures to adequate itself to the commercial practice and the commercial image of the distribution network,[619] and iii) the payment of entry fees, which are generally required at the beginning of the contractual relationship.[620] The doctrine identifies an investment made by a distributor who acquires property with location, surface, and distribution of spaces required for the business activity, but with the possibility of an alternative use, as an investment *without* specificity.[621] Other examples are the employment of the investment in an activity not directly related to the contract, either to reinforce the financial structure of the distributor or its supplementary activity.[622] There are methods to operationalize the concept of specificity; in particular, the models created by E. ANDERSON and A. COUGHLAN

[618] A. NERVI, *Contratti di distribuzione e "recovery period rule"*, cit., p. 267.
[619] A. FICI, *Il contratto di franchising*, Napoli: Edizioni Scientifiche Italiane, 2012, p. 118.
[620] Cf. P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 284-285; A. FICI, *Il contratto di franchising*, cit., p. 118; and C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 292.
[621] This example is provided by P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 285, based on a German decision, *OLG Müchen*. A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 267 gives another example: the imposition of acquisition of an oversized property is required. Contrary to the first example, this latter one may be included among the specific investments if the investing party demonstrates that this oversized property would be difficult to apply in another activity.
[622] These examples were extracted from French case law (Paris Court, November 25th, 2004, and Court of Cassation, May 30th, 2007).

(1987),[623] by B. KLEIN and K. MURPHY (1990)[624] by A. ZAHEEER and N. VENKATRAMAN (1994),[625] and by E. CHRISTIAANSE and N. VENKATRAMAN (2002) should be mentioned.[626]

There is also the need to determine the investments specificity to a particular relationship. A party might have made specific investments that serve to perform more than one contract. Their recovery should be calculated, considering its specificity to more than one relationship. The doctrine acknowledges that this situation makes it more difficult the investment amortization.[627] However, based on a decision of the French Competition Authority (No. 08-MC-01, December 17th, 2008, see section 4.2.6), it suggested a method to their estimation. It is the contrafactual method, provided in Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The specific investments to a particular contract are the difference between the reality and the contrafactual state: the lost revenues and the avoided expenses without an agreement. This method can exclude fixed assets and expenses preexisting to the contract. They are not specific to the relationship.[628] If the investment acquired to perform a particular contract, it is used in another transaction, only its fraction that should be considered. A suitable method is to

[623] According to E. ANDERSON; A. COUGHLAN, *International Market Entry and Expansion via Independent or Integrated Channels of Distribution*, in Journal of Marketing, vol. 51, January 1987, five factors should be considered to verify a specificity of an investment. How much training at the sales office do you provide to salespeople who handle your product? 0, 1, 2, 3, 4, 5 (0 = no training, 5 = very high level of training). How much training do you give employees of purchasers at their installation? 0, 1, 2, 3, 4, 5 (0 = very little training, 5 = very high level of training). How much training do you give employees of purchasers in your U.S. facilities? 0, 1, 2, 3, 4, 5 (0 = very little training, 5 = very high level of training). How many years of education do you require for sales employees to be qualified to handle this product? (Example: bachelor's degree coded as 16 years of education). How much sales experience do you require for salespeople to handle this product? (coded as the number of months of experience required).

[624] For B. KLEIN; K. MURPHY, *Vertical Restraints as Contract Enforcement Mechanisms*, in The Journal of Law & Economics, vol. 31, no. 2, Oct., 1988, there are six elements on a seven-point scale (1 = completely disagree, 7 = completely agree). Some questions are raised. Is it difficult for an outsider to learn our ways of doing things? To be effective, does a salesman have to take much time to get to know the customers? Does it take a long time for a salesperson to learn about this product thoroughly? Does a salesman have inside information on the procedures that would be helpful to the competitors? Are specialized facilities needed to market this product? Is a large investment in equipment and facilities needed to market this product?

[625] A. ZAHEER; N. VENKATRAMAN, *Determinants of Electronic Integration in the Insurance Industry: An Empirical Test,* in Management Science, vol. 40, no. 5, May 1994 adopt three questions on a seven-point scale (1 = relatively similar to other carriers, 7 = significantly customized for the focal interfaced carrier).

[626] According to E. CHRISTIAANSE; N. VENKATRAMAN, *Beyond Sabre: An Empirical Test of Expertise Exploitation in Electronic Channels*, in MIS Quarterly, vol. 26, no. 1, March 2002, the test has two sections on a seven-point scale.

[627] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475.

[628] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475 recommend the parties to identify in the contract specific investments in order to be easier to claim eventual remedies due to their non recovery.

represent the contract in the form of an isolated business plan (stand-alone) and to compare this isolated business plan to the business plan integrating all the company's activity.[629]

Some investments linked to the production level should not be considered as specific investments. They vary according to the production level. If the contract terminates, these expenses are no longer required. For example, in the decision of the French Competition Authority (No. n° 08-MC-01, December 17th, 2008, see section 4.2.6), iPhone terminal subsidies were not considered specific investment, because these variable charges were not supported after the contractual end.[630]

No elements prevent the protection of intangible assets. The guidelines made this option clear when they used *training* as an example of protected investment.[631] Other examples are the counterparty's commercial image or know-how. In both cases, considering the difficulty in their value evaluation, they would require the contractual relationship to a have standard term, before which termination would be considered abusive.[632] Specific modalities of distribution agreements, in particular franchising and integrated distribution contracts, require the identification of the distributor with the producer's brand name and know-how. This suitability to the image of the producer allows the configuration of a simple presumption of its use for the relationship.[633]

References to investments are not limited to the provisions in those guidelines. The norms related to the *Codice degli appalti*, enacted under the European Union Directives, should also be considered. Different principles guide them in guaranteeing hold-up protection. This circumstance excludes its suitability to select the protected investments directly. Its provisions establish that the operational risks of the concession activity cannot be transferred to the public authorities. The use of investments to determine the duration of the contract, provided in Article 168, cannot transfer the operational risk. It is an indication of principle (*indicazione di principio*), according to which

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[629] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475.

[630] Ibid., p. 475.

[631] Cf. paragraph 107, *d*. The economic doctrine also emphasizes that the training of the personnel for compliance with the franchising agreement is an essential investment and, therefore, must be considered in the value of the contract. See R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., section 10, Kindle version.

[632] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 285. With the same position, see I. CHERPILLOD, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011 ; and L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475.

[633] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 854 argues a simple presumption in the cases of investments necessary for the performance of integrated franchising and distribution contracts. The counterparty has the burden of adducing facts or circumstances that would contradict this presumption.

investments should not be evaluated based on business activity. In other words, their recovery should not depend on the activity of the company and the verification if the recovery explicitly occurred in the concrete case. The standard to be used must be that of the normality of the activity; in the case of a distribution network, one can expect the necessary time for their members to achieve the recoupment of the investments. Directive EU/23/2014 also notes that the initial and new investments deemed necessary for the exploitation of the concession would be included among the investments protected.[634]

These rules give legal indicators for the delimitation of the protected investment. Although there might be some particular provisions, it is possible to make some generalizations about the conclusions this legal analysis reaches. Some elements in Brazilian law might be applicable to Italian law and vice versa. This proposition is based on the relation of these parameters with economic theories. There is a need to provide some parameters to the selection of protected investments since because provisions in both legal systems are generally vague. This makes their application risky because undue protection might change the economic balance of the agreement. The legal parameters extracted are as follows:

1) Protected investments are specific to a relationship. This specificity causes a significant loss of value after the termination of the relationship.
2) Investments have to be substantial, destined for recovery in a long-term contractual relationship.
3) An asymmetry of investments is necessary.

Other elements are also drawn from these rules:

4) Investments should be evaluated for their market price at the end of the relationship.
5) Either tangible or intangible assets may be classified as protected specific investments.
6) The operational risks associated with them cannot be attributed to the counterparty; they should be considered a standard term to assess the recoupment of the investments.

[634] Cf. Recital (52) of Directive EU/23/2014.

3.3.3. The hetero-determination of specific investments

The hetero-determination of investments is noted as a factor to select protected investments.[635] It occurs when the counterparty, within its contractual power, expressly determines which investments should be made to perform the agreement. This determination from the producer does not relate to the issues raised about self-responsibility and private autonomy (see section 3.1). These investments also do not reflect the party's initiative.[636] They are not the result of inducing the contractual performance but are an express imposition from the counterparty. Due to these features, the hetero-determination assures investment protection because it renders the assessment of its specificity unnecessary.

The hetero-determination is a restrictive notion. Specific investments are usually made in order to achieve the contractual objective without any specific requirement of the counterparty; they result from the diligent performance of the contract. The hetero-determination must be understood as the decisive influence of the counterparty, transmitted through objective conduct, in the decision to make the investments.[637]

The investments demanded in these circumstances may be protected. The way the counterparty requires the investments has repercussions for the configuration of its specification to the relationship. Investments made for the performance of the contract cannot presume its hetero-determination. These investments must also be specific to the relationship to be protected.[638] Once the specific nature of the investment in the relationship has been demonstrated, the investment can be protected. The counterparty is required to adduce facts or circumstances that preclude this protection, in particular, that the party took the risk of its impossibility of recovery.[639]

On the other hand, if the counterparty demands that investments be made, they are automatically specific. The assessment of their specific nature to the contract is dispensable. The investment imposed by the counterparty over the relationship does not require demonstrating its

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[635] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 789 ss.
[636] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 285. See also R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329; F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 739; A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 266.
[637] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 792.
[638] Ibid., p. 801.
[639] Ibid., p. 792.

specificity. There is a factual presumption of their specific nature that transfers the burden to prove it is specific to the relationship to the counterparty. Its unilateral determination assumes an idiosyncratic character, except in the case of the investments usually required of an entrepreneur who intends to exercise (or who already performs) the activity corresponding to the object of the contract.[640]

No form is required for an imposition to be considered hetero-determined. It may result from a contract, notably in a framework agreement or the counterparty's trade policy. It could also stem from the counterparty's behavior or its silence.[641] The producer might have supervised and later performed an active role in the implementation of investments.[642] Brazilian motor vehicle distribution agreement law has an exceptional requirement, not applicable to other investments, for the protection thereof. Article 23, II of Law No. 6.729/1979 limits the protection of investments to those that the counterparty has determined or learned of in writing without opposition. The objective is to give the producer control of the protected investments. This option is consistent with the requirement for the manufacturer to have an obligation to repurchase investments after deciding not to renew a fixed-term contract. It cannot be extended to other situations that are not encompassed in Brazilian and Italian law.

These considerations relate to the investments required at the beginning of the relationship and successive investments (as set out in Directive EU/23/2014). As observed in section 3.1, specific investments are protected in contracts with an indeterminate term, or with a similar regime. However, successive investments can also be protected in a fixed-term contract. In order to adapt to the changing market conditions, with the consequent supervening modification of its commercial policy, the counterparty may make additional extraordinary investment requirements. In this case, these investments may be protected, even with the fixed duration relationship, since the risk structure taken has been altered.[643]

As demonstrated in section 3.3.3, a common situation of hetero-determination occurs when the counterparty encourages the other to invest and, despite that, prematurely terminates the contract. The investing party has the expectation of recovering the investments throughout the contract because it was stimulated to make them. The liability is due to the counterparty's induction

[640] Ibid., p. 801-2.
[641] Ibid., p. 798.
[642] In French case law, see Court of Cassation, May 12th, 1998.
[643] Ibid., p. 803.

of concrete expectations concerning the relationship's duration. This protection might also be made based on the specification of the general clause in good faith, the *venire contra factum proprium*.[644]

This situation is common, especially when the producer presents a plan that modifies its commercial policy through the implementation of investments by the distributors. In the case O'Leary -v- Volkswagen Group Ireland Limited ([2016] IEHC 773), the High Court of Ireland evaluated the motor vehicle manufacturer's decision to terminate some distribution contracts. Concerning the claim to reinstate the plaintiff as an authorized dealer, based on the violation of promissory estoppel, the court denied it. The court understood that the manufacturer's representative did not act to his detriment on the strength of the promise made. It considered that the representative had not encouraged dealers to invest in their business. Even if he did, it was only encouragement; the decision to do so was made by the individual dealer. On the other hand, concerning the damage claim, the court considered the producer liable for reimbursing the plaintiff for the expenditure incurred by the plaintiff in performing works to his premises following a meeting, but with due allowance made for any value accruing to the plaintiff that arose from completing those works. The court understood that the producer did not inform about the possibility of reorganizing the distribution system in a timely way, which could prevent the dealers from making investments. Even though the court did not consider the time to recoup the investments, it understood that the omission of preventing unnecessary investments would configure a hetero-determination of the investments and, therefore, this could allow the producer's liability. In this case, there was hetero-determination by omission.

3.3.4. The recovery of specific investments

The previous sections have provided the elements of select protected investments. They indicate the elements to determine this protection: 1) the specificity to the relationship, 2) the substantiality, and 3) the asymmetry of investments. There is no relationship between the investments and a particular accounting category. The investment value might also be calculated according to its market value. These elements correspond to the determination of parameter a) proposed in section 3.3.2, which is necessary to verify the time required for their recovery.

[644] Ibid., pp. 803-4.

The assessment of investment recovery should also consider the earnings from the business activity (parameter b), described in section 3.2.2). In this regard, this section concluded the adoption of the economic amortization method. It considers that the profits from the activity should be used to partially recover the investment. The factor that might be used to assess the recoup is its reasonableness. The tax or accounting amortization (or, more appropriately, asset depreciation) should not be applied because it involves different principles and scopes.

Other elements drawn from the legislation can be used to determine their amortization. The notion of investment recovery is addressed in section 3.2.[645] The European Union guidelines about vertical agreements posing competition restrictions do not specify the amortization method; their perspective differs from the issue assessed in this thesis. They indicate the permissible contractual restrictions to prevent problems of contractual parasitism, especially those related to contractual hold-up.

Directive EU/23/2014, on which the Italian *Codice degli appalti publici* was based, indicates the principle of evaluating the recovery of investments. It does not allow a party to assign the operational risk of their recovery to the other. There is no minimum revenue equal to or higher than the specific investments that can be guaranteed. Moreover, this directive guarantees the protection of initial investments, and also the investments employed through the relationship. A party may be required to renew a piece of equipment, to reinvest, or to update the existing ones.[646]

The directive also indicates a tax amortization criterion to recover investments. Although they represent different concepts, asset amortization from accounting[647] and tax standpoints has some importance.[648] They could indicate some parameters of the legal application and provide some presumptions. The doctrine recognizes that the concept of tax amortization may be

[645] There are some words to indicate the recovery of investments, as such as recovery, amortization, and recoupment, and they are used interchangeably.
[646] R. BLAIR, F. LAFONTAINE, *The Economics of Franchising*, cit., section 10.3.2, Kindle version.
[647] In accounting, amortization (technically called "depreciation," the term "amortization" is reserved for intangible assets) consists of reallocating the cost of a tangible asset during its useful life. The accounting depreciation affects the financial statement. There are several methods to compute depreciation, and the period in which the assets are depreciated may vary. In Italian law, Article 2.426 of the Civil Code establishes how tangible and intangible assets, whose use over time must be systematically amortized, must be included in the balance sheet. The device establishes criteria for the amortization to consider the physical use of the good, its technological overcoming, and economic obsolescence. In Brazilian law, the amortization of the company's financial statement is regulated in Articles 183, V and 183, § 2º (Law No. 6.404/1976).
[648] Tax depreciation consists of the system that allows the deduction of taxes for the recovery of the course of the asset used in the business or for the production of income. Tax amortization rules change from country to country. In Italian law, the tax depreciation has discipline in Article 67 of D.P.R. 22 dicembre 1986, n. 917.

relevant.[649] However, it cannot be read in absolute terms because it has other purposes and principles. This relationship is addressed in the following section.

The requirement for the recovery of investments does not necessitate a detailed examination of this procedure. One cannot transfer the operational risk to the counterparty, and it is not possible to place the duration of the contract in the hands of the investing party; doing so could generate a moral hazard risk. Moreover, it is not possible to transfer external economic risks to the counterpart; such risks could have contributed to a slower recovery rate in the concrete case.[650] There are also practical reasons for this proposal, such as the difficulty of establishing a direct link between the profits obtained and imputing them to recovering investments, as well as the inconvenience of the counterparty having to permanently intrude on the counterparty's activity and management.[651]

It should be recalled that contractual relationships with specific investments involve a complex risk division. This relationship is often intended to extend in time, and the management of the contract is permanently affected by external events, especially market contingencies.[652] The recovery of investments depends on multiple variables, and these can only partially be controlled.[653] The contract duration is only one of these variables. The investigation of the period necessary for the recovery of investments, based on the specific and concrete duration of the contract, cannot ensure the amortization of all investments. There is no strict, static correlation between the duration of the bond and the amortization of the investments unless there is a specific legal determination. Amortization is a dynamic phenomenon.[654]

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[649] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 808.
[650] Ibid., p. 797. Cf. also L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475. These same reasons are also indicated as factors to rule out the recoupment doctrine by A. SCHWARTZ, *Relational Contract in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, in The Journal of Legal Studies, vol. 21, no. 2, jun. 1992. He develops two observations. He notes that the recovery period rule presupposes a link with the profits that the party could mature in the contract. It creates an incentive for the terminating party to underestimate the profits it would have during the relationship because the lower the profit, the smaller the portion to repay the investment. This is how one could maximize the request for compensation in the face of early termination. This rule would end up encouraging excessive investments. The party that fears the termination would exaggerate the investments to prevent the intention of the counterparty to terminate the relationship.
[651] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 806-811.
[652] Ibid., pp. 243-4.
[653] Ibid., pp. 243-4.
[654] Ibid., pp. 243-4.

The amortization period to be considered for the evaluation of investment protection should be a standard term that is not explicitly based on the contract. A reasonable period should be the period necessary in principle for the recovery of investments.[655] It can be determined to compare the recovery period that is standard for other relationships in the distribution network. The contractors must also exercise their activity in a similar context. This attributes a real opportunity for the recovery of these investments, thus avoiding rewarding an economic inefficiency and burdening the manufacturer with risks of a company that it does not control.[656]

This generalization does not preclude the assessment of particular circumstances. It is possible, for example, for external market reasons to have decisively contributed to the early recovery of investments, before the standard period, or even to the specific performance of the counterparty in a situation of a vertical agreement. If these circumstances are demonstrated, one may seek to reduce or increase the reasonable period for the recovery of investments.[657] An economic reasoning must not forget the presence of indirect effects of the contract on the rest of the enterprise. If, for example, the partner and the contract have been used as commercial reference and have made it possible to obtain other markets, it is economically logical to attribute a fraction of this positive effect to the specific revenue of the interrupted contract. We then speak economically positive externality of the contract on the activity of the company.[658]

Another method is to evaluate if the investment party is an efficient operator (*as efficient operator test*). It was recommended by the European Commission[659] and validated by the European Court of Justice[660] and the French Court of Cassation.[661] The evaluation consists in verifying that the methods of production and organization implemented to execute the contract are in conformity

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[655] See, for example, Article 168 of the Italian *Codice degli appalti*. See also I. CHERPILLOD, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011. He adds that this period should be calculated *ex ante*, when the investments are made, in order to avoid that the distributor's risks would transfer them to the counterparty.
[656] Ibid., p. 801.
[657] Ibid., p. 804.
[658] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475.
[659] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.
[660] European Court of Justice, March 27th, 2012, No. C-209/10, *Denmark Post*.
[661] French Court of Cassation, Commercial Chamber, No. June 17th, 2008, No. 05-17.566, Bull. civ. IV, n° 122.

with those of a hypothetical or "average" undertaking, who would have implemented the current practices to perform the contract.[662]

This section addressed the amortization method and the techniques that can enable the determination of the recovery period. Based on a provision derived from community law, which could be generalized to Brazilian law, the recoupment must not consider, in principle, particular aspects of the contractual relationship. This rule suggests the adoption of a standard period based on reasonableness. A comparative analysis with other, similar contracts might be useful to determine this period. Some circumstances, however, may influence the assessment of the recoupment period to extend or reduce it. Another particular element might also change this assessment, namely the hetero-determination of investments. Based on these aspects and those described in section 3.3.3, these are all the tools to determine parameters a) and b) (the investment value lost and the period to its recovery). With these, legal investment protection could be easily implemented. A further issue has to be addressed, the burden of proof, as well as the impact of the financial statement on this protection.

3.3.5. The burden of proof of the protected investments

The previous sections addressed the elements needed to select protected investments. The evaluation should also be dynamic throughout the contractual performance. It requires the adoption of tools capable of guiding their protection in Court. In the first stage, one must evaluate whether the contractual terms allow the legal protection of investments. There are many factors to be considered, and the relationship duration is one of the most crucial elements. There is a preference of their legal protection if the contract has an indefinite term or a similar structure (see section 3.1.).

The second step is to assess if the investment could be legally protected. The elements provide the criteria for this evaluation. This protection might be reserved for investments with the following features: 1) the specificity of the relationship, 2) their substantiality, and 3) the asymmetry of investments. The qualification as specific can be waived from this assessment if there is an investment of hetero-determination by the producer. Once these elements are present, the investment can receive legal protection.

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[662] L. BENZONI ; A. ATLANI, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p. 475.

The third step is to evaluate the value loss of the specific investment with the end of the relationship (parameter a), mentioned in section 3.2.2. The factors to calculate this value were mentioned in previous sections; in short, it should be calculated considering its subsequent use. If the investment cannot be converted into an alternative use, the aspect a) should correspond to the difference between the acquisition price and how much is recovered from the sale of the asset. If the investment is used for another purpose, it is necessary to add the costs for its remodeling to the investment value and then to deduct the new value with its new use. If the result of these operations is negative, the unilateral termination should be considered abusive.

The last step is to verify whether the investments were amortized (parameter b), as mentioned in section 3.2.2. This step considers that the income derived from the economic activity should be partially attributed to the business activity and partially to the recovery of sunk costs (economic amortization). The *economic amortization* requires that the income derived from investments is not limited to covering their costs. This recovery must consider a standard period for recouping the investment based on similar agreements. However, some contractual circumstances can be used to extend or reduce this standard term. The evaluation must avoid the attribution of some operational risks to the counterparty. The reasonable criterion provides the tool for this complicated assessment.

The investing party has the burden of proof for these numerous elements. This burden is due to the principle that the claimant must prove its claims. Moreover, the investing party has more elements to employ; it was the party that acquired the investment and controlled the income generated with its activity. It does not usually have all the elements to assess if the investments were recouped. An expert should have the final word to determine investment recoupment.

The financial statement of the investing party aids with this burden. It contains some elements that are important to this assessment and serves as guidance. R. PARDOLESI has suggested extracting them from the balance sheet.[663] The financial statement informs all the investments necessary to perform the contract, their value, their useful life, and their salvage value. These last two factors are present in the calculation of asset depreciation. There are some differences in these elements and those necessary to perform the determination of an economic amortization. They should, therefore, be taken with a grain of salt.

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[663] R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 327-328.

The balance sheet provides information on all of the company's assets. From this list, it is possible to evaluate which are specific to the contractual relationship. The financial statement also includes their initial value and their salvage value. These reflect the assets' fair value. Although the salvage value is not the same as the value loss after the end of the contract, it can be used as a reference. The useful life might also be an essential parameter to evaluate the investment recovery. If the relationship ends after a duration close to the asset's useful life, there is evidence that the investment might be recovered. This is a conservative calculation because it only takes the asset depreciation over time into consideration, and not the earnings derived from the business activity. Some other precautions should be taken. Accounting rules are based on some specific principles, in particular, that of prudence, which can lead to distortions in such examinations.[664] There are also certain expenditures that do not fall within the asset category, e.g., employee training, the identification of the activity with the counterparty's image, or the remodeling of the commercial establishment.[665]

The adoption of these indicators (a presumption of specificity in the case of hetero-determination, the elements from the financial statement, and the adoption of a standard term to recover investments) is also important considering the producer's position. It has to make a decision to terminate the relationship without knowing all the elements to evaluate the unlawfulness of its conduct. A comparative examination with other distributors might help the decision to terminate the contract. In addition, the manufacturer has an injunctive claim available to mandate the availability of the company's books and financial statements (Article 1191 of the Brazilian Civil Code and Articles 417-419 of the Brazilian Civil Procedure, as well as Article 2710 of the Italian Civil Code). An exception might be the franchisor, who must know and inform the necessary investments for the contractual performance. After the determination of the elements to demonstrate the investment recoup, the last issue must be addressed: the relationship between, on the one hand, specific investments and, on the other, the loss of customer base and compensation for lost inventories.

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[664] The considerations made by M. LIBERTINI, *Il risarcimento del danno per la violazione di norme generali sulla concorrenza (antitruste e concorrenza sleale)*, cit., p. 172 concerning competition damages may be extended to the notions of investments and their protection.
[665] Ibid., pp. 800-801.

3.3.6. The protected investments, the loss of customer base, and compensation for lost inventories

Section 3.2.1 outlined the existence of multiple interests that might be affected by the end of the contractual relationship. There are some damages inflicted with the premature and abrupt end of the relationship; some could even be considered specific investments: the compensation for loss of the customer base (*indennità suppletiva di clientela*) and compensation for lost inventories. The conceptual proximity makes it necessary to analyze whether they have the requirements for investment protection as established by the rules analyzed in Chapter II.

Indemnification for loss of the customer base is intended to compensate the agent especially for the particular type of "investment." The party crystallizes a stable clientele for the counterparty's products. This modality of "investment" can quickly be expropriated by the producer, who can terminate the contractual relation at will. This damage is an especially adapted remedy to protect the agent. It "invests" time in a relationship; however, these "investments" are distinguished from those made by the other contractors. The latter''s investments are usually in fixed assets. When comparing them, the compensation for loss of the customer base is intended to protect the agent's "investments" that translated into a clientele for the principal and from which the principal benefits even after the dissolution of the contract.

The typology of the investments protected, as outlined in this thesis, is not adapted to the specific needs of the agent.[666] It has requirements other than investment protection. Similarly, compensation for the loss of the customer base is more specific when compared with investment protection as this thesis describes it. In the Italian legal system, based on Directive CEE/86/653, Article 1.751 of the Civil Code defines the requirements for compensation.[667] It would not be possible, therefore, to extend the regulation discussed in Chapter II to this category. The debate in Brazilian law on the subject is still underdeveloped. A special law (Article 27, j of the Commercial

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[666] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 813.

[667] The decision of the Italian Court of Cassation (Cass. civ., n. 20047/2016) clarified the relationship of indemnity for the clientele with the requirement of prior notice. The compensation for the clientele represents an interest that differs from that of the concession of an adequate period of prior notice under the terms of Article 1.750 of the Civil Code. The indemnification due to the lack of prior notice does not hinder the compensation for loss of the customer base. The Court also emphasized the requirements for the application of indemnification for loss of the customer base: i) the existence of new clients of the principal or a sensitive increase of business with the old clients, and ii) the obtaining of substantial advantage by the principal. This same indemnity is granted in the case of a fixed-term contract with tacit renewal (Cass. Civil, n. 6481/2009). See also A. LUMINOSO; G. ZUDDAS, *La mediazione, il contratto di agenzia*, in Trattato di diritto commerciale, diritto da Vincenzo Buonocore, Torino: G. Giappichelli, 2005, p. 319 ss.; and E. SARACINI; F. TOFFOLETTO, *Il contratto d'agenzia: artt. 1742-1753*, Milano: Giuffrè, 2014, p. 375 ss.

Representation Law) establishes a specific remuneration in case of the termination of an agency contract. The Brazilian Civil Code, in regulating the agency contract, seems to have adopted the French solution (see note 186), in which the agent is awarded the remuneration for useful services rendered, even after the end of the contract (Article 717 of the Civil Code). However, the possibility of requesting additional compensation based on the same article, together with unjust enrichment provision, could allow the application of indemnification for loss of the customer base to the agency contract and even to the distribution agreement.[668] Article 720 of the Brazilian Civil Code may be essential to this function, particularly the low value of the fixed asset investments of the agents and the lack of a specific provision to compensate for the loss of the customer base. This rule could also be used to compensate for the loss of the customer base. However, even in this case, the investments' legal protection is different from the loss of the customer base.

On the other hand, since there is an absence of a delimitation of the investments as an accounting category (section 3.3.1), the indemnification resulting from inventories could also be broadly classified as investments. It may include not only investment in fixed capital, but also current assets. Both indemnifications are intended to compensate for the investments made. The establishment of inventories of products and parts involves costs and risks; they represent an immobilized, inactive capital, and this allocation of financial resources could be channeled to other purposes. They also entail the costs inherent in their retention.[669] The nature of inventories is not the same as investments, and the decision criteria to make them do not coincide. While inventories are part of the company's current capital, which is made up of assets that are intended to be transformed or sold to third parties, fixed assets are previously acquired to remain in the company and are continuously employed in the respective operational activity. Unlike investments in fixed capital, those made in stocks are forcibly affected by the contingent nature of the assets in which they are embodied. Moreover, the risks involved are not the same; one of the requirements of investment protection is its recovery through a long-term contract, and it does not match the characteristics of inventories. The problems each of these types of investment pose do not have to be resolved by recourse to the same legal instruments, nor do they have to be assessed according

[668] In this regard, see R. S. BORGES, *Da Aplicabilidade da Indenização de Clientela no Contrato de Concessão Comercial: A Compensação do Concessionário Pela Angariação de Clientela,* in Revista dos tribunais, São Paulo, v. 106, n. 975, p. 211-242, jan. 2017.
[669] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 468.

to the same decision-making models. The difficulties encountered concerning marketing stocks after the decision to terminate the relationship involve the determination of the prior notice period, which is not the case with investments in permanent capital.[670]

3.4. Abuse with the premature termination of the contractual relationship and the impossibility of the recovery of investments

Another common element in the rules regarding investment protection at the end of the relationship is the comparative examination of interests involving the interruption of a contractual relationship. The disproportionate exercise of termination occurs in different modalities (see section 3.4.1, *supra*). The selection of the relevant interests takes place either by the legislator upstream or by the interpreter in the concrete case. In the latter case, it considers the circumstances involving the termination and the legal principles. The interests of the parties, especially their freedom of economic initiative, should be evaluated in a comparative perspective.

In particular, the general clauses of the of abuse of economic dependence and good faith allow the interpreter to evaluate the parties' conflicting interests with the interruption of the contractual relationship. After this comparative examination, and with the conclusion of the arbitrariness of the interruption of the relationship, legal remedies are assigned to protect the party (see Chapter IV). A general clause presupposes attributing this comparison of interests for the determination of the intended legal effect to the interpreter.[671] This procedure would be inherent in

[670] Ibid., p. 508.

[671] According to M. LIBERTINI, *Clausole generali, norme di principio, norme a contenuto indeterminato. Uma proposta di distinzione*, cit., p. 368, the general clauses (in the strict sense) constitute a normative structure with undetermined concepts that identify a conflict of interests equally protected by the law and that attribute to the judge (or the interpreter) the determination criterion for balancing them. S. RODOTÀ, *Il tempo delle clausole generali*, cit., p. 721-2 and 728 emphasizes that the general clauses are intended to operate within the scope assigned to the principles. He adds that the general clauses are not confined regarding adaptation, but rather the articulation of the legal system between the legislator and the interpreter, with attention to the pluralism of values and the dynamism of the legal system.

the general clauses of the abuse of right and objective good faith[672] and the abuse of economic dependence.[673]

Along with the normative technique of the general clause, the selection of interests related to the interruption of the commercial relationship can also be defined in a rule of specific content, indicating the legal structure of the disproportionate exercise and the criterion to allow counterbalancing the interests. Articles 473 and 720 of the Brazilian Civil Code indicate, as the triggering action of the remedies established therein, the exercise of the unilateral termination of an indefinite term contract. It qualifies the exercise of this right as illicit without the time necessary for the amortization of the investments required having been completed.[674] The indeterminate concepts (the nature of the contractual relationship and the extent and nature of the investments) make this protection more adaptable. These rules identify a criterion to evaluate the abusive exercise of the termination. They attribute a specific remedy: the suspension of the termination effects until the amortization of the investments. The protection of investments in the franchising agreement under Italian law, according to Article 3/3 of Law No. 129/2004, also has a specific content. The provision establishes the minimum duration of the contract; there is no need to evaluate other elements for the eventual unilateral termination of the contract. The right to interrupt the contractual relationship is not defined until the amortization of the specific investments, and it is not less than three years.[675]

The different ways these rules function does not rule out a global examination of the exercise of an arbitrary termination. The purpose of this section is to establish the main

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[672] The debate around these institutes is extensive and can be referred to section 2.2.2 of this thesis. In Italian law, despite the approximation of the abuse of right and the objective good faith promoted by the debated decision of the Court of Cassation, there are still uncertainties about their relationship. For example, it is still important to characterize the abuse of right as the exercise in disregard of the interest assigned to the right and good faith as the assessment of the comparative conduct of the parties. Cf. C. RESTIVO, *Abuso del diritto e autonomia privata. Considerazioni critiche su una sentenza eterodossa*, in Rivista critica del diritto privato, 2010, pp. 341 ss.

[673] Concerning the abuse of economic dependence, the requirement of balancing interests is necessary for the characterization of the judgment of unlawfulness (*illegalità in sensu stricto*), with the balance of interests between the freedom of movement of the dominant company and its counterpart. The qualification of this institute as a general clause is found in footnote 189.

[674] Although with a reduced scope of application, the governing rules of the Brazilian distribution of motor vehicles law require the configuration of a specific hypothesis for the protection of investments: the absence of renewal of a contract entered into for a fixed term (Article 23). This represents a precise circumstance, without recourse to undefined legal concepts for their protection. In this case, there is no assessment of the recovery of investments. The absence of contract renewal is sufficient for the legal effect. It should be noted that this contractual type does not admit termination *ad libitum*; its exercise must occur only in one of the legal hypotheses (Articles 21 and 22 of Law No. 6.729/1979).

[675] This construction presupposes, apparently, the application of the rule present in Law No. 129/2004 to contracts of indefinite term. This proposal is almost unanimously accepted in Italian doctrine (see section 4.2.1.1)., *infra*).

circumstances the interpreter should consider balancing the opposing interests in the event of the interruption of the relationship in which specific investments were made. This assessment encompasses the configuration of an unlawfulness (*illecito in sensu stricto)* or the determination of the appropriate remedy.

3.4.1. The structural identification of an arbitrary act

The general clauses have the advantage of allowing the protection of investments without identifying the exercise of the right considered abusive or disproportionate. The concept of abuse in the presence of investments is usually identified as the unilateral termination of the indefinite-term contract. The configuration of the relationship can be more complex and, accordingly, so can the evaluation of the act considered abusive.

As discussed in section 3.1, the same risk distribution might occur in a chain of contracts and a non-renewal.[676] The same can also occur if, under a framework contract, the counterparty reduces or ceases to make acquisitions or sales.[677] The exercise of a cancellation clause (*clausola risolutiva espressa*) is also suggested,[678] or even an modification of the decision to enlarge the distributor's territory exploration.[679] The advantage of applying the rules of the abuse of economic dependence consists of reducing the burden of proof in the case of the configuration of the typical hypotheses of abuse; in this case, there is a particular importance of the relationship and the refusal to sell or purchase for the arbitrary interruption (see sections 3.1 and 3.4.1).

Some regulatory provisions may also admit an analogical application to other situations; they could be applied analogically to other contractual relations interrupted with another right. For example, Articles 473 and 720 of the Brazilian Civil Code require the unilateral termination of an indefinite-term contract. This condition could receive a flexible interpretation, so that other situations mentioned could also generate the effect provided therein. In addiiton to the presence of

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[676] Regarding the latter possibility, see P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 389.
[677] This hypothesis is considered an interruption of a commercial relationship by P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 399-402; R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 390. On the contrary, for M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., 16, the reduction of applications would represent an atypical hypothesis of economic dependence.
[678] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 395. The author cites the decision T. Genova 22.9.2012 as an example of this hypothesis.
[679] L. VOGEL and J. VOGEL, cit., p. 372 provide this example.

an adequate structure, an abusive exercise of a termination right requires balancing the conflicting interests. The next section provides some criteria for this assessment.

3.4.2. The criteria for balancing the interests

Unlawfulness (*illecito in sensu stricto)* is necessary for the application of general clauses, the abuse of right, the abuse of economic dependence, and objective good faith. It requires balancing the conflicting interests. This balancing must be performed under the principles of the legal system and of the sector to which the governing rules belong. On the one hand, there is the interest of the investing company in maintaining in the contractual relationship (or remaining in the same commercial relationship) because it relies on its continuation; on the other hand, there is the counterparty's intention to move freely in order to select a new partner and to look for other opportunities. These decisions adapt the company's behavior to the changing market scenarios.[680]

In order to resolve this conflict of interests, they should be evaluated in a comparative perspective. One must reject unilateral solutions and the idea that the principle of the freedom of economic initiative would allow the company to operate in its interest without taking into account the consequences of its conduct.[681] At the same time, the stability of the relationship must also not be guaranteed without taking into account the reasons of the dominant undertaking to dissolve the relationship. The investment protection might not constitute social insurance for its continuation.[682]

The indicators to accommodate these interests are varied, and the present work does not pretend to exhaust them. Given their complexity, they would require a monographic work. This finding does not prevent this thesis from the possibility of identifying the most common elements to evaluate them in the case of the premature termination of the commercial relationship with specific investments. By extinguishing the relationship without the recovery of investments, the

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[680] In this regard, R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 396; P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 339; and F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, cit., p. 2.563.

[681] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 396.

[682] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 396. This demand to balance interests can also be extracted from the reading of the unilateral termination in the light of objective good faith and the principle of free initiative. In Italian law, see C. SCOGNAMILGIO, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto, Relazione al Convegno "Il nuovo diritto dei contratti: problemi e prospettive," Crotone, 24-26 maggio 2001*, in Europa e diritto privato, 2003, fasc. 4, p. 812. The author refers to the decision of the Italian Court of Cassation 22 ottobre 2003, n. 12365 about the unilateral termination of the employment contract.

party's chance to do so is denied (for the delimitation of that interest, see section 3.2, especially 3.2.2).[683]

3.4.2.1. The exercise of legitimate business reasons and the recovery of investments

The hypothesis of the premature termination of the relationship with the presence of specific investments raises some issues. Once the relationship has been terminated without considering the time required to recover investments, the interest of the party is to remain in the relationship in order to obtain the profits necessary for their amortization. In this case, this interest has already been violated. The question is to assess whether the interest of the company that decided to terminate the relationship could overlap with that of recovering the investments.

The decision to terminate the relationship can be founded on legitimate business reasons. These reasons contribute to the assessment of the proportionality of the act with the aim pursued[684] and, above all, to determine the applicable remedy. In other contexts, without the presence of specific investments, the existence of specific reasons could avoid the arbitrariness of the interruption, even in the configuration of the counterparty's economic dependence.

The assessment of the compromise of the parties' interests is conducted in the wake of the principles of the legal system. The principles of the proper functioning of the market are particularly useful. The protection of competition, especially its promotion to allow allocative or productive efficiency, plays an essential role in the evaluation of business reasons.[685] The primary interest of the party that interrupts the relationship is to allow its freedom of movement in the market, particularly given the possibility of adopting a simple, rapid, and effective reaction to the changing economic context in which the contract is inserted.[686]

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[683] R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329.

[684] Concerning the application of the principle of proportionality in balancing interests, see P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 383. The author adds that community case law adopted this method of proceeding with the United Brands decision (European Court of Justice of 14 February 1978. United Brands Company and United Brands Continental BV vs. European Commission. Banane Chiquita. Cause 27/76).

[685] R. NATOLI, *L'abuso di dipendenza economica*, cit., pp. 396-7 relates the business reasons for disengaging from the commercial relationship to the adoption of efficient conduct from an allocative or productive perspective. For a similar view, see P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 384. In Brazilian law, see section 2.3.2. The contribution of P. A. FORGIONI (*Contrato de distribuição*, cit., p. 274) indicates an interpretive parameter to evaluate the abusiveness of the efficiency of the distribution system.

[686] In community law, this issue may depend on the market sector. In the automobile distribution market, Regulation 1400/2002, no longer in effect, established the duty to terminate the agreement with detailed, objective, and transparent reasons. In the case O'Leary -v- Volkswagen Group Ireland Limited ([2016] IEHC 773), the decision found that it was

The complexity of business decisions does not allow the exhaustion of the reasons given.[687] In a detailed classification, the reasons may relate to: i) the sphere of the party making the investments, ii) the sphere of the company that exercises the interruption, and iii) circumstances outside of the contractual relationship. In the first case, it could be justified by counterparty default, insufficient confidence in the regular development of the relationship,[688] the elimination of free riders inciting non-investment by other network operators,[689] bankruptcy, or insolvency proceedings, which would render the continuation of the relationship untenable.[690] The company that decides to terminate the relationship may also claim market circumstances for corporate reorganization:[691] the supplier's contribution would not be justified by the market's progress,[692] new business partners could perform the same activity under different and better economic or qualitative conditions,[693] or the reorganization of the dominant company that decided to initiate a process of vertically integrating the activity.[694] The company could also, as an example of the

not enough to give genuine and brief reasons. For an opposing view, see the decision of the Paris Court of Appel (Badat, Foucque Automobiles [SAS], Investment and Management Company Foucque [SAS], Foucque [SAS] v. Automobiles Citroen [SA]), dated 24 June 2015. In Italy, without explicitly addressing this issue, the decision Cass. Civile, 13 ottobre 2016, n. 20688 adopted the balancing of interests. It assessed the decision of a motor vehicle manufacturer to change its distribution network by terminating some contracts. The court understood that it did not produce anti-competitive effects because it was based on concrete elements of the market and its purpose was to acquire higher efficiency. Morover, this decision would not have had unjustifiably violating the distributor's rights as its objective.

[687] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 28 adds an element to the configuration of the arbitrariness of the unilateral termination. In addition to the business reasons, according to the author, another criterion would be the knowledge of the terminating party at the time the agreement is formed. The termination would not be arbitrary if it was founded on new elements, or if the occurrence of facts was not known or knowable with ordinary diligence at the time of the contract's conclusion.

[688] In the same sense, see P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 297.

[689] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 297.

[690] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 383-4.

[691] According to A. FRIGNANI, *Cosa ne è degli affiliati in caso di riorganizzazione aziendale del "franchisor" (fino alla incorporazione in altra società)?*, in I Contratti, 2014, p. 707, the concept of corporate reorganization would correspond to the change in the corporate policy. In the context of distribution agreements, it would occur with the change in the typology of the distribution contracts used, deciding to distribute through directed sales or with different channels. It may also involve quantitative alterations with changes to the number of resellers, enlargement or restriction of the territory; or qualitative modifications, an increase of the minimum limit, guarantees, completion of the diversity of products, and the modification of the distribution concept.

[692] Concerning the abuse of economic dependence in the Italian legal system, cf. T. Catania, ord. 2.9.2009, cit., and T. Bassano del Grappa, ord. 9.2.2010. The decision to adopt the reduction of orders would be due to the concentration of demand for products made in Italy.

[693] R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 140 exemplifies the case as the new partner that offers the best price conditions, is endowed with better technological capacity, or still has a special commercial know-how.

[694] R. NATOLI, *L'abuso di dipendenza economica*, cit., pp. 396-7. See also A. DI BIASE, "*Contrazione" delle relazioni commerciali ed abuso di dipendenza economica, Nota a ord. Trib. Catania sez. distaccata Bronte 9 luglio 2009*, cit., p. 259; L. MIOTTO, *Recesso* ad nutum*, abuso e ragioni dell'impresa*, in Giurisprudenza Commerciale, 2012, note 17 p. 888. M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 28-29 provides other examples of corporate

second category, claim the generic economic impossibility of maintaining the relationship, the decision to leave the market, or an impediment derived from exclusivity with another company.[695] Particular attention should also be paid to the configuration of a discrimination, a typification of the abuse of economic dependence, which occurs in the event of the interruption of a contract in a franchise or distribution system.[696]

The alleged motive for interrupting the relationship must be plausible, although the real motives may be otherwise.[697] One should not evaluate the business decision; the company is free and should only decide on the motive for the adopted conduct based on plausibility and coherence. In particular, if business reorganization is alleged, one can demand proportionality between the coherence of the plan and the act of interrupting the relationship[698] and the information that the company possessed.[699]

Given the issue analyzed in the thesis, business reasons, in principle, are not sufficient to exclude the protection of the company that missed the significant opportunity (the chance) to recover the investments.[700] The preponderance of the recovery of the investments is based on a

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reorganization, such as the change of legislative rules that liberalizes the market of a given product and requires network adequacy; after a reduction in the supply of the raw material, a decision is needed to reduce production and therefore the number of distributors; in the event of a company's internal issue, the decision to reduce the range of distributors is based on the absence of financial means arising from the default of debtors. In case law, cf. Trib. Roma, 5 novembre 2003; Trib. Roma, 17 marzo 2010, Trib. Roma 19 febbraio 2010; Trib. Roma, 24 settembre 2009; Trib. Roma, 26 maggio 2009; and Trib. Roma, 15 maggio 2009.

[695] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 384.

[696] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 401. The author narrates an example of a configuration of abusiveness with the interruption of the franchising relationship not only by arbitrary termination but also by the disparity of treatment concerning the other franchises of the same net system.

[697] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 383.

[698] See L. MIOTTO, *Recesso* ad nutum*, abuso e ragioni dell'impresa*, cit., pp. 881 ss.

[699] Cf. M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 28-29; and F. GAMBINO, *Il dovere di coerenza nell'atto di recesso (note sull'abuso del diritto)*, in Rivista di diritto privato, 2011, fasc. 1, p. 76; v. Cass 14 luglio 2000, n. 9321.

[700] In the sense of the prevalence of the investment recovery, P. FABBIO, *Interruzione delle relazioni commerciali in atto e abuso di dipendenza economica. Nota a ord. Trib. Bari 6 maggio 2002,* cit., p. 340; F. GAMBINO, *Il dovere di coerenza nell'atto di recesso (note sull'abuso del diritto)*, cit., p. 77; L. RENNA, *L'abuso di dipendenza economica come fattispecie transtipica*, cit., pp. 381-2; M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 30-31; A. NERVI, *Contratti di distribuzione e "recovery period rule"*, cit., p. 259. In this regard, see apparently Trib. Torre Annunziata, 30 marzo de 2007. Even without considering the provision for prohibition of abuse of economic dependence, O. CAGNASSO, *La concessione di vendita: problemi di qualificazione*, Milano: A. Giuffrè, 1983; and R. PARDOLESI, *I contratti di distribuzione*, cit., p. 325 understood this limitation on the basis of the imposition of the canon in objective good faith. French case law also shares this analysis (Court of Cassation, April 9th, 2002, and Court of Cassation, May 12th, 1998). M. R. MAUGERI, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, cit., p. 87 does not seem to agree with this understanding. In examining the emblematic decision of the Court of Cassation, she concluded that there would be elements of the abuse of contractual power or economic dependence, although this was not enacted at that time. However, the author states that the termination occurred due to business reasons (i.e., the restructuring of the system of sale due to the crisis in the market), and it would remove the termination abusiveness in spite of the presence of non-recovered investments. R. NATOLI, *L'abuso di dipendenza*

modality to stimulate competitive dynamics, especially with the requirement to stimulate the specialized investments and to allow the company's activity in the market.[701]

The interest of the party that made the unrecovered investments prevails. According to the principle of proportionality in light of the dynamic efficiency of the market,[702] it requires a prior notice period that is sufficient for the company to redirect its activity, mainly to recover from the competitive damages suffered, with the deterioration of the position in the market.[703] The assessment of this notice period should take several factors into account, especially the reasonable period for the recovery of investments, although there is no proportionality relationship between the recovery time and the period of the notice. It must consider many factors related to the contractual relationship from which one seeks to withdraw (see section 3.2).

This reasoning does not imply that a business decision to extinguish the contract cannot be conducted as a matter of urgency. The decision not to grant prior notice or to reduce it in comparison with similar cases is exceptionally permissible. Once urgency is claimed, the need to perform the business reorganization cannot be based on possible reasons and, therefore, there must be a correlation between the opportunity to change the network of a particular supplier and the temporal circumstances.[704]

The reasons may be considered in the assessment of remedies admissible to the parties, in particular, the possibility of continuing the contractual relationship (see section 4.2.1.3), *infra*). The existence of reasons to interrupt the relationship, such as those indicated above, represents a

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economica: il contratto e il mercato, cit., p. 147 also describes his reservations about the thesis defended in this work. For the author, the recovery period rule could only apply if the interruption was conducted for abusive purposes. The author also argues that a different solution would be in contrast with the notion of autonomous entrepreneur (*imprenditore indipendente*). In order to overcome these issues, the solution to avoid the stabilization of the relation is to divide the assessment in two, of abusiveness and the appropriate remedy. In this sense, P. FABBIO (*L'abuso di dipendenza economica*, cit., p. 397) notes that the subsistence of business reasons is not enough to exclude the investment protection. This termination is considered abusive, but it ends the relationship. However, the party has a remedy to continue the relationship for a sufficient period to amortize the investment if its conditions are met. See Chapter IV about the requirement for adopting this remedy.

701 P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., 169.

702 P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 383. The author adds that this protection of the investments (P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica*, cit., 169) would discourage competitive dynamism in the form of specific investments and could guarantee the activism in the market of the investing company. On the other hand, the adequate protection of competitive dynamism could require balancing the investment protection with the possibility of reorganizing the distributive network to adapt it to the changing circumstances of the market. This possibility is addressed in Chapter IV.

703 In general, this reconstruction would be based on the recovery period rule presented by R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 326 ss. See also R. NATOLI, *L'abuso di dipendenza economica: il contratto e il mercato*, cit., p. 147.

704 See L. MIOTTO, *Recesso* ad nutum*, abuso e ragioni dell'impresa*, p. 881 ss.

consistent criterion that the investing party, even in the event of the absence of amortization, cannot require the extension of the relationship, but only the granting of a shorter period necessary for the reallocation of its business activity, or even simply the damage compensation.[705]

3.4.3. The burden for providing business reasons and the investment recovery

The dissolution of a business relationship occurs through the exercise of the right aimed at terminating the contract. In principle, there is no obligation to provide a motive for the contractual termination.[706] It is a potestative right (*diritto potestativo*). However, the termination without the amortization of the investments places the party in a delicate situation. This decision might be considered unlawful if there is no justification for it. For this reason, there is a burden on the terminating party to provide business reasons.

The application of general clauses to protect investments requires the presentation of business reasons. In the case of the abuse of economic dependence, since situations of abuse would be legally typified (especially the arbitrary interruption of a commercial relationship), there is already a qualification of illicitness in this termination. This can be avoided with the particular business reasons.[707] There is a burden for the dominant company to demonstrate the plausibility and coherence of the business reasons to terminate the contract.

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[705] This last hypothesis is noted by P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., p. 169.

[706] For an opposing view from a civil law perspective, cf. C. SCOGNAMIGLIO, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto*, p. 810; F. GALGANO, A*buso del diritto: l'arbitrario recesso* ad nutum *della banca*, in cit., 1998 demand the presentation of a justification.

[707] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 382 ss.; A. VILLELLA, *Abuso di dipendenza economica ed obbligo a contrarre*, pp. 173 ss. According this these authors, the dependent company must demonstrate the state of economic dependency, the configuration of a typical dependency hypothesis, and the chain of causation between dependency and abuse. In contrast, F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, in Giurisprudenza italiana, 2010, fasc. 12, pp. 2561-2564 argues that the dominant undertaking must not justify its own choices or the absence of arbitrariness. The imposition to justify a termination limits the company's management. See also A. DI BIASE, "*Contrazione" delle relazioni commerciali ed abuso di dipendenza economica, Nota a ord. Trib. Catania sez. distaccata Bronte 9 luglio 2009*, cit., p. 259. In particular, see M. LIBERTINI. For him, the burden of proof is influenced by the typification of the abusive act. M. LIBERTINI, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, cit., p. 16 argues that the textual difference present in Article 9 may have relevance regarding the burden of proof. In case of the refusal to sell or purchase and the imposition of unjustifiably burdensome or discriminatory contractual conditions, the abuse may be presumed *ex lege*. The burden of proving the existence of a reasonable business justification is attributed to the dominant company. In other cases, the dependent company must prove the unjustified or arbitrary character of the economic behavior of which it declares itself victim. Simple presumptions may also give the proof of arbitrariness. The company's counterclaim may concern the existence of a just cause or a justified objective motive.

In other cases, this would depend on the specific rule (as in the case of Article 473 of the Civil Code). Article 473 in the Brazilian Civil Code could be interpreted as a duty of the terminating party to demonstrate the plausibility and coherence of the business reasons to prevent the counterparty from claiming a specific remedy in court. If no particular condition is established, there would be no requirement to indicate one of these reasons.

Regardless of the position adopted, the motivation for the unilateral termination of the contract serves as an instrument to demonstrate and legitimize the decision adopted. It could still avoid possible judicial discussion of the issue. Concerning the indication of the elements to be proven in Italian law regarding the application of the abuse of economic dependence and good faith, see section 2.2.1.2. The next chapter addresses the remedies available to the parties.

Chapter 4. Remedies for the protection of investments in Italian and Brazilian law

The previous chapters aid in determining the remedies to protect specific investments in Italian and Brazilian law. Chapter I delimited the economic phenomenon of investments, and it presented and described economic theories to understand this protection. This chapter also proposed contractual solutions to the hold-up problem, a phenomenon that has attracted legislators' attention. As shown in Chapter II, Brazilian and Italian law have legal provisions governing specific contractual investments at the end of the relationship. In addition to these rules, some general clauses – the abuse of economic dependence, the abuse of right, and good faith – might also protect the hold-up situation. Since these norms regulate different aspects of the case and sometimes have overlapping legal effects, their systematization was necessary.

These rules did not provide the criteria for their application. The legislature did not establish clear parameters to allow the adequate protection of investments due to the complexity of regulating the phenomenon. Investments increase the transaction value, with positive effects for the contractors and the market. However, these positive effects occur only with the encouragement of investments at a socially optimal level; they are lost if there is overinvestment and underinvestment. Considering these difficulties, Chapter III examined four common elements of these rules. It addressed the influence of private autonomy and the contractual terms in the legal protection of investments. The second element was the interests related to the implementation of investments in the contract. The notions of specific investments and their characteristics were then addressed. As the fourth element, it also assessed the parameters regarding the abusiveness of a contractual termination when the investments are not recovered.

These elements represent the criteria for determining the applicable remedies. As in Chapter II, there is also a need to systematize these remedies to promote complete, adequate protection. Legal measures impose consequences on the contract and remedies, attributing the means to safeguard them to the parties. On the one hand, the law can determine a contractual term linked with the recovery of investments, as in Italian franchise law. In another example, the Brazilian law on the motor vehicle distribution agreement imposes obligations at the end of the contract to protect investments. It determines the producer's duty to repurchase some specific investments in the event of the non-renewal of a fixed-term contract or contractual breach. On the other hand, some rules grant remedies for the protection of investments, such as the extension of the relationship, damage

compensation, or even the invalidation of a contractual provision. Given the characteristics of the interests related to specific investments, there is a preference for their specific protection through a prohibitory injunction or a remedy of specific performance.

The adopted perspective of focusing on the remedies available can implement the protection of investments.[708] However, it faces some difficulties. There are few works on remedies in the event of arbitrary and unilateral termination.[709] Some norms that could protect investments do not present the remedies available. For example, the prohibition of the abuse of right and good faith does not dispose of remedies to protect the situation. Even in studies about the abuse of economic dependence, there are not uniform solutions.[710] Considering this context, defining the appropriate remedy is complex.

To study the modalities and the remedies available to protect investments, a separate assessment of the legal systems is again required. In the first part, the remedies in Italian law are addressed, while the second addresses those in Brazilian law. The structure of the exposition of remedies should be different in each part of this chapter, but some of the conclusions in the first part can be useful for systematization in Brazilian law. As outlined in Chapter II, in Italian law, the center of investment protection is the prohibition of the abuse of economic dependence. It provides different remedies that may promote the adequate protection of the investments. A norm in franchise agreement law raised the possibility of contractual stability when there are specific investments for contractual performance. A more precarious stability of the relationship could also result from the imposition of an obligation of prior notice or the exercise of a remedy consisting of a specific protection (*rimedio in forma specifica*), prohibitory injunction (*rimedio inibitorio*), and specific compensation (*risarcimento in forma specifica*). Other forms of protections are also analyzed, such as damage compensation and the contractual invalidation of its clauses. In Brazilian law, the center of gravity shifts to Article 473 of the Civil Code. Its relationship with the general

[708] A. DI MAJO, *La tutela civile dei diritti*, Milano: Giuffrè, 2001, p. 1 emphasizes that one of the primary duties of the legal system is to provide adequate protection of recognized and guaranteed rights. This requirement of protection would derive from the principle of effectiveness that characterizes the statutory system. See also C. SCOGNAMIGLIO, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto*, cit., p. 813.
[709] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 18. In a conclusion that remains valid, he adds that the authors examining the unilateral termination are limited to the substantial profiles, timing, and conditions of judicial evaluation. As a result, the proposed solutions would be evident or conditioned to the legal construction adopted. In the view of the author, it would seem that there is a lack of in-depth analysis of the relationship between the protected interest and the applicable remedy.
[710] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 16.

clauses of the abuse of right and the good faith objective presents the remedies available in Brazilian law.

4.1. A premise for the reconstruction of remedies available in Brazilian and Italian law

This thesis has addressed different aspects of specific contractual investments. The assessment of the available remedies concerning these investments in Brazilian and Italian law requires a broader examination of the end of a contractual relationship in their presence. It is not sufficient for the discussion to be limited to the remedies directly related to investments, the damage compensation for not recouping them, and, eventually, a specific remedy. For this reason, this section provides a broader view on the consequences of the end of the contract.

In a contract with specific investments, especially those related to a distribution network, both parties have an interest in maintaining and continuing the relationship. In addition, the producer also has an interest in designing a dynamic distribution network and in making its members perform their obligations diligently. A dynamic network enables the producer to adapt it to changes in the market and consumers' preferences. It also stimulates the members to be efficient and to provide adequate responses to market conditions. To reach these dynamic interactions within the distribution network, the producer has to end some contracts in a short period. This option is only possible because many agreements of this network have an indefinite-term or a short-term that is renewed annually. These clauses give the producer the right to exclude some distributors and adapt its business to the current market conditions.[711]

Even if it has the objective of gaining more efficiency in a long-term analysis, a member exclusion produces adverse consequences for the producer and its network. Granting a prior notice has some effects on the member's performance. During this period, the distributor's performance efficiency level may decline, which would cause a decrease in the sales of contracted products. The distributor would not be motivated to sell those goods. From another perspective, the contractual end leaves the distributor in an even worse position; the distributor would no longer benefit from a certain and regular supply, or from the revenues from the contract, especially with an exclusivity clause. He also might not find another contractual partner able to provide a product with the same

[711] L. VOGEL and J. VOGEL, *Droit de la distribution,* in *Traité de droit économique,* t. 2, Paris: Lawlex Bruylant, 2015, introduction: makes this broader analysis to reconstruct the discipline of the distribution contracts in France.

qualities and technicity as before. This situation is more delicate with members that have made specific investments to perform the contract; they might not recover their financial investment after it ends.

Given the complexity of this situation and the conflicting interests involved, its legal regulation imposes many difficulties. It requires a sophisticated regime that can consider the producer's interest in providing an adequate level of dynamism to the network, as well as the vulnerable nature of network members, without disregarding the crucial stimulus to make the parties invest in the relationship. Moreover, there are many consequences of abusive and brutal contract termination; they also need to be taken into account.

The doctrine provides different views on this regime.[712] The first reading treats the network member as a vulnerable party that might need protection from the imposition of unbalanced clauses. Its private autonomy might not be properly expressed in these agreements due to the difference in bargaining power. This interpretation is based on some contractual principles, contractual solidarity, and contractual justice. The second interpretation tends to read this discipline as a stimulus of efficiency in the distribution system. According to this view, excessive protection produces adverse effects. It restricts the entry of new distributors and tends to make them less responsible and diligent. The producer would have to bear risks related to its inefficiency and inferior quality. A less protective regime might stimulate competition and generate benefits for consumers.[713]

In principle, the distribution agreement regime should aim for efficiency as it refers to business relationships,[714] without forgetting the difference in contractual power between the

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[712] The reconstruction of the Italian rule of abuse of economic evidence this debate, which could be expanded to a broader field of distribution agreements. A relevant part of Italian doctrine attributes to this rule a function to protect of a weaker party. It also bases it on contractual justice. The reference for this orientation is present in footnote 193. However, as argued in section 2.2.1, there is a preference for the other reconstruction of this category, based on the competition principle. This interpretation would be more coherent and could provide some application criteria. This conclusion could indicate an adequate solution to investment protection in Italian law. Cf. Ph. FABBIO, *La disparità di potere economico e abuso di dipendenza economica, in Contratto e antitrust*, a cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008, passim.

[713] The same division is also present in French doctrine. See L. VOGEL and J. VOGEL, *Droit de la distribution,* in *Traité de droit économique,* t. 2, Paris: Lawlex Bruylant, 2015, introduction.

[714] Reference is made to the typological construction of business contracts made by M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, in I contratti per l'impresa, a cura di G. Gitti, M. Maugeri, M. Notari, Il Mulino, Bologna, 2012, vol. I, p. 46. The author stated "In ogni case, rispetto a questa categoria di 'contratti d'impresa, intesi come contratti legati da un rapporto di strumentalità necessaria con l'attività produttiva, l'impostazione dei problemi dev'essere – a mio avviso – quella di considerare i contratti come strumenti funzionali all'efficienza dei mercati in cui le impresa operano (e quindi funzionali anche all'efficienza dell'impresa e alla sua capacità di profitto), anziché come atti di disposizione di risorse patrimoniali da parte di soggetti titolari di potere dominicale".

parties. The presence of specific investment adds a new facet to this issue. The second interpretation proposed is insufficient to stimulate the positive effect of specific investments for well-being. An interpretation aimed at attributing an extreme value to the parties' autonomy and, for this reason, promoting efficiency might not respond appropriately to reach its objective. In this perspective, efficiency might not always match the freedom to stipulate the agreement. Efficiency considerations include not only allocative efficiency; specific investments stimulate one different aspect of efficiency. They elevate the relationship value and innovation in the market. A dynamic competition requires the protection of these specialized investments. With investments in the relationship, there is a need to prevent opportunistic behaviors from being implemented. This protection must not be excessive; otherwise, it would not reach its objectives. A balanced and nuanced protection is required.

European laws that address a new facet of this protection exist. There is currently a proposal for a directive on unfair trading practices in business-to-business relationships in the food supply chain (see section 2.2.5). This proposal was based on a green paper published in 2013. This paper notes that sudden and unjustified termination of a commercial relationship or termination without a reasonable period of notice would be a significant type of such unfair trading practices. It asserts that one function of the period of notice is the recoupment of investments. An imposition of a prior notice period promotes dynamic competition as it protects investments.[715] Regulation CE/1400/2002 on vertical agreements and concerted practices in the motor vehicle sector, which is no longer in force, also has a regime that aims to guarantee a level of efficiency in the distribution system. This normative protects the integrated distributor against contract termination by the producer. Although some authors would read this provision as a mechanism to promote contractual justice and the weaker contractor, this protection would enforce competitive dynamism.[716]

Italian and Brazilian laws do not always share the same premise. Both, but especially the latter, are a varied and complex discipline, primarily illuminated by contractual fairness and the protection of the weaker party. As seen in Chapter II, the first has few provisions regarding the end of the relationship and investment protection. The abuse of economic dependence, coupled with

[715] This green paper affirms that "UTPs may have detrimental effects on the EU economy and for the B2B food and non-food supply chain in particular. Such practices may affect companies', including SMEs', capacity to invest and innovate."

[716] Ph. FABBIO, *La disparità di potere economico e abuso di dipendenza economica, in Contratto e antitrust*, a cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008, p. 159.

the general clauses of good faith and the abuse of right, assumes an essential role in this task. The mentioned readings on the distribution discipline relate to the interpretation of Article 9 of Law No. 192/1998. As mentioned in footnote 193, there are two different views on the principles involving the application of this provision, the competition principle, and contractual fairness. This debate has different consequences for the end of the relationship depending on the interpretation of abuse of economic dependence. However, there are some protective rules, especially Article 3/3 in Law No. 129/2004. It guarantees a contractual minimum duration based on the presence of investments. This measure represents more of a franchisor protection in Italian law than a stimulus of network efficiency (see section 2.2.3).

Brazilian law is highly incoherent on this subject. Its provisions have a protective view regarding the members of the network, and it is sometimes overly excessive. Some attempts have been made to the revoke them, but they faced strong opposition from lobbies of these categories (see footnote 388). However, Brazilian case law, led by decisions of the Superior Court of Justice, has a less protective view, and it accepts the contractual terms related to its termination. It grants more weight to the contractors' autonomy. The decisions demonstrate a preference for respecting the contractual terms in case of contractual termination, and they tend to approve the sufficiency in the prior notice length (see section 4.3.1). There is also a tendency to not qualify the distributor as the weaker party in the relationship.[717] On the other hand, the central rule to protect investments at the end of the contract, Article 473, was designed to protect the party that makes investments. It withdraws the termination effects until the investments made are recovered. This excessive protection, if interpreted literally, might produce adverse consequences for competition; it would freeze the distribution channels, stimulate the presence of inefficient distributors, and avoid the input of new members. These consequences would be detrimental to consumers. The same critiques may apply to other specific legislation. Article 720, which has a similar provision, may also produce the same outcome. Commercial agents, who have a special statute, also have protective provisions, especially an indemnity based on a percentage of commissions received during the relationship in case of contract termination (Article 27, j of Law No. 4886/1965). The law

[717] The Superior Court of Justice has some decisions ruling out the vulnerability of the distributor: STJ, REsp 1320870, 3a T., Rapporteur Justice Villas Bôas Cueva, 27.6.2017; STJ, REsp 1403272, 3a T., Rapporteur Justice Marco Aurélio Bellizze, j. 10.3.2015. The latter decision asserts that the distributor can assume the risks as a business, despite its economic dependence. There is also a decision that expresses a contrasting position: STJ, REsp 1112796, 4ª T., Justice Holnildo Amaral, j 10.8.2010.

regulating the motor vehicle distribution contract (Law No. 6729/1979) also has some high protective provisions that prohibit termination without a cause and stimulate the duration of these agreements.

The need to protect the weaker party is a relevant interest to move legislators to design rules to rebalance the relationship. Consumer contracts are a clear example of the success of this intervention. The promotion of contractual fairness in business-to-business agreements might also be an objective to be pursued. There are examples of market failure, informational asymmetry, and opportunistic in such relationships. However, this purpose should not compromise the distribution network efficiency, as it does in Brazilian law. There is excessive protection of these laws. They were enacted from the 60s until the 80s, and they consider another economic model. The legislation also aimed at protecting some distributors in a still-developing economic sector, but these grounds no longer hold. Their inadequacy is evident in some legislative attempts to change them; although these were not successful, they indicate the necessity of modernizing the distribution channels based on the perception of this economic change and the development of legal principles.

The most important movement in this regard was the enactment of Provisional Measure 881/2019 in the *Economic Freedom* (section 2.3.7). It represents a milestone of a new economic model being adopted in Brazil. For this reason, it aimed at disciplining the constitutional notion of the freedom of economic initiative. Discipline promotes efficiency in private and public affairs, and it pursues not only allocative efficiency but also dynamic efficiency. The mention of dynamic efficiency, although directed towards the public sector, was inserted in Article 4, V. It might also affect other legal fields and, accordingly, private relationships. This provisional measure institutes some contradictory measures. The modifications in the Civil Code and Article 3, V, and VIII highlight the parties' autonomy in business contracts and limit state intervention. Coherence should be found; the increase of the contractors' autonomy has more weight, but this does not prevent the law from intervening when necessary to assure economic dynamism and an adequate contractual balance. The protection of specific investments is such a case.

Another element might also help provide an adequate reading of the distribution legislation, especially in Brazilian law. The delimitation and the protection of competition as a legal principle have been developed in Italian law (see section 2.2.1).[718] They serve to interpret the legislation. As

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[718] See the eminent study conducted by M. LIBERTINI, *Concorrenza,* in Enciclopedia del diritto – Annali III, Giuffrè, Milano, 2010, pp. 191-247.

highlighted in section 2.3.2, this notion still has imprecise contours in Brazilian law. A modern idea of competition[719] helps in the task of transposing the same potential explored in the Italian legal system onto Brazilian law. Doing so could give more coherence to the provisional measure mentioned above, and to the legislation governing the end of the relationship. This new perspective therefore has to consider the end of long-term contracts, not only to protect specific investments. The remedies to protect investments should consider these elements to provide the appropriate remedies to the parties.

4.2. Remedies available to protect investments in Italian law

There are different remedies available for investment protection; they can promote contractual stability, damage compensation, and invalidation of the contract or its clauses. Antitrust enforcement also provides some remedies in cases of competition infringement. The remedies and legal measures to promote contractual stability are studied in the next section, which is divided into three parts: the minimum duration of the franchise agreement, the need for prior notice, and contractual specific remedies.

4.2.1. Remedies and legal measures to promote contractual stability

Contract stability may occur through legal measures and the remedies available to the parties. A contractual-type regime can establish a minimum term of the agreement, an imposition to renew or extend it automatically, or determine restrictions to terminate.[720] There are also less aggressive forms, such as the granting of prior notice, which is a more precarious remedy. Specific remedies (*rimedi specifici*) also can provide this stability, granting the parties a claim to continue in the relationship despite its unilateral termination.

The central element to protect investments is the abuse of economic dependence. This rule establishes the claims for compensation, inhibitory, and invalidation as remedies. In the case of

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[719] P. FORGIONI, *Os Fundamentos do Antitruste*, São Paulo: Revista dos Tribunais, 2016, pp. 142-3, 194, and A. FRAZÃO, *A necessária constitucionalização do direito da concorrência*, in Direitos fundamentais e jurisdição constitucional. São Paulo: Revista dos Tribunais, 2014, *passim*.

[720] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 230.

termination without the recoupment of investments, the compensation for the equivalent may become an inadequate measure.[721] A specific remedy can reduce the damages to the investing party. Likewise, in business contracts, specific remedies should be considered the standard and receive systematic priority.[722] Section 4.2.1.3) further develops the reasons to prioritize this remedy. They are the reason the Italian legislature chose to link the duration of the franchising agreement to the amortization of investments.

1) The minimum duration of franchise agreements

The most emblematic form of contractual stabilization corresponds to the determination of a minimum or reasonable term. The law may establish a minimum duration by linking its term to the recovery of specific investments. There is a need for a legal imposition on this matter. Section 3.2.2 rules out the configuration of an interest to a minimum contract duration when a party performs specific investments. As was argued in that section, their implementation demands the granting of a notice period not for the company reorientation, but to promote a stability at the contract's unilateral termination.

The Italian law on franchising agreements imposes a minimum duration.[723] Article 3/3 of Law No. 129/2004 establishes that, in a fixed-term contract, the franchisor must guarantee the affiliate a minimum duration sufficient for the amortization of investments.[724] The rule adds that this minimum period must not be less than three years. This determination was one of the reasons for the introduction of this legislation, and it encourages the affiliates to invest and prevent unfair contractual terms from being implemented.[725] The minimum period conforms to market practice, and according to it, the franchising contract generally lasts between two and three years in the case

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[721] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 509.
[722] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 64.
[723] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381. The author adds that the same protection would also be present in the contract of *approvvigionamento e affidamento degli impianti di distribuzione di carburanti*. However, as explained in section 2.2.3, the rule mentioned imposes an adequate remuneration of the investments, i.e. the congruent remuneration of the contract based on the investments, not the minimum duration of the relationship.
[724] P. PERLINGIERI, *Nuovi Profili Contrattuali*, cit., p. 431 points out that that provision is an expression of the principles of proportionality and reasonableness. The duration of the franchise agreement must be proportional to the time needed to amortize the investments sustained by the franchisee. With a similar view, see C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 274.
[725] M. MELI, *Contratti di distribuzione*, in Portale Treccani – Enciclopedia Giuridica, Istituto della Enciclopedia Italiana, Roma, 2012.

of low initial investments, and 12 to 15 years in the case of substantial investments.[726] This command also has practical and systematic repercussions, which are addressed throughout this thesis.

This rule weighs two opposing interests, which are similar to those that should be balanced in the decision to terminate the relationship (section 3.4). On the one hand, there is the franchisor's freedom to decide and organize its distribution network, and on the other is the franchisees' interest in the relationship's continuity. The rule establishes a preference for the latter by introducing an instrument of stabilization at the beginning of the agreement.

This rule protects the affiliate as a vulnerable contractual party in the relationship.[727] The franchisee is the party with lesser bargaining power and, for this reason, it merits this protective measure. This provision seeks to promote contractual justice. An *ex ante* imposition of a contractual term stimulates the franchisee to sign the contract because it guarantees that the substantial investments made to perform the contract will be recouped through the relationship. It eliminates some risks related to being part of a distribution network. As a protective and an exceptional rule, it would not apply analogically to other contractual types.[728]

Despite this innovative provision, which acts specifically according to the contractual duration, there is rarely litigation concerning this rule. There are some reasons for this. The norm is contained in a law explicitly dedicated to the franchise agreement, defined precisely and differently from the fluid characteristics of the commercial distributors.[729] It is also argued that the prohibition of the abuse of economic dependence has a more prominent role in protecting a weak party in business contracts. The latter provision has a broader scope of application and grants remedies to the party.[730] In addition, the rule in the franchise agreement law contains some

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[726] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 63.
[727] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., pp. 62-3; A. FICI, *Il contratto di franchising*, cit., p. 123; C. LEO, *Art. 3*, in G. DE NOVA; C. LEO; A. VENEZIA, *Il Franchising*, cit., p. 30; and U. VIOLANTE, *Recesso unilaterale nel contratto di franchising. Il commento, Nota a ord. Trib. Bari sez. II 8 aprile 2005*, in Danno e responsabilità, 2005, fasc. 10, pp. 985 ss
[728] A. FICI, *Il contratto di franchising*, cit., p. 122. With a different opinion, cf. M. A. LIVI, *Forma e contenuto del contratto*, in L'affiliazione commerciale, a cura di Vicenzo Cuffaro, Torino: G. Giappichelli, p. 113.
[729] A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., pp. 257-260. According to Article 1 of Law No. 129/2004, commercial affiliation (or franchising) would be the contract between two economically and legally independent legal parties, on the basis of which one party grants the availability to the other, in respect of a respective set of industrial or intellectual property rights trademarks, trademarks, utility models, designs, copyright, know-how, patents, technical or commercial assistance or consultation, by including the affiliate in a system consisting of a plurality of affiliates distributed in the territory, particular goods or services.
[730] A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., pp. 257-260.

undetermined concepts, which make them somewhat difficult to apply.[731] It does not provide the criteria to interpret the notions of *amortization* and *investment*.[732]

In order to overcome these difficulties, this norm requires the determination of some elements for its application: i) the possibility of analogical application to other temporal structures, ii) the investments required to apply it, iii) the investment amortization method and the calculation of contractual duration, and iv) the remedies available to ensure the minimum duration. Some of the notions necessary to apply this rule were already addressed in previous chapters. Elements ii) and iii) were discussed, in general terms, in sections 3.2 and 3.3.3. It is necessary to verify whether this norm has any peculiarity.

i) The possibility of analogical application to other temporal structures

The provision's wording determines its application only to fixed-term contracts.[733] Such application would limit its practical repercussions, and it would also cause unjustified differentiation. There is no rational reason to justify the legislature's choice to restrict the rule to fixed-term contracts. The explanation for this absence stems from the rarity of undefined term agreements.[734] Franchising usually has a fixed-term, which may be renewed at the end of each short contract.

The doctrine defends its broad application scope, recognizing its impact on indefinite-term franchising contracts.[735] There are several grounds for adopting this interpretation. The fundamentals of the norm are, for the majority, objective good faith and, for others, the abuse of economic dependence (see section 2.3.7). Regardless, the simultaneous application of a general

[731] G. DE NOVA, *La nuova legge sul franchising*, cit., p. 763.
[732] A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 257.
[733] The original rule wording states that: "Qualora il contratto sia a tempo determinato, (…)".
[734] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 343-344; and A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., 62.
[735] See A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 63; A. FICI, *Il contratto di franchising*, cit., p. 120; G. CIAN, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, cit., p. 5894; A. FINESSI, *La tipizzazione del contratto di franchising e i profili problematici della l. 6 maggio 2004, n. 129*, in Studium iuris, 2004, p. 1485; M. A. LIVI, *Forma e contenuto del contratto*, cit., pp. 110 ss; V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 813; and G. DE NOVA, *La nuova legge sul franchising*, cit., p. 763. In an isolated understanding, F. BORTOLOTTI, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, cit.

clause could allow its application to other temporal structures. The confluence of these arguments results in a proposal to apply the provision analogically.[736]

The same reasons to extend this rule to indefinite-term contracts allow its application in the case of fixed-term agreements with a renewal clause. There are contrasting opinions on the matter; a notable author has stated that a fixed-term contract with an automatic renewal clause presumes that the investments would have been amortized throughout the first contract.[737] There would be no reason, then, to allow its analogical application. The two structures – fixed-term contracts and agreements with a renewal clause – have a different interaction with specific investments. The latter represents the party's choice to limit the duration so that an analogical application cannot derive from it. However, this argument does not allow ruling out an analogous application. It can remove the protection of investments in specific situations, such as when the affiliate has excluded its protection and has accepted the risk of the non-recovery of investments. The rule is used for all fixed-term contracts, even if they have a non-renewal clause.

The application of this rule to other temporal structures generates interactions with other provisions. It does not exclude the need to grant a notice period prior to terminating the agreement. In this contractual type, the abuse of economic dependence applies together with the provision of Law No. 129/2004 (for a systematic application of these norms, see section 2.3.7). The former rule imposes the grant of prior notice before the unilateral termination takes effect.[738] Based on the characteristics of the franchise agreement, the doctrine suggests a month for each year of the contract as the notice length.[739] This notice does not have as function to promote the recovery of investments, but to allow the franchisee to re-establish itself in the market and promote activities to reduce the damages caused by the relationship's end (see section 3.2). Another essential element to apply this rule is the specification of the notion of *investment*.

[736] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 343-344.
[737] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., pp. 63-4.
[738] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., pp. 63; A. VENEZIA, *Gli strumenti contrattuali per le reti di vendita: guida pratica per la comprensione, l'applicazione e la scelta dei contratti: agenzia, procacciamento d'affari, concessione di vendita, il nuovo franchising (L. n. 129/2004)*, cit., p. 164.
[739] A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 62.

ii) The investments required to apply the rule

Article 3/3 of Law No. 129/2004 imposes a minimum duration that is sufficient to recover the *investments*. The rule does not establish any other information about them, nor the criteria for selecting the protected investments. Section 3.3 provides the parameters for the concretization of this norm. According to the conclusions reached therein, the requirements to protect investments are 1) their specificity to the relationship, 2) their substantiality, and 3) their implementation asymmetry between the parties.

Some specifications must be made in the face of the particularities of the franchise agreement. In this contractual type, the investments made are usually directed towards the adaptation to the praxis and the commercial image of the distribution network. As stated in section 3.3, they represent examples of investments that are not fixed assets. They can also be the costs required to adapt the facilities and to operate the management[740] and entry fees.[741] Protected investments are not limited to these examples.

Two interpretations have been proposed in the doctrine to evaluate the moment of protected investments' implementation. The first position holds that they should be calculated at the beginning of the relationship because of the rule established in Article 3/4 of Law No. 129/2004. According to it, all required investments must be indicated in the contract. The contract would be considered as fixed-term at the beginning of the contract based on the investments referenced therein.[742] However, as defended in section 3.3.4, investments that are required subsequently must be protected. They also determine the minimum duration of the relationship.[743] This understanding seems to be in conformity with the provision, which has no limitations concerning the moment the investments are made. This interpretation would still be consistent with incomplete contracts. Investments made are implemented during the relationship performance, such as the facilities required by the counterparty for the performance of the contract. In addition, some investments are not quantifiable at the beginning of the relationship, which may be required throughout the

[740] A. FICI, *Il contratto di franchising*, cit., p. 118; V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 812.
[741] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 284-285; A. FICI, *Il contratto di franchising*, cit., p. 118; C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 292.
[742] C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., p. 292.
[743] G. CIAN, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, cit., p. 5.894.

contract.[744] The function of Article 3/4 is to inform the franchisee of the necessary expenditures to perform the contract. With more information, it can then assess whether signing the contract represents a favorable business opportunity. It cannot restrict the investment protection.

The investments to be considered are those made as a result of the agreement or are required by the franchisor. If the investment is the result of the franchisee's autonomous decision and is neither needed nor induced by the franchisor, it should not be protected.[745] In this latter case, it must demonstrate that the investments do not represent a unilateral choice of the affiliate, even though they are not contained in the investment list provided at the beginning of the relationship. Another element to determine the contract duration is the method adopted to verify the recoupment of the protected investments. The considerations made in section 3.2 also apply to selected protected investments.

iii) The investment amortization method and the calculation of the contractual duration

The determination of the minimum duration requires identifying the protected investments and the period to recoup them. Once the protected investments are determined, the modality of their recovery should be explored. Section 3.3.5 outlined the procedure to promote investment protection in its different aspects.

Article 3/3 of Law No. 129/2004 refers to the *amortization* of investments. The conclusions reached in this section apply to this provision. The amortization method adopted is the economic method,[746] not financial or accounting amortization.[747] The standard terms to recover investment should be considered,[748] especially considering the presence of intangible assets. A comparative

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[744] F. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 812.
[745] F. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 813. A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 266 points out that this concept is critical for the definition of contractual risks.
[746] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 381; and A. FICI, *Il contratto di franchising*, cit., 118.
[747] V. FARINA emphasizes that it should be guided based on the criteria established in Article 2.426 of the *Codice Civile* (V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 821). See also A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 63.
[748] Regarding the criterion of reasonableness, clarifies C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., pp. 294-5 that the hermeneutical criterion for qualitative comparison between the investments and the minimum duration of the contract would be reasonableness, due to the absence of homogeneity of the elements confronted.

analysis with other contracts in the same distribution network aids in determining this period.[749] The period necessary to recover investments is not the only element to determine the contractual duration; rather, it has to be read together with the determination that this period cannot be less than three years. If the period to recover the investments is more than three years, it should apply the term to amortize the investments made.

G. DE NOVA has suggested a procedure for establishing this minimum term.[750] First, Article 1.339 of the Italian Civil Code inserts an imposed period in the contractual relationship. This term might change if the necessity of recouping the investment imposes a duration greater than three years. In this case, this determination arises from an equitable decision by the judge under the provisions of Article 1.374 of the Civil Code. However, although elaborated, this construction attributes an excessive role to equity, which allows the interpreter to alter the contractual relationship. Article 3/3 of Law No. 129/2004 establishes the parameters to modify the contractual term, and there is no need to resort to equity. The interpreter must use and apply these and consider the open texture of this rule. This provides a broader possibility to determine its precise effect. The judge cannot rewrite the contractual term based on fairness in this case.

iv) The remedies available to ensure the minimum duration

The previous items established the scope of application of the rule. They also determined the parameters of its application, especially considering the notion of the recovered period and investments. Based on these conclusions, the remedies available must be addressed to assure the efficacy of this provision to the franchisee. The elements to determine the contractual term require extensive work; doing so involves numerous factors, which could even change during the contractual performance, and it has a dynamic definition. There is considerable uncertainty about this term, especially in a business context when the players must make quick decisions.

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[749] There is a doctrinal opinion, according to which the term of the contract does not automatically constitute itself. It requires its determination in court. This solution would reduce its application. Cf. A. FICI, *Il contratto di franchising*, cit., p. 121; C. LEO, in G. DE NOVA; C. LEO; A. VENEZIA, *Il Franchising*, cit., p. 29.

[750] G. DE NOVA, *La nuova legge sul franchising*, cit., p. 764. See also V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit., p. 814. Contrary to this view, G. CIAN, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, cit., p. 5.892 excludes the possibility that the court may determine the duration of the contract for more than three years for the recovery of specific investments. That possibility would exceed the limits of the powers conferred upon the judicial authority.

The franchisor must respect the minimum duration of the contract, which is sufficient to guarantee the amortization of the investments. Both in fixed-term contracts and indefinite-term contracts (or with automatic renewal), the term must be respected. There is no right to terminate the agreement until the complete recovery of investments. Termination cannot affect the relationship until the complete recovery of investments. Until then, the franchisee cannot be excluded from the network and can continue the contractual relationship.

The doctrine has not accepted this interpretation; two other solutions have been proposed. The first argues that, even though is possible, the termination can only be exercised once sufficient time has elapsed for the amortization of the franchisee's investment.[751] If it is not respected, the franchisee can obtain forced reintegration into it.[752] The reintegration into the network stems from the systematic interpretation of the provision (see section 2.3.7), with the possibility of applying the specific remedies related to the abuse of economic dependence.[753] The second opinion opposes the idea that the decision to reintegrate into the distribution network would be the franchisee's decision. It claims that this contractual type requires intense collaboration, which excludes the imposition from a judicial decision to continue the relationship. If the franchisor decides to the end the relationship, the compensation remedy is the only one available.[754]

If there is no measure to reintegrate the franchisee, the protection corresponds to the compensation for damages. The consistency of this damage depends on the interpretation of the situation. If it is understood that the franchisor does not have the right to terminate the contract, a forced termination has happened, which has some serious repercussions. The decision to exclude the franchisee is a contractual default, and the responsible party must compensate the losses and damages corresponding to the expected interest of the period necessary for the amortization of the investments.[755] A more detailed description of this damage is addressed in section 4.2.2. An orientation claiming the losses and damages corresponding to a reasonable notice period does not meet the standard of the rule. Rather, it imposes a contractual term in accordance with the period necessary to amortize specific investments, not only an obligation to grant a prior notice.

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[751] G. DE NOVA, *La nuova legge sul franchising*, cit., p. 764.
[752] A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., pp. 261-2.
[753] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 343-344.
[754] In this regard, C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., pp. 299-300 believes that it is difficult to resort to the specific remedy. The minimum duration would be purely indicative, and it could not serve as reasoning to allow the continuation of the relationship.
[755] A. FICI, *Il contratto di franchising*, cit., p. 122.

Another remedy available is also available: the invalidity remedy. The rule does not mention the existence of this remedy, nor the presence of public interest in this regulation. However, a systematic interpretation of the law regulating the franchising agreement notes an interventionist discipline. Article 3 establishes, for example, the elements that the contract has to contain. Article 3/3 is no different; it establishes a contractual duration, which the parties must respect. If they do not establish a fixed-term contract duration in correspondence with this article, the clause is null.[756] The rule partially invalidates the contract content. Under Article 1.339 of the Civil Code, the voided clause is automatically replaced by the duration necessary for the amortization of investments.[757] This nullity preserves relationship stability.[758]

2) A prior notice in a contract with specific investments

The need to grant a notice period relates to the interests involved with making specific investments. This reconstruction of the interests was conducted in section 3.2. The first conclusion was that making investments does not directly condition the contractual duration. Although there is no direct, causal relation between them, the implementation of investments generates some consequences. The termination of the relationship without considering the unrecovered investments creates the need to i) grant a notice period considering various elements of the contract, including specific investments; ii) compensate investments not recovered during the relationship (including the additional extension period, if any); and iii) compensate any supplementary damages (*e.g.*, legal fees, dismissal of employees, compensation for loss of the customer base).

The granting of prior notice consists of a measure to promote the stability of the relationship in which investments are made. In an indefinite-term contract, the decision to terminate requires the party to communicate this in advance. From a legal perspective, it corresponds to setting a suspensive term for the termination's effectiveness.[759] In business contracts, the duty to give prior

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[756] A. FICI, *Il contratto di franchising*, cit., pp. 120-1; P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 343-344.
[757] A. FICI, *Il contratto di franchising*, cit., p. 121; G. DE NOVA, *La nuova legge sul franchising*, cit., p. 763; A. FRIGNANI, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, cit., p. 64; A. VENEZIA, *Gli strumenti contrattuali per le reti di vendita: guida pratica per la comprensione, l'applicazione e la scelta dei contratti: agenzia, procacciamento d'affari, concessione di vendita, il nuovo franchising (L. n. 129/2004)*, p. 168.
[758] C. CREA, *Reti contrattuali e organizzazione dell'attività d'impresa*, cit., pp. 299-300.
[759] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., 380.

notice is a requirement from objective good faith and the prohibition of the abuse of economic dependence, in coordination with the analogical application of the provisions of Article 1.569 of the Civil Code (see sections 2.2.2.1 and 2.3.7). The unilateral termination should not put an end to the relationship in an abrupt or untimely way. Except in exceptional circumstances, giving prior notice is required to avoid causing unnecessary damages to the counterparty. This protects the company's expectation and, as much as possible, prevents or mitigates the losses that the termination of the contract may cause.[760]

The decision to terminate the agreement has repercussions for the relationship. After granting a notice period, the parties must prepare for the termination of the relationship. They have to make decisions that minimize the damages resulting from its interruption. During this period, the parties must conclude deals, liquidate reciprocal activities, resell, or convert investments. The parties must also prepare for the new situation that they will face when the effects of the contract are over.[761] The intensity of the bonding may suffer a slowdown due to its inadequacy to the new circumstances.[762]

The term granted varies according to contractual conditions. The terminating party should consider the purposes of giving this additional period. It usually has the function of reducing the damages and redirecting the business activity. The length of a prior notice period should consider i) the duration of the contractual relationship, ii) the investments made, iii) the time needed to find a reasonable alternative, and iv) the commercial practices in certain economic transactions.[763] The investments, particularly their consistency, characteristics, extent, and the time of recovery, are also aspects for establishing the length of this period. These factors can also be observed in French case law (see section 3.2.3). Italian case law does not seem to have established clear parameters to establish the length of the period.

The notice period should not be considered a "warning" of the contractual end. For this reason, a short duration might be inadequate to the circumstances. Some judicial decisions point to

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[760] Ibid., p. 380.
[761] Ibid., p. 384.
[762] Ibid., p. 385.
[763] The Draft Common Frame Reference, drawn up by a study group promoted by the European Commission, established a list of factors to be taken into account in determining the duration of the notice; among them, the investments reasonably made have been indicated. Article 2: 303 also designates: (a) the time the contractual relationship has lasted; (b) reasonable investments made; (c) the time it will take to find a reasonable alternative; and (d) usages. About the term of effectiveness of the relationship, a period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is presumed to be reasonable

the possibility of its long duration and thus allow the recovery of all specific investments (although this is the purpose). French courts have granted some decisions in which the duration of the relationship extended over a long period (section 3.2.3). For example, in a 10-year contract, 18 months' notice was established as sufficient; in another relationship of 14 years, the term established was 12 months. The primary reason for this long notice period is the absence of reasonable alternatives in the market, as well the company's economic dependence.

It must be emphasized once again: investments are an essential factor to determine the notice period, but this time is not intended to ensure a minimum or reasonable contractual duration based on the recovery of investments.[764] Granting a notice period is not direct investment protection. There are two consequences if the notice is not granted or if the period is insufficient to the purposes. The first is the possibility to claim a notice period extension, and the second, which is related to the first, is compensation for investments not recovered. The notice period cannot be a compensation for the non-recovered investments. In the first case, the notice intends to minimize losses and allow business redirection. If it is not granted, the party has to compensate for the damages caused to the victim for not being able to minimize the losses, nor to redirect their activity. The analysis of the compensation remedy is studied in section 4.2.2.

3) The specific remedies: prohibitory injunction and specific compensation

A company's decision to terminate a contractual relationship requires it to grant reasonable notice to allow the counterparty's reorientation. The decision to give notice and its sufficient duration must consider several factors, such as the presence of specific investments, especially those not yet recovered. If the prior notice is not granted, or it does not correspond to the appropriate period, the investing party may adopt remedies aimed at correcting this situation.

The remedies depend on those available in the applicable rules; these include specific protections, which are established in Article 9 of Law No. 192/1998 (prohibition of the abuse of

[764] Article 720 of the Brazilian civil code indicates an interpretation to that effect. Although it is a norm present in another legal system, this rule lists the two phenomena differently. According to the provision, the unilateral termination of the agency contract can only occur with the recovery of investments; if so, a notice of ninety days must be given. These are two ways of stabilizing the relationship with different purposes. A. SCHWARTZ, *Relational Contract in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, cit., p. 308 confirms this reality by analyzing that the distribution contracts rarely match the duration of the notice of unilateral termination with the requirement to amortize the sustained investments.

the position of economic dependence). This specific protection should not be limited to cases of the abuse of economic dependence. As a result of M. LIBERTINI'S typological construction of the category of a business contract, specific remedies should be considered standards and receive a systematic priority.[765] This construction makes the juridical integration of the abuse of economic dependence and unfair competition possible.[766] There are two specific remedies, a prohibitory injunction (*rimedio inibitorio*) and compensation in a specific form (*risarcimento in forma specifica*).

A prohibitory injunction consists of a condemnation decision that contains an order of abstention projected into the future.[767] The judge assesses the potential damage probability of the conduct rather than the damage already verified. Its content is not necessarily based on events that have already occurred. It is necessary to indicate the danger of continuing the conduct.[768] This obligation is not susceptible to enforcement. Under Italian law, only the obligation to reinstate the situation (*reintegrare la situazione*) may be liable to enforceability; compensation may also be claimed for damages resulting from the violation of an injunction. The new Article 614-bis of the Italian Code of Civil Procedure allows the application of a fine (*astreinte*).[769]

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[765] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 64. The availability of specific protection under a long-term contract (*contratto di durata*), specifically in the distribution contract, was already noted by G. VETTORI, *Anomalie e tutele nei rapporti di distribuzione tra imprese*, Milano, 1983, pp. 68 ss. The author makes an intricate construction of application of the rules that govern unfair competition to allow a greater range of remedies to the distribution contract in its termination.

[766] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 64.

[767] M. LIBERTINI, *Nuove riflessioni in tema di tutela civile inibitoria e di risarcimento del danno*, in Rivista critica di diritto privato, 1995, pp. 386-7 explains that the prohibitory injunction does not require the judge to declare a violation of a conduct rule (*regola di condotta)* precisely determined by law, or the invasion of the sphere of a right. It regulates situations abstractly worthy of protection. The author adds that it can be a conflict between rights of the same nature or between heterogeneous subjective situations (*situazioni soggettive*) or, even, between protected interests not elevated at the level of right. M. LIBERTINI; A. GENOVESE, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, a cura di Daniele Santosuosso, in Commentario del Codice Civile, diretto da Enrico Gabrielli, Torino: UTET, 2014, p. 626 point out that the opinion regarding the exceptionality of this remedy has become a minority in recent years. The author already defended the current majority position in an article published in 1995 (M. LIBERTINI, *Nuove riflessioni in tema di tutela civile inibitoria e di risarcimento del danno*, cit.).

[768] M. LIBERTINI; A. GENOVESE, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, cit., pp. 626 ss. The authors add that, concerning proof of danger, it is understood that a simple assumption would suffice when the defendant continues to exercise a business activity, even if the specific behavior is terminated. The presumption cannot be formed in the face of facts that make it unlikely to continue an illicit activity.

[769] M. LIBERTINI; A. GENOVESE, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, cit., p. 629. A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 269 notes that there is still mistrust regarding the specific protection even after the entry into force of Article 614-bis of Civil Procedure Code. See also V. FARINA, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, cit. with considerations concerning the franchise agreement.

An injunctive relief order changes depending on factual circumstances. The judge must make a comparative assessment of interests and reasonably provide the most appropriate remedy.[770] Given the damages' potential concerning the decision to interrupt the contract without granting an adequate prior notice period, it can admit a prohibitory injunction.[771] The judge should withdraw the termination effects so that the relationship would not have been interrupted. The decision should also give an order to continue its performance.[772] This complimentary period is necessary for the reorientation of the victim company, and its purpose is not the time required for the recovery of the investments.[773]

The other remedy, the compensation in a specific form, requires other conditions and has another purpose. It may determine the formation of a contract. This measure is available when an abusive behavior corresponds to a single lawful alternative, and it consists of initiating or pursuing certain conditions in a business relationship.[774] It poses two conditions: the remedy requires the subjective element of fault (*colpa*) and, especially, a lawful alternative. It may apply under a framework or normative contract. With the refusal to buy or sell, the party could claim the formation of an execution contract, despite the lack of a legal obligation to contract. This is a delicate situation, and it requires some assumptions and limitations.[775]

Both remedies require evaluating situations that are abstractly worthy of protection. In this comparative assessment of interests, the judge must extract the norm of conduct that is more adaptable to the concrete situation.[776] It is an evaluation of equally protected spheres of freedom: the company that wishes to adapt itself to the market and its counterpart, whose investments were not recovered during the relationship. The elements to assess the arbitrariness of the termination also have relevance in this second evaluation (see section 3.4). If the remedy claimed is

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[770] M. LIBERTINI; A. GENOVESE, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, cit., p. 622.
[771] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 283-4.
[772] A. NERVI, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili. Relazione al convegno "Crisi economica e categorie civilistiche," Associazione Civilisti italiani e Consiglio Nazionale Forense, Roma, 28 e 29 giugno 2013*, in Rivista di diritto privato, 2013, fasc. 4, p. 462.
[773] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 283-4. On the other hand, A. NERVI, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili*, cit., p. 468 states that the period would be that which is necessary to recover the specific investments.
[774] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 514.
[775] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 511-515.
[776] M. LIBERTINI, *Nuove riflessioni in tema di tutela civile inibitoria e di risarcimento del danno*, cit., pp. 388-389.

disproportionate to the conflict of interest, the judge should deny the inhibitory remedy.[777] In this case, this claim can be excluded and yield damage compensation.

In assessing these interests, there are advantages and difficulties in the specific protection to be granted. Among the positive effects is the fact that the effectiveness of this measure would provide an incentive for the parties to renegotiate the relationship.[778] The perspective of specific and more effective protection could contribute to rebalancing the parties' power in the ordinary management of the relationship.[779] These remedies stabilize the relationship. If there is competitive damage, in the case of the abuse of economic dependence, they respond appropriately to the functioning of the market. Based on this perspective, there would be a general interest in the specific protection of investments.[780] However, some authors have argued that there would be a risk of sclerotizing existing market structures; the continuation of the relationship would close access to new entrants and, at the same time, reduce the competitive stimulus for the protected companies in their investment.[781] According to P. FABBIO, this argument is not rigorous and is not based on accurate, empirical data.[782] The impossibility of ending the relationship is not its consequence. It entails only the right of the company to a congruent contractual duration.[783] These specific remedies represent a consequence of a close interaction between contract law and

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[777] The rule of proportionality stems from the systematic unity between reparation in specific form *ex* Article 2.058 of the Italian Civil Code and the inhibitory remedy (M. LIBERTINI; A. GENOVESE, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, cit., p. 623).
[778] M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., p. 64.
[779] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 510.
[780] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 509. In this regard, A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 268 points out that the European Commission guidelines would indicate a positive factor for specific protection; by allowing the duration of the contract to avoid problems of hold-up or parasitism. On the contrary, F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 247 argues that protection may be blind to reality and that it may compromise the efficiency of distribution circuits. The author adds that this solution would entail high losses for global economic activity and, ultimately, for consumers.
[781] R. PARDOLESI, *I contratti di distribuzione*, cit., pp. 300-1 argues not about the risk of granting a prohibitory injunction, but about the possibility of over-extension of contractual relationships. For the author, the efficiency of the distributive apparatus constituted by the producing company is conditioned by its elasticity and by the speed with which it can adapt to the changing needs of the market. The mobility of the franchisees would be the best guarantee against the sclerosis of the network and the danger of its degradation in the face of external competition. Eventual prolongation of the decision would be to freeze the current channels of distribution methods, as well as to subsidize economic operators below the standard.
[782] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 283-4. In this regard, A. VILLELLA, *Abuso di dipendenza economica ed obbligo a contrarre*, cit., p. 183 emphasizes that one must take into account the modern economy's demand, in which the production of goods and services do not allow for a halt.
[783] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 283-4.

competition law. This interface makes it easier to admit the injunctive relief and to compensate in a specific form.[784]

Other negative evaluations of adopting specific protection in contracts also exist. The first criticism of the configuration of reliance interest resulting from the implementation of investments does not make it possible to claim a specific remedy. However, as argued in section 3.2, the reliance interest does not derive from specific investment-making; this argument does not hinder the continuation of the relationship.[785] Another criticism is related to the characteristics of long-term contracts. These contracts require cooperation between the parties, which might be affected.[786] However, for the company that terminates the contract, the contractual continuation represents an ordinary operation, especially considering the presence of a network of agreements. It cannot be treated as an exceptional issue. The arguments that oppose this position are mainly based on the view of the contract as protection of an individual owner (*protezione di un individuo proprietario*), and they are not functionally oriented to the efficiency of the markets in which the company operates.[787] If the operation requires an exceptional cooperation factor or may cause losses to the victim company, the protection, after examining proportionality, may not be granted. Therefore, there is an abstract possibility of granting specific protection; its concrete opportunity must be verified with the elements presented in the items below; they must be related to the applicable rules, the abuse of economic dependence, and good faith together with abuse of right.

i) Specific protection in case of the abuse of economic dependence

The configuration of the abuse of economic dependence allows the adoption of specific remedies to protect investments with greater argumentative ease. R. NATOLI has concluded that the application experience has matured over the years and has shown that the right remedy for abuses

[784] A. NERVI, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili*, cit., p. 494.
[785] As regards that argument, R. PARDOLESI, *I contratti di distribuzione*, cit., p. 329 argues that it is ruled out that the consequence of an unlawful termination may consist in the ineffectiveness. The ineffectiveness would have as objective to protect the positive contractual interest, which goes beyond the damages suffered by the intermediary for having predisposed the necessary structures for the commercialization of the contractual goods. See also M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 19.
[786] Concerning the first two objections, cf. M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 25. A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., p. 269 also warns of the consequences of this remedy on the plan of the concrete functioning of the relationship, without, however, adopting a clear position in relation thereto.
[787] This reference is related to the typological construction of business contracts of M. LIBERTINI, *Autonomia individuale e autonomia d'impresa*, cit., pp. 46 e 49.

of economic dependence is the inhibitory measure and, in a subordinate way, the compensatory measure. The nullity of the pact is rarely invoked.[788] The claim of the abuse of economic dependence is usually preceded by a demand for a provisional remedy, in which the dependent party looks to continue the commercial relationship.[789]

R. NATOLI has also noted that two problems of procedural law have continually been discussed: i) the admissibility of a provisionary remedy and ii) the admissibility of an interlocutory relief to an obligation that is not fungible.[790] Both obstacles can be overcome. It is necessary to demonstrate the concrete danger of repetition or even of an unlawful act; the threat may constitute an abuse if it is likely to influence the conduct of the victim company.[791]

Specific remedies require the assessment of how to balance conflicting interests. As mentioned previously, there are no obstacles to claiming them. A specific remedy might even be preferable to protect the market. There are also elements in the legal framework that show an interest in protecting investments and preserving the business relationship. A. NERVI has argued that the presence of indicators suggests a preference in distribution agreements for these specific remedies. He based his interpretation of Article 3/3 of Law No. 129/2004 on the franchise agreement. He has also argued that the protection of investments represents a positive factor for the competition, as established in the European guidelines on vertical restrictions. This author has

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[788] Some reasons may be presented to justify the inadequacy, especially in the case of specific investments, of compensation for damages. In the view of A. NERVI, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili*, cit., p. 491, the protection of compensation for the equivalent risks extinguishing its effectiveness by requiring the contracting party to provide evidence that the entity suffered damage. It is true that the court could also quantify the damaged entity in a fair way (*liquidazione del danno in via equitativa*), but the victim party should provide evidence to the court of the damaged entity. Other factors should be considered: 1) the disparity of bargaining power so that this contracting party is scarcely equipped to seek evidence regarding the global damage entity; 2) the urgency to react promptly to the abusive interruption occurs in a context with difficult adequate evidence to substantiate the claim of compensation.

[789] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 398. The author also provides a substantive list of decisions connected to the application of Article 9 of Law No. 192/1998 with the arbitrary interruption of the commercial relationships, in provisional remedies: Trib. Catania, 9 luglio 2009 (ord.), in Foro it., 2009, c. 2813 Trib. Torre Annunziata, 30 marzo 2007 (ord.), in Giur. merito, 2008, p. 341, Trib. Torino, 8 novembre 2006 (ord.),; Trib. Bari, 22 ottobre 2004, (ord.), cit.; Trib. Bari, 11 ottobre 2004 (ord.),; Trib. Taranto, 22 dicembre 2003 (ord.), Trib. Taranto, 17 settembre 2003 (ord.), Trib. Roma, 12 settembre 2002 (ord.); Id., 16 agosto 2002 (ord.); Id., 2 luglio 2002 (ord.), tutte in Foro it., 2002, I, c. 3207; Trib. Roma, 5 novembre 2003 (ord.); Trib. Bari, 6 maggio 2002 (ord.), in Foro it., 2002, I, 2178. In the case of Diesel, Sezione Trib Bronte, 9 luglio 2009, the court verified the abuse of economic dependence of the company and, in interlocutory relief, the continuation of the relationship was determined for three years, with the provision of pants at no less than 890,000 per annum. The danger of delay would be the irreparable loss of jobs that would result from this decision, the impossibility of recovering investments and the need to maintain productive activity.

[790] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 398.

[791] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 285. See also P. A. FORGIONI, *Contrato de distribuição*, cit., p. 298.

also defended that the contractual extension to remain in the distribution network should be for the time necessary to amortize the investments.[792] However, as argued in section 2.3.7, this provision should be considered exceptional, and there is no analogical application. The complementary time is necessary to allow the redirection of the activity.

There are situations in which this remedy is not completely advisable.[793] In the specific case of the recovery of investments, the requirement to ensure an adequate competitive dynamism can lead to balancing the interests in favor of the supplier's interest to be able to reorganize the distribution network itself (see section 3.4).[794] This circumstance does not exclude the admissibility of a specific remedy. Weighing the interests can lead to a specific remedy to continue the contract for a reasonable period – not for the time to recoup investments – and to compensate the non-recovered investments. The claim to continue in the contract until the investment recovery should not be accepted, but rather for a period necessary for the recoupment of the investments. Some decisions seem to adopt this rationale (see section 4.2.5).

ii) Specific protection in case of the abuse of right and good faith

If the claim of protecting the specific investments does not constitute an abuse of economic dependence, the situation could still be framed as a violation of the objective good faith and abuse of right. From a civil law doctrine standpoint, objections raised against specific protections are more readily accepted. These remedies are admitted only in exceptional circumstances.

The absence of competition damage might pose difficulties for admitting specific remedies. Some authors have also argued that these legal rules would protect only reliance interest (*interesse negativo*), even though the situation to protect is the same as that in the case of the abuse of economic dependence. The only remedy admissible would be damage compensation, which is preferable compared to the ineffectiveness of termination and the coactive performance of the contractual relationship.[795]

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[792] A. NERVI, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili,* cit., pp. 498-9 admits, however, that, apart from the specific scope of such relationships, the provision does not provide precise information as to the possibility of establishing the existence of interests in the continuation of a given business relationship.
[793] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 507.
[794] P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., p. 169.
[795] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 25.

Nevertheless, specific remedies are appropriate in a few situations. The most common of these is when compensation for the equivalent corresponds to untimely protection and is challenging to quantify. The example usually adopted in such a situation corresponds to the arbitrary unilateral termination of an agreement of advances on a current account after the client has already withdrawn consistent sums of money to perform a sophisticated business operation (see section 2.2.2). The damage resulting from this act is difficult to quantify. The borrower would use the sum advanced in a project, and its success would allow the repayment of the loan. The payment of the compensation also provides late protection because the entrepreneur could find itself in the situation of liquidity crisis and, consequently, at risk of insolvency. This situation allows the specific protection of the contracting party with the declaration of the ineffectiveness of the unilateral termination.[796] In this case, the financing would have already been granted, which is different from the determination to maintain a contractual relationship with the availability of funding.[797]

In addition to this case, even when elements for the application of prohibiting the abuse of economic dependence are not present, specific protection could be adopted with the integration of the contractual rule and the rule of unfair competition (Articles 2.598 ss. of the Civil Code); this is a result of M. LIBERTINI'S typological construction of the category of a business contract. This case would allow expanding the hypothesis of establishing a specific remedy to protect specific investments.

4.2.2. The compensation remedy

An arbitrary termination violates several interests that must be described again. As highlighted in section 3.2, the interests are as follows: i) granting a contractual extension within a reasonable time for the company's recovery, ii) the compensation of investments not recovered, and iii) other indemnities. These interests demonstrate the circumstances in which the investing

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[796] This understanding reflects the position adopted by the Italian Court of Cassation, Cass. 21 maggio 1997, n. 4538. The decision stated that the person who is granted credit through a current account contract has the legitimate expectation that he may have the sum in due time. He expects that the sum will be ready at any time to repay. The court also pointed out that to understand differently would represent to empty the reasons why a current account contract is usually executed.

[797] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 32.

party may claim damage compensation.[798] The first situation is when the party has not been granted a notice period after the interruption of the contractual relationship, or when its length is sufficient.[799] The lack of prior notice intends to compensate for the damages caused to the victim for not having the possibility of minimizing the damages or to redirect its activity. The primary loss is the benefits the victim contractor would obtain if the contract were continued in this period. In addition to this damage, they would encompass the costs of the temporary immobilization of the distributor's business resources and the increased expenses that it must incur in the case of rapid redirection.[800]

The second situation happens when the specific investments are not recovered. In this case, they should be considered additional damages. The compensation for the damage would correspond to the amount of the specific investments subtracted by their amortization over time and, depending on the circumstances, the amount of their alternative use and sale.[801] Section 3.5 mentions this. It is necessary to calculate the usefulness of the good after the end of the relationship.

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[798] M. LIBERTINI, *Il risarcimento del danno per la violazione di norme generali sulla concorrenza (antitruste e concorrenza sleale)*, cit., pp. 164-166 explains that, in the civil liability system, specific protection is neither subordinate nor exceptional concerning the compensation for the equivalent. It is possible to understand this conclusion focusing on the injured interest. The event violation (*l'evento lesivo*) can be translated into money through two criteria: i) the market value on the lost object (*aestimatio rei*), or ii) a cost to reconstruct a situation how was it before (*id quod interest*). There is a tendency to in case of event violation (*l'evento lesivo*) to use the first criterion. However, the rules of the Civil Code regarding compensation can be read in function of the recognition of two alternatives concerning the injured interest (*l'interesse violato*). It gives the possibility to choose among the various reparatory obligations: a) a monetary benefit, corresponding to the loss caused by the event violation; b) a pecuniary benefit, corresponding to the cost of repair or replacement; c) a specific benefit that consents to report the *de facto* situation to the *status quo ante*. The choice between them belongs exclusively to the creditor victim, and such choice is evaluated by the court only when the specific compensation is excessively burdensome for the debtor.

[799] It is argued that the interest protected in the case, even in the face of the configuration of investments, would correspond to the reliance interest (see M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., pp. 25-26). According to the author, the damage should be proportional to the legitimate expectation placed in the contract. With this termination clause, the party would agree to introduce into the contract a factor of randomness. The legitimacy to terminate derives from a clause freely accepted by the party. So, it could not claim to be placed in the same situation that would derive from the performance of the contract. Should the termination be arbitrary, the contracting party would be entitled to compensation of expenses and of loss of opportunities due to the trust generated. The author lists three other reasons to defend his orientation: i) without the indemnification of reliance interest the contracting party would not be encouraged to make investments; ii) the contract with unilateral termination gives the victim party more favorable contractual conditions; so it could not claim to be put into the situation as if the situation had been acted upon; iii) it would be possible to draw an analogy between the responsibility arising from the termination and the unjustified rupture of the negotiations. For this discussion, see section 3.2.

[800] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., p. 812.

[801] The High Court of Ireland (O'Leary -v- Volkswagen Group Ireland Limited ([2016] IEHC 773) did not adopt this second stage to quantify the damage. It determined that the producer should be liable to reimburse the expenditure incurred by the dealer in carrying out works to his premises following upon a meeting, but with due allowance being made for any value accruing to the plaintiff arising out of the carrying out of those works. It did not consider the time necessary to recoup these investments, especially considering that the notice took effect six years after its sending.

Specific investments can usually be reused with a substantial loss of value. After the relationship ends, the party must seek new business partners.[802] The criterion for determining this alternative use is ordinary diligence by the victim to reduce the damage suffered.[803] If there is no alternative use for the asset, it can be evaluated whether the capital goods can be reused based on a judgment of prognosis regarding the greater or lesser difficulty of their reallocation.[804] Some investments do not have a precise value, such as employee training, or investments in identifying activity with the supplier's image. In this case, only a standard period should be acknowledged.[805] Other indemnities might also be claimed.

4.2.3. The invalidation remedy of a contractual clause

The other remedy available to the investing party corresponds to the invalidity of a contractual clause. This remedy is outlined in Article 9/3 of Law No. 192/1998.[806] The abusive act usually takes the form of a behavior; therefore, the remedy of invalidity does not operate in these cases.[807] However, nullity can be operative if the abuse represents contractual content (*atto negoziale*). R. NATOLI has argued for the invalidation of a contractual term that is not consistent with the time required to amortize the specific investments made. With the configuration of partial nullity, the gap would be filled by the judge, thus establishing enough time to amortize the investments.[808] Nevertheless, this remedy cannot be summarized in these simple terms.

Its evaluation has two main difficulties: disregarding contractual schemes aimed at prolonging the relationship between the parties and the existence of many factors necessary to evaluate the duration of the contractual relationship. The parties may decide to establish short-term contracts with the possibility of renewal. This strategy would not be permissible if partial nullity of the clause is determined. There is also a practical question of assessing the period for the

[802] The amount of the damage will be the unamortized investments. If this is not the case, the residual value of the assets must be deducted from it. Cf. A. NERVI, *Contratti di distribuzione e "recovery period rule,"* cit., pp. 267-268.
[803] M. DELLACASA, *Il recesso arbitrario tra principi e rimedi*, cit., p. 27 shares this reasoning.
[804] A. NERVI, *Contratti di distribuzione e "recovery period rule*," cit., pp. 267-268. Cf. R. PARDOLESI, *I contratti di distribuzione*, cit., p. 327.
[805] P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 284.
[806] Compared with other remedies, P. FABBIO, *L'abuso di dipendenza economica*, cit., p. 520 points out that invalidation remedy may not be sufficient. The dependent company can perform the imposed contract, and the nullity does not create expectation interest. Besides, abuse may have a non-negotiating form, mere behavior, and the remedy of nullity would not operate.
[807] P. FABBIO, *L'abuso di dipendenza economica*, cit., pp. 520-521.
[808] R. NATOLI, *L'abuso di dipendenza economica*, cit., p. 397.

recovery of investments. The factors to be considered are challenging to implement, and an evaluation must be performed *ex-ante*.[809] Considering these circumstances, a clause might be considered invalid if there is no possibility of granting prior notice, despite the presence of specific investments. It would violate the need for the victim's company to redirect its activities.

4.2.4. The arrangement with creditors (*concordato preventivo*), the discipline of pending contracts (*contratti pendenti*), and the protection of investments

The remedies outlined concerning the prohibition of the abuse of economic dependence also involve evaluating its relationship with other rules related to the termination of the contract. The contractual bond can be terminated not only by a unilateral termination, but also by an effect of a business recovery plan presented in a judicial arrangement with creditors (*concordato preventivo*), based on Article 169-bis of Italian bankruptcy law (Law No. 267/1942). In the following, some questions are posed about this situation.

The first involves assessing the termination arbitrariness with the presentation of a reorganization plan. In other words, it is necessary to verify whether the unilateral termination *ex* Article 169-bis can justify interrupting the business relationship with specific investments not recovered. One has argued that the dominant company has a reorganization power to motivate the interruption of the relationship and, therefore, the arbitrariness would be ruled out. Since the unilateral termination or suspension of the contract is an option provided to the company in the legal system, these acts could not be illicit. However, it must be considered that the presentation of a restructuring plan represents an act of business autonomy, which does not exclude the configuration of the judgment of arbitrariness. There are also reasons for the protection of the victim company, and they do not disappear because the dominant company is in crisis. G. MORESCHINI has argued that the dissolution *ex* Article 169-bis would not *per se* justify the interruption of the relationship.[810]

There are other issues related to the available remedies. The remedies provided in Article 9 of Law No. 192/1998 cannot find a complete and automatic application within a procedure aimed at recovering the dominant company. The protection of the dependent company suffers from

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[809] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, cit., 244-5.
[810] G. MORESCHINI, *I contratti pendenti nel concordato preventivo*, cit., p. 159.

inevitable limitations imposed by this procedure. The denial to terminate a contract due to a reorganization plan cannot be accepted, even if the contract has specific investments.[811] If the arrangement were not allowed to continue, this circumstance would probably lead to the company's bankruptcy and, therefore, the protection of the victim party could not be achieved.[812] G. MORESCHINI has suggested overcoming this impasse without an extreme solution. It is not enough for the dominant company to demonstrate that the termination of the contract will facilitate the performance of the plan and would guarantee the best from creditors. He has argued that the debtor must propose a reorganization plan suitable to avoid the termination of the contract and that should entail a renegotiation of the agreement. The remedy of renegotiation would, in his view, be efficient.[813]

4.2.5. Italian case law and remedies to protect investments

The previous sections addressed the remedies admissible in Italian law concerning the protection of specific investments. Some decisions were mentioned to illustrate the application of these remedies. However, these references do not provide an overall evaluation of specific investments in Italian case law. The purpose of this section, then, is to demonstrate the influences of specific investments on the selection of the application of norms, the configuration of their legal requirements, and the adoption of the appropriate remedies.

Specific investments gain legal relevance in case law with the abuse of economic dependence; Italian case law does not seem to protect them based on other rules. An exception to this assertion was the notorious case *Cass. civile, sez. III, No. 20106/2009*, which admitted and applied the abuse of right, together with good faith, to assess the abusiveness of the exercise of a termination right (see section 2.2.2). Even in this case, whose facts date to before the enactment of the abuse of economic dependence, specific investments were not analyzed in detail. They constituted only one element of the concessionaries' claims since the producer had ordered the implementation of investments and terminated the contracts soon after.

Many decisions concerning the abuse of economic dependence take specific investments into consideration. However, they do not examine them in detail and in light of their multiple

[811] G. MORESCHINI, *I contratti pendenti nel concordato preventivo*, cit., p. 159.
[812] Ibid., p. 160.
[813] Ibid., pp. 164-165.

aspects. They also do not explore all the potentialities: generally, protection of the dependent company is denied. The in-depth studies about specific investment are still doctrinal. Even when these decisions mention such investments expressly, they generally do not verify whether the requirements to protect them, primarily their specificity to the contractual relationship, are present in the case. Sometimes, a simple reference is made to investments implemented to perform the contract. This is the reason G. COLANGELO, in commenting on the decisions of the Court of Catania and Torre Annunziata,[814] stated that these decisions echoed the sirens of judicial populism by not evaluating investments in detail (*e.g.*, their switching costs and the availability of satisfactory alternatives). He also contends that these decisions focused on the size of the companies involved to deduce the imbalance of rights and obligations. This criticism could also be extended to other judicial decisions.

The decisions contemplating specific investments were primarily made in the first instance, which explains why there is no consolidated view on specific investments in Italian case law. The Court of Appeals and the Court of Cassation have not ruled extensively about this issue. As an overall evaluation, Italian case law views specific investments as an essential factor in configuring economic dependence because they rule out the existence of a satisfying alternative in the market. This is the most common reference to specific investments. They are also an element of configuring the abusiveness of the contractual termination and a factor to assess the appropriate remedy. A more detailed view of these functions requires the description of the most notorious decisions on the abuse of economic dependence.

1) Marina Babini case (Court of Bari, j. 6.5.2002)

This decision was one of the first to address specific investments. It was later revoked on 2/7/2002 under the wrong allegation of the impossibility of applying the abuse of economic dependence to distribution agreements. According to this second decision, this discipline should be limited to outsourcing contracts. The relationship between the producer (Marina Babini), a cloth manufacturer, and a retailer lasted for about 10 years. They celebrated a framework agreement that regulated their rights and obligations. This contract attributed the right to revoke or change a

[814] G. COLANGELO, *Subfornitura di tabacchi ed abuso di dipendenza economica*, *cit.,* p. 1001.

purchase order to the retailer for 10 days after the order, while the producer had up to six months to accept the proposed ruling.

After a 10-year relationship, the producer decided not to accept the latest order and alleged that it chose to privilege retailers in the downtown area. The agreement was then interrupted after this refusal to take the purchase order. The retailer filed an action in court, demanding a provisionary measure. The court accepted this request, ordering that the contract would continue until the next commercial season. The judge recognized a contingent economic dependence linked to the need to have clothes for the following commercial season. The presence of specific investments was not a decisive factor in this case because the economic dependence was due to the necessity of the retailer purchasing cloth for the next commercial season.

2) Pfizer case (Court of Rome, j. 6.8.2002)

A medication producer interrupted a commercial relationship with one of its suppliers. This contractor alleged its economic dependence to the contract due to substantial financial loans to perform it. After a provisional prohibitory injunction claim to order the continuation of the relationship, the Court of Rome denied it. The ruling stated that these external commitments were not specific to the contractual relationship and therefore could not serve as a reason to establish economic dependence. The interruption of the commercial relationship cannot be qualified as abusive behavior.

3) Diesel case (Court of Bassano del Grappa, j. 9.2.2010; Court of Catania, j. 2.9.2009)

The *Diesel case* represents another decision that assessed a relationship with arbitrary interruption. In an outsourcing contract, the industry decided to reduce purchase orders. This choice resulted in a drastic drop in the subcontracted revenues. Viewing this decision as abusive, the outsourcer filed claims in different courts. The Court of Catania, section of Bronte, initially conceded a provisional measure that ordered the continuation of the contract for three years, with the same number of orders and the same economic conditions. Investments were relevant to the qualification as a dependent company. It implemented investments evaluated at €8,000,000, resulting in three production lines dedicated to performing the contract. In this decision, the investments were elements of the configuration of economic dependence. The danger of delay was

the irreparable loss of jobs, the impossibility of recovering investments, and the need to maintain productive activity. However, after an appeal, the same judge revoked his decision under the argument that the interruption was not arbitrary.

The Court of Bassano del Grappa denied the same provisional measure. It understood that the decision to interrupt the relationship was based on a business reason and that the freedom of economic initiative would allow the business to act in its interest, without consequences for the contractual partner. The industry alleged that the market had a decrease the clothing market.

4) Renault case (Court of Rome, j. 5.11.2003; Cass. civile, sez. III, No. 20106/2009)

The circumstances of the interruption of some motor vehicle distribution agreements resulted in the different distributors' claims. This controversy even reached the Court of Cassation in the notorious decision Cass. civile, sez. III, No. 20106/2009. The facts mentioned in section 2.2.2 describe this situation. Renault acted under the allegation of a legitimate entrepreneurial choice to interrupt these contracts, given i) the change in sales structure and ii) the savings resulting from the reduction of personnel, and their placement in their own distribution network. The producer also adopted this decision in order to reorganize the distribution network due to the entry into force of Regulation No. EC 1400/2002. In one of these controversies, the Court of Rome understood that this contractual interruption was legitimate because it was coherent with the requirements of "extraordinary termination" provided in Article 5 of Regulation CE 1475/1995.

5) Logistica case (Court of Rome, j. 17.3.2010, 19.2.2010, 24.9.2009, 26.5.2009, 15.5.2009)

In a chain of contracts with a renewal clause, the distributors accused the producer of adopting an arbitrary decision and not renewing their distribution agreements. The producer alleged a business reason for this decision. It had to restructure its business and rationalize the distribution points through the suppression of some and the unification of others. This business decision aimed at lowering costs. The decisions of 30/11/2009 and 17/3/2010 assessed the presence of investments as an element to establish economic dependence.

When examining some applications of the abuse of economic decision, it is necessary to systemize the functions attributed to specific investments in case law. There are three main

applications of specific investments: i) a factor to qualify economic dependence, ii) a factor to influence the assessment of the abusiveness, and iii) a factor to claim specific and compensation remedies.

i) A factor to qualify the economic dependence

The presence of specific investments is an essential instrument to qualify economic dependence (see section 2.2.1.1). Italian case law accepts this purpose: it is when investments are generally mentioned. The decisions that mention investments and qualify the company as dependent are the *Logistica case* (decision of 30/11/2009 and 17/3/2010), *Marina Babini case,*[815] Court of Trieste[816] (j. 21.9.2006), Court of Parma[817] (j. 15.10.2008), Court of Milan (j. 15.7.2015),[818] Court of Catania (j. 22.12.2014),[819] Court of Massa (j. 15.5.2014),[820] and Court of Catania decisions (j.5.3.2010).[821] The Court of Taranto (j. 22.12.2003) decision examined a franchising contract in which there are specific investments. However, it concluded that there was no evidentiary proof of this protection and thus the dedicated investments.

The decision of the Court of Catania (*Diesel case*) expressly considered the presence of specific investment a deciding factor in the qualification as economic dependence. It highlighted the presence of €8,000,000 in investments, with three production lines available to perform the contract. There are some criticisms of this qualification.[822] This court did not evaluate whether the investments were specific to the relationship, nor their necessary duration. The same criticism

[815] Information extracted from R. NATOLI, *Brevi note sull'abuso di dipendenza economica contrattuale. Nota a ord. Trib. Bari 6 maggio 2002*, in Giurisprudenza italiana, 2003, p. 725 and B. TASSONE, *Non solo moda (ma anche rewriting contrattuale): commento alla prima decisione in materia di abuso di dipendenza economica, Commento a ord. Trib. Bari 6 maggio 2002*, in Danno e responsabilità, 2002, fasc. 7, p. 770.
[816] Information extracted from P. QUARTICELLI, *Abuso di dipendenza economica ed "estorsione" post-contrattuale, Nota a ord. Trib. Trieste 21 settembre 2006*, in I Contratti, 2007, fasc. 2, pt. 1, p. 115.
[817] Information extracted from G. SCHIAVONE, *L'osservatorio di merito, Rassegna di giurisprudenza di Tribunali*, in Obbligazioni e Contratti, 2009, fasc. 1, p. 78.
[818] Information extracted from F. OCCELLI, *L'abuso di dipendenza economica come clausola generale? Nota a App. Milano sez. I civ. 15 luglio 2015*, in Giurisprudenza italiana, 2015, p. 2667.
[819] Information extracted from F. OCCELLI, *Abuso di dipendenza economica, possibili rimedi e regola di buona fede Nota a ord. Trib. Catania sez. civ. 22 dicembre 2014*, in Giurisprudenza italiana, 2015, p. 2415
[820] V. BACHELET, *La clausola squilibrata è nulla per abuso di dipendenza economica e il prezzo lo fa il giudice: note a margine di un caso pilota*, in Nuova giurisprudenza civile commentata, 2015, p. 228seems to admit the presence of specific investments.
[821] Information extracted from A. PALMIERI, *Abuso di dipendenza economica: battuta d'arresto o pausa di riflessione? Commento a ord. Trib. Taranto 22 dicembre 2003 e ord. Trib. Catania 5 gennaio 2004*, in Danno e responsabilità, 2004, fasc. 4, p. 431.
[822] G COLANGELO, *Subfornitura di tabacchi ed abuso di dipendenza economica, cit.* p. 1001.

could be extended to the decision of the Court of Parma (j. 15.20.2008). It considered the presence of investments and know-how, but it did not assess whether they were specific to the relationship or the period for their recoupment.

ii) A factor to influence the assessment of the abusiveness

As argued in section 3.4.2.1, the evaluation of a decision to terminate a commercial relationship with specific investments requires balancing the contractors' interest: an interest to discontinue the contract, usually based on a business strategy, and an interest to remain in the relationship until their recovery. In comparison with the previous functions, specific investments are not mentioned in this balancing of interests. Most of the decisions examined have concluded that there was no abuse if the act to interrupt was based on business reasons. In the *Diesel case*, the producer based its decision to discontinue the relationship on market conditions. There was a decline in the clothing in the market of products *made in Italy.* Another commonly alleged reason to interrupt was the necessity of reorganizing the company (*Renault* and *Logistic cases*). The Court of Torino (12.3.2010) also assessed specific investments as a factor in determining the abusiveness of an act to interrupt the relationship. It stated that this interruption would expose the distributor to the danger of not being able to recover the investments. In spite of this assessment, the court denied the provisional measure because the claim sought to order the producer to terminate the contract with other partners, which would interfere in another judicial sphere.

iii) A factor to claim specific and compensation remedies

Specific investments also influence the decision to grant the appropriate remedy in the case of the abuse of economic dependence. Some of the cases analyzed admitted provisional injunctions to maintain the relationship (*Marina Babini* and *Diesel* cases). Both decisions were later revoked. In the first case, the decision ordered the continuation of the contract to supply the retailer for the next commercial season. It limited the decision to continue the commitment for a specific duration. The second decision, however, established a longer term, for three years, maintaining the same commercial conditions.

Although these decisions are relevant to the application of a specific remedy in the case of the abuse of economic dependence, they do not discuss key issues on the matter: the admissibility of specific remedies when there are non-recovered specific investments and a decision to interrupt based on a business reason. Despite not mentioning it expressly, the *Diesel case*, decided by the Court of Catania, seems to admit this possibility. This position is in accordance with the view of R. NATOLI.[823] In contrast to the position adopted by this author, investment protection cannot lead to maintaining the relation until its recovery. In the hypothesis narrated, the interruption would be abusive because it would not respect the period for the amortization of specific investments, but the remedy could not be the forced extension of the contract *until the investment recoupment* (see section 3.4.2.1). If the prior notice was not granted within a reasonable period, the specific remedy could be adopted to allow the dependent company to find new partners, reorient its activity, and liquidate the investments, coupled with a compensation remedy. The contractual continuation cannot last until the investment recoupment.

4.2.6. Antitrust enforcement remedies to protect investments

As stated in the introduction of Chapter III, the discussion of the possible consequences of an antitrust violation related to specific investments is not a central issue in this thesis. The study of the available remedies primarily addresses the results of the end of a relationship with specific investments under a private law view.

Although it was not a central issue in this study, section 2.2.5 investigated situations in which specific investments could be relevant to antitrust issues. The implementation of specific investments portrays a condition in which a party increases the transaction value, but it is subject to a hold-up. As an economic factor, specific investments could manifest themselves in different antitrust situations. However, two cases are more common. These situations were described in section 2.2.5. The first situation is the positive effects on vertical agreement restrictions. These restrictions can be accepted because they aim to guarantee the recovery of investments. The second situation corresponds to the hypotheses of the abuse of economic dependence with antitrust relevance (see section 2.2.5.3).

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[823] R. NATOLI, *L'abuso di dipendenza economica,* in Mercati regolati, vol. V, in Trattato dei contratti, diretto da Vincenzo Roppo, condirettore Alberto M. Benedetti, Milano: Giuffrè, 2014, p. 396.

The European Commission or the Italian Competition Authority could initiate, *ex officio* or at the request of a company, an administrative procedure to verify an antitrust infringement. Before or during the process, these councils could adopt a provisional measure in case of urgency due to the risk of serious and irreparable damage to competition (Article 8 of Regulation CE 1/2003). An example of a provisional measure that thoroughly examined the influence of specific investments was a 2008 decision of the French Competition Authority concerning the distribution of the iPhone in France, described below in this section. This decision ordered the suspension of some clauses in the contract establishing an exclusivity to distribute and promote this product.

The final decision in this procedure can include: i) an inhibitory measure and accessory orders, ii) structural measures in the firm (Article 7.1 of Regulation CE 1/2003), iii) a fine (Article 23 of Regulation CE 1/2003), and iv) commitments binding the undertakings to end a possible antitrust infringement (Article 9 of Regulation CE 1/2003). The European Commission generally affirms a commitment involving situations in which the aftermarket has relevance to antitrust issues due to the presence of specific investments.

In addition to these antitrust enforcement remedies, there are also available private enforcement remedies. An effective competition protection system should adopt a mix of public and private remedies.[824] The public remedies present two limits: their selective nature (the competition authority must choose the sector and case in which it must act), and the fine could be inferior to the benefit from the company that infringed the competition. The private remedies available are compensation damage, specific remedies, and invalidatory remedies.

There two illustrations of specific investments in cases involving infringement of competition law. The first case was mentioned above (French Competition Authority decision No. 08-MC-01). The French Competition Authority intervened with some provisional measures and mainly assessed whether the investments made were specific to the relationship and whether the contractual duration would be enough to recover them. This analytic evaluation is the method required to effectively protect investments.

This decision, made in 2008, examined iPhone distribution by Orange in France. This distribution was based on some contracts between Apple and Telecom France over the course of five years. This telecom was the only one responsible for distributing this product. Another telecom

[824] M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, Milano: Giuffrè, 2014, p. 455.This choice is clearly adopted the European legislator (see the green paper and the white paper on private enforcement of European Competition Law. These papers resulted in the Directive EU 2014/104.

competitor then filed a complaint regarding the anti-competition effects in the selective distribution network established by Apple in France for the distribution of the iPhone. It would also impose a minimum resale price, restrict the freedom of resale by authorized distributors, and isolate national markets. There were also some unjustifiable and discriminatory selection criteria.

To evaluate this complaint, the competition authority examined where the investments indeed produced positive effects on the distribution agreement and could thus justify the imposed competition restrictions. The main argument of Apple and Orange was that the decision to execute this exclusive distribution agreement would reduce the costs of commercialization. This decision would require assuring that the investments would be amortized within the contractual term.

The competition authority agrees that, in principle, an exclusive vertical agreement might produce an efficiency gain. One of the justifications for this exclusivity is the need to guarantee the rentability of the investments. The return on an investment depends on the comparison between an immediate expense and an expected future income stream, discounted by an appropriate interest rate (the weighted average cost of capital), taking the risk into account. Significant investments may be profitable only if the investor has visibility for a sufficiently long period that allows him to expect a return on investment in economically reasonable conditions.

In the case, there were specific investments related to the launch of the iPhone and an Orange commitment to actively subsidize selling terminals. When the final product or service offered on the market requires specific investments, a contract of a particular duration may protect the investor against the risks of opportunism from the other party. This risk would discourage investments. Based on these assumptions, the competition authority verified whether the amount of the specific investment justified the duration of the exclusivity. The telecom company alleged that the specific investments made under the partnership since October 2007 amounted to €86.5 million euros. The administrative body stated that the sums paid to Apple as revenue-sharing on the consumption generated by the iPhone 2G could not be analyzed as specific investments because they were revenues and, by definition, had a variable character. In addition, the subsidization of terminals was a common practice and was not specific to the iPhone. The investments that could be considered specific to the iPhone were as follows: i) advertising expenses, ii) the training of dedicated personnel, and iii) the technical developments necessary to adapt the network to the iPhone's functionalities. The amount expended for those investments was €16.5 million, part of which was invested for the launch of the iPhone 2G. This appeared relatively low to the authority

in comparison to the sales that Orange derived from the sale of iPhones and packages associated with it. These revenues were not specified by Orange, but it noted that 301,000 iPhones were already sold between July 18 and November 5, 2008, which guaranteed revenues of about €177 million.

This comparison would establish the disproportionality between the amount of the investment granted and the duration of the exclusivity. The French authority then concluded that the evidence gathered at that stage of the investigation showed that the infringement of competition in the market for mobile telephone services resulting from exclusivity is not offset by efficiencies for the benefit to customers. It then suspended the stipulations that made Orange the exclusive mobile operator for iPhone products.

Concerning the influence of specific investments, the European Commission examined the relevance of the aftermarket and proposed a test to discuss its significance based on the conclusions reached in the Pelicano/Kyocera case.[825] After these decisions, the European Commission considered a few other cases on this issue. In some of them, the commission has concluded that companies may have abused their dominant position in the aftermarket. These cases have resulted in the companies under investigation being offered deals.[826] In others, the commission concluded that there would be no abuse of aftermarket dominance.[827] In one of the commitments,[828] IBM was obligated to maintain the availability of replacement parts to third-party maintainers under commercially reasonable and non-discriminatory conditions. This commitment would last for five years.

4.3. Remedies to protect specific investments in Brazilian law

There are two sets of remedies to protect investments in Brazilian law. The first set concerns the remedies available in private law to protect them at the end of the contractual relationship. In

[825] Rejection Letter of 22 September 1999 in Case No IV/34.330 – Pelikan/Kyocera

[826] Novo Nordisk case (1996); Digital case (1997); and IBM Mainframes Maintenance case (2011) (Commission Decision of 13 December 2011 in case 39.692 IBM Maintenance Services).

[827] Pelikan/Kyocera (1999) (Rejection Letter of 22 September 1999 in Case No IV/34.330 – Pelikan/Kyocera); Info-Lab/Ricoh (1999) (Rejection letter of 7 January 1999 in case IV/E 2/36.431 – Info-Lab/Ricoh); EFIM (2009); and Luxury Watches (2007/2014) (the Commission first rejected a complaint in 2007; the decision was annulled by the General Court on 15 December 2010 (case T-427/08), and subsequently the complaint was again rejected by the Commission in 2014).

[828] IBM Mainframes Maintenance case (2011) (Commission Decision of 13 December 2011 in case 39.692 IBM Maintenance Services).

comparison with Italian law, they are more limited. There is greater difficulty in admitting the claim of specific investments. The second, remedies in antitrust enforcement in case of competition violation, are related to the presence of specific investments (section 4.3.3). The above sections discussed the remedies available in Italian law, which assists with the same task of systemizing the remedies in Brazilian law. The conclusions previously reached can apply to the Brazilian legal system, without disregarding its peculiarities.

Concerning private law remedies, the adoption of this comparative view might be beneficial because contractual remedies are not a common topic in Brazilian law. The doctrine and the jurisprudence avoid discussing specific remedies; they limit the debate to compensation and invalidity remedies. This discrepancy might be explained through the structure of these legal systems. Brazilian legislation does not have the same institutes as Italian law. There was never a general discipline of unfair competition and the attribution of specific remedies to the competitors. Brazilian law also does not regulate the abuse of economic dependence, while Italian legislation provides three remedies for the dependent party.

Based on this comparative influence, this thesis highlights the possibility of claiming specific remedies to protect investments. The compensation remedy is usually attributed to protecting investments. However, specific remedies might also be possible due to an interpretation of Article 473. Invalidity might even be possible. To investigate, a division in this section has been made. Section 3.2 briefly described the multiple interests concerning investments at the end of the relationship. There is an obvious need to indemnify the investments that are not recouped, but it is also necessary to compensate other damages, which may have some similar characteristics, and to grant prior notice. This notice has many objectives, mainly to allow the party to redirect its activity and adapt investments to it.

This description of reality is not as clear in case law. To assess the adequate remedies in Brazilian law, this thesis follows the perspective adopted by Brazilian jurisprudence. It examines the need to grant prior notice at the end of the contract, but not necessarily in relation to specific investments. Next, it addresses the analysis in the case law of specific investments and, based on some conclusions reached before, investigates the appropriate remedies. A particular investigation is dedicated to the specific remedies available.

4.3.1. The notice period and Brazilian case law

With the end of a long-term contract without a term, it might be necessary to grant a prior notice before the agreement ceases to exist. The primary purpose of this notice is to allow the party to redirect its activity, find new partners, and adapt to the new conditions in the market. The imposition of this notice primarily derives from the good faith (Article 422) and the abuse of right (Article 187). There are also specific provisions regarding a prior notice period in some contractual types. For some authors and judicial decisions, Article 473, sole paragraph also has the same purpose. Its application and remedies, however, are studied in section 4.3.2.

No general parameters have established the notice period and the consequences of its insufficiency. Considering this conclusion, a broad study about this topic has been conducted in this section, which examined Brazilian case law for the last 15 years. This research resulted in an analysis of decisions of the Superior Court of Justice, the last venue to analyze legal issues (see Annex II). In summary, the decisions focused on the presence of a clause establishing a notice period and, in cases when it was not present, the reasonable notice period. There is no visible difference in the decision among the justices and court chambers. Given this scenario, a brief comparative analysis was performed. As discussed in section 4.2.5, Italian case law does not offer great detail to help understand this issue in Brazilian law. For this reason, an analysis of French case law was made (mentioned in section 3.2.4). It presents an intense debate due to a provision inserted in 1996 in the Commercial Code that prohibits the brutal termination of established relationships.

The first conclusion reached in this jurisprudential analysis was the adoption of a broad notion regarding the act of terminating the contract (see also section 3.1). The application of general clauses, good faith and the abuse of right, to assess the termination right imposes the evaluation of different temporal structures on the interpreter. It results in the creation of rich case law to regulate the contractual unilateral dissolution. The contract termination and the need to grant a notice period are examined in indefinite-term contracts and renewed short-term contracts. Although it has not yet been contemplated by Superior Court of Justice, a reduction in executive transactions related

to a framework agreement might represent another temporal structure and require an additional period before it ends.[829]

These rules in Brazilian law impose the terminating party to grant prior notice for a *reasonable period*. This assessment is almost unanimously shared with the doctrine. However, this imposition might be disregarded if the termination is *motivated.* According to Superior Court of Justice jurisprudence, the main reason for this motivation is the counterparty's default.[830] The case law generally limits its analysis to this reason. Even though it is implicit in some decisions, the contractual breach is not expressly required to be substantial or severe. A contractual breach should not be the only reason to waive a party's duty to grant a prior notice for a reasonable period. Based on foreign experiences, other causes justify the decision to terminate with reasonable prior notice, such as a loss of trust in the counterparty, the presentation of false reports, force majeure (*e.g.,* strike and economic crisis), and the impossibility of giving the required bail.[831]

In addition to the situations previously described, when the party does not grant a notice period, there is no need to motivate the termination (as discussed in section 3.4). However, it might help avoid discussion about eventual damages with the end of the relationship. In the case of an agreement with no amortized investments, it is important to motivate the decision to terminate. As is discussed in section 3.4.2.1, this could be a way to prevent the counterparty from pursuing a specific remedy and, with that, prolonging the relationship. This justification is not usually employed and thus not assessed in case law. In the jurisprudence of the Superior Court of Justice, there are some references to the adaptation to the market as a factor to establish the prior notice period, but its relevance is not clearly established.[832]

The main concern regarding contractual termination is the parameters to assess reasonable prior notice. Case law does not perform this evaluation when there is a notice period already established in a law concerning a contractual type. In long-term contracts with specific investments,

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[829] French law admits as a brutal termination a *partial* termination of a contract. It expands this notion to apply to numerous situations. A substantial reduction of requests to product distribution, a change in the contract in detriment to the distributor, the reduction of contract remuneration might qualify as partial termination. At the same time as it protects the contractor, it creates legal insecurities. There is not a clear line separating the change the contract and a partial termination. L. VOGEL and J. VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016 criticize the application of this notion.

[830] STJ, REsp 1320870, 3a T., Rapporteur Justice Villas Bôas Cueva, j. 27.6.2017; and STJ, AgInt nos EDcl no Ag 1376489, 4ª T., Justice Raul Araújo, j. 8.11.2016.

[831] L. VOGEL and J. VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016, *passim.*

[832] STJ, REsp 1494332, 3ª T., Rapporteur Justice Villas Bôas Cueva, j. 4.8.2016.

Brazilian law regulates this period in agency contracts (90 days, Article 720, Civil Code), commercial agency (30 days, Article 33, Law No. 4886/1965) and motor vehicular distribution agreement (120, Article 22, Law No. 6729/1979).

If the agreement does not qualify as one of those types, Brazilian case law is not sophisticated in assessing this period. The elements adopted to define it are not usually mentioned. Generally, it provides a period considered *reasonable*, without referring to the elements utilized to reach this conclusion. This approach can cause insecurity, as it is not easy to identify the necessary notice period. However, this uncertainty balances the court's tendency to respect contractual terms and therefore is not considered abusive the termination period.

In most cases, the Superior Court of Justice rules out the abusiveness of the termination if it is based on a contractual clause.[833] In the last three years, especially in decisions involving Rapporteur Justice Villas Bôas Cueva, this position has been made more explicit. The Superior Court of Justice has a high reverence for the party's autonomy. Most of the contracts examined were distribution contracts; a standard duration in these contracts for the notice period was 60 days.[834]

This position merits some critiques. The presence of a clause with a notice period should not exclude the assessment of its sufficiency. The need to avoid the brutality of termination is an issue of public order (see especially French case law, section 3.2.4). There is a significant power difference between the producer and the members of the network. The clause inserted is not generally the result of discussion between the contractors. In addition, the exercise of a termination right is different from the moment when it was conceived. This time difference imposes the verification of new circumstances when it is exercised, which would be disregarded if the clause with a period notice were always observed. In addition, most importantly, a reasonable notice

[833] STJ, REsp 1320870, 3ª T., Rapporteur Justice Villas Bôas Cueva, 27.6.2017; STJ, AgInt no REsp 1266785, 4ª T., Rapporteur Justice Isabel Galotti, 1.6.2017; STJ, AgRg no REsp 1225943, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 17.9.2015; STJ, AgRg no AREsp 210524, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 17.9.2013; STJ, REsp 493159, 3ª T., Rapporteur Justice Castro Filho, j. 19.10.2006; STJ, REsp 681100, 3ª T., Rapporteur Justice Carlos Alberto Menezes Direito, j. 20.6.2006; STJ, REsp 766012, 3ª T., Rapporteur Justice Humberto Gomes de Barros, j. 23.8.2005; STJ, REsp 1112796, 4ª T., Rapporteur Justice Holnildo Amaral, j. 10.8.2010. With a contrasting view, cf. AgRg no STJ, AgRg no REsp 1224400, 4ª T., Rapporteur Justice Isabel Galotti, j. 4.9.2012; and STJ, REsp 1555202, 4 T., Rapporteur Justice Luis Felipe Salomão, j. 2016.

[834] STJ, REsp 1320870, 3a T., Justice Villas Bôas Cueva, 27.6.2017; STJ, REsp 1494332, 3ª T., Rapporteur Justice Villas Bôas Cueva, j. 4.8.2016.; REsp 1112796; STJ, REsp 681100, 3ª T., Rapporteur Minister Carlos Alberto Menezes Direito, j. 20.6.2006; STJ, REsp 1112796, 4ª T., Rapporteur Justice Holnildo Amaral, j 10.8.2010.

period could stimulate the competition because it guarantees the *partial* protection of specific investments.

However, there are some exceptions to this position of the Superior Court of Justice. Most of the cases in which the abusiveness was verified were in an agreement without a prior notice period clause.[835] If the contract does not have a clause providing a termination period, the norms discussed in Chapter II impose a notice period. The party has to grant a period at the end of the relationship. For example, a decision did not consider the granting of 30 days reasonable in a contract with specific investments and with a particular production cycle.[836] Another exception corresponds to a situation in which, despite the presence of a termination clause establishing a period notice, it was considered abusive. For example, a five-day notice period for a contract with specific investments and 11 months of duration was not admitted.[837] This case represents, however, an extreme; the period of five days is excessively short.

This position of the Superior Court of Justice is ambiguous. It assesses some clauses but not others. It seems that this happens when it considers this period excessively short. The period outlined in the agreement serves as an essential parameter to delimit the period necessary to redirect activity and liquidate some contractual obligations, but it should not preclude examining the clauses. More stringent control should be exercised, and other factors should be taken into consideration to determine it. At the contracting moment, the parties do not know when the contract will be extinguished. A case is an example of the insufficiency of the time established in the contract.[838] In a contract of 17 years, it has a clause providing a termination period of 60 days. To avoid the qualification as abusive, the contractor considered this time insufficient and, for this reason, granted an additional 120 days' notice period.

As mentioned, the Superior Court of Justice generally does not investigate the parameter to establish a reasonable period. However, some criteria can be drawn from the characteristics of the contract. The main parameters are the relationship duration, the presence of exclusivity, and

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[835] STJ, REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j. 9.2.2010; STJ, AgRg no AREsp 569413, 3ª T., Rapporteur Justice Paulo de Tarso Sanseverino, j. 16.3.2017; and STJ, REsp 1169789, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, j. 16.8.2016.

[836] STJ, REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j. 9.2.2010.

[837] STJ, REsp 1555202, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 2016. Another example of this situation, cf. STJ, AgRg no REsp 1224400, 4ª T., Rapporteur Justice Isabel Galotti, j. 4.9.2012.

[838] STJ, REsp 1494332, 3ª T., Rapporteur Villas Bôas Cueva (with the dissenting votes of Justices Jõao Otávio de Noronha and Paulo de Tarso Sanseverino), j. 4.8.2016

investments. Using more detailed parameters, one decision referred to the production cycle.[839] This approach is still timid. Considerations of the possibilities of market reorientation should be considered more frequently.[840]

Prior notice allows the rearrangement of interests with the reorganization of the business project.[841] For the evaluation of this period, many factors must be considered.[842] French case law uses that diversity of elements to determine its duration (see section 3.2.3). The most important aspects are the duration of the commercial relationship; the configuration of economic dependency; the requirement of reconversion of the victim, especially considering the current market of the company; the existence of a productive cycle; the presence of a non-compete clause; the existence of the distribution of products under the distributor's brand; and making specific investments.[843]

French case law, analyzed briefly in section 3.2.4, adopts a more sophisticated position. This legal system has a rule that prohibits brutal termination in established relationships (Article L. 442-1 of the Commercial Code). It has diverse case law because about 200 procedures are submitted each year about this topic.[844] Although assessing the brutality and the sufficiency in all contractual terminations is praiseworthy, this position leads to legal insecurity. The parties often adopt a longer notice period and a call for tender to avoid characterizations of relationship stability.[845] The doctrine criticizes the difficulty of foreseeing whether the termination would be

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[839] STJ, REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j 9.2.2010.

[840] STJ, REsp 1494332, 3ª T., Rapporteur Justice Villas Bôas Cueva, j. 4.8.2016; STJ, AgRg no REsp 1224400, 4ª T., Rapporteur Justice Isabel Galotti, j. 4.9.2012.

[841] R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., pp. 286 e 365; P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 315.

[842] It is unanimous in the doctrine's understanding that, in the absence of a specific provision governing the period of notice, it should be set according to the customs, business circumstances and legal provisions envisaged in similar cases. See R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 286; P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 298 ss; F. F. R. MAIA, *A limitação da eficácia da resilição unilateral dos contratos como manifestação positiva do princípio da confiança: o parágrafo único do artigo 473 do código civil*, cit.; G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 322; V. P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 195; J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., p. 666; P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 315; G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 322.

[843] For G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., pp. 323-4, when addressing the agency contract, these should be the elements to be considered at the time of the contract termination: the nature of legitimate expectations and trust; the duration of the contract; and the degree of dependence.

[844] L. VOGEL and J. VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016, *passim.*

[845] Ibid.

adequate. It would not contribute to the efficiency of French companies.[846] This situation led to a recent modification in the provision that limits the notice period to 18 months.

On the other hand, the parameters to examine the brutality of the termination are established. French case law has even institutionalized a relationship between the contractual duration and the notice period: it is between one and one and a half months for each year of the contract's duration.[847] As can be derived from Annex II, this also seems to be a tendency in the jurisprudence of the Superior Court of Justice.[848] French jurisprudence even had a cap (before the legal change enacted in 2019) to the notice period: usually 24 months, but it could even reach three years.[849] A table gives an adequate perspective of the notice period in French case law (Annex I).[850]

The analysis conducted in the last paragraphs can be better visualized in a table with all the decisions of the Superior Court of Justice (Annex II) concerning this matter. It contains information concerning the contract, such as the length of it and the notice period, as well as other characteristics of the relationship and some circumstances concerning the decision. According to the Superior Court of Justice, the legal remedy adopted in case of the insufficiency of the notice period is the compensation remedy. Other remedies are not usually available to contractors. This orientation might change in the presence of specific investments, as proposed in section 4.3.2.3. The insufficiency in the notice period generates a loss of profits for the time that the relationship should last.[851] Other damages may also have to be proven.

The Superior Court of Justice does not have a firm position on this topic.[852] It does not differentiate between the damage items, nor does it set clear parameters to assess the loss of profits. In case of the insufficient notice period, the loss of profits represents the benefits the company

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[846] Ibid.
[847] Ibid.
[848] The same perception is shared with P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 312-3.
[849] L. VOGEL and J. VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016.
[850] It was transcriped from L. VOGEL and J. VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016.
[851] In an isolated orientation, STJ, REsp 1555202, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 2016 recognized the unreasonable notice period, but it ruled out the application of loss of profit.
[852] STJ, AgRg nos EDcl no REsp 1114091, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, j. 20.8.2013 (it mentions loss of profits, but it does not indicate any parameters to apply it); STJ, REsp 1255315, 3ª T., Rapporteur Justice Nancy Andrighi, j. 13.9.2011 (the loss of profit is defined as the revenues discounted the taxes, interest, depreciation and amortization; in this case, the compensation damage was the net profit for two years); STJ, AgRg no REsp 1224400, 4ª T., Rapporteur Justice Isabel Galotti, j. 4.9.2012 (loss of profit was based on the average daily revenue, multiplied by the days of the recovered period, plus a 25% of profits); STJ, AgRg no AREsp 569413, 3ª T., Rapporteur Justice Paulo de Tarso Sanseverino, j. 16.3.2017 (there is only a general mention to loss of profit); and STJ, REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j 9.2.2010 (there is only a general mention to loss of profit).

would obtain with the continuation of the relationship. After the demonstration of a brutal termination, the party must establish what the sufficient notice period and its previous revenues would be. The adequate parameter to measure the loss of profit is the company's revenues, subtracted by the costs to exercise the business activity. Some decisions of the Superior Court of Justice adopt this criterion, the net profit, and rule out the utilization of the gross profit. The net profit represents this damage better.[853] During the notice period, the party does not bear some expenditures, taxes, assurances, and publicity commissions. For example, in a relevant decision (STJ, REsp 1.255.315, 3ª T., Justice Nancy Andrighi, j. 13.9.2011), the court excluded the application of the EBITDA (Earnings before interest, taxes, depreciation, and amortization) as a parameter to determine the damages and suggested the net profit.

The assessment of the notice length requires considering elements available to the party at the moment of contract termination. However, another perspective should be adopted to evaluate the damage.[854] It should be assessed on the date of the decision; at that time, the judge might take the repositioning of the victim party into account. The contractor might have repositioned in the market and chosen new partners, which could reduce the loss of profit.[855]

In addition to the loss of profit related to the brutality of the termination, it might also be abusive, thus causing other damages. These indemnities should not be confused with the damage related to the insufficiency of the prior notice. A penalty clause could serve as an instrument to liquidate these damages. If it is not set forth, the damages should be proved. These damage items are examined individually:

1) a loss in revenues related not to the notice period, but to the end of the contract and the impossibility of continuing in a profitable relationship. In principle, this damage is not directly related to the termination. The right to terminate the contract is established in the contract.
2) Some damages might have been caused not by the contract termination, but by unfair competition and contractual breach. There are situations concerning the violation of the

[853] In French case law, see Court of Paris, January 28th, 2016, No. 14/13036; Court of Paris, January 28th, 2016, No. 14/13190.
[854] C. M. S. Pereira, *Responsabilidade civil*, Rio de Janeiro: Forense, 2018, p. 53; and J. A. Dias, *Da responsabilidade civil*, Rio de Janeiro: Lumen Juris, 2011, p. 83.
[855] In French case law, see Court of Paris, January 28th, 2016, No. 14/13036; Court of Paris, January 28th, 2016, No. 14/13190.

zone exclusivity and the diverting of consumers. These circumstances can transform a termination in abuse and cause further damages.[856]

3) The Superior Court of Justice jurisprudence has an ambiguous position concerning the loss of the consumer base (section 3.3.6 explored its difference from the specific investments). It admits this compensation in some decisions. Its first condition is that the termination is unlawful.[857] There is also a debate about the configuration of the loss of the consumer base in the case of distribution contracts. This contractual type is characterized by a strong brand effect on the consumers, which it not necessarily attracted by the distributor activity. Based on this rationale, this claim was denied.[858] However, it has been admitted in other decisions.[859] Some decisions also confuse the notion of the loss of the consumer base with the idea of firm (*azienda*).
4) The Superior Court of Justice also has inconsistent jurisprudence concerning the non-material damage (*danno morale / existenziale*) applicable to companies after the contract is discontinued. Some authors have criticized the possibility of applying non-material damage to companies.[860] The court seems to disagree with this position. It has some decisions that rule out this possibility, but only because the termination would have caused this damage.[861] Other decisions admit this possibility. The court considers that an unlawful termination would cause damage to image.[862] In a particular decision of this court, the damage liquidation was elevated and oddly considered a percentage (30%) of the material damage.[863]

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[856] STJ, REsp 1255315, 3ª T., Rapporteur Justice Nancy Andrighi, j. 13.9.2011; STJ, AgInt nos EDcl no Ag 1376489, 4ª T., Rapporteur Justice Raul Araújo, j. 8.11.2016.

[857] STJ, REsp 1320870, 3a T., Rapporteur Justice Villas Bôas Cueva, 27.6.2017. With an opposite position, see STJ, REsp 1317528, 3ª T., Rapporteur Justice Marco Aurélio Bellizze, j. 13.9.2016.

[858] STJ, REsp 1605281, 3ª T., J Rapporteur Justice Moura Ribeiro, j. 11.6.2019; and STJ, REsp 766012, 3ª T., Rapporteur Justice Humberto Gomes de Barros, j. 23.8.2005.

[859] STJ, AgRg no AREsp 228148, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, j. 19.11.2015. The consumers would belong to the establishment, which is damaged with the of the contract. This fund was liquidated as one year of gross revenues.

[860] See, among others, G. TEPEDINO, *Crise de fontes normativas e técnica legislativa na parte geral do Código civil de 2002*, in Revista forense, v. 98, n. 364, p. 113-123, nov./dez. 2002, p. 120.

[861] STJ, AgInt no AREsp 639646, 4a T., Rapporteur Justice Isabel Gallotti, j. 6.9.2016 excluded the damage because there was not a circumstance that could harm the company's image in the market.

[862] STJ, AgInt no AREsp 639646, 4a T., Rapporteur Justice Isabel Gallotti, j. 6.9.2016; and STJ, REsp 1255315, 3ª T., Rapporteur Justice Nancy Andrighi, j. 13.9.2011.

[863] STJ, REsp 1255315, 3ª T., Rapporteur Justice Nancy Andrighi, j. 13.9.2011.

5) There are other damages caused in cases of termination, such as the expenses related to the termination of employment contracts.[864]

4.3.2. Remedies available to protect investments and Article 473, sole paragraph

From a broad perspective, the previous section addressed the end of a contract in Brazilian law, especially the grant of a reasonable period of notice and the damages that originate from it. It examined the jurisprudence of the Superior Court of Justice in depth. The discussion of this topic before the analysis of remedies available at the end of the relationship represents a choice to clarify investment protection. The need to grant a notice period is a central issue regarding the end of the contractual relationship in Brazilian law, and it is sometimes confused with investment protection. As was concluded, the need to grant a notice period does not have a function of recovering investments, although it can be an essential instrument to liquidate them and partially recoup them. After this delimitation, the following sections focus on the remedies available in Brazilian law to protect specific contractual investments.

As stated in Chapter II, Article 473, sole paragraph of the Brazilian Civil Code develops a central role in investment protection. It is a provision with a broad scope of application because it impacts many contractual types. Despite this amplitude, its application faces many difficulties, which have been addressed in the previous chapters. The identification of the available remedies is the emphasis of this section, which also considers the practical consequences of the introduction of this rule with the Brazilian Civil Code in 2002, especially the admissibility to claim specific remedies, and it reviews the requirements of its incidence. The protection through other rules is addressed in Chapter II of this study. The results are then compared with the jurisprudence of the Superior Court of Justice concerning the protection of specific investments in its many aspects.

4.3.2.1. Consequences of the introduction of Article 473, sole paragraph

The presence of Article 473, sole paragraph generates some juridical consequences in the Brazilian legal system and investment protection. As can be derived from its express wording, it is an article designed to protect investments at the end of the contract. To guarantee this protection,

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[864] STJ, REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j. 9.2.2010.

this rule introduces a specific remedy: the withdrawal of the termination effects until the complete amortization of investments. As another remarkable characteristic, it has undefined concepts (*contractual nature*, *considerable investments*, and *nature and extent of the investments*) as application requirements. These elements were addressed in section 2.3.2, which highlighted the possibility of linking this article with the principle of free competition and freedom of initiative because of its origin and the need to attribute a systematic coherence capable of guiding its application to it.

In addition to these circumstances, this rule produces important consequences for the protection of investments. These two legal effects specify the conditions explained in Chapter III. In this chapter, common elements of Italian and Brazilian law regarding the protection of investments were studied: the division of contractual risks, the protected investments, the abuse in the contractual termination, and, lastly, the interests concerning the end of the contractual relationship. The rule mentioned imposes some consequences on the conclusions reached therein. Article 473 determines i) a more extended notice period, but without establishing a minimum contractual length, and ii) a justification for the unilateral termination.

i) A more extended notice period

As was argued in section 2.3.2, to protect specific investments, Article 473, sole paragraph applies together with the good faith and the abuse of right at a contractual termination.[865] They

[865] This understanding seems to differ from the interpretation proposed by J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., pp. 666 ss. In a sense similar to this author, P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 192; C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, cit., pp. 310-311; apparently D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 32. J. MARTINS-COSTA argues that there is a difference between the determination established in Article 473 and the exercise of the abusive right of unilateral termination. According to the author, the effect to suspend the unilateral termination (which could lead to an indemnity if not respected) is based on objective reasons, which would be different from the abusive exercise in the termination of a contract. The literal interpretation would indicate the existence of only objective elements for the application of the provision. However, this solely objective assessment is not consistent with this rule. Its application requires considering several elements that are undetermined and therefore lack of objective content: i) the possibility of granting a specific remedy, which naturally requires the weighing of interests; and ii) the determination of the reasonable time for recouping of investments in consideration of the specific investments. The determination of the reasonable period, in principle, considers objective elements, the specific investments and their recovery with the passage of time; however, this evaluation should be performed with reasonableness, and not as a result of algebraic sum. Therefore, the provision's application has to be made with those general clauses.

limit the exercise of the right to interrupt business relationships[866] and impose the grant of an extended notice period. Article 473 does not determine the necessity of a longer notice period expressly due to the presence of investments. This interpretation derives from the institution of a rule designed to protect specific investments in Brazilian law and the circumstance that their presence in a contract requires a more extended period for the reconversion of the company's activity and their liquidation. A more extended notice period would facilitate completing these objectives.

The presence of investments in a relationship requires the notice period to be more extended, but it should not last until the complete recovery of investments. The notice period does not have investment recoupment as its primary function. The period should aim to guarantee a reorientation of the activity, to find new partners, and to liquidate investments. Other elements beyond investments in the contractual relationship need to be taken into account to determine this period, notably the contract length, the party's economic dependence, and the exclusivity. In addition, as was addressed in section 4.1, an extended notice period would limit the efficiency in the distribution network, which it is not in accordance with the principles that guide the interpretation of Article 473.

Similarly, the need to grant a more extended notice period does mean that Article 473 requires a minimum extension of the relationship. The provision is not designed to ensure the minimum duration of the contract.[867] It does not act as a constraint on the contract term, but rather as an instrument to allow adequate prior notice after the termination. The distinction is subtle and was addressed in section 3.2. Specific investments do not constitute a condition for the contract duration; rather, they are an element capable of allowing the reorientation of the company's activity, which can indirectly provide reasonable time for the recovery of investments.

The economic consequences of defending the minimum duration of the contract based on investments are severe. Article 473 applies to all contractual arrangements. In this case, the

[866] The reference to arbitrary disruption of the business relationship can cover some structures, such as framework contracts, and substantial reduction of orders; short-term contracts with automatic renewal clause; or chain contracts. One argued that Article 473, sole paragraph, would apply analogously also to these situations since they have a functional identity with the exercise of the right of unilateral termination.

[867] On the contrary, C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, cit., p. 309. R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 246 also considers that it is necessary to establish a contract with the minimum time necessary for its performance, under penalty of violation of the principle of objective good faith and the principle of the social function of the contract. See also F. A. VIÉGAS, *Denúncia contratual e dever de pré-aviso*, Belo Horizonte: Fórum, 2019.

recoupment of specific investments would determine the duration of the relationship. Despite the attempt to protect the party that makes the investments, this interpretation would reduce the economic operation of a contract to its term and the presence of investment. Investments are not the only elements to be considered when determining the duration of the relationship; claiming this link would mean disregarding the rich contractual reality, which may have other factors to balance the risk of specific investments.[868] In certain contractual types, the law may adopt this position, as in the franchising agreement under Italian law. Expanding this rationale to all contractual relationships, however, might be dangerous.

ii) A requirement to justify unilateral termination

Article 473 has another systematic consequence: It indicates the greater weight of the presence of investments on the decision to unilaterally terminate the contract. This rule establishes that the termination of a contract without the recoupment of specific investments is unlawful. Article 473 determines the parameters for the balance of interests in the evaluation of the interruption of the contractual relationship[869] without the need for the interpreter to repeat this procedure. The recovery of investments becomes a crucial parameter to assess the termination abusiveness.

There is no reason to exclude this conclusion. The absence of investment recoupment overlaps the eventual business reason alleged as justification for the extinction of the relationship. This motive becomes a dominant factor for the evaluation of the abusiveness of the unilateral termination, even if there are business reasons to justify it. This provision confirms the conclusions established in section 3.4.2.1, but it does not necessarily mean that the relationship should be extended in all cases with non-recovered investments.

As is argued in section 4.3.2.1.i), Article 473 provides a specific remedy to extend the relationship for a period in case of the non-recovery of investments. This remedy is not an

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[868] F. A. F. PINTO, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, Lisboa: Universidade Católica, 2013.

[869] D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 30 identifies the two interests at stake in this counterbalance: the party's interest in putting an immediate end to the agreed legal relationship for an undetermined term and the interest of the party receiving the notice that the obligatory relationship lasts for a more extended period, because it has a legitimate expectation that the contractual relationship was to last longer in order to amortize the investments.

automatic effect from the rule, as it would suggest its literal meaning. Considering the possibility of extending the relationship, the terminating party should justify the termination to avoid the eventual injunction claim of contractual extension. The party is assigned the burden of having grounds to terminate the relationship with specific investments. The failure to discharge this burden could facilitate the granting of an order aimed at re-establishing the agreement. It must be acknowledged that the presence of investments is not enough to guarantee the continuation of the relationship. It requires other conditions, which are also mentioned.

4.3.2.2. Elements for the application of Article 473

Chapter II explored the scope of the application of Article 473 and its coordination with the general clauses of good faith and the abuse of right. The previous section examined the legal consequences of its introduction. To determine the remedies available, the requirements for its application, which have already been outlined in Chapter III, are precisely determined considering elements of this article. Its incidence requires the following: i) a particular *nature* for contract, ii) substantial investments for the contractual performance, and iii) a contract duration compatible with the extent and nature of the investments. The provision aims to protect *specific investments*.[870] There is no contractual *nature* that is required to apply this rule.[871] However, the investments to be protected must follow the characteristics established in section 3.3. They have to be specific to the relationship, to be substantial, and require a long-term relationship for their recovery. Moreover, elements ii) and iii) were already addressed in general terms in Chapter III. There are, however,

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[870] This consideration would exclude the application of this provision to residential leases, as defended by A. ABELHA, *O novo CPC e o despejo liminar por denúncia vazia na locação não residencial*, https://www.linkedin.com/pulse/o-novo-cpc-e-despejo-liminar-por-den%C3%BAncia-vazia-na-loca%C3%A7%C3%A3o-abelha/. The "investments" made during this relationship could not be qualified as specific investments. Moreover, this contractual type has already specific rules concerning the contract termination and the expenditures in a residential lease.

[871] The term *nature of the contract* is generally interpreted as the type of contract for the application of the provisions. It is argued that it would not apply to the mandate contract (C. M. S. PEREIRA, *Instituições de direito civil*, vol. III, Rio de Janeiro: Forense, 2014, pp. 134 ss), deposit contract (P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 195; H. C. BDINE JÚNIOR, *Resilição contratual e o art. 473 do CC*, in Revista Advogado, 2012, p. 103); it would be applicable to the franchise contract, or agency contract (G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 326), lease contract (H. C. BDINE JÚNIOR, *Resilição contratual e o art. 473 do CC*, cit., p. 99)), or brokerage of a large enterprise (R. AGUIAR JÚNIOR, cit., p. 365). The linking of the *nature of the contract* to the contractual type may not allow for proper protection of the parties and does not consider the particularities of the contract.

some aspects that should be discussed because they are specific to the wording of Article 473, sole paragraph.

1) The notion of the nature of the contract

The element of the *nature of the contract* does not restrict the article's application.[872] There is no need for the contact to be a particular type to protect specific investments, whose characteristics were set forth in section 3.3. However, given the open nature of this expression, it could be an instrument to rule out this protection if the parties decide to bear the risks of their non-recoupment. The rule applies to indefinite-term contracts, and in principle, fixed-term contracts would be out of its scope. Its systematic position as an expression of either good faith or the functioning of the market would also allow it to be applied to temporal schemes with a regime similar to contracts for an indefinite period, especially short-term contracts[873] (particularly considering the volume of investments) with renewable clauses and framework contracts.

The notion of the *nature of contract* could exclude the protection if the parties shape the agreement with a clause stipulating an investment regime. They could, for example, indicate which investments should be protected, their amortization method, or the term of their recovery. The contractors could even eliminate investment protection. They exclude the indemnity of non-recouped investments. This clause would function as a limited liability clause. However, they cannot exclude or excessively reduce the notice period. As was outlined in section 4.3.1, the need to grant a notice period is an issue of public order,[874] especially when there are specific investments.

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[872] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 316 states the need to relate the rule to business risks. The author argues that the interpretation of Article 473 cannot allow the distribution contract, the object of her monographic work, to free the distributor of business premises and, thereby, to immobilize the distribution mechanism. For the author, the parties accept the normal business risk; however, it must prevent the parties from causing harm not related to the usual business risk. Article 473, sole paragraph would represent a security factor against the promotion of abrupt termination. In the same regard, C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, cit., p. 309.

[873] P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 322-3.

[874] H. C. BDINE JÚNIOR, *Resilição contratual e o art. 473 do CC*, cit., p. 102. On the contrary, G. TEPEDINO, *Validade e efeitos da resilição unilateral dos contratos*, cit, p. 4. R. X. LEONARDO, *A denúncia e a resilição: críticas e propostas hermenêuticas ao art. 473 do CC/2002 Brasileiro*, p.95 ss. defends the existence of public interest and therefore the determination of partial nullity of the contract if its duration is not in correspondence with the recovery of investments.

2) The typology of protected investments

Article 473, sole paragraph also establishes that the *investments* have to be *considerable* for the contractual performance. This element reinforces the characteristics established in section 3.3 to characterize the protected investments. It safeguards *specific* and *substantial* investments. Investments could not be identified as the concept of *expenditure*[875] nor with sums nonspecific to the contracts (such as hiring personnel, procuring materials and equipment, and transporting equipment without any specificity).[876] The concept of investment is not limited to the increase the means of production, nor with fixed assets (such as machinery, equipment, facilities, or the transport of goods incorporated into the production activity).[877] The reference to the increase in productivity is not an adequate way to define the specific investments.[878]

The provision also requires that investments have a particular *nature*, which can be linked to their specificity and their hetero-determination.[879] It is not clear how the concept of the nature of investments should protect recoverable investments, as P. FORGIONI has suggested (see footnote 361). According to the criterion the author proposed, the provision also protects irrecoverable investments. These investments do not generate any cost to the investing party; they can be reused in another business activity.

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[875] R. E. REQUIÃO, *O contrato de representação comercial e o novo Código Civil. O contrato de agência e distribuição. O poder de denunciar o contrato sem prazo determinado e o dever de indenizar os investimentos realizados pelo representante ou pelo agente,* in Revista do Instituto dos Advogados do Paraná, 2002, p. 121. On the contrary, P. NADER, *Curso de direito civil*, v. III, Rio de Janeiro: Forense, 2018, p. 169.

[876] D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 33.

[877] P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, in cit., p.194.

[878] G. TEPEDINO, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, cit., p. 377.

[879] In a similar view, P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 313. The investment would correspond to idiosyncratic costs, those relating to transactions in which the specific identity of the parties produces relevant cost implications and requires investments of material and human resources exclusively directed to the transaction. The author indicates two other criteria for the interpretation of the content of the nature of the investment: investments should be those expected by a diligent distributor; and the determination thereof by the counterparty. These criteria are related to those indicated in section 2.3.2.1. The criticism of the category of sunk costs, made by the author, was also indicated in that section. On the other hand, the assertion that the protected investments would not be sufficiently stimulated or consented to (expressly or tacitly) by the counterparty is not enough to the adequate protection. See also D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 34.

The provision also requires a contract duration that is compatible with the investments. The doctrine proposes some formulas to evaluate if their term allows investment recovery.[880] However, the economic method of recoupment should be used, as was outlined in section 3.3.2.[881]

4.3.3. Remedies available

With its application consequences and its unique requirements outlined, Article 473 also plays a crucial role in determining the remedies available to the parties to protect investments. The article's literal nature determines the suspension of the termination effects until the recoupment of investments. According to this understanding, the contract would last for a reasonable period for the recovery of investments.[882] There are reasons not to follow this literal meaning, which is practically ignored in doctrine and case law.[883] However, this provision contains some elements to concede *specific remedies* to the investing party. To assess this possibility, a summary of the available remedies is provided.

As was established in section 3.2, at the end of a contract with specific investments, the investing party has an interest in i) having a reasonable period to redirect its activity and liquidate

[880] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 315 contends that this expression ("compatible with the nature and extent of the investments") must be reasonable for the performance of the agreement. According to the author, it is necessary to ensure the permanence in the market to enable the recovery of the investments made i) by obtaining profits (already realized or to be realized) that amortize the irrecoverable investments; and ii) by granting a period (counting from the notification) that allows the recovery of other investments, for example, through the re-direction of business activities. However, in this passage, the author does not consider how the recovery of investments should be evaluated.

[881] An accounting expert examination could verify this recovery. It could measure the amount used monthly or at another time scale for the amortization of the considerable investments previously defined for indemnity purposes, calculating a) the value of investments not yet amortized; b) the monthly amount amortized on these investments; c) net profit rate; and d) the amount for future amortization. The latter should consider the sum of the value of the past average amortization and the past average profit, obtaining a monthly index for purposes of calculating the time of extension of the contract until the settlement of such amount. See P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 198. Nevertheless, it is necessary to take into account in this process the interest related to the making of investments.

[882] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 312. R. AGUIAR JÚNIOR, *Extinção do contrato,* cit., p. 364 also argues that there is a minimum time for the exercise of the right of unilateral termination. See also C. R. BARBOSA MOREIRA, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, cit., pp. 308-9. This author states that the provision would guarantee a minimum life of the contractual relationship.

[883] P. A. FORGIONI, *Contrato de Distribuição*, cit., p. 312 emphasizes the novelty of the provision of Article 473 of the Civil Code. Accordingly, it would not only prevent an abrupt termination, but it would also require suspension of the effects of the termination. However, the consequences of this provision application are not clear in the author's work. The monograph did not address how this termination suspension would happen.

the investments, ii) being compensated for the non-recovery investments, and iii) being compensated for other damages (*e.g.*, loss of customer base and non-material damage). The notice period (interest i)) considers many elements, not only the presence of investments.

The first interest was detailed in section 4.3.1 and in Annex I with an in-depth analysis of the jurisprudence of the Superior Court of Justice. The court admits the need to grant a reasonable notice period based on good faith, the abuse of right, and even Article 473. It limits the examination of the reasonableness of a clause establishing a notice period in an extreme situation. This court generally accepts the notice period provided in the contract, unless it is excessively short. Another case of examining the notice period is when there is no clause that determines it.

i) Remedies available if not respect the obligation to grant a reasonable notice period

If there is no notice period or it is not reasonable, the party has caused damages to its counterparty. There are three foreseeable remedies: damage compensation, a specific remedy to suspend the termination or determine the continuation of the contract, and a clause invalidity. The standard remedy is compensation for damages.[884] The liquidation of the damage was discussed in section 4.2.2. In summary, it must consider the loss of profits for the period that should last a reasonable notice.[885] The jurisprudence of the Superior Court of Justice only accepts this remedy.

The other remedy has controversial grounds. The jurisprudence of the Superior Court of Justice has difficulty with admitting remedies aimed at guaranteeing contract stability.[886] It

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[884] According to G. TEPEDINO, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, cit., p. 372, failure to give notice would attribute to the party that terminated the contract abruptly an obligation to compensate the counterparty, taking into account the resulting adverse consequences. In a similar view, see R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 249.

[885] R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 249; C. SANTOLIM, *A proteção dos investimentos específicos na resilição unilateral do contrato e o risco moral: uma análise do artigo 473, parágrafo único, do Código Civil*, cit., p. 9.

[886] The Brazilian law does not usually grant as a remedy the possibility to suspend the effects of unilateral termination. Some decisions addressed in section 4.3.2.4, *infra* demonstrate the insensibility to the remedy (see especially Superior Court of Justice, Special Appeal No. 972.436, 3a T., Rapporteur Justice Nanty Andrighi, judged on 17.3.2009; Superior Court of Justice, Special Appeal No. 966.163, 4a T., Rapporteur Justice Luis Felipe Salomão, judged on 26.7. 2010; Special Appeal No. 1.555.202, Rapporteur Justice Luis Felipe Salomão, 4a T., judged on 13.12.2016). In general terms, the doctrine also does not seek to change this scenario, except in Antitrust law (see the thesis defended in the University of São Paulo, made by Priscila Brolio GONÇALVES, *A obrigatoriedade de contratar como sanção fundada no direito concorrencial brasileiro*). The main reason for rejecting contract specific remedies is the impossibility to force the continuation of the contract since it would go against the will of the party. Also, there is not in Brazilian law the discipline of unfair competition, with a broad scope of application and the possibility of specific remedies. There is also not a provision similar to Article 2.058 of the Italian Civil Code. In tort liability, part of the doctrine views the specific remedy as exceptional. It is admitted specific remedy only when there is a existential interest (*interesse*

generally does not allow the forced extension of the relationship.[887] However, in light of the Italian experience with institutes of unfair competition and the abuse of economic dependence, based on Article 473, sole paragraph, a contractual party that has made specific investments might claim a specific remedy.

The wording of Article 473 determines the suspension of the effects of the termination until the recovery of investments. However, as was argued in sections 2.3.2 and 4.3.2.1, this possibility should not be admitted; it would create practical difficulties because a dynamic determination of the termination would be difficult. The elements for the termination end are not readily available for both parties and are difficult to calculate. Moreover, it would freeze distribution channels, which is contrary to the reading of the provision in accordance with some principles in Brazilian law and the view on efficiency of the network distribution system.

As was outlined in section 2.3.9, after a systematic interpretation of the provisions in Brazilian law, the content of Article 720 of the Civil Code, addressed to the agency agreement, corroborates that interpretation. It establishes a complex and, in its literality, contradictory rule. In the main section of the article, it reproduces the provisions in the sole paragraph of Article 473. An agency contract in an indefinite period could be terminated, provided that it has elapsed within a period compatible with the nature and extent of the investment. The same main section also indicates the need to grant notice with a minimum period of 90 days. Its sole paragraph includes a contradictory rule that requires systematic interpretation. In the case of divergence between the parties, the judge decides the *reasonableness* of the term and the amount due. In interpreting its sole paragraph, it can be deduced that the imposition does not have a peremptory nature; if it is not respected, the judge would determine the amount of the compensation.[888]-[889] This systematic

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esistenziale) (see. A. SCHREIBER, *Reparação não pecuniária dos danos morais*, in Pensamento crítico do direito civil brasileiro. Curitiba: Juruá, 2011, p. 329-346).

[887] D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, cit., p. 31 shares the same view about the orientation of the Superior Court of Justice. According to him, the orientation adopted by the doctrine is reprehensible. It merely reprocesses the wording of the rule, without considering the effects, especially the market relevance, of the provision.

[888] According to G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 376, if the mentioned requirements are met, the judge may grant specific protection to suspend the effectiveness of an illegitimate termination, postponing the contractual term until the 90-days prior notice and the period compatible with investments.

[889] Some authors defend this interpretation based on the literal wording of the provision. Their proposals are often not systematic nor explicit. See D. BOULOS, *Breves comentários ao art. 473 do CC Brasileiro*, pp. 31 e 34 (the position of the author is not clear, the provision would allow the request for suspension of the contract and payment of damages); H. C. BDINE JÚNIOR, *Resilição contratual e o art. 473 do CC*, p. 101; C. R. BARBOSA MOREIRA, Carlos Roberto, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, cit., p. 312; R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 246 e 249; G. TEPEDINO, *Das Várias Espécies de*

interpretation attributes different effects to the provision from its literal interpretation (see section 4.2.1.3). It also reinforces the absence of a minimum or reasonable contract term setting due to specific investments.

Although the strict application of Article 473 is not desirable, its wording attributes a specific remedy to the investing party.[890] This remedy – notably, the prohibitory injunction and the compensation in a specific form – could stabilize the contractual relationship. In some circumstances, the investing party could seek an order to suspend the termination effect for a reasonable period or to force the continuation of a framework agreement for a certain period. This interpretation does not mean that the suspension effect is automatic. The reasonable period also does not aim to recoup the investments made, but rather to allow the continuation for a period necessary for the party to redirect its activity. This remedy would not only equilibrate the bargaining power between the parties (see some arguments in favor of specific remedies in the case of economic dependence in section 4.2.1,3) concerning this remedy in Italian law), but would mainly prevent some harmful situations from happening. It would avoid some contractual terminations in which the notice period was inexistent or excessively short. For example, the clause analyzed by the Superior Court of Justice (REsp 1555202, 4ª T., Min. Luis Felipe Salomão, j. 2016, see section 4.3.2.4, e) established a notice period of five days, which is not reasonable, mainly because there were considerable non-recouped investments. In this case, an injunction based on Article 473 should have been admitted to suspend the termination for a reasonable period – again, not to recoup the investments.

Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte, cit., p. 376; G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 326; A. J. AZEVEDO, *Contrato de distribuição. Causa final dos contratos de trato sucessivo. Resilição unilateral e seu momento de eficácia. Intepretação contratual. Negócio* per relationem *e preço determinável. Conceito de "compra" de contrato e abuso de direito*, in Revista dos Tribunais, v. 826, 2004, p. 9; P. A. FORGIONI, *Contrato de Distribuição*, cit., pp. 312-3. In an isolated position, R. X. LEONARDO, *A denúncia e a resilição: críticas e propostas hermenêuticas ao art. 473 do CC/2002 Brasileiro*, cit. argues that the extension of the term of the contract should generally be granted, whereas the compensation remedy is an excepcional remedy.

[890] From another perspective, the victim contractor could choose, instead of the attribution of the ineffectiveness of the termination and, consequently, the continuation of the contractual relationship, the transformation into losses and damages of the due period of the relationship. Cf. P. R. BONINI, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, cit., p. 196. In this case, it would be up to the party to adopt a provisional measure; otherwise, at the end of the process, it would be unfeasible to have protection. According to R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 246, nothing prevents the injured party from filing a claims to obtain, in an interlocutory relief, the granting of the reasonable period that the rescuer failed to give.

This specific remedy should not be confused with a claim to oblige performing an obligation (*esecuzione* in natura). Based a literal interpretation of Article 473, part of the doctrine admitted that it would be possible to require the continuation of the contract with a claim directed towards the terminating party to execute its performance.[891] This claim would have grounds in Article 497 of the Brazilian Code of Procedure, which also provides the possibility of requiring a provisional measure. Although this rationale facilitates the request to continue in the agreement, there is no such obligation to be performed. Article 473, sole paragraph does not establish a minimum term of the contracts with investments and thus an obligation to execute the contract until that date. The specific remedy requires balancing to different interests that are not materialized in a contractual obligation.

There are some specificities concerning agency agreements and motor vehicle distribution agreements. Regarding the first contractual type, the relationship between the notice period of 90 days and the requirement to recover investments should be clarified.[892] The period of 90 days is a *minimum* notice period, which may be increased over time due to the presence of investments. This understanding does not make an agency contract with a fixed-term become a relationship with a reasonable duration.[893] If the conditions are presented, there is the possibility of requesting the suspension in court if the 90-day notice or the period compatible with the investments is defended.[894]

The contract for the distribution of motor vehicles has specific rules to protect investments. First, it has a minimum duration. It has a regime similar to the minimum term of the contract. This agreement can only be executed for a fixed term of no less than five years with a requirement to renew the contract (Article 21) or for an indefinite period with severe limitations of the chances of its extinction: i) agreement of the parties, ii) force majeure, and iii) breach by the counterparty

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[891] Chicão, p. 235

[892] Article 720 of the Civil Code would not have the function of protecting the period necessary for their recoupement, but to the agent sell tie stocks and dismiss its employees. Cf. P. E. LILLA, *O Abuso de Direito na Denúncia dos Contratos de Distribuição: o Entendimento dos Tribunais Brasileiros e as Disposições no Novo Código*, in http://egov.ufsc.br/portal/sites/default/files/anexos/9165-9164-1-PB.pdf, p. 27.

[893] R. E. REQUIÃO, *O contrato de representação comercial e o novo Código Civil. O contrato de agência e distribuição. O poder de denunciar o contrato sem prazo determinado e o dever de indenizar os investimentos realizados pelo representante ou pelo agente,* cit., pp. 47-8 seems to defend this position.

[894] G. TEPEDINO, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, cit., 376. G. HAICAL, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, cit., p. 327 takes a more cautious stance. The author emphasizes that in agency contracts, where trust is necessary, it is difficult to conceive of the forced maintenance of the bond.

(Article 22). The possibility to apply Article 720 in case of unilateral termination is argued.[895] However, this provision should not be applied; investment protection is already in place. The law governing the motor vehicle distribution agreement is considered special, and, therefore, its analogous interpretation is not allowed (see section 2.3.7). Among the consequences of terminating the contract or lack of renewal, the possibility of requesting additional damages is not listed. The fact that it is a special law does not preclude the option of seeking further compensation concerning the vehicle distribution agreement.[896]

The opportunity to claim a specific remedy does not mean that it is always admissible. There is a procedure to verify the option to order a specific remedy. The considerations made in section 4.2.1.3) concerning Italian law also apply to the Brazilian legal system. The specific remedy requires the evaluation between situations that are abstractly worthy of protection. In this comparative assessment of interests, the judge must extract the norm of conduct that is more adaptable to the concrete situation. It is an evaluation of equally protected spheres of freedom: the company that wishes to adapt itself to the market and its counterpart whose investments were not recovered during the relationship. If the remedy claimed is disproportionate to the conflict of interest, the judge should deny the inhibitory remedy.

There are situations in which this remedy is not advisable. The application of a specific remedy is excluded and becomes compensation for the equivalent. In the particular case of the recovery of investments, the requirement to ensure an adequate competitive dynamism can lead to a balance between the distributor's interest and that of the supplier's interest to be able to reorganize the distribution network itself (see section 3.4). Weighing those interests can lead to compensating for the damages, and not through the specific form of protection of the distributor.[897] However, if the termination does not have has a plausible business reason as a justification, a specific remedy is appropriate.

Another remedy is rarely invoked. The protection of investments could also invalidate the contractual agreement. A contractual clause could excessively limit the notice period, which is an issue of public order, as established in section 4.3.1. This remedy derives from objective good faith as a function of control and correction of the content of the contract, in a systematic interpretation

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[895] R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 333.
[896] R. AGUIAR JÚNIOR, *Da Extinção do Contrato*, cit., p. 338. See also STF, RE 95052, Reporting Justice José Néri da Silveira, judged on 6.9.1986.
[897] P. FABBIO, *La disparità di potere economico e abuso di dipendenza economica,* cit., p. 169.

with Articles 104, II[898] and 166[899] of the Civil Code.[900] In most cases, the assessment of the clause does not lead to its nullity. Nevertheless, there are some cases in which there is a clause establishing the absence of a need to grant a notice period. This clause does not allow the opportunity to reorganize the company's activity. In contracts with a short notice period and specific investments, the clause could be considered invalid because the party could always grant a longer notice period than is established in the contract.

ii) Remedies available to protect the other interests

The second protected interest is the investments not recovered with the end of the contract. After the determination of the protected investments and the period necessary for their amortization (section 3.3), the party can seek an indemnity to compensate for this expense. As the last interest, the party could also seek to compensate other damage, such as non-material damage and loss of the customer base (see the analysis of the Superior Court of Justice jurisprudence, section 4.3.1. and Annexes II and III).

4.3.3.1. The jurisprudence of the Superior Court of Justice and specific contractual investments

The notion of investments has become progressively more common in the jurisprudence of the Superior Court of Justice. It and the interpretation of Article 473, sole paragraph have Special Appeal No. 1.555.202, Rapporteur Justice Luis Felipe Salomão, 4a T., judged on 13.12.2016 (case *e*) as the most relevant decision. This decision examined the protection of investments in many facets. Despite this hermeneutic effort, there are some criticisms to be made. This court did not establish parameters to determine the protected investments and did not explore all the potentialities of Article 473, especially the possibility to claim specific investments. In addition, it

[898] Article 104. The requirements for the validity of a legal transaction are I – a capable agent; II – a licit, possible and determined or determinable object; III – a form that is prescribed or not prohibited by law.
[899] Article 166. A juridical transaction is null when: (…) II – this object is illicit, impossible or cannot be determined".
[900] According to the interpretation proposed by J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., pp. 575 ss., Article 104 of the Civil Code establishes that a legal transaction (*negozio giuridico*) must have a legal object; the contrariety of a contractual provision with good faith would constitute an element of its illegality. Partial nullity would occur (Article 166, II) in case of nonconformity with such contractual principle.

was a decision that ruled out the compensation for the loss of profit, and it confused some legal concepts.

An overview of the jurisprudence highlights two main applications of the notion of investments (not necessarily with the adjective *specific*) at the end of the contract termination. It serves as an element for the configuration of damages that occurred at the end of the contract.[901] The investments also serve as a parameter to evaluate the abusiveness of contract termination.[902] However, there is a usual link between the investment protection and Article 473 with the penalty clause.[903]

Except in the decision mentioned above, this provision generally loses its application autonomy. The Superior Court of Justice indicates it as a factor for corporate reorganization[904] and as the concession of a reasonable time for prior notice.[905] The remedies awarded in the case of the abusive termination are homogeneous; the compensation remedy is considered the sole remedy admitted. There are difficulties in accepting the prohibitory injunction with the suspension of effects of the unilateral termination. The mystique of the autonomy of the will is a commonly used argument.[906] The investments are referred to as damages,[907] and they are not considered to enable their recovery with the continuation of the contract.[908] The content of the decisions of this court is examined in detail.

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[901] STJ, Special Appeal No. 1.362.084, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 16.5.2017; STJ Special Appeal No. 1605281, 3ª T., Rapporteur Justice Moura Ribeiro, j. 11.6.2019 (these damages are mentioned as fixed assets and a building remodeling; and STJ, Special Appeal No. 1.555.202, Rapporteur Justice Luis Felipe Salomão, 4a T., judged on 13.12.2016 (the investments had to be liquidated by an expert; it was the only damage with the brutal termination since the decision excluded the damage of loss of profit).

[902] STJ, Special Appeal No. 1.555.202, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 13.12.2016.

[903] STJ, Special Appeal No. 1.362.084, 4a T., Rapporteur Justice Luis Felipe Salomão, judged on 16.5.2017.

[904] STJ, Special Appeal No. 972.436, 3ª T., Rapporteur Justice Nancy Andrighi, judged on 17.3.2009; and STJ, Special Appeal No. 1.169.789, 4ª T., Repporteur Justice Antonio Carlos Ferreira, judged on 16.8.2016.

[905] STJ, Special Appeal No. 654.408, 4ª T., Rapporteur Justice Fernando Gonçalves, judged on 9.2.2010; and STJ, Special Appeal No. 972.436, 3ª T., Reporting Justice Nancy Andrighi, judged on 17.3.2009; STJ, REsp 1112796, 4ª T., Repporteur Justice Holnildo Amaral, j 10.8.2010; STJ, REsp 1169789, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, j. 16.8.2016; STJ, AgRg no AREsp 569413, 3ª T., Rapporteur Justice Paulo de Tarso Sanseverino, j. 16.3.2017; and STJ, REsp 654408, 4ª T., Min. Fernando Gonçalves, j. 9.2.2010.

[906] STJ, Special Appeal No. 1.255.315, 3ª T., Rapporteur Justice Nancy Andrighi, judged on 13.9.2011; and STJ, Special Appeal No. 966.163, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 26.10.2010.

[907] STJ, Special Appeal No. 1.255.315, 3ª T., Reporting Justice Min. Nancy Andrighi, judged on 13.9.2011.

[908] STJ, Special Appeal No. 1.255.315, 3ª T., Rapporteur Justice Nancy Andrighi, judged on 13.9.2011; STJ, 1112796, 4ª T., Rapporteur Justice Min. Honildo de Mello Castro, judged on 10.8.2010; STJ, Special Appeal No. 966.163, 4ª Turma, Rapporteur Justice Min. Luis Felipe Salomão, judged on 26.10.2010.

a) Bayer v. Socipar S/A Case (Superior Court of Justice, Special Appeal No. 1.255.315, 3ª T., Rapporteur Justice Nancy Andrighi, judged on 13.9.2011)

After a 14-year business relationship, Bayer decided to terminate a verbal distribution agreement. The case occurred before the entry into force of the Civil Code of 2002 and the rule of Article 473, sole paragraph. The object of the contract was the commercialization of sodium sulfate extracted from chromium, which was produced by Bayer in its industrial complex. The distributor would have invested a significant amount in the business; it would have developed its technology, such as the logistics of storage, delivery, transportation, and technical support to customers. The sodium sulfate that was produced was challenging to commercialize because it had chromium contamination. This highlights the specific investments made to perform the contract. Due to its success, the distributor started to perform the same functions in Argentina. The intensity of the relationship between the two companies is demonstrated by the concentration of the distributor's business with Bayer. In the 10 years before the end of the relationship, 91% of the sodium sulfate marketed by the distributor came from Bayer (73% from Bayer Brazil and 26% from Bayer Argentina). For its part, Bayer also concentrated the distribution of products with the distributor. From 1989 to 1997, Bayer sold 61% of its revenue from the product (48% from Bayer Brazil and 13% from the subsidiary in Argentina) to the distributor.

Bayer decided to deactivate the industrial complex where it produced this product after a decision from its headquarters in Germany. Its activities with chrome were to be focused on two units in Argentina and South Africa. With this decision, the distributor could import sodium sulfate from Argentina. However, after the end of the relationship, the distributor would have been prevented from importing the product from Argentina. Bayer also alleged the distributor's persistent default. After the transfer of production to Argentina and the end of the relationship with the distributor, Bayer began to import and distribute sodium sulfate, reselling it directly to the customer network the distributor built over the years.

Despite the business reasons Bayer presented, the court considered that there was an abusive termination of the contract because the company sought to appropriate the distributor's customers. In acknowledging the arbitrary termination of the relationship, the Superior Court of Justice upheld the damages awarded by the lower court. The parameter of two years of lost profits was used. This period allowed the distributor to organize its business activity, and it considered the investments made and the duration of the relationship. The calculation basis used was the final

profitability of the company, discounting what would be spent as interest, taxes, depreciation, and amortization. The distributing profits of the distributor were set at an amount close to €600,000 and the determination of non-material damages awarded to a company (*danno esistenziale*) in an amount fixed at 30% of the value of the material damages.

The decision considered the remedy of damage compensation appropriate. The court expressly rejected the possibility of requesting the continuation of the relationship. The decision did not address all aspects of the issue; on the contrary, damages and loss of profits were attributed without indicating the appropriate parameters for their establishment, or that they could be applied in future decisions. The decision is in accordance with the main arguments adopted in this thesis, except the reason to deny the continuation of the contract.

b) Tostines Case (Superior Court of Justice, Special Appeal No. 401.704, 4a T., Rapporteur Justice Honildo Amaral de Melo Castro, judged on 25.8.2009)

In a verbal contract of foodstuffs lasting approximately 30 years, the distributor claimed compensation for the unilateral termination of the contract without the granting of a congruent prior notice. The termination of the relationship occurred under the allegation that the distributor defaulted on its contractual obligations. On the other hand, the distributor also alleged that the agreement corresponded to 70% of the company's revenues.

In assessing the first argument, the Superior Court of Justice adopted the view that, although the distributor delayed some obligations to perform, these were not sufficient grounds for discontinuing the relationship. The court further considered that the unilateral termination of the contract, without the granting of prior notice, would constitute an abrupt termination of the relationship and, for that reason, should be compensated. Based on the expert report, the court maintained the damage condemnation, which consisted of labor and investment that the distributor had to make and lost profits. The damage attributed was equivalent to €60,000.

c) Excellence Project Case (Superior Court of Justice, Special Appeal No. 1.112.796, 4ª T., Rapporteur Justice Honildo de Mello Castro, judged on 10.5.2010)

The Superior Court of Justice examined another dispute involving a distribution agreement. The beverage company exercised the right not to renew a distribution agreement with an exclusivity clause and granted 60 days' notice, as established in the contract. The parties had entered into chain

contracts that lasted a total of 20 years. The peculiarity of the case involves the circumstance that, about three years after the interruption of the relationship, the manufacturer implemented, with all its distributors, a "Project of Excellence." Its purpose was to expand the business transactions between the network members. To comply with the plan, they had to implement investments. Instead of developing the commercial relationship, the manufacturing company started to substantially reduce the supply and the variety of products intended for marketing. This also benefited other distributors.

The Superior Court of Justice acknowledged that the conduct of the producer was not abusive because it conformed with the provisions of the contractual clause, with the granting of prior notice of 60 days. The decision was not unanimous, and it was argued that the conduct was contrary to good faith, in particular, the *venire contra factum proprium*, with the investment project being promoted by the manufacturer.

The decision was based on the understanding that the termination of the relationship, in coherence with a reasonable contractual clause, removed the possibility of the configuration of abusiveness. The fact that a period of 60 days, a reasonable duration for the reorientation of the activity, was provided in the contract would also corroborate this position. However, the decision did not assess if the investments made under the excellence project would have been amortized over the contractual relationship, nor was it determined whether the 60-day period would be enough to reorient the company in the market. These two issues would have to be analyzed in order to evaluate the correctness of the decision.[909]

d) Case of extension *ad aeternum* of a motor vehicles distribution agreement (Superior Court of Justice, Special Appeal No. 966.163, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 26.7. 2010)

A distributor attempted to extend a 33-year motor vehicle distribution after it had been interrupted. The lower courts determined the continuation of the contract without indicating its end based on objective good faith and a determination of the law of the distribution of motor vehicles, which requires granting a prior notice period of 120 days. The Superior Court of Justice dismissed the possibility of maintaining the relationship after this period had elapsed. It argued that it is

[909] In a comment on the decision, J. MARTINS-COSTA, *A boa-fé no direito privado: critérios para a sua aplicação*, cit., p. 665 agrees with the court that there has been no unlawful conduct by the producer.

impossible to maintain a contractual relationship against the will of the parties, except in the case of monopoly and cases that are due to the *social nature* of the contract. The court ruling reversed the lower court decision and is therefore correct. However, it is not possible to agree on the limitation of the hypothesis of the extension of contractual relationships.

e) Case of the extrajudicial debt collector (Special Appeal No. 1.555.202, Rapporteur Justice Luis Felipe Salomão, 4ª T., judged on 13.12.2016)

A large financial institution entered into an indefinite-term service agreement in which it gave the counterparty the obligation to make amicable and extrajudicial debt collection in its name. After only 11 months of the agreement, there was a meeting to terminate it. According to the company providing the service, the decision to unilaterally terminate the contract, even with the five-day prior notice provided in it, would have entailed damages. The performance of the contract required high investments, such as the acquisition of a specialized software license in the amount of approximately €25,000 and the change of headquarters to another location, among other investments.

The Superior Court of Justice confirmed the claim for payment of damages. The legal grounds would have been objective good faith, the violation of legitimate expectation, and Article 473 of the Civil Code. The damages would be only direct damages related to the frustration due to the premature termination of the relationship. In specifically addressing the protection provided for in Article 473, the court recognized its literalness, but at the same time removed the possibility of extending the contract until the recovery of the investments. For this decision, it stated that no one could be bound by contract to continue a relationship after a unilateral termination. Damage reimbursement would be the most appropriate protection.

The court's decision examined specific investments and the interpretation of Article 473, sole paragraph in depth. This decision considered that the short duration of the contract would be an important factor in determining termination abuse, even though there was a contractual clause providing five days' notice; the short period would impede investments recovery. As another positive aspect, the decision determined that the investments to be indemnified were those incurred under the contract and that did not have sufficient time for their recovery. However, it did not outline the parameters to determine the recovery of investments. The court did not consider the

possibility of suspending the termination because the lower courts had already denied the request, which did not reach the court in time.

However, some criticisms must be made regarding the decision. There are several aspects related to the investments to be protected that the decision did not evaluate, such as the verification of the specificity to the relationship and the verification of their hetero-determination. It also did not establish the parameters for the recovery of investments. Similarly, the decision did not consider the existence of the interest of the company in reorganizing its activity, which would entail the determination of lost profits corresponding to the period necessary for its reorientation. The decision also makes a strange assessment of compensation for expectation interest (*interesse positivo*), according to which it would mean the amount spent on the performance of the contract. In addition to the inadvertent reference to the text by R. COOTER and T. ULEN, this definition would fit more as a reliance than an expectation interest.

In summary terms, the decision faced the issue, which had long been neglected by the Superior Court of Justice. It has made some strides, especially on the more considerable detailing of the concept of specific investments. However, it did not extract the full potential of interpretation of Article 473, which summarized a legitimizing factor for the compensation of investments, but not to extend the contract. It also did not adopt the correct notion of investment, and thus it did not investigate the existence of its specificity to the agreement.

f) Telecom "Net" Case (Superior Court of Justice, Special Appeal No. 1.362.084, 4ª T., Rapporteur Justice Luis Felipe Salomão, judged on 16.5.2017)

In a class action, a consumer telecommunication contract regulating services related to the provision of TV signal and Internet, the Superior Court of Justice evaluated the legality of the penalty clause inserted therein. This clause stipulated the payment of a fine if the consumer opted for the early and unjustified interruption of the contract. This clause was equated to a damage compensation for the investments made by the service provider. With the consumers' unilateral termination, it would incur losses resulting from their choice. Based on this conclusion, the Superior Court of Justice interpreted whether Article 473 of the Civil Code applied. The court concluded that the scope of the rule would correspond to the compensation of investments made by one of the parties for the performance of the contract. However, the fine established consists of

a penalty clause (*clausola penale*), which it is not related to specific investments. The reference to Article 473 of the Civil Code is not adequate.

g) Gatorade distribution Case (Superior Court of Justice, Special Appeal No. 654.408, 4ª T., Rapporteur Justice Fernando Gonçalves, judged on 9.2.2010)

A producer unilaterally terminated a seven-year verbal and indefinite-term beverage distribution contract with a prior notice of 30 days. The Superior Court of Justice assessed the clause establishing a reasonable period of prior notice. In the case, the notice period was extended from 30 days to 120 days. The court argued that the structure of the distribution company was explicitly adapted to the development of the activity, considering the extent of the investments and the seasonality of the product. Justice João Otávio de Noronha's vote emphasized that the sole paragraph of Article 473 established the principle of the reasonableness of the prior notice for terminating an indefinite-term contract. This decision does not comply with the interpretation of Article 473 indicated in this thesis. However, the court deemed a prior notice to be insufficient upon examining the existence of specific investments, which corroborates the requirement of an autonomous function of that provision.

h) COELBA Case (Superior Court of Justice, Special Appeal No. 972.436, 3ª T., Rapporteur Justice Nanty Andrighi, judged on 17.3.2009)

The Superior Court of Justice examined a peculiar case: It addressed an indefinite-term contract signed between an electricity distributor and a service provider. The agreement was terminated after five years with the granting of 30 days' notice. On an interlocutory relief, the lower court decided for the extension of the contract without indicating its final deadline. This decision lasted until the appeal was heard by the Superior Court of Justice five years later. The court understood that there was no justification for extending the contract for such a long period, even though one of the parties had made investments. In the decision, there was no discussion regarding the characteristics of the investments made, nor of their significance.

The court used the sole paragraph of Article 473 of the Civil Code as an analogous argument to justify dismissing a lower-instance decision that determined the maintenance of the contractual relationship. According to the court, even if one party has made specific investments, the contract should continue only for a reasonable period for the parties to organize their activities in the event

of the termination of the contractual relationship to expand the customer base and suppliers and to settle the relationship. The Court's interpretation of Article 473, sole paragraph, did not assign it a specific function to a norm to protect specific investments. It would be a mere prohibition of the implementation of an abrupt rupture of the relationship.

i) Superior Court of Justice, Special Appeal No. 1.169.789, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, judged on 16.8.2016

This case discussed a hypothesis of the unilateral termination of a verbal contract of the distribution of food products for an indeterminate period. The understanding adopted by the court was the need to grant a reasonable time after the termination. Otherwise, this act would generate a duty to repair damages. Articles 473 and 720 were not part of the merits of the discussion. However, the court stated that these rules would have the function of imposing a period after termination to avoid damages, especially to end labor relationships. According to this understanding, these provisions have no specific utility and represent a mere repetition of what was extracted from the function of good faith and the abuse of right.

4.3.4. Antitrust enforcement remedies to protect investments

As established in section 2.3.5, specific investments also have some repercussions for competition. In Brazilian law, these contours are still uncertain; these investments could be considered positive factors for the evaluation of a vertical restriction, as laid out in the European antitrust guidelines (see section 2.2.5.1). In addition to this application, making investments could be a factor to promote a dominant position, or even circumscribe the antitrust effects of an abuse of economic dependence. In these last two hypotheses, there are some antitrust enforcement remedies. Some of them concerning Italian law also apply in this section (see section 4.2.6).

The Brazilian Antitrust Authority (Administrative Council for Economic Defense – CADE, the acronym in Portuguese) has powers similar to the Italian Antitrust Authority. Its members are responsible for judging the occurrence of illicit antitrust activity. It can establish measures to be taken to cease it, as well as the period for their implementation and conclusion (Article 79, I and II of Law No. 12529/2011). The authority can also impose fines due to illicit conduct and in case of the continuation or breach of the measures (Article 79, III, IV, and V). It also can impose a

precautionary measure when there is evidence or well-founded fear that the defendant, directly or indirectly, will cause or may cause the market to be irreparably damaged or difficult to repair, or render ineffective the final outcome of the proceedings (Article 84). Private antitrust enforcement might also be admissible.

To render these measures more effective, there are some facilitating instruments. Antitrust law institutes the solidarity between all societies and entities in the economic group (Article 33), as well as between the company and those responsible, its managers or administrators (Article 32). It can also disregard the legal entity when there is an abuse of rights, excess of power, infringement of the law, unlawful act or fact, or violation of the bylaws (Article 34).

In Brazilian competition law, there are still difficulties in admitting a specific obligation to contract. As stated in section 2.3.5, competition law exemplifies anticompetitive practices. Among them, there is the conduct of hindering or disrupting the continuity or development of indefinite commercial relations (Article 36, XII, Law No. 12529/2011). However, this legislation does not set a specific remedy to oblige the party to contract. Some academic works have addressed this possibility, in spite of the defense by a substantial part of the doctrine of the impossibility to force a contract. P. FORGIONI,[910] C. SALOMÃO FILHO,[911] and P. BROLIO GONÇALVES[912] have admitted this possibility in the case of the abuse of dominant position or economic dependence. Some judicial decisions also admit this possibility,[913] but it still has a timid response. This possibility exists in some decisions of the Brazilian Competition Authority.[914]

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[910] P. A. FORGIONI, *Contrato de Distribuição*, São Paulo: Revista dos Tribunais, 2014, p. 493-499.
[911] C. SALOMÃO FILHO, *Direito concorrencial: as condutas*, São Paulo: Malheiros, 2007, p. 236-246.
[912] P. BROLIO GONÇALVES, *A obrigatoriedade de contratar como função fundada no direito concorrencial,* Tese de Doutorada, Faculdade de Direito, Universidade de São Paulo, 2008, *passim*.
[913] TJSP, AI No. 1179750-5, 11 CC, j. 12.6.2003; TJMG, AI No. 1.0024.06.984815-8/008.
[914] Amex vs. VISA, DirectTV vs. Globo, Messer vs. White Martins, Philip Morris vs. Souza Cruz, Power-tech vs. Matec, Shopping Jardi Sul vs. Shopping Iguateli, Neto TV vs. Globo.

Conclusions

1. **The legal notions of investment**. The first task performed in this thesis was the attempt to define the legal notions of "investment." The economic definition of investment is the present allocation of capital in the expectation of producing future income. Some notions presented in the legal system could be categorized under this definition, but its generic sense prevents it from identifying contractual investments. There are some normative provisions in Brazilian and Italian law that govern different profiles of the concept of investment. They do not concern the same phenomenon and could be categorized as i) investment as a placement of capital in financial assets, ii) an accounting category, iii) investment in an entity of another country, and iv) specific investment for the performance of a contract.

2. **Assumptions of the economics of contract.** The notion of investments as the object of this thesis is category iv). In order to understand specific contractual investments, the thesis considered the paradigm shift of the microeconomic model. In the neoclassical model, complete contracts regulate economic transactions. New and more realistic economic theories, called *economics of contract*, have the abandonment of the theoretical fiction of complete contracts as the unifying trait. Their focus is the contractual and institutional structures. One of its branches, *transaction costs economics*, demonstrates that specific investments are a relevant element of the transaction. Their examination presupposes the assessment of other characteristics of incomplete contracts: the parties' limited rationality, their informational asymmetry, their informational limitation, and the parties' opportunism.

3. **Specific investment for the performance of the contract.** Specific investments are central elements of these theories. Economic agents usually have the choice between making general or specific investments for the performance of the contract. Specific investments are those intended for a particular contractual relationship. The agent decides to invest in physical and human resources to increase the relationship's value. These investments have value (at least, a higher value) within a specific relationship.

4. **Specific investments and the risk of opportunism**. Contract-specific investments and the impossibility for the third party (usually the judge) to properly verify the contractual terms expose the investing party to the risk of opportunism. Investments, despite increasing the productivity of the contract, constitute an opportunistic platform for the counterparty. Given this scenario, the economic literature proposes solutions to overcome it. They require the implementation of governance solutions for various business transactions to induce investments at a socially optimal level.

5. **Selfish, cooperative, and hybrid-specific investments**. The admissibility of some solutions to particular contract categories was questioned. These critiques were based on the perception that specific investments are not a unitary category. The majority of works assume that the seller invests in reducing its costs and the buyer in extending its benefits. Those investments would be *selfish investments*. However, some authors have claimed the existence of two other types of investments, *cooperative investments* and *hybrid investments*. The former does not provide any direct benefit to the investor, and the hybrid investments offer benefit to both parties (it has elements of selfish and cooperative investment).

6. **Specific investments and the object of the thesis**. The legal issues addressed in this thesis differ from those presented in the work's proposed solution to opportunistic behavior, discussed in section 1.4. This economic literature explains the characteristics of the specific investments and their effects on competition and efficiency. However, the thesis does not discuss contractual mechanisms to allow the efficient protection of investments. These mechanisms are mainly focused on selfish investments and simpler structures. The assessment of this thesis focuses on the legal aspects related to cooperative or hybrid investments. These investment modalities allow value to be attributed to the counterparty. They have repercussions in two areas of law, with mutual interference, contractual and antitrust law. Under the contractual profile, specific (cooperative) investments manifest themselves in contractual relationships, especially those focused on acting in another market level. The competitive aspect manifests itself in different forms. Its relevance stems from the positive effects of the specific and cooperative investment relationship in the market, in particular by allowing the development of dynamic competition under some circumstances. Investments raise the overall value of the relationship and may respond to the need to produce new

and better goods and services. Specific investments, on the other hand, also allow one to outline a reduced market, which under certain conditions may allocate market power to a particular company and, accordingly, allow the establishment of unlawful competition.

7. **A general view on the legal protection of investments in Brazilian and Italian law**. In civil law systems, specific investments find their legal relevance through general clauses, to which the phenomenon of contractual investments has been related since the middle of the 20th century. There are also a small number of legal rules with an express reference to investments. General clauses and statutory provisions present different structures that attribute complexity to their application. A comparative analysis demonstrated that the legal grounds for investment protection are constructed on controversial legal bases. Italian and Brazilian law represent exceptions; in both legal systems, there are provisions that refer to investments. In Brazilian law, there is an elevated number of rules. However, the introduction of these rules was not followed by their systematization.

8. **Legal relevance of specific contractual investments**. The legal relevance of specific investments occurs in different forms. Investments can be an element for determining the duration of the contractual relationship. The rule can prohibit abusive conduct, usually a unilateral termination of a contract, after its implementation. They can also define the available remedies, which correspond to the most common modalities of rules. Under antitrust law, investments are a positive factor capable of justifying certain vertical restraints or an element to evaluate the dominance relationship configuration for antitrust purposes. In addition to the economic rationale, other motives protect investments. They are grouped into economic, moral, and commutative justice. The purpose of these rules is to make a compromise between two conflicting requirements. On the one hand, there is the interest of the party that makes the investment and seeks to prolong the relationship; on the other, there is the possibility of the counterparty reacting on time to changes in the economic context that may necessitate a network restructuring.

9. **Specific contractual investments in Italian law**. There is no general provision for the protection of investments in Italian law. Their protection takes place through general clauses and specific provisions. There are two general clauses that could apply: good faith and the abuse of

economic dependence. Despite the case law restrictions related to applying the latter rule, the abuse of economic dependence provides three different remedies (competition, invalidation, and inhibitory remedies) that can adequately protect the party. There are two contrasting interpretations of this provision. The *competition* reading is not only more systematically coherent, but it also allows the appropriate examination and protection of investments. A rule on the franchising law has an interesting regulation of investments: it links the contractual term to the recovery of investments. European law aids in systemizing the interpretation of these rules. The European Commission provides guidelines on vertical restraints with elements to characterize specific investments.

10. **Contract specific investments in Brazilian law**. The Brazilian legal system presents characteristics that differ from those of Italian law. The prohibition of the abuse of dependence is not a central provision in the protection of investments. At the same time, Brazilian law turns its attention to the rules for protecting investments through limitations to the termination of the contractual relationship. The main rules in this regard consist of the general clauses in the Brazilian Civil Code, the abuse of right, and objective good faith. Another rule with great relevance is Article 473, sole paragraph. Although this norm expressly regulates specific investments, it is not commonly applied. The reason for this is its severe effects on the competition and the complexity of its wording. The heterogeneity of the rules in Brazilian law imposed their systematization with the purpose of defining their application to concrete cases.

11. **Protection of investments at the end of the contract**. Considering this fragmented discipline, there was a need to choose to address only the direct protection of the investments and the regime of the investments at the end of the relationship. While there are specific factors for each of the rules, they can be traced to some elements common to all of them. The general clauses of the abuse of economic dependence and objective good faith entrust the interpreter with the selection of the legally relevant interests for the final assessment of conduct based on the principles of the legal system. On the other hand, the legislator can select these interests in the specific provisions.

12. **The common elements for the protection of specific investments**. The common elements of investment protection are summarized as follows: 1) the factors that influence the private autonomy and the principle of self-responsibility in the assumption of contractual risks and their interference in investments recovery, 2) the protected interest regarding the making of specific investments, 3) the type of protected investments, and 4) the configuration of an abusive act. These factors establish the destiny of the investments made in a contractual relationship that has ceased prematurely and cannot be reassessed in an alternative way.

13. **The assumption of risks and the recovery of investments**. Some factors are capable of eliminating the investment protection related to the private autonomy and the principle of self-responsibility in taking contractual risks. These risks are capable of interfering with the recovery of investments. The assessment of taking risks that involve the implementation of the investments must be made in two moments: a) at the beginning of the contractual relationship and b) at the time of the exercise of the act considered abusive. The contractual term plays a crucial role in the assumption of these risks.

14. **The delimitation of the interest protected with making specific investments**. It is not enough to indicate the elements capable of preventing this protection. The study requires circumscribing the interest related to making specific investments. The answer to this issue is contingent upon comparative evaluations that involve the presence of investments. Its determination has practical consequences: it is essential for fixing the time before which it would not be possible to terminate the relationship without constituting an abusive act. When the commercial relationship with specific investments is prematurely terminated, there would be i) the interest of the company that has been given prior notice necessary for the orientation of its activity, considering the presence of investments not recovered; this notice period is not to be confused with a minimum contractual term; ii) compensation corresponding to investments not amortized; and iii) any other indemnities resulting from such act, such as indemnification for the loss of the customer base. It is crucial that reasonable time is given at the time of termination to give the distributor a fair chance to recover the investments. The exercise of the unilateral termination must consider the occurrence of a reasonable period for the reorientation of the activity, which is different from the concept of the reasonable duration of the contract.

15. **The protected specific contractual investments**. The contractual investment refers to the costs incurred by the party for the performance of the contract in order to receive future benefit from that use. The investments covered would generally correspond to the investments in the fixed capital used for the performance of the contract. The guidelines on vertical restraints point to the qualities of investments to merit antitrust protection against hold-up risk. The protected investments have the following attributes: i) protected investments are specific to a relationship, and this specificity causes a significant loss of value after the termination of the relationship; ii) investments have to be substantial and are destined to be recovered in a long-term contractual relationship; and iii) an asymmetry of investments is necessary. A systematic view also provides the following elements to verify the investment amortization: i) investments should be evaluated for their market price at the end of the relationship, ii) either tangible or intangible assets may be classified as protected specific investments, and iii) the operational risks associated with it cannot be attributed to the counterparty. It should be considered a standard term to assess the recoupment of the investments. The hetero-determination of investments, those demanded by the counterparty, waives the condition of the investment to be specific to the transaction. In principle, the recoupment must not consider particular aspects of the contractual relationship. The investment recovery should adopt a standard period based on reasonableness. A comparative analysis with other, similar contracts might be useful to determine this period. Some circumstances, however, may influence the assessment of the recoupment period to extend or reduce it. The protection of investments differs from the loss of the customer base and the compensation for lost inventory.

16. **Abuse with the premature termination of the contractual relationship and the impossibility of the recovery of investments**. Another common element to the rules on investment protection is the comparative examination of interests involving the interruption of the business relationship. The selection of the relevant interests occurs either by the legislator or by the interpreter in the concrete case considering the circumstances of the case and in light of the principles of the legal system and the sector. Business reasons are not sufficient to exclude the protection of the company that missed the significant opportunity to recover the investments. The preponderance of the recovery of investments is based on a modality of induction to the competitive dynamics, especially with the requirement to stimulate the specialized investments and to allow

the activity of the company in the market. However, these reasons may be considered in the assessment of remedies admissible to the parties, in particular, the possibility of continuing the contractual relationship. The existence of reasons to interrupt the relationship represents a consistent criterion that the investing party, even in the event of the absence of amortization, cannot require the extension of the relationship, but only the granting of a shorter period necessary for the reallocation of its business activity, or even simply the damage compensation.

17. **Elements to determinate the notice period**. The interest of the party that made the unrecovered investments prevails, which, according to the principle of proportionality, requires a notice period sufficient for the company to redirect its activity, mainly to recover the competitive damage suffered, with the deterioration of its position in the market. The assessment of this notice period should take several factors into account, especially the reasonable period for the recovery of investments – although there is no proportionality relationship between only such a time lapse and the period of notice. This must necessarily consider many factors related to the contractual relationship one seeks to terminate.

18. **Remedies for the protection of investments**. The perspective adopted, of focusing on the remedies available, can lead to the protection of investments. However, it faces some difficulties. There are few works on remedies in the event of arbitrary and unilateral termination. Some norms that could protect investments do not present the remedies available. The definition of the appropriate remedy is complex, and this protection must also consider the diversity of interests involved with the premature extinction of the contractual relationship.

19. **Investment protection and the dynamicity of distribution channels**. The assessment of the available remedies concerning these investments in Brazilian and Italian law requires a broader examination of the end of a contractual relationship with their presence. A discussion limited to the remedies directly related to investments (the damage compensation for not recouping them and eventually a specific remedy) is not sufficient. In a contract with specific investments, especially those related to a distribution network, both parties have an interest in maintaining and continuing the relationship. Additionally, the producer also has an interest in designing a dynamic distribution network and in making its members perform their obligations diligently. A dynamic network

enables the producer to adapt it to changes in the market and consumers' preferences. It also stimulates the members to be efficient and provide adequate responses to the market conditions. To reach these dynamic interactions within the distribution network, the producer has to end some contracts in a short period. Even if it has the objective of gaining more efficiency in a long-term analysis, a member's exclusion produces adverse consequences for the producer and its network. In another perspective, the contractual end leaves the distributor in an even worse position. Given the complexity of this situation and the conflicting interests involved, its legal regulation imposes many difficulties. It requires a sophisticated regime able to consider the producer's interest in providing the adequate level of dynamism to the network, as well as the vulnerable nature of network members, without disregarding the crucial stimulus to make the parties invest in the relationship.

20. **Remedies for the protection of investments in Italian law**. Different remedies are available for investment protection. There are those to promote contractual stability, damage compensation, and the invalidation of the contract or its clauses. Antitrust enforcement also provides some remedies in the case of competition infringement. Contract stability may occur through legal measures and remedies available to the parties. A contractual-type regime can establish a minimum term for the agreement, an imposition to renew or extend it automatically, or determine restrictions to terminate. There are also less aggressive forms, such as the granting of prior notice, which is a more precarious remedy. Specific remedies can also provide this stability, granting the parties a claim to continue in the relationship despite its unilateral termination. The central element to protect investments is the abuse of economic dependence. In the case of termination without the recoupment of investments, the compensation for the equivalent may become an inadequate measure. A specific remedy can reduce the damages to the investing party. Similarly, in business contracts, specific remedies should be considered the standard and receive systematic priority. Specific investments gain legal relevance in the case law with the abuse of economic dependence.

21. **Italian case law and remedies to protect investments**. Many decisions concerning the abuse of economic dependence take specific investments into consideration. However, they do not examine them in detail and in their multiple aspects. They do not explore all the potentialities:

generally, protection for the dependent company is denied. As an overall evaluation, Italian case law views specific investments as an essential factor in configuring economic dependence because they rule out the existence of a satisfying alternative in the market. This is the most common reference to specific investments. In some cases, they are also an element to establishing the abusiveness of the contractual termination and a factor to assess the appropriate remedy.

22. **Remedies to protect specific investments in Brazilian law**. The adoption of this comparative view might be beneficial because contractual remedies are not a common topic in Brazilian law. The doctrine and the jurisprudence avoid discussing specific remedies and limit the debate to compensation and, eventually, invalidity remedies. This discrepancy might be explained through the structure of these legal systems. Brazilian legislation does not have the same institutes as Italian law. There was never a general discipline of unfair competition and the attribution of specific remedies to the competitors. Brazilian law also does not regulate the abuse of economic dependence, while Italian legislation provides three remedies for the dependent party. This thesis highlights the possibility of claiming specific remedies to protect investments. The compensation remedy is usually attributed to protecting investments. However, specific remedies might also be possible due to an interpretation of Article 473. Invalidity might even be possible. There is an obvious need to indemnify the investments that are not recouped, but there is also a necessity to compensate other damages, which may have some similar characteristics, and to grant prior notice.

23. **The notice period and investment protection**. The main concern regarding contractual termination is the parameters to assess reasonable prior notice. Brazilian case law provides a period considered *reasonable* without referring to the elements utilized to reach this conclusion. This approach can cause insecurity because it is not easy to identify the necessary notice period. However, this uncertainty balances the court's tendency to respect contractual terms, and therefore the termination period is not considered abusive.

24. **Article 473, sole paragraph and its systematic consequences**. The presence of Article 473, sole paragraph generates some juridical consequences for the Brazilian legal system and investment protection. Article 473 determines i) a more extended notice period, but without establishing a minimum contractual length and ii) a justification for unilateral termination. It also

contains some elements to concede specific remedies to the investing party, which is a preferable remedy.

25. **Brazilian case law and remedies to protect investments.** An overview of the jurisprudence highlights two main applications of the notion of investments (not necessarily with the adjective *specific*) at the end of the contract termination. It serves as an element for the configuration of damages that occur at the end of the contract. The investments also serve as a parameter to evaluate the abusiveness of contract termination. Article 473 generally does not have application autonomy. The remedies awarded in case of the abusive termination are homogeneous; the compensation remedy is considered the sole remedy admitted. There are difficulties with accepting the prohibitory injunction, with the suspension of the effects of the unilateral termination.

Annex I

Relationship between the contract length and the prior notice length

Contract length	Prior notice length	Contract length	Prior notice length
1 year	1 months	16 years	6 months
20 to 21 months	3 months	17 years	12 months
2 years	2 à 6 months	18 years	6 à 12 months
27 years	6 months	19 years	6 à 12 months
30 to 31 moths	6 months	19 years	6 à 12 months
3 years	3 à 12 months	21 years	21 months
3 years et 1/2	4 à 5 months	22 years	20 to 24 months
4 years	4 à 7 months	23 years	25 months
51 months	6 months	25 years	12 à 24 months
4 years et 1/2	4 à 6 months	34 years	12 months
5 years	2 à 12 months	35 years	24 months
5 years et 1/2	4 months et 1/2	40 years	12 months
6 years	3 à 15 months	43 years	24 months
7 years	3 à 36 months	44 years	36 months
7 years 1/2	6 months	45 years	24 months
8 years	6 to 18 months	63 years	24 months
8 years et 1/2 to 8 years et 8 months	6 months	70 years	36 months
9 years	6 à 7 months	40 years	12 months
10 years	3 à 12 months	43 years	24 months
11 years	3 à 12 months	44 years	36 months
12 years	9 à 15 months	45 years	24 months
13 years	4 et ½ to 12 months	63 years	24 months
13 years et 9 months	10 months	70 years	36 months
14 years	6 à 12 months		

Annex II

Judgment references	Court Conclusion	Length of the notice period	Length of the contract	Other characteristics of the contract	Circumstances of the decision
REsp 1320870, 3a T., Rapporteur Justice Villas Bôas Cueva, 27.6.2017	Absence of abuse.	60 days (according to the contractual clause).	26 years.	Beverage distribution agreement. Reference to the “Excellence 2000 plan” (a set of measures to improve the marketing of beverages). Reference to investments.	Motivated termination (default regarding non-payment of goods).
AgInt no REsp 1266785, 4ª T., Rapporteur Justice Isabel Galotti, 1.6.2017	Absence of abuse.	Without the information in the decision about the notice period. It was according to the contractual clause.	N/A	N/A	Termination without reason.
AgInt no AREsp 639646, 4a T., Rapporteur Justice Isabel Gallotti, j. 6.9.2016.	Absence of abuse.	30 days (without a contractual clause).	3 years.	No presence of investments.	Discussion about qualification as distribution of the contract. Moral damage was ruled out.
REsp 1494332, 3ª T., Rapporteur	Absence of abuse.	60 days (according to the contractual	17 years.	Exclusivity. Presence of investments.	Beverage Distribution Agreement.

Justice Villas Bôas Cueva, j. 4.8.2016.		clause) + 120 days (additional period for the company to reorient itself in the market).			Termination without a reason. Contract with annual renewal.
AgRg no REsp 1225943, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 17.9.2015.	Absence of abuse.	Without information about the length. It was according to the contractual clause.	N/A	N/A	Beverage distribution agreement.
AgRg no AREsp 210524, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 17.9.2013.	Absence of abuse.	180 days (according to the contractual clause).	38 years.	N/A	Beverage distribution agreement. Termination without a reason.
AgRg nos EDcl no REsp 1114091, 4ª T., Rapporteur Justice Antonio Carlos Ferreira, j. 20.8.2013.	Abusiveness recognized. The notice period was not in accordance with the contractual clause.	Not in compliance with the contractual clause.	N/A	Presence of investments. Exclusivity.	Beverage distribution agreement. Contract not renewed.
REsp 493159, 3ª T., Rapporteur Justice Castro Filho, j. 19.10.2006.	Absence of abuse.	Without information about the period length. It was according to the	N/A	N/A	Beverage distribution agreement. Contract not renewed.

		contractual clause.			
REsp 681100, 3ª T., Rapporteur Justice Carlos Alberto Menezes Direito, j. 20.6.2006.	Absence of abuse.	60 days (according to the contractual clause).	12 years.	N/A	Beverage distribution agreement. Contract not renewed. Contract with annual renewal.
REsp 766012, 3ª T., Rapporteur Justice Humberto Gomes de Barros, j. 23.8.2005.	Absence of abuse.	180 days (according to the contractual clause).	27 years.	N/A	Beverage distribution agreement.
REsp 1112796, 4ª T., Rapporteur Justice Holnildo Amaral, j 10.8.2010.	Absence of abuse.	60 days (according to the contractual clause).	23 years.	Presence of investments. Exclusivity.	Beverage distribution agreement. "Excellence 2000 Project" (implemented in 1995, terminated in 1998). Contract with annual renewal.
REsp 654408, 4ª T., Rapporteur Justice Fernando Gonçalves, j 9.2.2010.	Abusiveness recognized.	30 days (without a contractual clause). The reasonable length would be 120 days.	6 years.	Absence of exclusivity. Presence of investments.	Beverage distribution agreement.
REsp 1169789, 4ª T., Rapporteur Justice Antonio Carlos	Abusiveness recognized. The lower Court will have to determine the notice period and	A grant of an insufficient prior notice. (without a contractual clause).	21 years.	Exclusivity.	Verbal food distribution agreement. Unjustified resolution.

Ferreira, j. 16.8.2016.	liquidate damages.				
AgRg no REsp 1224400, 4ª T., Rapporteur Justice Isabel Galotti, j. 4.9.2012.	Abusiveness recognized. A 180 days notice period suggested (to reorient in the market).	30 days (according to the contractual clause).	N/A	Presence of investments.	Food distribution agreement.
AgRg no AREsp 569413, 3ª T., Rapporteur Justice Paulo de Tarso Sanseverino, j. 16.3.2017.	Abusiveness recognized. The lower Court suggested a notice period of de 60 days.	With prior notice.	N/A	The decision considers these factors: exclusivity, investment, and contractual length.	Distribution agreement.
AgInt nos EDcl no Ag 1376489, 4ª T., Rapporteur Justice Raul Araújo, j. 8.11.2016.	N/A	N/A	N/A	N/A	Beverage distribution agreement. Without a reason termination. Default of the producer.
REsp 1317528, 3ª T., Rapporteur Justice Marco Aurélio Bellizze, j. 13.9.2016.	N/A.	N/A	25 years.	N/A	Food distribution agreement.
REsp 1555202, 4ª T., Rapporteur Justice Luis Felipe Salomão, j. 2016.	Abusiveness recognized. Suggested notice period: 6 months.	5 days (according to the contractual clause)	11 years.	Presence of investments.	Service provision contract. Termination without a reason.

REsp 1255315, 3ª T., Rapporteur Justice Nancy Andrighi, j. 13.9.2011.	Abusiveness recognized.	Without prior notice (verbal contract, without a contractual clause).	14 years.	Presence of specific know-how.	Substance distribution agreement. Reason for termination: repositioning in the global market.
REsp 1605281, 3ª T., Rapporteur Justice Moura Ribeiro, j. 11.6.2019.	Abusiveness recognized. Termination based on the counterparty's default, which was proved.	Without a contractual clause.	5 years.	Presence of investments.	Food distribution agreement.

Annex III

Judgment reference	Damage concerning the insufficiency of the notice period	Other damages items	Circumstances of the decisions and characteristics of the contract
AgRg nos EDcl no REsp 1114091, 4ª T., Justice Antonio Carlos Ferreira, j. 20.8.2013.	Mention of lost profits for not having met the notice period established in the contract.	N/A	Absence of abuse if the prior notice was granted as set forth in the contract.
REsp 1169789, 4ª T., Justice Antonio Carlos Ferreira (voto vencido Isabel Gallotti), j. 16.8.2016.	The decision referred for further arbitration of loss of profit by the lower court.	N/A	Abusiveness recognized. Absence of notice (without a contractual clause).
AgRg no REsp 1224400, 4ª T., Justice Isabel Galotti, j. 4.9.2012	The loss of profit should be calculated based on the results from the daily average revenue multiplied by the number of lost working days, plus the 25% of profit.	N/A	Abusiveness recognized. Suggestion of 180 days' notice period (to position itself in the market).
AgRg no AREsp 569413, 3ª T., Justice Paulo de Tarso Sanseverino, j. 16.3.2017	General mention of lost profits.	N/A	Abusiveness recognized. Judgment of the lower court for the notice period: 60 days.
REsp 1317528, 3ª T., Justice Marco Aurélio Bellizze, j. 13.9.2016.	N/A	Absence of **loss of customer base**. The lower court had arbitrated this damage item even without any demand.	
REsp 1255315, 3ª T., Justice	Loss of profits was not based on the	**Non-material damage**: violation of the company's	Abuse recognized.

Nancy Andrighi, j. 13.9.2011.	EBITDA (earnings before interest, taxes, depreciation, and amortization), but based on the company turnover, discounted interest, tax, depreciation, and amortization. The loss of profit would be the net income. The notice period was two years and the approximate material damage was R$2 million (€500,000).	image. It should also consider a punitive aspect. Value 30% of the value of material damage.	Distribution agreement of substance applied in industry. Alleged reason for the termination: repositioning in the global market.
AgInt no AREsp 639646, 4a T., Justice Isabel Gallotti, j. 6.9.2016.	N/A	**Moral damage**: absence of condemnation. There was no dishonorable fact.	Discussion of qualification as distribution of contract beverages. Absence of abuse.
REsp 1605281, 3ª T., Justice Moura Ribeiro, j. 11.6.2019.	N/A	**Goodwill compensation**: no condemnation. The decision criticizes the compensation for the loss of customers (similar to goodwill) in the distribution contract, where there is a large marketing strategy for customers. The clientele cannot be owned. **Unpaid fees:** a condemnation derived from the lower court decision. **Minimum profit of 28% requirement:** a condemnation derived from the lower court decision based on a clause. **No compensation for non-material damage of the company shareholders. Compensation of non-**	Abusiveness recognized.

		material damage due to the harm in the company's image worth.	
REsp 1555202, 4ª T., Justice Luis Felipe Salomão, j. 2016.	Denied condemnation on lost profits. If necessary, it would be the period of 6 months to recover. This point deserves criticism.	N/A	Abusiveness recognized. Treatment of art. 473, sole paragraph.
REsp 654408, 4ª T., Justice Fernando Gonçalves, j 9.2.2010.	Loss of profits corresponding to the 120-year period. The procedure for obtaining the lost profits was not specified.	N/A	Abusiveness recognized. 30 days' notice period (no clause). The reasonable period should be 120 days.
REsp 1320870, 3a T., Justice Villas Bôas Cueva, 27.6.2017		**Loss of customer** base: no compensation; only in case of unlawful termination.	Absence of abuse.
AgRg no AREsp 228148, 4ª T., Justice Antonio Carlos Ferreira, j. 19.11.2015.		N/A	No discussion of the abusive termination of the contract.
AgInt nos EDcl no Ag 1376489, 4ª T., Justice Raul Araújo, j. 8.11.2016.	N/A	No refund for **technical assistance costs**. **Goodwill compensation**.	Beverage distribution agreement. Absence of just cause. Default of the producer.

Bibliography

AA. VV., *La subfornitura: Legge 18 giugno 1998*, n. 192, Milano: IPSOA, 1998.

AA. VV., *Il franchising: Legge 6 maggio 2004*, n. 129, Milano: IPSOA, 2004.

AA. VV., I *processi di esternalizzazione: opportunità e vincoli giuridici*, a cura di Raffaele De Luca Tamajo, Edizioni scientifiche italiane, 2002.

AA. VV., *I contratti di intermediazione: mandato, agenzia, mediazione, contratto estimatorio, commissione, procacciamento d'affari, concessione di vendita, franchising, intermediazione finanziaria*, a cura di Giuseppe Cassano, Marco Eugenio di Giandomenico, CEDAM, 2009.

AA. VV, *I contratti di distribuzione: agenzia, mediazione, promozione finanziaria, concessione di vendita, franchising: figure classiche e new economy*, a cura di Giuseppe Cassano, Milano: Giuffrè, 2006.

AA. VV., *Commercial agency, franchise and distribution contracts (PEL CAFDC)*, Munich: Sellier European law publishers, 2006.

AA. VV., *I contratti della distribuzione commerciale*, diretto da Gerardo Villanacci, Torino: UTET giuridica, 2010.

AA. VV., *Codice dei contratti pubblici commentato*, a cura di Luca R. Perfetti, Milano: Wolters Kluwer, 2017.

ABELHA, André, *O novo CPC e o despejo liminar por denúncia vazia na locação não residencial*, https://www.linkedin.com/pulse/o-novo-cpc-e-despejo-liminar-por-den%C3%BAncia-vazia-na-loca%C3%A7%C3%A3o-abelha/>.

AFFERNI, Giorgio, *La responsabilità precontrattuale per violazione di obblighi di informazione*, in Trattato breve della responsabilità civile: fatti illeciti, inadempimento, danno risarcibile, diretto da Giovanna Visintini, Padova: CEDAM, 2005, 731-774.

AGOSTINELLI, Benedetta, *Il patto abusivo: fenomenologia e rimedi*, Torino: G. Giappichelli, 2012.

AGUIAR JÚNIOR, Ruy Rosado de, *Da Extinção do Contrato*, in Comentários ao Novo Código Civil, coordenador Sávio de Figueiredo Teixeira, Forense: Rio de Janeiro: 2011.

AGHION, Philippe; TIROLE, Jean, *Formal and Real Authority in Organizations*, in The Journal of Political Economy, vol. 105, no. 1, Feb. 1997, pp. 1-29.

ALBANESE, Antonio, *Abuso di dipendenza economica: nullità del contratto e riequilibrio*, in Europa e Diritto Privato, 1999, pp. 1179-1220.

ALOJ, Nicoletta, *Diritto di recesso e tutela del contraente debole nei contratti di distribuzione*, in Rassegna di diritto civile, 2012, pp. 275-307.

ALPA, Guido, *Appunti sul divieto dell'abuso del diritto in ambito comunitario e sui suoi riflessi negli ordinamenti degli Stati membri*, in Contratto e impresa, 2015, fasc. 2, pp. 245-261.

ALPA, Guido, *Il cotnratto in generale. Principi e problemi,* Milano: Giuffrè, 2014.

ALPA, Guido, *L'interpretazione economica del diritto*, in Enciclopedia del diritto, 1989.

ALPA, Guido, *Rischio*, in Enciclopedia del diritto, vol. XL, Milano, l989.

ANDERSON, Erin; COUGHLAN, Anne, *International Market Entry and Expansion via Independent or Integrated Channels of Distribution*, in Journal of Marketing, vol. 51, January 1987, pp. 71-82.

ANDRIOLI, Virgilio, *Presuzioni (Diritto civile e Direitto processuale civile)*, in Nossivimo Digesto Italiano, vol. XIII, 766-772, Torino: Editrice Torinese.

ANGIOLINI, Francesca, *Abuso di dipendenza economica ed eterodirezione contrattuale,* Giuffrè: Milano, 2012.

ARCIDIACONO, Davide, *Abuso di dipendenza economica e mercato rilevante. Il caso della delocalizzazione produttiva*, in Giurisprudenza Commerciale, 2015, pp. 786 ss.

ARTOM, Alessandro, *Disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari, Commento a art. 62 d.l. 24 gennaio 2012*, in Rivista di Diritto Alimentare, 2012, n. 1, fasc. 2, pp. 13 ss.

ASCARELLI, Tullio, *Problemi giuridici*, Milano: A. Giuffrè, 1959.

ASCARELLI, Tullio, *O desenvolvimento histórico do direito comercial e o significado da unificação do direito privado,* in Revista de Direito Mercantil, Industrial, Econômico e Financeiro, v. 37, n. 114, p. 237-252, abr./jun. 1999.

ASTONE, Francesco, Venire contra factum proprium, Napoli: Jovene, 2006.

AZEVEDO, Álvaro Villaça, *Validade de denúncia em contrato de distribuição sem pagamento indenizatório*, in Revista dos Tribunais, v. 737, março de 1997, pp. 98-111.

AZEVEDO, Antônio Junqueira de, *Contrato de distribuição. Causa final dos contratos de trato sucessivo. Resilição unilateral e seu momento de eficácia. Intepretação contratual. Negócio* per relationem *e preço determinável. Conceito de "compra" de contrato e abuso de direito*, in Revista dos Tribunais, v. 826, 2004, pp. 119-136.

BACCHINI, Francesco, *Le nuove forme speciali di vendita ed il franchising: vendita self service nei grandi magazzini, vendita a mezzo di distributore automatico, vendita per corrispondenza, vendita porta a porta, commercio elettronico*, Padova: CEDAM, 1999.

BACHELET, Vittorio, *La clausola squilibrata è nulla per abuso di dipendenza economica e il prezzo lo fa il giudice: note a margine di un caso pilota*, in Nuova giurisprudenza civile commentata, 2015, pp. 222-235.

BALDI, Roberto; VENEZIA, Alberto, Il *contratto di agenzia: la concessione di vendita, il franchising*, Milano: A. Giuffrè, 2001.

BANDEIRA, Paula Greco, *O contrato incompleto*, São Paulo: Atlas, 2015.

BARALDI, Mario, *Il recesso* ad nutum *è, dunque, recesso* ad libitum*. La cassazione di nuovo sull'abuso del diritto*, in Contratto e impresa, 2010, pp. 41-70.

BARALDI, Mario, *Le "mobili frontieri" dell'abuso del diritto: l'arbitrario recesso* ad nutum *dall'apertura di credito a tempo determinato,* in Contratto e impresa, 2001, fasc. 3, pp. 927

BARBA, Angelo, *Reti di impresa e abuso di dipendenza economica*, in Contratto e impresa, 2015, pp. 1264-1351.

BARBA, Angelo, *L'abuso di dipendenza economica: profili generali, in La subfornitura nelle attività produttive*, a cura di Vicenzo Cuffaro, Napoli, 1998, p. 297 ss.

BARBANERA, Roberta, *Gli abusi contrattuali*, in Trattato breve della responsabilità civile: fatti illeciti, inadempimento, danno risarcibile, diretto da Giovanna Visintini, Padova: CEDAM, 2005, 179-200.

BARBOSA MOREIRA, Carlos Roberto, *Contrato de fornecimento de mercadoria em consignação. Considerações genéricas sobre o art. 473 do Código Civil*, in Revista Forense, 2012, pp. 305-322.

BARCELLONA, Eugenio, *Recesso "ad nutum" fra principio di buona fede e abuso del diritto: "solidarietà sociale" o "inderogabilità del "mercato"? Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2011, fasc. 2, pt. 2, pp. 165-216.

BARCELLONA, Mario, *Clausole generali e giustizia contrattuale: equità e buona fede tra codice civile e diritto europeo*, Torino: Giappichelli, 2006.

BARCELLONA, Mario, *Sul risarcimento del danno in forma specifica (ovvero sui limiti della c.d. interpretazione evolutiva)*, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti, Napoli: Jovene, 1989.

BARROSO, Luís Roberto, *Estado e livre-iniciativa na experiência constitucional brasileira*, Revista brasileira de direito público RBdP, v. 12, n. 45, p. 9-19, abr./jun. 2014.

BASTIANON, Stefano, *Rifiuto di contrarre, interruzione arbitraria delle relazioni commerciali e abuso di dipendenza economica, Commento a ord. Trib. Bari 6 maggio 2002*, in Corriere giuridico, 2002, fasc. 8, pp. 1066-1071.

BDINE JÚNIOR, Hamid Charaf, *Resilição contratual e o art. 473 do CC*, in Revista Advogado, 2012, pp. 98-104.

BEHAR-TOUCHAIS, Martine, *La rupture d'une relation commerciale établie*, in Petites affiches, n.203, p. 9.

BELFIORE, Angelo, *La presupposizione*, Torino: G. Giappichelli, 1998, in Il contratto in generale, Trattato di diritto privato, diretto da Mario Bessone, v. 9, tomo 4.

BELLANTUONO, Giuseppe, *I contratti incompleti nel diritto e nell'economia*, Padova: CEDAM, 2000.

BELLIA, Marco, *Abuso di dipendenza economica dal carattere escludente e concorrenza sleale: competenza, condotta illecita e natura della responsabilità. Nota a Trib. Milano 28 febbraio 2014*, in La Nuova giurisprudenza civile commentata, 2014, pp. 971-977.

BENAZZO, Paolo, *I diritti di "voice" e di "exit" nei contratti di rete "riconosciuti"*, in Rivista delle società, 2012, 677-710.

BENEDETTI, Alberto Maria; BARTOLINI, Francesca, *La nuova disciplina dei contratti di cessione dei prodotti agricoli e agroalimentari*, in Rivista di diritto civile, 2013, fasc. 3, pp. 641-662.

BENETAZZO, Cristiana, *Il regime giuridico delle concessioni demaniali marittime tra vincoli U.E. ed esigenze di tutela dell'affidamento*, in federalismi.it, 2016, fasc. 25, pp. 35.

BENUCCI, Silvia, *La dipendenza econômica nei contratti tra imprese,* in Squilibrio e usura nei contratti, a cura di Giuseppe Vettori, Padova, 2002.

BENZONI, Laurent ; ATLANI, Alexis, *Le délai de préavis lors d'une rupture contractuelle : approche économique*, in AJ Contrat 2016, p.475.

BERNHEIM, B. Douglas, WHINSTON, Michael, *Incomplete Contracts and Strategic Ambiguity*, in American Economic Review, 1998, vol. 88, issue 4, pp. 902-32

BERTI, Carlo, *Subcontratto, subfornitura e decentramento produttivo tra imprese*, Milano: Giuffrè, 2000.

BERTINO, Lorenzo, *Il contratto di agenzia*, Torino: Giappichelli, 2016.

BERTOLOTTI, Angelo, *Il contratto di subfornitura*, Torino: UTET, 2000.

BESSONE, Mario, *Adempimento e rischio contrattuale*, Milano: A. Giuffre, 1969.

BIFERALI, Giorgia, *Nullità a tutela dell'impresa "dipendente" e filiera agroalimentare*, in Europa e diritto privato, 2015, fasc. 3, pp. 613-668.

BLACK, Henry Campbell (contributing authors Joseph R. Nolan and M. J. Connolly), *Black's law dictionary: definitions of the terms and phrases of American and English jurisprudence, ancient and modern*, St. Paul, Minn.: West Publishing Co., 1979.

BLAIR, Roger; LAFONTAINE, Francine, *The Economics of Franchising*, Cambridge: Cambridge University Press, 2010.

BONFANTE, Angelo, *L'evoluzione normativa*, in Norme per la disciplina dell'affiliazione commerciale, a cura di Oreste Cagnasso, Torino: G. Giappichelli, 2005, pp. 9-47.

BONINI, Paulo Rogério, *Resilição contratual. Relações civis-empresariais. Interpretação do art. 473, parágrafo único, CC. Consequências do exercício da resilição unilateral. Indenização x prolongamento do contrato*, in Cadernos Jurídicos, 2015, pp. 191-199.

BORTOLOTTI, Fabio, *Il contratto di franchising: la nuova Legge sull'affiliazione commerciale*, le norme antitrust europee, Padova: CEDAM, 2004.

BORTOLOTTI, Fabio, *Riduzione delle commesse e interruzione arbitraria delle relazioni commerciali in atto: i limiti dell'abuso di dipendenza economica, Nota a Trib. Bassano del Grappa 9 febbraio 2010; Trib. Catania 2 settembre 2009*, in Giurisprudenza italiana, 2010, fasc. 12, pp. 2561-2564

BOULOS, Daniel, *Breves comentários ao art. 473 do CC Brasileiro*, in Araken de Assis et alli (coords.), Direito Civil e Processo. Estudos em homenagem ao Professor Arruda Alvim, pp. 25-35.

BRICKLEY, James, MISRA, Sanjog; and VAN HORN, R. Lawrence, *Contract Duration: Evidence from Franchising*, The Journal of Law & Economics, vol. 49, no. 1, April 2006, pp. 173-196.

BRITO, Maria Helena, *O Contrato de Concessão Comercial*, Coimbra: Almedina, 1999.

BROLIO GONÇALVES, Priscila, *A obrigatoriedade de contratar como função fundada no direito concorrencial,* Tese de Doutorada, Faculdade de Direito, Universidade de São Paulo, 2008.

BROOKS, Richard, STREMITZER, Alexander, *On and Off Contract Remedies Inducing Cooperative Investments*, in American Law and Economics Review, vol. 1, no. 2, 2012, pp. 488-516.

BRUTTI, Nicola, *Recesso unilaterale e obbligo di preavviso: esperienze europee e nordamericane*, Salerno: Dipartimento di diritto dei rapporti civili ed economici nei sistemi giuridici contemporanei, 2004.

BUONOCORE, Vincenzo, *Contrattazione d'impresa e nuove categorie contrattuali*, Milano: Giuffrè, 2000.

BUSSANI, Mauro, *Contratti moderni. Factoring Franchising Leasing*, in Trattato di Diritto Civile, diretto da Rodolfo Sacco, Torino: UTET, 2004.

CAFAGNO, Maurizio, *Flessibilità e negoziazione. Riflessioni sull'affidamento dei contratti complessi*, in Rivista Italiana di Diritto Pubblico Comunitario, 2013, pp. 991-1020.

CAGNASSO, Oreste, *Introduzione, in Norme per la disciplina dell'affiliazione commerciale*, a cura di Oreste Cagnasso, Torino: G. Giappichelli, 2005.

CAGNASSO, Oreste, *La concessione di vendita: problemi di qualificazione*, Milano: A. Giuffrè, 1983.

CAGNASSO, Oreste; COTTINO, Gastone, *Contratti commerciali*, in Trattato di diritto commerciale, diretto da Gastone Cottino, Padova: CEDAM, 2009.

CAGNONI LUONI, Cecilia, *La concessione di vendita: recesso* ad nutum *del concedente e tutela del concessionario*, in I Contratti, 2017, pp. 185 ss.

CAMARDI, Carmelita, *Contratti di consumo e contratti tra imprese. Riflessioni sull'asimmetria contrattuale nei rapporti di scambio e nei rapporti "reticolari"*, in Rivista Critica del Diritto Privato, pp. 549-591.

CAPOBIANCO, Antonio, *Competition Issues in Aftermarkets – Note from the Europena Union*, in https://one.oecd.org/document/DAF/COMP/WD(2017)3/en/pdf.

CAPOBIANCO, Ernesto*, L'abuso di dipendenza economica. Oltre la subfornitura. Relazione al Convegno "Contratti tra imprese e tutela dell'imprenditore debole"*, Verona, 16-17 settembre 201, in Concorrenza e mercato, 2012, pp. 619-651.

CAPURRO, Tommaso, *Abuso di dipendenza economica e rifiuto di contrarre, Nota a Trib. Catania 5 gennaio 2004*, in La Nuova giurisprudenza civile commentata*,* 2005, fasc. 6, pt. 1, pp. 985-990.

CARETTA, Alessandro Boso, *Interruzione del rapporto di distribuzione integrate e abuso di dipendenza economica, Nota a Trib. Torre Annunziata sez. distaccata Castellamare di Stabia 30 marzo 2007*, in Giurisprudenza di merito, 2008, pp. 350-356.

CARLI, Carlo C., *Appalti e analisi economica - spunti per un'audit giureconomica dei contratti di impresa. Verso un diritto dettato dall'economia? Relazione al Convegno su "L'acquisizione di beni e servizi alla luce delle innovazioni normative in materia", Nocera Inferiore, 19 novembre 2004*, in La Nuova giurisprudenza civile commentata, 2005, pp. 173-197.

CARLI, Cecilia, *L'abuso di potere negoziale nella Grande Distribuzione Organizzata. Un paradigma a geometria variabile*, in Mercato concorrenza regole, 2016, pp. 181-204.

CASADESUS-MASANELL, Ramon; SPULBER, Daniel F., *The Fable of Fisher Body*, in Journal of Law & Economics, vol. 43, no. 1, April 2000, pp. 67-104.

CASO, Roberto, *Subfornitura industriale, analisi giuseconomica delle situazioni di disparità di potere contrattuale*, in Rivista critica di diritto privato, 1998, pp. 243 ss.

CASTALDO, Angelo; CONTE, Elisabetta; GALEOTTI, Gianluigi, *Buona fede e responsabilità precontrattuale: comportamenti opportunistici e "hold up" nelle trattative*, in Mercato concorrenza regole, 2012, fasc. 3, pp. 577-605.

CASTIGLIONI, Andrea, *Contratto d'opera intellettuale con termine finale e recesso ad "nutum" ai sensi dell'art. 2237 c.c., Nota a Cass. sez. II civ. 14 gennaio 2016, n. 469*, in I Contratti, 2016, fasc. 7, pp. 653-658.

CASTRONOVO, Carlo, *Il risarcimento in forma specifica come risarcimento del danno*, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti, Napoli: Jovene, 1989.

CATALANO, Roberta, *L'abuso di dipendenza economica*, Napoli: Jovene, 2009.

CAVANI, Raffaele, *Riflessioni critiche (e considerazioni pratiche) sull'abuso di dipendenza economica*, in Diritto dei trasporti, 2017, fasc. 1, pp. 24-37.

CENINI, Marta; GAMBARO, Antonio, *Abuso di diritto, risarcimento del danno e contratto: quando la chiarezza va in vacanza. Nota a Cass. sez. III 18 settembre 2009, n. 20106*, in Corriere giuridico, 2011, fasc. 1, pp. 109-117.

CERIDONO, Giada, *Legge 18 giugno 1998, n. 192. Disciplina della subfornitura nelle attività produttive, Commento alla l. 18 giugno 1998, n. 192. Art. 8. Regime IVA. Art. 9. Abuso di dipendenza economica*, in Le Nuove leggi civili commentate, 2000, fasc. 1-2, pp. 428-453.

CHE, Yeon-Koo; HAUSCH, Donald, *Cooperative Investments and the value of Contracting*, in The American Economic Review, vol. 89, no. 1, Mar. 1999, pp. 125-147.

CHE, Yeon-Koo; CHUNG, Tai-Yeong, *Contract Damages and Cooperative Investments*, in The RAND Journal of Economics, vol. 30, no. 1, Spring, 1999, pp. 84-105.

CHERPILLOD, Ivan, *La protection des investissements du distributeur contre la résiliation abusive*, in RDS Revue de droit suisse 130, 2011, pp. 55-79.

CHRISTIAANSE, Ellen; VENKATRAMAN, N. Venkat, *Beyond Sabre: An Empirical Test of Expertise Exploitation in Electronic Channels*, in MIS Quarterly, vol. 26, no. 1, March 2002, pp. 15-38.

CHUNG, Tai-Yeong, *Incomplete Contracts, Specific Investments, and Risk Sharing*, in Review of Economic Studies, 1991, vol. 58, issue 5, pp. 1031-1042.

CIAN, Giorgio, *Codice civile e leggi collegate: commento giurisprudenziale sistematico*, Padova: CEDAM, 2016.

CIAN, Marco, *La nozione di strumento finanziario nel sistema del diritto commerciale*, in Studium iuris, 2015, fasc. 12, pp. 1450-1456

CIMMINO, Nelson Alberto, *Il recesso unilaterale dal contratto*, Padova: CEDAM, 2000.

COASE, Ronald, *The Nature of the Firm: Influence*, in O.E Williamson/ S. G. Winter, 1993, pp. 61-74.

COASE, Ronald, *The problem of social cost*, in Classic papers in natural resource economics, pp. 87-137.

COASE, Ronald, *The nature of the firm,* in Economica, vol. 16, no. 4, 1937, pp. 386-405.

COEN, Robert M.; EISNER, Robert, *Investment (Neoclassical),* in DURLAUF, Seven N.; BLUME, Lawrence, The new Palgrave Dictionary of Economics, vol. 10, I, Houndmills, Basingstoke: Palgram Macmillan, 2008.

COLANGELO, Giuseppe, *Intese obtorto collo e risarcibilità del danno: le improbabili acrobazie dell'antitrust comunitario, Commento a CGCE 20 settembre 2001 (causa C-453/99)*, in Corriere giuridico, 2002, fasc. 4, pp. 456-460.

COLANGELO, Giuseppe, *Prime note di commento ala normativa in materia di* Franchising, in Corriere Giuridico, 2004, pp. 851-856.

COLANGELO, Giuseppe, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti: un'analisi economica e comparata*, Torino: G. Giappichelli, 2004.

COLANGELO, Giuseppe, *L'ambito di applicazione dell'abuso di dipendenza economica: il caso Logista Italia, Nota a ord. Trib. Roma 17 marzo 2010*, in Danno e responsabilità, 2010, fasc. 12, pp. 1178-1181.

COLANGELO, Giuseppe, *Subfornitura di tabacchi ed abuso di dipendenza economica, Nota a Trib. Roma 17 marzo 2010; Trib. Roma 19 febbraio 2010; Trib. Roma 30 novembre 2009; Trib. Roma 24 settembre 2009; Trib. Roma 5 maggio 2009; Trib. Roma 22 aprile 2009*, in Il Foro italiano, 2011, pp. 270-271.

COLANGELO, Giuseppe, *Subfornitura, dipendenza economica ed obbligo di contrarre, Nota a ord. Trib. Catania 9 luglio 2009*, in Danno e responsabilità, 2009, fasc. 10, pp. 997-1005

COOTER, Robert; MATTEI, Ugo; MONATERI, Pier Giuseppe; PARDOLESI, Roberto; ULEN, Thomas, *Il mercato delle regole: analisi economica del diritto civile*, Bologna: Il mulino, 1999.

COOTER, Robert; ULEN, Thomas, *Law and Economics*, Berkeley Law Books, 2016, in http://scholarship.law.berkeley.edu/books/2.

CORAPI, Diego, *Il diritto brasiliano: nuovo terreno di indagine per la comparazione*, in Rivista di diritto civile, 2007, fasc. 3, pt. 1, pp. 375-381.

CORAPI, Diego, *Tradizione romanistica e influenze di common law nell'evoluzione del diritto brasiliano. Relazione presentata al Convegno "Mundus Novus. Unità del continente latino americano: leggere i Digesti, unificare il diritto", svoltosi a Roma, il 25-26 maggio 2006*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2009, fasc. 4-6, pt. 1, pp. 365-375.

CORAPI, Diego, *L'unificazione del Codice di Commercio e del Codice Civile in Brasile*, in Il Nuovo Codice Civile Brasiliano, a cura di Alfredo Calderale, pp. 3 ss.

CORDOPATRI, Franco, *Presunzione (dir. proc. civ.)*, in Enciclopedia del diritto, vol. XXXV, Milano: Giuffrè, 1986, pp. 274-300.

COSTA, André Brandão Nery, *Efeitos legais do conflito tipológico entre o contrato de agência e de representação comercial autônoma*, in Revista de Direito Privado, dez. de 2018.

COSTANTINO, Laura, *La tutela del contraente debole nelle relazioni negoziali lungo la filiera agro-alimentare nelle più recenti esperienze giuridiche europee e statunitensi*, in Rivista di diritto agrario, 2013, fasc. 1, pt. 1, pp. 166-190.

CREA, Camilla, *Contratti tra imprese e sistemi reticolari fra cooperazione e concorrenza*, in Rassegna di diritto civile, 2009, pp. 904-913.

CREA, Camilla, *Reti contrattuali e organizzazione dell'attività d'impresa*, Edizioni Scientifiche Italiane: Napoli, 2008.

CROCKER, Keith J.; MASTEN, Scott E, Mi*tigating Contractual Hazards: Unilateral Options and Contract Length*, in RAND Journal of Economics, 1988, vol. 19, no. 3, pp. 327 ss.

D'ADDA, Alessandro, *Il risarcimento in forma specifica: oggetto e funzioni*, Padova: CEDAM, 2002.

D'AMICO, Giovanni, *Recesso* ad nutum*, buona fede e abuso del diritto. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in I Contratti, 2010, pp. 11-23.

DASSI, Anna, *Il contratto di franchising*, Padova: CEDAM, 2006.

DE ASSIS, Araken, *Comentários aos arts. 421 a 480*, in Comentários ao Código Civil Brasileiro, coordenadores Arruda Alvim e Thereza Alvim, Rio de Janeiro: Forense, 2007.

DE FRAJA, Gianni, *After You Sir. Hold-Up, Direct Externalities, and Sequential Invesments, in Games and Economic Behavior*, vol. 26, no. 1, 1999, pp. 22-29.

DE GUTTRY, Andrea, *Il problema della termination nel contratto di franchising*, in AA.VV., Tipicità ed atipicità dei contratti, Milano: Giuffrè, 1983, pp. 79-88.

DE MORAES, Alexandre *et al.*, *Constituição Federal Comentada,* Rio de Janeiro: Forense, 2018.

DE NOVA, Giorgio, *La nuova legge sul* franchising, in Giorgio De Nova; Carmen Leo; Alberto Venezia, *Il Franchising*, IPSOA, 2004.

DE NOVA, Giorgio; LEO, Carmen; VENEZIA, Alberto, *Il Franchising*, IPSOA, 2004

DE NOVA, Giorgio, *Recesso*, in Digesto delle discipline privatistiche, sezione civile, vol. XVI, Torino, 1993.

DE NOVA, Giorgio, *La nuova legge sul franchising*, in I contratti 2004, p. 761 ss.

DEL PRATO, Enrico, *Patologia del contratto: rimedi e nuove tendenze*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2015, fasc. 1, pt. 2, pp. 19-35.

DELLACASA, Matteo*, Il recesso arbitrario tra principi e rimedi*, in Rivista di diritto privato, 2012, fasc. 1, pp. 13-37.

DELLI PRISCOLI, Lorenzo, *Franchising e tutela dell'affiliato*, Milano: A. Giuffre, 2000.

DELLI PRISCOLI, Lorenzo, *Il divieto di abuso di dipendenza economica nel Franchising, fra principio di buona fede e tutela del mercato*, in Giur. merito, 2006, pp. 2153 ss.

DELLI PRISCOLI, Lorenzo, *Il recesso nel contratto di subfornitura*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2003, fasc. 1-4, pt. 1, pp. 257-278.

DELLI PRISCOLI, Lorenzo, *Abuso di dipendenza economica e abuso di diritto*, in http://www.orizzontideldirittocommerciale.it/media/11966/delli_priscoli.pdf.

DELLI PRISCOLI, *L'abuso di dipendenza econômica nella nuova legge sulla subfornitura*, in Giurisprudenza commentata, vol. 25, fasc. 6, pt. 1, 1998, pp. 833-843.

DEZZANI, Flavio; PISONI, Perio; PADDU, Luigi, *Il bilancio*, Milano: Giuffrè, 2001.

DIAS, José de Aguiar, *Da responsabilidade civil*, Rio de Janeiro: Lumen Juris, 2011.

DIAS, Claude ; URBAIN-PARLEANI, Isabelle, *Les contrats de distribution commerciale à l'épreuve du temps*, Aix-en-Provence : Presses universitaires d'Aix-Marseille, 2014.

DI BIASE, Antonio, "*Contrazione" delle relazioni commerciali ed abuso di dipendenza economica, Nota a ord. Trib. Catania sez. distaccata Bronte 9 luglio 2009*, in I Contratti, 2010, fasc. 3, pp. 252-263.

DI BIASE, Antonio, *La violazione degli obblighi di* disclosure *nel contratto di franchising e l'abuso di dipendenza economica*, in Europa e diritto privato, 2007, pp. 801 ss.

DI CELSO, Andrea Mazziotti, *Art. 9. Abuso di dipendenza economica*, in La Subfornitura: commento alla legge 18 giugo 1998 n. 192, a cura di Guido Alpa e Angelo Clarizia, Milano: Giuffrè: 1999, pp. 236-293.

DI LORENZO, Giovanni, *Abuso di dipendenza economica e contratto nullo*, Padova: CEDAM, 2009.

DI GREGORIO, Giovanna, *Mancata protrazione del rapporto di affiliazione commerciale oltre la naturale scadenza. Nota a ord. Trib. Bari 22 ottobre 2004*, in Danno e responsabilità, 2005, pp. 752-754.

DI MAJO, Adolfo, *La tutela civile dei diritti*, Milano: Giuffrè, 2001.

DI MAJO, Adolfo, *Le tutela contrattuale*, Torino: G. Giappichelli, 2009.

DI MAJO, Adolfo*, Forme e tecniche di tutela*, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti, Napoli: Jovene, 1989.

DI MAJO, Adolfo, *Il risarcimento da adempimento del contratto, Nota a CGCE 20 settembre 2001 (causa C-453/99)*, in Europa e diritto privato, 2002, fasc. 3, pp. 791-796.

DI MAJO, Adolfo, *Rilevanza del termine e poteri del giudice*, Milano: Giuffrè, 1972.

DINIZ, Gustavo Saad. Dependência econômica nos acordos verticais, in Revista de direito privado, v. 15, n. 59, p. 91-120, jul./set. 2014.

DIDIER JR., Fredie, *Contrato empresarial. Contrato prorrogado por prazo indeterminado. Possibilidade de denúncia vazia. Aviso prévio. Licitude. Enriquecimento sem causa. (parecer)*, in Revista de Direito Civil Contemporâneo, 2017, pp. 305-330.

EDLIN, Aaron; REICHELSTEIN, Stefan, *Specific Investment Under Negotiated Transfer Pricing: An Efficiency Result*, in Accounting Review, vol. 70, no. 2, April 1996, pp. 275-291.

EDLIN, Aaron; REICHELSTEIN, Stefan, *Holdups, Standard Breach Remedies, and Optimal Investment, in American Economic Review*, in American Economic Review, vol. 86, no. 3, June 1996, pp. 478-501.

FABBIO, Philip, *L'abuso di dipendenza economica*, Milano: Giuffrè, 2006.

FABBIO, Philipp, *Note sulla terminazione dei rapporti di distribuzione automobilistica integrata, tra diritto comunitario e nazionale*, in Rivista di diritto commerciale, 2004, pp. 9-36.

FABBIO, Philipp, *Interruzione delle relazioni commerciali in atto e abuso di dipendenza economica. Nota a ord. Trib. Bari 6 maggio 2002*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2002, fasc. 7-10, pt. 2, pp. 326-344.

FABBIO, Philipp, *Osservazioni sull'ambito d'applicazione del divieto di abuso di dipendenza economica e sul controllo contenutistico delle condizioni generali di contratto tra imprese, Nota a ord. Trib. Trieste 21 settembre 2006*, in La Nuova giurisprudenza civile commentata, 2007, fasc. 7-8, pt. 1, pp. 902-908.

FABBIO, Philipp, *Abuso di dipendenza*, in Portale Treccani – Enciclopedia Giuridica, Istituto della Enciclopedia Italiana, Roma, 2012.

FABBIO, Philipp, *Abuso di dipendenza economica*, in Trattato dei contratti, diretto da Pietro Rescigno ed Enrico Gabrielli, I contratti della concorrenza, vol. XV, Torino: UTET.

FABBIO, Philipp, *La disparità di potere economico e abuso di dipendenza economica, in Contratto e antitrust*, a cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008.

FABRE-MAGNAN, Muriel, *L'obligation de motivation en droit des contrats,* in Mélanges Ghestin, LGDJ, 2001.

FACHECHI, Alessia, *Il problema della disciplina applicabile tra tipicità e atipicità contrattuale, in Rassegna di diritto civile*, 2016, pp. 1185-1223.

FARINA, Vicenzo, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor*, in Obbligazioni e contratti, 2011, pp. 806-815.

FAUCEGLIA, Giuseppe, *Il franchising: profili sistematici e contrattuali*, Milano: A. Giuffrè, 1988.

FERLA, Stefano, *Nuovi investimenti per la distribuzione gas: un riconoscimento tariffario "condizionato"? Serve chiarezza sull'analisi costi-benefici*, in Appalti e contratti, 2016, fasc. 10, pp. 59-62.

FERRI JR., Giuseppe, *Investimento e conferimento*, Milano, 2001.

FERRARO, Pietro Paolo, *L'impresa dipendente*, Napoli: Edizioni scientifiche italiane, 2004.

FICI, Antonio, *Il contratto di franchising*, Napoli: Edizioni Scientifiche Italiane, 2012.

FINESSI, Arianna, *La tipizzazione del contratto di franchising e i profili problematici della l. 6 maggio 2004, n. 129*, in Studium iuris, 2004, pp. 1477-1488.

FORGIONI, Paula A., *Contrato de Distribuição*, São Paulo: Revista dos Tribunais, 2014.

FORGIONI, Paula A., *Os Fundamentos do Antitruste*, São Paulo: Revista dos Tribunais, 2016.

FORGIONI, Paula A., *A evolução do direito comercial brasileiro: da mercancia ao mercado*, São Paulo: Revista dos Tribunais, 2016.

FORGIONI, Paula A., *Contratos empresariais: teoria geral e aplicação,* São Paulo: Revista dos Tribunais, 2016.

FRADERA, Vera Maria Jacob de, *Pode o credor ser instado a diminuído o próprio prejuízo?*, in Revista trimestral de direito civil: RTDC, v. 5, n. 19, p. 109-119, jul./set. 2004.

FRANZINA, Pietro, *Considerazioni sulla legge applicabile all'abuso di dipendenza economica*, in La Nuova giurisprudenza civile commentata, 2002, fasc. 3, pp. 230-242.

FRANZONI, Massimo, *Efficacia del contratto e recesso unilaterale: artt. 1372-1373*, vol. 1, in Il Codice Civile. Commentario, Milano: Giuffrè, 1998.

FRANZONI, Massimo, *Il danno risarcibile*, vol. 2, in Trattato della responsabilità civile, diretto da Massimo Franzoni, Milano: Giuffrè, 2004.

FRAZÃO, Ana, *A necessária constitucionalização do direito da concorrência*, in Direitos fundamentais e jurisdição constitucional. São Paulo: Revista dos Tribunais, 2014, p. 139-158.

FREITAS, Rafael Véras de; RIBEIRO, Leonardo Coelho, O prazo como elemento da economia contratual das concessões: as espécies de "prorrogação", in Contratos administrativos, equilíbrio econômico-financeiro e a taxa interna de retorno: a lógica das concessões e parcerias público-privadas, Belo Horizonte: Fórum, 2016, p. 283-300.

FRIGNANI, Aldo*, Franchising: la nuova legge*, Torino: G. Giappichelli, 2004.

FRIGNANI, Aldo, *Il contratto di franchising: orientamenti giurisprudenziali prima e dopo la legge 129 del 2004*, Giuffrè: Milano, 2012.

FRIGNANI, Aldo, *Cosa ne è degli affiliati in caso di riorganizzazione aziendale del "franchisor" (fino alla incorporazione in altra società)?*, in I Contratti, 2014, pp. 706-715.

FRIGNANI, Aldo, *La "riorganizzazione aziendale" del "franchisor" o del produttore che effetti può avere sugli affiliati o sui concessionari?*, in Nuovo notiziario giuridico, 2014, fasc. 2, pp. 309-335.

GABRIELLI, Enrico, *Autonomia negoziale dei privati e regolazione del mercato: i contraenti. Relazione svolta al convegno "Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato"*, Siena, 22-24 settembre 2004, in Giustizia civile, 2005, pp. 183-199.

GABRIELLI, Enrico, *Operazione economica e teoria del contratto: studi*, Milano: Giuffrè, 2013.

GABRIELLI, Giovanni, *Vincolo contrattuale e recesso unilaterale*, Milano : A. Giuffrè, 1985.

GALGANO, Francesco, Qui suo iure abutitur neminem laedit?, in Contratto e impresa, 2011, fasc. 2, pp. 311-319.

GALGANO, Francesco, A*buso del diritto: l'arbitrario recesso* ad nutum *della banca*, in Contratto e impresa, 1998.

GALLI, Cesare, *Diritti di proprietà intellettuale e remunerazione degli investimenti, Relazione al Convegno "IP e costituzioni"*, Università di Pavia, 23-24 settembre 2005, in AIDA, 2005, pt. 1, pp. 68-79.

GAMBINO, Francesco, *Il dovere di coerenza nell'atto di recesso (note sull'abuso del diritto)*, in Rivista di diritto privato, 2011, fasc. 1, pp. 61-80.

GENOVESE, Anna, *Il risarcimento del danno da illecito concorrenziale*, Edizioni Scientifice Italiane, Napoli, 2005.

GENTILI, Aurelio, *Abuso del diritto e uso dell'argomentazione. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Responsabilità civile e previdenza, 2010, fasc. 2, pp. 354-364.

GHIDINI, Gustavo; CAVANI, Giovanni, *Presupposti e portata della tutela dei marchi "dotati di rinomanza"*, in Rivista di diritto industriale, 2017, fasc. 2, pt. 1, pp. 69-105

GILLES, Anne, *La définition de l'investissement international,* Bruxelles: Larcier, 2012.

GOLDBERG, Victor P.; ERICKSON, John R, *Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke*, in Journal of Law and Economics, 1987, vol. 30, no. 2, pp. 369-398.

GOMES, Orlando, *Contratos*, Rio de Janeiro: Forense, 2007.

GONÇALVES, Carlos Roberto, *Direito civil brasileiro*, vol. III, São Paulo: Saraiva, 2017.

GOODWIN, Michael ; BURR, Dan E., Economix: La première histoire de l'économic en BD, Paris : Les Arènes, 2019.

GRANIERI, Massimiliano, *Il tempo e il contratto: itinerario storico-comparativo sui contratti di durata*, Milano: Giuffrè, 2007.

GRANIERI, Massimiliano, *In tema di pagamento del canone per l'utilizzo di una tecnologia brevetta, Nota a CGUE sez. I 7 luglio 2016 (causa C-567/14)*, in Il Foro italiano, 2017, fasc. 2, pp. 97-99, pt. 4.

GRAZIANI, Augusto*, Investimento (economia politica)*, in Novissimo Digesto Italiano, pp. 32-34.

GRAZZINI, Barbara, *Articolo 9*, in BERTI, Carlo; e GRAZZINI, Barbara, La Disciplina della Subfornitura nella attività produttive, commento alla legge 18 giugno 1998, n. 192 come modificata dalla legge 5 marzo 2001, n. 57 e dal decreto legislativo 9 ottobre 2002, n. 231, Giuffrè: Milano, 2003.

GRAU, Eros Roberto, *A ordem econômica na Constituição de 1988,* São Paulo: Malheiros, 2014.

GREGG, Frasco, *Exclusive Dealing: a comprehensive case study*, University Press of America, 1991.

GROSSMAN, Sanford J.; HART, Oliver D, *An Analysis of the Principal-Agent Problem*, in Econometrica, vol. 51, 1983, pp. 7-45.

GROSSMAN, Sanford; HART, Oliver, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, in Journal of Political Economy, August 1986, vol. 94, no. 4, pp. 691-719.

GROSSO, Patrizia, *Cessato il contratto, il "franchisee" deve lasciare i locali avuti in sub-locazione, Nota a ord. Trib. Milano sez. spec. Impresa 15 gennaio 2015*, in I Contratti, 2016, fasc. 3, pp. 246-248.

GROUT, Paul, *Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach*, in Econometrica, vol. 52, no. 2, 1984, pp. 449-460.

GRUNDMANN, Stefan; CAFAGGI, Fabrizio; VETTORI, Giuseppe, *The Contractual basis of Long-Term Organization – The Overall Archtecture*, in The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law, Oxford: Routledge, 2013.

GUERREIRO, José Alexandre Tavares, *Aplicação analógica da lei dos revendedores*, in Revista de direito mercantil, industrial, econômico e financeiro, v. 22, n. 49, p. 34-40, jan./mar. 1983.

GURIEV, Sergei; KVASOV, Dmitriy, *Contracting on Time*, in American Economic Review, vol. 5, no. 5, 2005, pp. 1369-1385.

HAICAL, Gustavo, *Apontamentos sobre o direito formativo extintivo de denúncia no contrato de agência*, in Judith Martins-Costa (coord.), Modelos de Direito Privado, São Paulo: Marcial Pons, pp. 294-331.

HASTINGS, David, *Análise Financeira de Projetos de Investimento de Capital*, Saraiva: São Paulo, 2012.

HART, Oliver, *Incomplete Contracts and the Theory of the Firm*, in Journal of Law, Economics, and Organization, 1988, vol. 4, issue 1, pp. 119-39.

HART, Oliver; MOORE, John, *Incomplete Contracts and Renegotiation*, in Econometrica, July 1988, vol. 56, no. 4, pp. 755-785.

HART, Oliver, MOORE, John, *Property Rights and the Nature of the Firm*, in Journal of Political Economy, vol. 98, no. 6, Dec., 1990, pp. 1.119-1.158.

HENRY, Xavier, *Les principes jurisprudentiels mal établis de la rupture brutale de l'article L. 442-6, I, 5° du code de commerce*, in Revue Trimestrielle de Droit Commerciale, 2018, pp. 523.

HERRERA, Alicia García, *La Duración del Contrato de Distribución Exclusiva*, Madrid: Editorial Tirant Lo Blanch, 2006.

HIRSHLEIFER, Jack, *Investment Decision Criteria,* in DURLAUF, Seven N.; BLUME, Lawrence, *The new Palgrave Dictionary of Economics*, vol. 10, I, Houndmills, Basingstoke: Palgram Macmillan, 2008.

IRRERA, Maurizio, *I profili fallimentare*, in Norme per la disciplina dell'affiliazione commerciale, a cura di Oreste Cagnasso, Torino: G. Giappichelli, 2005.

JANNARELLI, Antonio, *La strutturazione giuridica dei mercati nel sistema agroalimentare e l'art 62 della legge 24 marzo 2012 n. 27: un pasticcio italiano in salsa francese*, in Rivista di Diritto Agrario, vol. 4, pp. 545-597.

JOSKOW, Paul, *Asset Specificity and Vertical Integration*, in The New Palgrave Dictionary of Economics and Law, MacMillan, 1998.

KLASS, Michaell; RAPP, Richard, *Litigating the Key Economic Issues under Kodak*, in Antitrust, vol. 7, no. 14, 1992-1993.

KLEIN, Benjamin, *Hold-up problem*, in The new Palgrave dictionary of economics and the law, vol. 2: E-O, Basingstoke; New York: Palgrave Macmillan, 2002.

KLEIN, Benjamin, *Why 'Hold-Ups' Occur: The Self-Enforcing Range of Contractual Relationships*, Economic Inquiry, vol. 34,1996, pp. 444-463.

KLEIN, Benjamin; CRAWFORD, Robert G., and ALCHIAN, Armen A., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, Journal of Law and Economics, vol. 21, pp. 297 ss.

KLEIN, Benjamin; MURPHY, Kevin, *Vertical Restraints as Contract Enforcement Mechanisms*, in The Journal of Law & Economics, vol. 31, no. 2, Oct., 1988, pp. 265-297.

KLEIN, Saul; FRAZIER, Gary; ROTH, Victor. J, *A Transaction Cost Analysis Model of Channel Integration in International Markets*, in Journal of Marketing Research, May 1990, pp. 196-208.

KONDER, C. N, *Para além da 'principialização' da função social do contrato*, in Revista Brasileira de Direito Civil, v. 13, p. 39-59, 2017.

LABELLA, Enrico, *Responsabilità per improvvisa interruzione di relazioni commerciali, Nota a CGUE sez. II 14 luglio 2016 (causa C-196/15)*, in Europa e diritto privato, 2017, fasc. 4, pp. 1539-1551.

LAGHEZZA, Paolo, *Inadempimenti ed onere della prova: le sezioni unite e la difficile arte del rammendo. Nota a Cass. sez. un civ. 30 ottobre 2001, n. 13533*, in Il Foro italiano, 2002, fasc. 3, pt. 1, pp. 769-775.

LAMICELA, Mariella, *Abuso di dipendenza economica, buona fede e illecito in un sistema di accordi di distribuzione "a cascata". Nota a Cass. sez. III civ. 23 luglio 2014, n. 16787*, in I Contratti, 2015, pp. 246-25.

LANDRISCINA, Valeria, *L'abuso di dipendenza economica tre violazione del canone di buona fede e abuso del diritto*, in Giurisprudenza commerciale, 2011, pp. 1479 ss.

LAS CASAS, Antonio, *Tutele dell'investimento precontrattuale e razionalità economica: profili comparatistici*, Torino: Giappichelli, 2009.

LEONARDO, Rodrigo Xavier, *A denúncia e a resilição: críticas e propostas hermenêuticas ao art. 473 do CC/2002 Brasileiro*, in Revista de Direito Civil Contemporâneo, 2016, pp. 95-117.

LIBERTINI, Mario, *Il risarcimento del danno per la violazione di norme generali sulla concorrenza (antitruste e concorrenza sleale)*, in Risarcimento del danno da illecito concorrenziale e da lesione della proprietà intellettuale. Atti del Convegno SISPI, svoltosi a Castel Gandolfo, 20-22 marzo 2003, Giuffrè, Milano, 2003, pp. 163 ss.

LIBERTINI, Mario, *La responsabilità per abuso di dipendenza economica: la* fattiespecie, in Contratto e impresa, 2013, fasc. 1, pp. 1-19.

LIBERTINI, Mario, *L'impresa*, in Giuseppe Ferri e il legislatore: atti del Convegno commemorativo della nascita di Giuseppe Ferri: Roma, 23 ottobre 2008, a cura di Berardino Libonati, Napoli: Jovene, 2009.

LIBERTINI, Mario, *La tutela civile inibitoria, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti*, Napoli: Jovene, 1989.

LIBERTINI, Mario, *Nuove riflessioni in tema di tutela civile inibitoria e di risarcimento del danno*, in Rivista critica di diritto privato, 1995.

LIBERTINI, Mario, *Ancora sui rimedi civili conseguenti ad illeciti antitrust*, in Danno e responsabilità, 2005, pp. 237-251.

LIBERTINI, Mario, *Ancora sui rimedi civili conseguenti a violazioni di norme antitrust*, in Danno e responsabilità, 2004, pp. 933-941.

LIBERTINI, Mario, *I principi della correttezza professionale nella disciplina della concorrenza sleale*, in Europa e diritto privato, 1999, pp. 509-564.

LIBERTINI, Mario, *Il vincolo del diritto positivo per il giurista*, in Scritti in onore di Angelo Falzea, vol. 1 (teoria generale e filosofia del diritto), Milano: Giuffrè, 1991.

LIBERTINI, Mario, *La causa nei patti limitativi della concorrenza tra impresa*, in Diritto e libertà: studi in memoria di Matteo Dell'Olio, vol. I, Torino: G. Giappichelli, 2008.

LIBERTINI, Mario, *Posizione dominante individuale e posizione dominante collettiva Relazione al Convegno sul tema del controllo delle concentrazioni conglomerali, Roma 4 ottobre 2002*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2003, fasc. 9-10, pt. 1, pp. 543-584.

LIBERTINI, Mario, *Adeguata istruttoria e standard probatori nei procedimenti antitrust, Nota a Cons. Stato sez. VI 7 marzo 2008, n. 1006*, in Giornale di diritto amministrativo, 2008, fasc. 10, pp. 1105-1109.

LIBERTINI, Mario, *Tutela e promozione delle creazioni intellettuali e limiti funzionali della proprietà intellettuale, Relazione al Convegno "IP e diritto della concorrenza nella UE", Pavia, 13-14 settembre 2013*, in AIDA, 2014, pt. 1, pp. 299-336

LIBERTINI, Mario, *Clausole generali, norme di principio, norme a contenuto indeterminato. Uma proposta di distinzione*, in Rivista Critica di Diritto Privato, 2011, 345 ss.

LIBERTINI, Mario, *Autonomia individuale e autonomia d'impresa*, in I contratti per l'impresa, a cura di G. Gitti, M. Maugeri, M. Notari, Il Mulino, Bologna, 2012, vol. I, pp. 33-68.

LIBERTINI, Mario, *Diritto della Concorrenza dell'Unione Europea*, Milano: Giuffrè, 2014.

LIBERTINI, Mario, *Concorrenza,* in Enciclopedia del diritto – Annali III, Giuffrè, Milano, 2010, pp. 191-247.

LIBERTINI, Mario; GENOVESE, Anna, *Della disciplina della Concorrenza e dei consorzi, in Delle Società – Dell'Azienda – Della Concorrenza*, a cura di Daniele Santosuosso, in Commentario del Codice Civile, diretto da Enrico Gabrielli, Torino: UTET, 2014.

LILLA, Paulo Eduardo, *O Abuso de Direito na Denúncia dos Contratos de Distribuição: o Entendimento dos Tribunais Brasileiros e as Disposições no Novo Código*, in http://egov.ufsc.br/portal/sites/default/files/anexos/9165-9164-1-PB.pdf.

LIVI, Maria Alessandra, *Forma e contenuto del contratto*, in L'affiliazione commerciale, a cura di Vicenzo Cuffaro, Torino: G. Giappichelli, pp. 105-157.

LONGU, Tiziana, *Il divieto dell'abuso di dipendenza economica nei rapporti tra le imprese*, in Rivista di diritto civile, 2000, fasc. 3, pt. 2, pp. 345-387.

LUCCHESI, Francesca, *Le alternative soddisfacenti dell'impresa in stato di dipendenza economica*, in Obbligazioni e Contratti, 2006, fasc. 3, pp. 236-244.

LUMINOSO, Angelo, *I contratti tipici e atipici. Contratti di alienazione di godimento, di credito*, in Trattato di Diritto Privato, a cura di Iudica-Zatti, 1995.

LUMINOSO, Angelo; ZUDDAS, Godoffredo, *La mediazione, il contratto di agenzia*, in Trattato di diritto commerciale, diritto da Vincenzo Buonocore, Torino: G. Giappichelli, 2005.

LUMINOSO, Angelo, *Sulla responsabilità contrattuale ed extracontrattuale dell'impresa Relazione svolta al II Congresso giuridico per l'aggiornamento forense, Roma, 15-16-17 marzo 2007*, in Contratto e impresa, 2007, fasc. 4-5, pp. 917-932.

LUPI, André Lipp Pinto Basto, *Os contratos comerciais na declaração dos direitos de liberdade econômica (MP881/19),* in Revista Brasileira de Políticas Públicas, v. 9, n. 1, 2019.

MACARIO, Francesco, *Abuso di autonomia negoziale e disciplina dei contratti fra imprese: verso una nuova clausola generale?*, in Rivista di Diritto Civile, 2005, pp. 663-708.

MACARIO, Francesco, *Equilibrio delle posizioni contrattuali ed autonomia privata nella subfornitura*, in Equilibrio delle posizioni contrattuali ed autonomia privata, a cura di Lanfranco Ferroni, Napoli: Edizioni Scientifiche Italiane, 2002.

MACARIO, Francesco, *Recesso* ad nutum *e valutazione di abusività dei contratti tra imprese: spunti da una recente sentenza della Cassazione*, in Corriere giuridico, 2009, pp. 1577 ss.

MACARIO, Francesco, *Genesi, evoluzione e consolidamento di una nuova clausola generale: il divieto di abuso di dipendenza economica*, in Giustizia civile, 2016, fasc. 3, pp. 509-546.

MACARIO, Francesco, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli: Jovene, 1996.

MACARIO, Francesco, *Sopravvenienze e gestione del rischio nell'esecuzione del terzo contratto,* in Gregorio Gitti e Villa Gianroberto, Il terzo contratto: L'abuso di potere contrattuale, Bologna: Mulino, 2009, pp. 179 ss.

MACLEOD, W. Bentley; MALCOMSON, James M, *Investments, Holdup, and the Form of Market Contracts*, in American Economic Review, vol. 83, issue 4, 1993, pp. 811-837.

MASTEN, Scott E.; CROCKER, Keith J, *Efficient Adaptation in Long-Term Contracts: Take-or-Pay Provisions for Natural Gas*, in American Economic Review, vol. 75, no. 5, 1985, pp. 1083-93.

MAFFEIS, Daniele, *Art. 9*, in La subfornitura: Legge 18 giugno 1998, n. 192, a cura Giorgio de Nova, Ipsoa, Milano, 1998, p. 77 ss.

MAGRI, Geo, *Precetti e sanzioni nella nuova disciplina dell'affiliazione commerciale*, Giurisprudenza Italiana, 2006, 2215 e ss.

MAIA, Felipe Fernandes Ribeiro, *A limitação da eficácia da resilição unilateral dos contratos como manifestação positiva do princípio da confiança: o parágrafo único do artigo 473 do código civil*, in Revista IOV de Direito Civil e Processo Civil, 2010, pp. 118-136.

MANCINI, Giuseppe, *Prime osservazioni sul recesso straordinario*, in Studi in onore di Francesco Santoro Passarelli, Napoli, Jovene, 1972, vol. V, pp. 643-676.

MANTUCCI, Daniele, *Profili del contratto di subfornitura*, Napoli: Edizioni scientifiche italiane, 2004.

MARCUS, Alan J.; MOHANTY, Pitabas; BODIE, Zvi and KANE, Alex, *Investiments*, 2010, São Paulo: Mc Graw Hill.

MARTINS-COSTA, Judith, *A boa-fé no direito privado: critérios para a sua aplicação*, São Paulo: Marcial Pons, 2016.

MASTRORILLI, Annachiara*, L'abuso del diritto e il terzo contratto, Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Danno e responsabilità, 2010, pp. 352-357.

MAUCERI, Tommaso, *Sopravvenienze perturbativa e rinegoziazione del contratto*, in Europa e Diritto Privato, 2007, pp. 1095 ss.

MAUGERI, Maria Rosario, *Concessione di vendita, recesso e abuso del diritto. Note critiche a Cass. n. 20106/2009*, in Nuova giurisprudenza civile e commerciale, 2010, pp. 319-336.

MAUGERI, Maria Rosaria, *Le recenti modifiche della disciplina sull'abuso di dipendenza economica in una prospettiva comparatistica*, in Europa e diritto privato, 2002, pp. 455-509.

MAUGERI, Maria Rosario, *Abuso di dipendenza economica e autonomia privata*, Milano: Giuffrè, 2003.

MAURO, Mario, *Contratti della filiera agroalimentare: squilibrio ed effettività dei rimedi*, in Persona e mercato, 2016, fasc. 1, pp. 18 ss.

MAURO, Mario, *Contratti della filiera agroalimentare, squilibrio e rimedi. Il punto sull'art. 62 d.l. 1/2012*, in Agricoltura Istituzioni Mercati, 2015, fasc. 1, pp. 31-66.

MAZZAMUTO, Salvatore, *La comminatoria di cui all'art. 614 bis c.p.c. e il concetto di infungibilità processuale*, in Europa e diritto privato, 2009, fasc. 4, pp. 947-1008.

MAZZAMUTO, Salvatore, *Problemi e momenti dell'esecuzione in forma specifica*, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti, Napoli: Jovene, 1989.

MAZZAMUTO, Salvatore, *I rimedi*, in Manuale di diritto privato europeo, a cura di Carlo Castronovo, Salvatore Mazzamuto, vol. 2, Milano: A. Giuffrè, 2007.

MEDICI, Chiara, *Abuso di dipendenza economica: la prima volta dell'Autorità Commento a provv. Autorità garante concorrenza e mercato 26 novembre 2016, n. 26251*, in Mercato concorrenza regole, 2016, pp. 549-559.

MELI, Marisa, *Contratti di distribuzione*, in Portale Treccani – Enciclopedia Giuridica, Istituto della Enciclopedia Italiana, Roma, 2012.

MENEZES CORDEIRO, Antônio, *Direito Comercial*, Coimbra: Almedina, 2012.

MENEZES CORDEIRO, Antônio, *Tratado de Direito Civil Português*, t. IV, Coimbra: Almedina, 2012.

MERLUZZI, Orlando, *Rede de Concessionárias, Setor Automotivo, Tendências, Montadoras: Hora de repensar o modelo de distribuição de veículos no Brasil*, in https://oleodieselnaveia.com/2018/06/10/montadoras-hora-de-repensar-o-modelo-de-distribuicao-de-veiculos-no-brasil/ (2018).

MIOTTO, Linda, *Recesso* ad nutum*, abuso e ragioni dell'impresa*, in Giurisprudenza Commerciale, 2012, pp. 881 ss.

MIRANDA, Custodio da Piedade Ubaldino, *Comentários ao código civil: v. 5 (arts. 421 a 480)*, Dos contratos em geral, coordenador: Antônio Junqueira de Azevedo, São Paulo: Saraiva, 2013.

MIRAVALLS, Martì Jaume, *Il recesso unilaterale "ad nutum" ed il risarcimento dei danni nei contratti di distribuzione: il risarcimento per gli investimenti non ammortizzati nell'ordinamento giuridico spagnolo*, in Rassegna di diritto civile, 2013, pp. 1190-1210.

MOREIRA, Egon Bockmann, *Direito das concessões de serviço público: inteligência da Lei 8.987/1995: parte geral*, São Paulo: Malheiros, 2010.

MONCALVO, Fabrizio Armando, *Il contratto di concessione di vendita, nel quadro dei contratti per la distribuzione commerciale*, in La Nuova giurisprudenza civile commentata, 2008, fasc. 4, pt. 2, pp. 93-119.

MONTICELLI, Nicola, *Dall'abuso del diritto all'abuso di dipendenza economia: un'indagine sulla dipendenza economica tra modello francese ed italiano*, Forense Editrice: Roma, 2006.

MORESCHINI, Gabriele, *I contratti pendenti nel concordato preventivo*, Giuffrè: Milano, 2016.

MUSSO, Alberto*, La subfornitura: Legge 18 giugno 1998, n. 192: titolo 3, dei singoli contratti, suplemento*, Bologna: Zanichelli, 2003.

NADER, Paulo, *Curso de direito civil*, v. III, Rio de Janeiro: Forense, 2018.

NAVARRETTA, Emanuela, *Buona fede oggettiva, contratti di impresa e diritto europeo. Relazione su "Contratti di impresa e principio di buona fede", tenuta al Convegno "Il diritto europeo dei contratti d'impresa. Autonomia negoziale dei privati e regolazione del mercato", Siena, 22-24 settembre 2004*, in Rivista di diritto civile, 2005, fasc. 5, pt. 1, pp. 507-538.

NAVARETTA, Emanuela, *Principio di uguaglianza, principio di non discriminazione e contratto, Relazione tenuta al XXII Incontro nazionale del Coordinamento Dottorati di Ricerca in Diritto Privato, Trieste, 30 gennaio, 1 febbraio 2014*, in Rivista di diritto civile, 2014, fasc. 3, pp. 547-566.

NATALI, Luca Christian, *Abuso di dipendenza economica e "debolezza" relativa dell'impresa subfornitrice, Nota a ord. Trib. Bari 17 gennaio 2005*, in I Contratti, 2005, fasc. 10, pp. 896-905.

NATOLI, Roberto, *Brevi note sull'abuso di dipendenza economica contrattuale. Nota a ord. Trib. Bari 6 maggio 2002*, in Giurisprudenza italiana, 2003, pp. 724-727.

NATOLI, Roberto, *Abuso del diritto e abuso di dipendenza economica*, in I Contratti, 2010, fasc. 5, pp. 524-531.

NATOLI, Roberto, *L'abuso di dipendenza economica: il contratto e il mercato*, Jovene: Napoli, 2004.

NATOLI, Roberto, *L'abuso di dipendenza economica,* in Mercati regolati, vol. V, in Trattato dei contratti, diretto da Vincenzo Roppo, condirettore Alberto M. Benedetti, Milano: Giuffrè, 2014.

NATOLI, Ugo, *Note preliminar ad uma teoria dell'abuso del diritto nell'ordinamento italiano,* in Rivista trimestrale di diritto e procedura civile, 1958.

NERVI, Andrea, *Contratti di distribuzione e "recovery period rule"*, in Rivista di diritto dell'impresa, 2014, pp. 255-270.

NERVI, Andrea, *The "Recovery Period Rule" in the Distribution Contracts: Some Remarks under Italian Law*, in Osservatorio del diritto civile e commerciale, 2014, pp. 373 ss.

NERVI, Andrea, *Interruzione abusiva del rapporto contrattuale e rimedi esperibili Relazione al convegno "Crisi economica e categorie civilistiche", Associazione Civilisti italiani e Consiglio Nazionale Forense, Roma, 28 e 29 giugno 2013*, in Rivista di diritto privato, 2013, fasc. 4, pp. 487-499.

NERY JUNIOR, Nelson, *Negócio Jurídico Temporária e abuso de direito*, in Nelson Nery Junior, Soluções Práticas, 2010, pp. 79-116.

NERY JUNIOR, Nelson, *Constituição Federal comentada e legislação constitucional,* São Paulo : Revista dos Tribunais, 2017.

NESI, Ettore; RIGHI, Roberto, *Osservazioni sulla sentenza della Corte giustizia dell'Unione Europea, sez. v, 14 luglio 2016, in C-458/14 e C-67/15, con particolare riferimento ai suoi effetti sui rapporti concessori in atto, Nota a CGUE sez. V 14 luglio 2016 (cause riunite C-458/14 e C-67/15)*, in GiustAmm.it, 2016, fasc. 11, pp. 42 ss.

NICITA, Antonio; SCOPPA, Vincenzo, *Economia dei Contratti*, Carocci: Roma, 2005.

NICOLINI, Giovanni, *Subfornitura e attività produttive: commento alla L. 18 giugno 1998, n. 192*, Milano: Giuffrè, 1999.

NIVARRA, Luca, *Alcune osservazioni in tema di franchising e abuso di dipendenza economica*, in AA. VV., Studi in onere di Gerhard Schricker, Milano, 2005.

NIVARRA, Luca, *I rimedi specifici*, in Europa e diritto privato, 2011, fasc. 1, pp. 157-201.

NOCERA, Raffaella, *Il contratto di somministrazione*, Milano: Giuffrè, 2010.

NÖLDEKE, Georg; SCHMIDT, Klaus, *Option contracts and renegotiation: a solution to the hold-up problem*, in RAND Journal of Economics, vol. 26, no. 2, Summer 1995, pp. 163-179.

NORTH, Douglas, *Institutions*, *Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990.

NORTH, Douglas, *Institutions and credible commitment*, in Journal of Institutional and Theoretical Economics, vol. 149, no. 1, 1993, pp. 11–23.

OCCELLI, Federico*, L'abuso di dipendenza economica come clausola generale? Nota a App. Milano sez. I civ. 15 luglio 2015*, in Giurisprudenza italiana, 2015, pp. 2666-2669.

OCCELLI, Federico, *Abuso di dipendenza economica, possibili rimedi e regola di buona fede Nota a ord. Trib. Catania sez. civ. 22 dicembre 2014*, in Giurisprudenza italiana, 2015, pp. 2414-2416.

OLIVEIRA, Murilo Carvalho Sampaio. *A resignificação [i.e. ressignificação] da dependência econômica*, in Revista dos tribunais, São Paulo, v. 100, n. 914, p. 321-350, dez. 2011.

OPPO, Giorgio, *Principi*, in Trattato di diritto commerciale, diretto da Vincenzo Buonocore, Torino: G. Giappichelli, 2001.

ORLANDI, Mauro, *Contro l'abuso del diritto (in margine a Cass. 18 settembre 2009, n. 20106)*, In Nuova giurisprudenza civile commentato, 2010, p. 129 ss.

OSTI, Cristoforo, *L'abuso di dipendenza economica*, in Mercato concorrenza regole, 1999, pp. 9 ss.

OSTI, Cristoforo, *Primo affondo dell'abuso di dipendenza economica, Nota a ord. Trib. Bari 6 maggio 2002*, in Il Foro italiano, 2002, pp. 2183-2190.

OSTI, Cristoforo, *Nuovi obblighi a contrarre*, Torino: G. Giappichelli, 2004.

PAGLIANTINI, Stefano, *Il "pasticcio" dell'art. 62 l. 221/2012: integrazione equitativa di un contratto parzialmente nullo ovvero responsabilità precontrattuale da contratto sconveniente?*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2014, fasc. 2, pt. 2, pp. 169-195.

PALMIERI, Alessandro, *Abuso di dipendenza economica: battuta d'arresto o pausa di riflessione? Commento a ord. Trib. Taranto 22 dicembre 2003 e ord. Trib. Catania 5 gennaio 2004*, in Danno e responsabilità, 2004, fasc. 4, pp. 430-432.

PALMIERI, Alessandro, PARDOLESI, Roberto, *Intesa illecita e risarcimento a favore di una parte: "chi è causa del suo mal ... si lagni e chieda i danni", Nota a Corte giust. CE 20 settembre 2001, causa C-453/99,* in Il Foro italiano, 2002, fasc. 2, pt. 4, pp. 76-84

PANETTI, Francesco*, Buona fede, recesso* ad nutum *e investimenti non recuperabili dell'affiliato nella disciplina dei contratti di distribuzione: in margine a Cass., 18 settembre 2009, n. 20106. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Rivista di diritto civile, 2010, pp. 654-687.

PARDOLESI, Roberto, *I contratti di distribuzione*, Jovene: Napoli, 1979.

PARDOLESI, Roberto, *Contratti di Distribuzione*, in Enciclopedia Giuridica Treccani, 2007.

PARDOLESI, Roberto, *Analisi economica del diritto*, in Digesto, vol. IV, disciplina privato, Torino, 1987.

PARDOLESI, Roberto, *Nuovi abusi contrattuali: percorsi di una clausola generale*, in Danno e responsabilità, 2012, pp. 1165-1177.

PARDOLESI, Roberto, PALMIERI, Alessandro, *Della serie "a volte ritornano": l'abuso del diritto alla riscossa, Nota a Cass. sez. III civ. 18 settembre 2009 n. 20106*, in Il Foro italiano, 2010, fasc. 1, pt. 1, pp. 95-98.

PARDOLESI, Roberto, *I rimedi*, in Lezioni sul contratto, raccolte da Andrea Orestano, Torino: Giappichelli, 2009.

PATTERSON, Edwin W., *The apportionment of business risk through legal devices,* in Columbia Law Review, vol. 24, 1924, pp. 357-359.

PEREIRA, Caio Mário da Silva, *Instituições de direito civil*, vol. III, Rio de Janeiro: Forense, 2014.

PARINI, Maria Margherita, Francising *e obblighi di* disclosure*, Intervento al convegno "Contratti fra imprese e tutela dell'imprenditore debole", Verona, 17 settembre 2011*, in La Nuova giurisprudenza civile commentata, 2012, pp. 783-797.

PARISI, Francesco, Cenini, Marta, *Interesse positivo, interesse negativo e incentivi nella responsabilità contrattuale: un'analisi economica e comparata***,** in Rivista di diritto civil*e,* 2008, fasc. S1, pp. 219-242.

PASSOS, Herculano, *O setor da distribuição de veículos a serviço da mobilidade,* in http://herculanopassos.com.br/site/wp-content/uploads/2016/02/cartilha_Frente_DistribuicaoVeiculosAutomotores_Mobilidade.pdf (2015).

PATTI, Salvatore, *Risoluzione per inadempimento, contratti di durata e contratto di appalto d'opera. Relazione al Convegno "Il contratto e le tutele. Prospettive di diritto europeo", Università Roma Tre, Roma 31 maggio/1 giugno 2002*, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2002, fasc. 7-10, pt. 1, pp. 521-537.

PEREIRA, Caio Mário da Silva, *Responsabilidade civil*, Rio de Janeiro: Forense, 2018.

PERFETTI, Luca R., *Brevi note in tema di affidamento del servizio distribuzione gas, ammortamento degli investimenti e responsabilità del concedente*, in Giustizia amministrativa, 2010, fasc. 2, pp. 141-145.

PERLINGIERI, Pietro, *La contrattazione tra imprese*, in Rivista di diritto dell'impresa, 2006, fasc. 3, pp. 323-349.

PERLINGIERI, Pietro, *Il "giusto rimedio" nel diritto civile*, in il giusto processo civile, a. 2011, v. 6, fascicolo 1, pp. 1-23.

PERLINGIERI, Pietro, *Nuovi Profili Contrattuali*, in Il diritto dei contratti fra persona e mercato: problemi del diritto civile, Napoli: Edizioni scientifiche italiane, 2003, pp. 415-439.

PESCATORE, Valerio, *Forme di controllo, rapporti tra imprenditori e ordine pubblico economico, Intervento al convegno "Contratti fra imprese e tutela dell'imprenditore debole", Verona, 16 novembre 2011*, in Obbligazioni e contratti, 2012, fasc. 3, pp. 166-173.

PETRELLI, Luca, *L'art. 62 dopo le ultime decisioni, Relazione al Convegno "La disciplina del commercio interno ed internazionale dei prodotti alimentari", Roma, 29 novembre 2013*, in Rivista di Diritto Alimentare, 2014, fasc. 1, pp. 12 ss.

PITCHEFORD, Rohan; SYNDER, Christopher, *A solution to the hold-up problem involving gradual investment*, in Journal of Economic Theory, vol. 114, no. 1, 2004, pp. 88-103.

PIGNALOSA, Maria Pia, *Abuso di dipendenza economica e tutela dell'imprenditore debole, (art. 9, legge 18 giugno 1998, n. 192)*, in Codice della concorrenza e del mercato, a cura di A. Catricalà e P. Troiano, Torino: UTET, 2010.

PINHEIRO, Rosalice, *O abuso do direito e as relações contratuais*, Rio de Janeiro: Renovar, 2002.

PINTO, Fernando A. Ferreira, *Contratos de distribuição: da tutela do distribuidor integrado em face da cessação do vínculo*, Lisboa: Universidade Católica, 2013.

PINTO MONTEIRO, António, *Contratos de distribuição Comercial*, Coimbra: Almedina, 2004.

PINTO, Vincenzo, *L'abuso di dipendenza economica "fuori dal contratto" tra diritto civile e diritto* antitrust, in Rivista di Diritto Civile, 2000, pp. pp. 389-428.

PIRODDI, Paola, *La subfornitura nel diritto internazionale privato comunitario*, Padova: CEDAM, 2004.

PIRRONG, Stephen Craig, *Contracting Practices in Bulk Shipping Markets: A Transactions Cost Explanation, The Journal of Law & Economics,* vol. 36, no. 2, 1993, pp. 937-976.

PORTALE, Giuseppe B., Dal codice civile del 1942 alle (ri)codificazioni: la ricerca di un nuovo diritto commerciale, in *Rivista del Diritto Commerciale e del diritto generale delle Obligazioni,* n. 1, 2019, pp. 79 s.

PRATI, Luca; CARDINI, Alessandra, *I rapporti di subfornitura*, Milano: IPSOA, 1999.

PROSPERI, Francesco, *L'abuso di dipendenza economica*, in La responsabilità d'impresa, a cura di Guido Alpa e Giuseppe Conte, Milano: Giuffrè, 2015.

PUGLIATTI, Salvatore, *Autoresponsabilità*, in Enciclopedia del diritto, vol. IV, pp. 452 ss.

QUARTICELLI, Paola, *Abuso di dipendenza economica ed "estorsione" post-contrattuale, Nota a ord. Trib. Trieste 21 settembre 2006*, in I Contratti, 2007, fasc. 2, pt. 1, pp. 114-118.

QUATTROCCHIO, Luciano Matteo, *Forma e contenuto del contratto*, in Norme per la disciplina dell'affiliazione commerciale, a cura di Oreste Cagnasso, Torino: G. Giappichelli, 2005.

RAVERA, Enrico, *Il recesso*, Milano: Giuffrè, 2004.

REALE, Miguel, *Estrutura normativa da lei n. 6.729 sobre concessões comerciais entre produtores e distribuidores de veículos automotores,* in Revista da Faculdade de Direito da Universidade de São Paulo, v. 91, 1996, p. 63-102.

REALE, Miguel, *Supervisor da Comissão Revisora e Elaboradora do Código Civil*, in Revista da EMERJ, n. especial pt.1, fev./jun. 2002, pp. 9-34.

REALE, Miguel, *Resilição dos contratos por tempo indeterminado*, in Miguel Reale, Questões de Direito Privado, São Paulo: Saraiva, 1997.

REALFONZO, Umberto, *Le concessioni nel nuovo Codice dei contratti pubblici*, in GiustAmm.it, 2016, fasc. 4, pp. 18 ss.

RENDA, Andrea, *Esito di contrattazione e abuso di dipendenza economica: un orizzonte più sereno o la consueta "*pie in the sky*"*, in Rivista di diritto dell'impresa, 2000, pp. 243-303.

RENNA, Luca, *L'abuso di dipendenza economica come fattispecie transtipica*, in Contratto e impresa, 2013, pp. 370-400.

REQUIÃO, Rubens Edmundo, *O contrato de representação comercial e o novo Código Civil. O contrato de agência e distribuição. O poder de denunciar o contrato sem prazo determinado e o dever de indenizar os investimentos realizados pelo representante ou pelo agente*, in Revista do Instituto dos Advogados do Paraná, 2002, pp. 206-221.

RESCIGNO, Pietro, *L'abuso del diritto*, in Rivista di diritto civile, 1965, I, pp. 205 e ss.

RESCIGNO, Pietro, *Edizioni musicali e durata del contratto*, in Rivista di diritto civile, 1989, fasc. 4, pt. 1, pp. 417-438.

RESTIVO, Carmelo, *Contributo ad una teoria dell'abuso del diritto*, Giuffrè: Milano, 2007.

RESTIVO, Carmelo, *Abuso del diritto e autonomia privata. Considerazioni critiche su una sentenza eterodossa*, in Rivista critica del diritto privato, 2010, pp. 341-367.

REVET, Thierry, *L'indemnisation du distributeur à l'occasion de la rupture du contrat -Quelle rationalité ?*, in RDC 2015, n. 112p1, p. 1005.

RINALDI, Raimondo; Turitto, Francesca, *L'abuso di dipendenza economica, in La disciplina del contratto di subfornitura nella Legge n.192 del 1998*, a cura di Piergiorgio Sposato e Massimo Coccia, Torino: G. Giappichelli, 1999.

RIZZIOLI, Sebastiano, *La disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e alimentari tra prospettive di diritto dell'Unione europea e legislazione alimentare interna*, in Le Nuove leggi civili commentate, 2013, fasc. 2, pp. 239-273

ROCCHIO, Flavio, *Recesso legale da contratti di servizi a termine convenzionale?, Nota a Cass. sez. II 14 gennaio 2016, n. 469*, in Giurisprudenza italiana, 2016, fasc. 3, pp. 539-54.

RODOTÀ, Stefano, *Il tempo delle clausole generali*, in Rivista Critica di Diritto Privato, 1987, p. 709-733.

RODOTÀ, Stefano*, Le fonti de integrazione del contrato,* Milano: A. Giuffre*,* 2004.

ROGERSON, William P., *Efficient Reliance and Damages Measures for Breach of Contract*, in RAND Journal of Economics, vol. 15, 1984, pp. 39-53.

ROMANO, Valerio Cosimo, *La natura della responsabilità da abuso di dipendenza economica tra contratto, illecito aquiliano e culpa in contrahendo, Nota a ord. Cass. sez. un. civ. 25 novembre 2011, n. 24906*, in La Nuova giurisprudenza civile commentata, 2012, fasc. 4, pt. 1, pp. 302-306.

ROMANO, Valerio Cosimo, *Problemi scelti in tema di abuso di dipendenza economica da ritardo nei pagamenti commerciali. Commento a provv. Autorità garante concorrenza e mercato 23 novembre 2016, n. 26251*, in Danno e responsabilità, 2017, fasc. 3, pp. 382-384.

ROMANO, Rosaria, *Innovazione, rischio e "giusto equilibrio" nel divenire della proprietà intellettuale*, in Rivista di diritto civile, 2015, fasc. 3, pp. 532-553

ROSENKRANZ, Stephanie; Schmitz, Patrick W., Know-How Disclosure and Incomplete Contracts, in Economics Letters, Elsevier, vol. 63, no. 2, May 1999, pp. 181-185.

RUSSO, Luigi, *Il contratto di rete in agricoltura*, in Rivista di diritto civile, 2015, fasc. 1, pp. 181-208.

RUVOLO, Michele, *Questioni giurisprudenziali in tema di subfornitura industriale, abuso di dipendenza economica e contratti di distribuzione*, in Corriere giuridico, 2010, fasc. 5, pp. 599-609.

SACCO, Rodolfo, *L'abuso del diritto soggettivo*, in Trattato di diritto civile, diretto da Rodolfo Sacco, Torino, 2001.

SAENZ, Fernando, *La indemnización por clientela em los contratos de agencia e concesión*, Madrid: Civitas, Madrid: Monografías Civitas, 1995.

SAENZ, Joseba A. Echabarria, *El contrato de franquicia: definición y conflitos em las relaciones internas*, Madrid: MacGraw-Hill, 1995.

SALERNO, Francesco, *Abuso del diritto, buona fede, proporzionalità: i limiti del diritto di recesso in un esempio di* jus dicere *"per principi", Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Giurisprudenza italiana, 2010, fasc. 4, pp. 809-814

SALOMÃO FILHO, Calixto, *Direito concorrencial: as condutas*, São Paulo: Malheiros, 2007.

SALVI, Cesare, *Risarcimento del danno*, in Enciclopedia del diritto, vol. XV, 1989.

SALVI, Cesare, *La responsabilità civile*, Milano: Giuffrè, 2005.

SALVI, Cesare, *Il risarcimetno del danno in forma specifica*, in Salvatore Mazzamuto, Processo e tecniche di attuazione dei diritti, Napoli: Jovene, 1989.

SALVI, Cesare, *Abuso del diritto*. I) Diritto civile, in Enciclopedia giuridica, vol. I, Roma, 1988.

SANGIORGI, Salvatore, *Rapporti di durata e recesso* ad nutum, Milano: Giuffrè, 1965.

SANTOLIM, Cesar, *A proteção dos investimentos específicos na resilição unilateral do contrato e o risco moral: uma análise do artigo 473, parágrafo único, do Código Civil*, in Revista Síntese, 2013, pp. 9-13.

SARACINI, Eugenio; TOFFOLETTO, Franco, *Il contratto d'agenzia: artt. 1742-1753*, Milano: Giuffrè, 2014.

SCAGLIONE, Francesco, *Abuso di potere contrattuale e dipendenza economica. Nota a Cass. sez. III civ. 18 settembre 2009, n. 20106*, in Giurisprudenza italiana, 2010, fasc. 3, pp. 560-562.

SCAGLIONE, Francesco, *L'abuso del diritto tra buona fede "in executivis" e causa del contratto, Nota a Cass. sez. I civ. 24 agosto 2016, n. 17291*, in La Nuova giurisprudenza civile commentata, 2017, fasc. 1, pt. 1, pp. 24-29.

SCARPA, Dario, *Rete di imprese in prospettiva industrial: adeguata e congruità quali criteri fondant la struttura*, in Rivista di Diritto Industriale, 2014, pp. 48 ss.

SCARSO, Alessandro, *Il contraente debole*, Torino: G. Giappichelli, 2006.

SCARSO, Alessandro P., *Abuso di dipendenza economica, autonomia contrattuale e diritto antitrust (Pt. I)*, in Responsabilità civile e previdenza, 2008, fasc. 2, pp. 261-278.

SCARSO, Alessandro P., *Abuso di dipendenza economica, autonomia contrattuale e diritto antitrust (Pt. II)*, in Responsabilità civile e previdenza, 2008, fasc. 3, pp. 512-534.

SCARSO, Alessandro Pietro, *L'applicazione dell'art. 9, l. n. 192/1998, ad un contratto di utenza telefonica stipulato tra imprenditori. Nota a ord. Trib. Trieste 21 settembre 2006*, in Responsabilità civile e previdenza, 2008, fasc. 10, pp. 2112-

SCOGNAMIGLIO, Claudio, *Il nuovo diritto dei contratti: buona fede e recesso dal contratto, Relazione al Convegno "Il nuovo diritto dei contratti: problemi e prospettive", Crotone, 24-26 maggio 2001*, in Europa e diritto privato, 2003, fasc. 4, pp. 797-817.

SCOGNAMIGLIO, Claudio, *Abuso del diritto, buona fede, ragionevolezza (verso una riscoperta della pretesa funzione correttiva dell'interpretazione del contratto?), Rielaborazione della relazione presentata al Convegno "Autonomia privata, recesso e abuso del diritto", Facoltà di Giurisprudenza dell'Università degli Studi di Siena, 20-21 novembre 2009*, in La Nuova giurisprudenza civile commentata, 2010, fasc. 3, pt. 2, pp. 139-147

SCHÄFER, Hans-Bernd; OTT, Claus (tradotto del tedesco da Matthew Braham), *The economic analysis of civil law*, Cheltenham, UK; Northampton, MA: Edward Elgar, 2004.

SCHIAVONE, Giovanni, *L'osservatorio di merito, Rassegna di giurisprudenza di Tribunali*, in Obbligazioni e Contratti, 2009, fasc. 1, pp. 77-80.

SCHREIBER, Anderson, *Alterações da MP 881 ao Código Civil – Parte I*, in http://www.cartaforense.com.br/conteudo/colunas/alteracoes-da-mp-881-ao-codigo-civil---parte-i/18342.

SCHWARTZ, Alan, *Incomplete contract*, in The new Palgrave dictionary of economics and the law, vol. 2: E-O, Basingstoke; New York: Palgrave Macmillan, 2002.

SCHWARTZ, Alan, *Relational Contract in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, in The Journal of Legal Studies, vol. 21, no. 2, jun. 1992, pp. 271-318.

SEGAL, Ilya R.; WHINSTON, Michael D., *Exclusive contracts and protection of investments*, in RAND Journal of Economics, vol. 31, no. 4, Winter 2000, pp. 603-633.

SEGAL Ilya R.; WHINSTON, Michael D., *The Mirrlees Approach to Mechanism Design with Renegotiation with Applications to Hold-Up and Risk Sharing*, in Econometrica, vol. 70, no. 1, January, 2002, pp. 1-45.

SHAVELL, Steven, *Damages Measures for Breach of Contract*, in Bell Journal of Economics, vol. 11, 1980, pp. 466-490.

SHAVELL, Steven, *The Design of Contracts and Remedies for Breach*, in Quarterly Journal of Economics, vol. 99, 1984, pp. 121-147.

SIMON, François-Luc, *Rupture brutale des relations commerciales établies: le nouvel article L. 442-1, II, du Code de commerce*, in L'ESSENTIEL Droit de la distribution et de la concurrence - n°06, p. 4.

SIMON, Herbert, *A Behavioral Model of Rational Choice*, in The Quarterly Journal of Economics, vol. 69, no. 1, Feb., 1955, pp. 99-118.

SIMONINI, Gian Franco, *L'assistenza* post *vendita delle autovetture: le singolari problematiche di un piccolo costruttore*, in Rivista di Diritto Industriale, 2015, pp. 152 ss.

SIMONINI, Gian Franco, *Il contratto di concessione di vendita nel settore automobilistico profili evolutivi della nostra giurisprudenza*, in Contratto e impresa, 2013, pp. 1216-1252.

SIMONINI, Gian Franco, *Nuovi profili di valutazione del contratto di concessione di vendita (New profiles for the evaluation of agency agreements), Nota a CGUE sez. I 19 dicembre 2013 (causa C-9/12)*, in Il Diritto dell'economia, 2015, fasc. 3, pp. 649-666.

SMORTO, Guido, *Il danno da inadempimento*, Padova: CEDAM, 2005.

SPACCAPELO, Chiara, *Abuso di dipendenza economica e provvedimento d'urgenza, Nota a Trib. Trieste 20 settembre 2006*, in Giurisprudenza italiana, 2007, fasc. 7, pp. 1739-1743.

SPADA, Paolo, *Conclusioni, Relazione al Convegno "IP e costituzioni", Università di Pavia, 23-24 settembre 2005*, in AIDA, 2005, pt. 1, pp. 217-221.

SPOLIDORO, Marco Saverio, *Riflessioni critiche sul rapporto fra abuso di posizione dominante e abuso dell'altrui dipendenza economica*, in Rivista di diritto industriale, 1999, fasc. 4-5, pt. 1, pp. 191-215.

STOFFEL-MUNCK, Philippe, *Abus de droit, agrément et rupture fautive*, in Revue des contrats, n. RDCO2005-2-011, p. 288.

STOFFEL-MUNCK, Philippe, *Terme du contrat*, in Revue des contrats, n. RDCO2004-3-009, p. 647.

STREMITZER, Alexander, *Standard Breach Remedies, Quality Thresholds, and Cooperative Investments,* in Journal of Law, Economics, Organization, vol. 28, no. 2, pp. 337-359.

TANZARELLA, Elena, *La nuova disciplina del Franchising*, in Rassegna di diritto civile, 2005, pp. 559 e ss.

TARUFFO, Michele, *La prova dei fatti giuridici: nozioni generali*, Milano : A. Giuffrè, 1992, in Trattato di diritto civile e commerciale, già diretto da Antonio Cicu, Francesco Messineo, Luigi Mengoni; continuato da Piero Schlesinger.

TASSONE, Bruno, *Non solo moda (ma anche rewriting contrattuale): commento alla prima decisione in materia di abuso di dipendenza economica, Commento a ord. Trib. Bari 6 maggio 2002*, in Danno e responsabilità, 2002, fasc. 7, pp. 768-777.

TASSONE, Bruno, "*Uncoscionability" e abuso di dipendeza economica*, in Rivista di diritto privato, 2001, pp. 527-582.

TARTUCE, Flavio, *A Medida Provisória da "Liberdade Econômica" e a Desconsideração da Personalidade Jurídica (Art. 50, CC): Primeiras Impressões*, in http://genjuridico.com.br/2019/05/06/a-medida-provisoria-da-liberdade-economica-e-a-desconsideracao-da-personalidade-juridica-art-50-cc-primeiras-impressoes/.

TEPEDINO, Gustavo, *A resilição unilateral imotivada nos contratos sucessivos*, in Gustavo Tepedino, Soluções Práticas, 2011, pp. 173 - 198.

TEPEDINO, Gustavo, *Validade e efeitos da resilição unilateral dos contratos*, in Gustavo Tepedino, Soluções Práticas, 2011, pp. 571-584.

TEPEDINO, Gustavo, *Das Várias Espécies de Contrato. Do Mandato. Da Comissão. Da Agência e Distribuição. Da Corretagem. Do Transporte*, in Comentários ao Novo Código Civil, coordenador Sávio de Figueirado Teixeira, Forense: Rio de Janeiro, 2008.

TEPEDINO, Gustavo, *Evolução da autonomia privada e o papel da vontade na atividade contratual*, in Revista do Ministério Público do Estado do Rio de Janeiro, n. 53, p. 141-154, jul./set. 2014.

TEPEDINO, Gustavo, Cris*e de fontes normativas e técnica legislativa na parte geral do Código civil de 2002*, in Revista forense, v. 98, n. 364, p. 113-123, nov./dez. 2002.

TEPEDINO, Gustavo, *Editorial*, in Revista Brasileira de Direito Civil, v. 20, n. 2, 2019.

TEPEDINO, Gustavo, BODIN DE MORAES, Maria Celina, BARBOZA, Heloísa Helena, *Código civil interpretado: conforme a Constituição da República*, Rio de Janeiro: Renovar, 2007, vol. 1 e 2.

TEPEDINO, Gustavo; SCHREIBER, Anderson, A boa-fé objetiva no Código de Defesa do Consumidor e no Código Civil, in Código de defesa do consumidor e o código civil de 2002: convergências e assimetrias. São Paulo: Revista dos Tribunais, 2005, pp. 216-231.

THEODORO JÚNIOR, Humberto, *Apontamentos sobre a responsabilidade civil na denúncia dos contratos de distribuição, franquia e concessão comercial*, in Revista dos Tribunais, 2001, pp. 11-44.

TIROLE, Jean, *Procurement and Renegotiation*, in Journal of Political Economy, April 1986, vol. 94, no. 2, pp. 235-259.

TRECCANI, Matteo, *Subfornitura e abuso di dipendenza economica: presupposti e rimedi. Nota a ord. Trib. Bari 11 ottobre 2004; ord. Trib. Bari 17 gennaio 2005*, in Rivista di diritto privato, 2005, pp. 704-731.

TRIMARCHI, Pietro, *Il contratto: inadempimento e rimedi*, Giuffrè: Milano, 2010.

TARUFFO, Michel, La *prova dei fatti giuridici: nozioni generali*, Milano: A. Giuffrè, 1992.

TOMASETTI JÚNIOR, Alcides, *Abuso do poder econômico e abuso de poder contratual: regime jurídico particularizado; denunciabilidade restrita da relação contratual a tempo indeterminado; contrato de fornecimento, aumento arbitrário de lucros ilícitos, constitucionais e de direito comum; providências processuais corretivas*, in Revista dos tribunais, São Paulo, v. 84, n. 715, p. 87-107, maio 1995.

TOSCHI VESPASIANI, Francesco, *Prime note di commento alla l. 6 maggio 2004, n. 129, recante norma per la disciplina del contratto di affiliazione commerciale o franchising*, in Studium iuris, 2004, pp. 1353 ss.

TURCO, Claudio, *L'interesse negativo nella colpa in contrahendo (verità e distorsioni della teoria di Jhering nel sistema tedesco e italiano), Relazione al XXI Congresso dell'Associazione per gli scambi culturali tra giuristi italiani e tedeschi su "Problemi attuali della responsabilità e dell'illecito in Italia e in Germania", Catania, Università degli Studi, 6-7 ottobre 2006,* in Rivista di diritto civile, 2007, fasc. 2, pt. 1, pp. 165-195.

VACCÀ, Cesare, *Franchising: una disciplina in cerca di identità*, in Contratto e Impresa, 2004, pp. 870 ss.

VACCÀ, Cesare, *Le regole del* franchising*, fra prassi contrattuale e disciplina legislativa, in Contratti d'impresa e restrizioni verticali: agenzia, franchising, commissione, mediazione, spedizione*, a cura di Rolandino Guidotti e Nicola Soldati, Milano: Giuffrè, 2004.

VALENTINO, Daniela, *Il contratto incompleto*, in Rivista di diritto privato, 2008, pp. 509-545

VENEZIA, Alberto, *Gli strumenti contrattuali per le reti di vendita: guida pratica per la comprensione, l'applicazione e la scelta dei contratti: agenzia, procacciamento d'affari, concessione di vendita, il nuovo franchising (L. n. 129/2004)*, Milano: IPSOA, 2004.

VENTURI, Fabien, *La protection des investissements du distributeur intégré en droit interne et communautaire*, Ph.D Thesis, University of Nice, 2005.

VESSIA, Francesca, *Tutela cautelare d'urgenza, obblighi di contrarre e competenza giurisdizionale nell'abuso di dipendenza economica*, in Contratto e impresa, pp. 1293-1340.

VETTORI, Giuseppe, *Il diritto ad un rimedio effettivo nel diritto privato europeo*, in Persona e mercato, 2017, fasc. 1, pp. 16.

VETTORI, Giuseppe, *Il controllo del contratto da parte del giudice, in Manuale di diritto privato europeo*, a cura di Carlo Castronovo, Salvatore Mazzamuto, v. 2, Milano: A. Giuffrè, 2007.

VETTORI, Giuseppe, *L'abuso del diritto. Distingue frequenter, Abuso del diritto e buona fede nei contratti*, a cura di Stefano Pagliantini, Torino: Giappichelli, 2010.

VETTORI, Giuseppe, *Anomalie e tutele nei rapporti di distribuzione tra imprese*, Milano: Giuffrè, 1983.

VETTORI, Giuseppe, *Contratto e rimedi*, Assago: CEDAM, 2009.

VERÇOSA, Haroldo Malheiros Ducler; SZTAJN, Rachel, *Novo Código Comercial: os empresários vão pagar essa conta;* dos mesmos autores, *Projetos de Código de Direito Comercial: não lemos e não gostamos!*, *Professores da USP rechaçam projeto de Código Comercial*, in https://www.migalhas.com.br/dePeso/16,MI281459,41046-Novo+Codigo+Comercial+os+empresarios+vao+pagar+essa+conta.

VIEGAS, Francisco de Assis, *Denúncia contratual e dever de pré-aviso,* Belo Horizonte: Fórum, 2019.

VIGORITI, Vincenzo, *Problemi attuali dell'arbitrato sugli investimenti*, in Contratto e impresa, 2011, pp. 365-368.

VILLA, Gianroberto, *Danno e risarcimento contrattuale*, in Trattato del contratto, diretto da Vincenzo Roppo, Rimedi, vol. 2, a cura di Vincenzo Roppo, Giuffrè, 2006.

VILLELLA, Aquila, *Abuso di dipendenza economica ed obbligo a contrarre*, Napoli: Edizioni scientifiche italiane, 2008.

VIOLANTE, Umberto, *Recesso unilaterale nel contratto di franchising. Il commento, Nota a ord. Trib. Bari sez. II 8 aprile 2005*, in Danno e responsabilità, 2005, fasc. 10, pp. 985-988.

VISSAMY, Gerges, *Les contrats de dépendance ; essai sur les activités professionnelles exercées dans une dépendance économique*, Paris: Librairie générale de droit et de jurisprudence, 1986.

VOCABULAIRE JURIDIQUE, publié sous la direction de Gérard Cornu, Paris: Presses Universitaires de France, 1987.

VOGEL, Luis; VOGEL, Joseph, *Panorama de la rupture de relations commerciales établies: un droit à reformer*, in AJ Contrat, 2016.

VOGEL, Luis; VOGEL, Joseph, *Droit de la distribution,* in *Traité de droit économique,* t. 2, Paris: Lawlex Bruylant, 2015.

WALD, Arnoldo, *Novo Código Comercial será importante para o desenvolvimento econômico,* in https://www.conjur.com.br/2018-dez-14/wald-codigo-comercial-importante-desenvolvimento.

WEIGMANN, Roberto, *(In tema di abuso di dipendenza economica)*, Nota a Trib. Roma 5 febbraio 2008, in Giurisprudenza italiana, 2009, fasc. 1, pp. 118-120.

WIECKER, Franz, *El Principio General de la Buena Fe*, Madrid: Civitas, 1986.

WILLIAMSON, Oliver E., *The economic institutions of capitalism: firms, markets, relational contracting*, New York: Free press; London: Collier Macmillan, 1985.

WILLIAMSON, Oliver, *The new institutional economics: Taking stock, looking ahead*, in Journal of Economic Literature, vol. 38, 2000, pp. 595-613.

WILLIAMSON, Oliver, *The Vertical Integration of Production: Market Failure Considerations*, American Economic Review, vol. 61, May 1971, pp. 112 ss.

WILLIAMSON, Oliver, *Markets and Hierarchies: Some Elementary Considerations*, in The American Economic Review, Vol. 63, No. 2, May, 1973, pp. 316-325

WILLIAMSON, Oliver, *Transaction-Cost Economics: The Governance of Contractual Relations*, in Journal of Law and Economics, vol. 22, 1979, pp. 233-261.

WILLIAMSON, Oliver, *The Mechanisms of Governance*, New York: Oxford University Press, 1996.

WILLIAMSON, Oliver, *Credible Commitments: Using Hostages to Support Exchange*, in T*he American Economic Review, in* vol. 73, no. 4, Sep., 1983, pp. 519-540.

ZAHEER, Akbarl; VENKATRAMAN, N, *Determinants of Electronic Integration in the Insurance Industry: An Empirical Test,* in Management Science, vol. 40, no. 5, May 1994, pp. 549–566.

ZECCHIN, Francesco, *La tutela del produttore agroalimentare fra tentativi di riequilibrio del potere contrattuale e misure di sostegno*, in Europa e diritto privato, 2017, fasc. 4, pp. 1407-1465.

ZENO-ZENCOVICH, Vincenzo, *Le reti della conoscenza: dall'economia al diritto. Lavoro svolto in occasione del Convegno "Le reti d'impresa nel mercato globalizzato", Bologna, 29 febbraio 2008,* in Il Diritto dell'informazione e dell'informatica, 2008, pp. 141-171.

ZOPPINI, Andrea, *Autonomia contrattuale, regolazione del mercato e diritto della concorrenza*, in Contratto e antitrust, cura di Gustavo Olivieri e Andrea Zoppini, Roma: GLF editori Laterza, 2008.

ZUDDAS, Goffredo, *Somministrazione, concessione di vendita, franchising*, Trattato di diritto commerciale, diretto da Vincenzo Buonocore, vol. 2.3.2, Torino: G. Giappichelli, 2003.