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THE ROLE OF CREDITORS IN CORPORATE AND CONTRACT GOVERNANCE

ABSTRACT. *The essay deals with the impact on corporate and contract governance of creditor's intervention in the management of the financed company. In fact, the conventional notion according to which the creditor was not endowed with sufficient incentives to manage the company has gradually been overcome since the development of new contractual types that grant the lender conformative rights in the debtor company. By contrast, the contribution from the creditor might enforce both the entity's commercial operations and, in general, the market structures in which the debtor company participates.*

CONTENT.

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1. The evolution of corporate governance rules

The expression 'corporate governance' refers to the set of rules that make it possible to balance the different interests and power relations involved in the management of a company, in order to allocate control efficiently[1]. In both Anglo-Saxon and Japanese-Rhine models these dictates are conceived on the contraposition between the company's shareholders, its owners in their various forms, and the directors, while other stakeholders are not traditionally recognised as having any effective management role[2].

[1] *Ex multis*: A. Gambino, *Governo societario e mercati mobiliari*, in *Giur. comm.,* 1997, I, p. 788 ss.; U. Tombari, *La nuova struttura finanziaria della società per azioni (*Corporate governance *e categorie rappresentative del fenomeno societario)*, in *Riv. soc*., 2004, p. 1084 ss.; L. Enriques-P. Volpin, *Corporate Governance Reforms in Continental Europe*, in 21 *Journal of Economic Perspectives* 117 (2007); P. Montalenti, Società per azioni, *corporate governance* e mercati finanziari, Giuffrè, Milano, 2011; E. Ferran-L. Chan Ho, *Principles of corporate finance law*, II ed., Oxford University Press, Oxford, 2014; L. Gullifer-J. Payne, *Corporate Finance Law. Principles and Policy*, III ed., Bloomsbury, London, 2020. See also the essays in *Governo dell'impresa e mercato delle regole. Scritti giuridici per Guido Rossi*, I, Giuffrè, Milano, 2002.

[2] F. Barca, *Imprese in cerca di padrone. Proprietà e controllo nel capitalismo italiano*, Laterza, Roma-Bari, 1994, stylises the corporate governance rules of the various jurisdictions along certain common lines: (i) balance between ownership and control; (ii) provision of instruments that can take the place of ownership in the exercise of control; (iii) the presence of financial institutions within ownership structure and of guarantee instruments in favour of non-controlling owners. In recent years, despite traditionally incorporating the specificities of their legal systems of origin, corporate governance rules have become increasingly more harmonised on a global level. The Anglo-Saxon model of corporate law is essentially conceived on the distribution of capital among a multitude of shareholders, with the consequent need for a financial market structure capable of ensuring the contestability of control. Hence the central role played by large banking institutions. In the German model, banks also play a key role, centralising within their own structures the transactions associated with the exercise and transfer of control. Similarly, in the Japanese model, the role of the *keiretsu* stands out, a network set up between financial and insurance intermediaries and companies in which a bank holds a majority stake in the group. Lastly, in Italy, following the various reforms of company law, there has been a gradual shift away from a 'family' capitalist model to a system that is closer to the Japanese-Rhine model, with the possibility of choosing between a dualistic scheme, with a management board and supervisory board, and a monistic scheme, based on the presence of the board of directors and an internal management control committee. For a more in-depth analysis, see A. Nicita-V. Scoppa, *Economia dei contratti*, Carocci, Roma, 2005, p. 315 ss., in addition to J. Armour-Enriques-H. Hansmann-R. Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, III ed., Oxford University Press, Oxford, 2017, p. 50 ss. e R. La Porta-F. Lopez-de-Silanes-A. Shleifer, *Corporate Ownership Around The World,* National Bureau of Economic Research (NBER) Working paper n. 6625, available at the following link: <http://www.nber.org/papers/w6625>.

It is also worth recalling how these rules, which outline the procedures and principles governing the decision-making process, have developed, especially in recent decades, as a synthesis of the various theories of the firm that have been elaborated by the American scholars. It is therefore appropriate at this point to provide a brief overview of the main theories.

The earliest models of the "firm" in North American literature followed an approach aimed at valorising their function as mere production entities, without investigating their organisational characteristics. However, as early as the 1930s, Coase emphasised the ontological distinction between the firm and the individual, identifying the firm as an institution capable of ordering relations between a plurality of subjects[3]. The firm thus replaces the market, in that the traditional exchange relationship is replaced by a structure in which the entrepreneur directs production, placing himself at the centre of an 'internal' network of transactions[4].

In the wake of Coasian thought, Simon proposed the idea of the firm as a complex organisation aimed at managing the interests of a plurality of subjects and minimising transaction costs, given, however, not so much by the peculiarities of the market as by the limited rationality of the acting subjects[5].

Williamson, on the other hand, turning back to the two theoretical approaches outlined above, associated the concept of 'governance' with the firm, considering the latter as a private system endowed with its own rules. More specifically, the firm is attributed the role of governing exchanges capable of producing transactional costs, identifiable in limited rationality, in the scarcity of resources, and in opportunistic behaviours[6].

The Grossmann-Hart-Moore (GHM) model, however, elaborated a theory of the efficient allocation of property rights in the context of incomplete contracts. In

[3] R.H. Coase, *The Nature of The Firm,* in 4 *Economica* 386 (1937). See also Id., *The problem of social cost*, in 3 *Journal of Law & Economics* 1 (1960).

[4] G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, in 117 *Harvard Law Review* 1102 (2004).

[5] H.A. Simon, *New developments in the theory of the firm*, in 52 *American Economic Review* 1 (1962).

[6] O.E. Williamson, *The economic institution of capitalism,* The Free Press, New York, 1986.

particular, property rights are identified as a residual right to control, i.e., the right to decide on the use of the asset in all cases that are not foreseen, or not foreseeable, in a contract[7]. The firm, from this perspective, catalyses property rights over the various assets which it is made up of, attributing control to whoever holds the indispensable asset.

The theory of the 'nexus of contracts', which identifies the company as the common denominator behind a series of contractual relationships both within the company (between shareholders and managers, and between minority and majority shareholders), and outside the company (with the company's creditors, employees, suppliers, and customers)[8], has also obtained considerable success. According to this concept, the shareholders, having injected risk capital, then bear higher costs and have higher gains and thus become those with the highest incentives to exercise decision-making powers[9].

This reconstruction, however, has long since been revised, due to a number of corrections that have been made – such as the theory of the firm not as a network *of* contracts but as a "nexus *for* contracts" – in order to distinguish it from the other networks of contractual relationships, but also due to profound criticism, since this theory does not take into account the role that other subjects, such as the creditors, can take on in the governance of the enterprise, and above all, since it takes as its starting point the idea of the completeness of contracts, that regulate every aspect of the relationship between the parties from the very moment they are signed[10].

Whilst the first theories of the firm use as their reference model an entity in

[7] J. GROSSMAN-O.D. HART, *An Analysis of the Principal – Agent Problem*, in 51 *Econometrica* 7 (1982); IDD., *The costs and benefits of ownership: A theory of vertical and lateral integration*, in 94 *Journal of Political Economy* 691 (1982); HART-J. MOORE, *Property Rights and The Nature of The Firm,* in 98 *Journal of Political Economy* 1119 (1990); IDD., *Foundations of incomplete contracts,* 66 *Review of Economic studies* 115 (1999).

[8] A. ALCHIAN-H. DEMSETZ, *Production, Information Costs and Economic Organization,* in 62 *American Economic Review* 777 (1972); HANSMANN, *The Ownership of Enterprise*, Harvard University Press, Cambridge - London, 1996 (It. transl. *La proprietà dell'impresa*, edited by A. Zoppini, Il Mulino, Bologna, 2005); L. ZINGALES, *In search of new foundations*, in 55 *Journal of Finance* 1623 (2000); C. MARCHETTI, *La* 'nexus of contracts' theory: *teorie e visioni del diritto societario*, Giuffrè, Milano, 2000; K. AYOTTE-HANSMANN, *A nexus of contracts theory of legal entities*, in 42 *International Review of Law and Economics* 1 (2015).

[9] M. MOZZARELLI, *Business covenants e governo della società finanziata*, Giuffrè, Milano, 2013, p. 79 ss.

[10] W. BRATTON, *The "Nexus of Contracts" Corporation: A Critical Appraisal*, in 74 *Cornell Law Review* 407 (1989). See also G. TEUBNER, *Networks as Connected Contracts*, Bloomsbury, Oxford-Portland, 2011.

which ownership and control are bound together in the same subject, the phenomenon gradually emerges of the separation of ownership and control, in which the shareholders are attributed the role of residual claimants while the directors have control over the management of the company[11]. Hence the origin of managerial theories of the firm, above all that of Jensen and Meckling, which analyse the problems of agency between the firm's lenders and its management, in order to identify forms of governance that are most suitable for reducing such gaps[12].

The brief introduction above is a preface to the understanding of the models and requirements of a strictly economic nature analysed below, that have favoured the proliferation of clauses designed to give creditors ever-increasing power to intervene in the decisions of financed companies. As Posner stated: "*efficient company law should not favour corporate freedom or creditor protection, but endeavors to find a balance between these two objectives in a way that minimizes the cost of investment*"[13].

2. Creditors and the shareholder primacy theory

The assumption of shareholder primacy found in the theories of American doctrine in the past, according to which the objective of management is to increase the wellbeing of shareholders, has gradually been replaced by a wider vision in which the management of a company must be exercised by taking into account the interests of all

[11] According to BARCA, *Le politiche del governo societario*, in A. Ninni-F. Silva (eds), *La politica industriale: teorie ed esperienze*, Laterza, Roma-Bari, 1997, p. 220, "*the essence of corporate governance lies precisely in freeing control from ownership, through the balancing of two opposing interests: the interest of the entrepreneur in exercising control over the company without interference and the interest of investors (creditors or shareholders) in protecting themselves against the risk of inefficient management of the financing received by the entrepreneur"*. On the separation between ownership and control, see E. FAMA-M. JENSEN, *Separation of Ownership and Control*, in 26 *Journal of Law and Economics* 301 (1983), and F.H. EASTERBROOK-D.R. FISCHEL, *The Economic Structure of Corporate Law*, Harvard University Press, Cambridge-London, 1991.

[12] M.C. JENSEN-W.H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in 3 *Journal of Financial Economics* 305 (1976).

[13] R.A. POSNER, *The Rights of Creditors of Affiliated Corporation,* in 43 *University of Chicago Law Review* 499, 509 (1976).

the actors involved, from shareholders to creditors, and from customers to suppliers[14]. Despite this, the influence of the creditor on the debtor company was initially ignored and relegated to the rank of an episodic phenomenon, only of any importance when a company crisis was approaching[15]. The challenge of corporate governance, which focusses on achieving a balance between ownership and control, with the aim of leading the directors' discretionary power towards the interests of the shareholders, thus did not benefit from the potentially crucial role of creditors[16].

The lender is commonly associated with a position of passivity, merely waiting to receive payment, which is occasionally counterbalanced by the activation of contractual remedies in the case of default or the approaching of a company crisis[17]. It was, therefore, the shareholders who were also recognised as having the function of monitoring the performance of the entity's economic activity, since creditors were not considered to have adequate incentives.

However, it should be noted that commercial practice, which more and more frequently provides for the inclusion of ancillary clauses in financing contracts, giving the creditor powers to intervene in the management of the financed company, has made the need to determine whether a contribution to the management of the company could come from creditors – especially bank creditors –[18].

Law and economics literature focuses on the relationship between the management and the shareholders of the firm as a fiduciary duty – and thus one of loyalty – of the former towards the latter. It is also often pointed out that directors and shareholders do not always have any unmediated interaction, as both have a contract

[14] M.E. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts and the Dual Nature of the Firm,* in 24 *Journal of Corporate Law* 834 (1999).

[15] F. Tung, *Leverage in the Boardroom: The unsung influence of private lenders in corporate governance,* in 57 *UCLA Law Review* 115, 118 (2009).

[16] H.G. Manne, *Mergers and the Market for Corporate Control,* in 73 *Journal of Political Economy* 110, 112-14 (1965).

[17] Tung, *Leverage in the Boardroom: The unsung influence of private lenders in corporate governance*, cit., p. 119 concerning the role of creditors in traditional corporate governance states succinctly that "*They are simply not a part of the classic corporate governance story*".

[18] L. Picardi, *Il ruolo dei creditori fra monitoraggio e orientamento della gestione nella società per azioni,* Giuffrè, Milano, 2013, p. 112.

directly with the company. The directors perform their duties vis-à-vis the company and thus only indirectly vis-à-vis the shareholders. The latter, however, turn out to be the ultimate beneficiaries of the managers' actions, since they are the ones who own the company's shares. Hence the origin of a model in which a duty is placed on the directors to protect the company's shareholdings.

Such a scenario is not traditionally present in the relationship with the company's creditors. The difference between the latter and the shareholders is identified by scholars in the shareholders' position as residual claimants. The shareholders' contract with the company is more fragile than that of the other stakeholders, since, as bearers of residual risk, the shareholders are the last to receive the cash flows generated by the economic activity and effectively hand over control of the company to the directors[19].

In modern capitalist economies, the broad autonomy accorded to directors is in fact justified by the need for them to constantly make complex decisions, which require weighing up the aspects of specific concrete cases, which are difficult to foresee *ex ante* on a contractual basis. The result is a framework in which the management of the company is left to the evaluations and discretion of those vested with decision-making power. Hence the idea of the greater vulnerability of shareholders, who are at risk of the danger of directors pursuing their own personal interests.

3. The issue of incomplete contracts

Having clarified the marginal role of creditors in 'traditional' corporate governance, a further consideration must be made in order to understand the motivations behind the lender governance phenomenon. Reference here is made to the dogma of incomplete contracts, according to which in the real world it is not possible, on the basis of the information provided by the parties at the time of its conclusion, to draw up a contract capable of regulating all aspects of the relationship between the contracting parties, and between the latter and interested third parties[20]. Conversely,

[19] Easterbrook-Fischel, *The Economic Structure of Corporate Law*, cit., p. 30.

[20] O. Hart-B. Holstrom, *The theory of contracts* in *Advances in Economic Theory*, edited by T. Bewley, Cambridge

one must be aware of the ontological inability of the contract to ensure maximum functionality at all stages of the relationship and between all parties involved.

The reasons for this assertion are to be found in the considerations of behavioural law and economics, which take as their starting point the impossibility for the human mind to collect, process and comprehend an unlimited amount of information. This is due both to the cognitive limitation of contracting parties and to the existence of information asymmetries between them[21].

The incompleteness of contracts therefore imposes a change in the concept of the contract[22]. The so-called 'sanctity of contract', given the *ex-ante* impracticability of drawing up a contract that takes into account all possible unforeseen events or variation in terms, is replaced by a more flexible idea of the contract that is anchored to factual reality[23]. In this way, the agreement becomes a mere summary of the regulation desired by the parties, and contains only the essential guidelines, leaving open the possibility of renegotiation, or a mere modification of certain clauses, in the event of changes to the structure of interests originally agreed upon. The impracticability of a complete and exhaustive set of clauses, capable of providing for all contingencies and protecting all actors from the moment it is signed, confers dynamism on the contractual instrument,

University Press, Cambridge, 1987, p. 71 ss.; HART-MOORE, *Foundations of incomplete contracts,* cit., p. 115 ss.; J. TIROLE, *Incomplete Contracts. Where Do We Stand?,* in 67 *Econometrica* 741 (1999); W. MACLEOD, *Complexity and Contract,* in E. Brousseau-J.M. Glachant (eds), *The Economics of Contracts. Theories and Application*, Cambridge, 2002; A. KEAY-H. ZHANG, *Incomplete Contracts, Contingent Fiduciaries and A Director's Duty to Creditors*, in 32 *Melbourne University Law Review* 141, 156 (2008).

[21] KEAY-ZHANG, *Incomplete Contracts, Contingent Fiduciaries and A Director's Duty to Creditors*, cit., p. 154 state that "*In other words, the contracting parties are not able to foresee the future perfectly, although some may know more about something than others".* See also *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato*, edited by G. ROJAS ELGUETA-N. VARDI, Roma, 2014, *passim.*

[22] For a thoughtful survey of contract theories, issues and cases in order to reassess the field's present vision of contract law, see the essays in *Comparative Contract Law*, edited by P.G. Monateri, Edward Elgar Publishing, Cheltenham-Northampton, 2018. The relationship between contract and economic theory is analyzed by R. COOTER-U. MATTEI-MONATERI-R. PARDOLESI-T. ULEN, *Il mercato delle regole. Analisi economica del diritto civile*, I, Il Mulino, Bologna, 2006, ch. 3.

[23] F. MACARIO, *Regole e prassi della rinegoziazione al tempo della crisi*, in *Crisi finanziaria e categorie civilistiche,* edited by G. Alpa-E. Navarretta, Giuffrè, Milano, 2015, p. 61 ss.

which ultimately can adapt to changing circumstances[24].

Incompleteness also manifests itself with regard to the opportunistic behaviour of the parties aimed at maximising self-interest. Due to information asymmetry, contractors are not always able to recognise such conduct at the negotiation stage and find themselves facing disputes during the execution stage[25]. Here again, one of the reasons for incomplete contracts is related to the cost and time involved in defining an agreement that is as complete as possible. This circumstance often makes it preferable to include a mere mapping of the main elements of the agreement in the contract, leaving the concrete implementation of the arrangement of interests to a later date. Reference must then be made to the costs of negotiation and those necessary to obtain a judicial enforcement of the agreement, with the risk, moreover, that an external authority may be unable to verify and analyse the relevant information[26].

Hence contractual incompleteness can be a source of inefficiency, since the difficulty of ascertaining all the terms of the agreement undermines the character of absolute binding force attributed to reciprocal promises, leading the parties to disregard the agreement in its entirety. The contract becomes, in this context, a set of declarations that can always be renegotiated, not fulfilling a pareto-efficient function from the moment it is signed[27].

Moreover, assuming the incomplete nature of the contract implies overcoming the idea, typical of the nexus of contract theory, according to which the efficient attribution of decisional rights can only take place in favour of the category that bears the highest costs but also obtains the highest revenue, i.e., the shareholders[28]. In fact,

[24] See the monographs of G. BELLANTUONO, *I contratti incompleti nel diritto e nell'economia*, Cedam, Padova, 2000 and A. FICI, *Il contratto incompleto*, Giappichelli, Torino, 2005.

[25] Added to this there is the difficulty for the courts to verify beyond doubt the opportunistic behaviour. See T. MURIS, *Opportunistic Behaviour and the Law of Contracts,* in 65 *Minnesota Law Review* 521 (1981).

[26] Hence the identification of the incomplete contract as a contract that cannot be verified *ex post facto* by the party obliged to settle the dispute and therefore not fully enforceable. NICITA-SCOPPA, *Economia dei contratti*, cit., p. 195 ss.

[27] Thus, the risk of post-contractual opportunism ("hold-up") arises for the party making a specific investment in the presence of an incomplete contract. This risk is embodied in the possibility that at any time the counterparty may renegotiate or terminate the contractual relationship. NICITA-SCOPPA, *Economia dei contratti*, cit., p. 197.

[28] MOZZARELLI, Business covenants *e governo della società finanziata*, cit., p. 81 underlines how the *nexus of contract*

the relationship that is established between the company and the financing parties, like any other long-term relationship, must necessarily be conceived as dynamic, with the awareness that time and originally unforeseeable events are capable of altering the scenario outlined at the time the agreement is signed. The contract, therefore, while it may aspire to completeness, is not ontologically capable of containing all the variables that may manifest themselves in a relationship[29].

It follows that, with specific regard to the contract between the company and creditors, the agreement cannot *ab origine* regulate every single factual change capable of affecting the terms agreed upon, but it can certainly regulate the decision-making process[30]. The change in the reference paradigm is evident, considering that in a model that assumes the contract to be complete, the need to include the lender among the actors involved in the governance of the debtor enterprise does not arise. In this hypothesis, the contractual protection is considered to be full and is unaffected by the decisions of the shareholders. On the other hand, the attribution of an incomplete nature to the contract implies the insufficiency of the transaction to guarantee creditors full protection. The decisions of the partners are potentially capable of generating negative consequences on the rights of the lenders, thus raising the question whether it could be useful to allow creditors to enter into the governance of the debtor company.

Ultimately, the path outlined above, which has led to the emergence of the phenomenon of lender governance – which is covered in the following section – denotes the idea that, far from attributing decision-making power to a single category of subjects, it may be beneficial to allocate decision rights in the financed enterprise by reasoning in terms of greater efficiency.

theory bases this assumption on the different incentives that influence stakeholders and creditors. The latter, in view of their pre-established claim, would be indifferent to any greater gains obtained by the financed company.

[29] A diametrically opposite dynamic is referred to in the so-called 'merger clauses', an expression used to indicate clauses placed at the foot of international contracts in which the parties state that the signed document represents the 'entire agreement', and anything not included therein does not assume any binding value between the parties. On this subject, see the monograph of M. FOGLIA, *Il contratto autoregolato: le* merger clauses, Torino, 2015.

[30] MOZZARELLI, Business covenants *e governo della società finanziata*, cit., p. 86.

4. Creditors' involvement in the governance of debtor company

That being said, the following considerations must be made with regard to the position of the company creditors[31]. The marginal role reserved for them by studies on corporate governance is based, as demonstrated above, on the idea that shareholders bear a greater risk than other stakeholders. The company's financiers are the bearers of claims that can be defended in courts of law with a predefined amount, and not potentially unlimited, as is the case with residual claimants[32]. Moreover, they tend to benefit from more comprehensive contractual schemes that provide a certain amount of protection, which is not always the case in the relationship between directors and shareholders. It is clear, however, that even if one wishes to adhere to such a reconstruction, the need to protect the position of creditors, whether or not it is more or less 'inconvenient' than that of the shareholders, remains. On the contrary, it is worth asking whether the risk to which the creditors are subject might not justify the inclusion of a legally binding obligation on the debtor company to take account of creditors' expectations.

This risk can be seen when a debtor company engages in opportunistic behaviour, a phenomenon that can be broken down into two elements: the opportunism of shareholders and that of the managers[33]. With regards to the shareholders, the ontological structural difference between their claims and the creditor's claims has already been emphasised, with a consequent divergence also in terms of incentives. Faced with a fixed claim by the creditor, the shareholder is induced to undertake more risky actions, given that any increase in income would not entail a change in the magnitude of the creditor's claim considering that, on the contrary, they would in any case bear the risk of the debtor company's eventual bankruptcy[34]. At the same time,

[31] *The Law and Economics of creditor protection*, edited by H. Eidenmüller-W. Schön, Asser Press, The Hague, 2008.

[32] V. Acharya-Y. Ahimud-L.P. Litov, *Creditor Rights and Corporate Risk-Taking*, in 102 *Journal of Financial Economics* 150 (2011).

[33] Armour-Hertig-Kanda, *Transactions with creditors*, in *The anatomy of corporate law. A comparative and functional approach,* cit., p. 115.

[34] L. Enriques-A. Romano, *Rewiring Corporate Law for an Interconnected World*, in 64 *Arizona Law Review* 51 (2022).

however, since the creditor's claim would have to be satisfied before that of the shareholders, the latter might be disincentivised from engaging in transactions capable of ensuring an immediate positive net value, since they would only produce benefits for the lenders.

With regard to the opportunism of the decision-making body, the problem that arises is primarily related to the risk of directors pursuing their own self-interest. Moreover, even where this is not the case, it must always be remembered that the directors are bound by a fiduciary relationship with the shareholders, which requires them to defend this category of investors[35]. The creditor can resolve the problems outlined above *ex ante* by implementing a contractual scheme that can raise his level of protection. However, it is unlikely for cognitive and informational limitations to allow for the stipulation of a contract that is so complete that it takes into consideration all forms of opportunistic conduct. On the other hand, the control of the company and full knowledge of its performance still remains with the directors, who could use this circumstance to their own advantage in pursuit of their own personal interest as well as that of the shareholders.

In such a scenario, it is easy to understand the usefulness of clauses, such as covenants, aimed at limiting the *ex-post* discretion of the decision-making body on investment choices and requiring the disclosure of information relevant to the repayment of the loan[36]. By means of such covenants, the creditor tends to gradually secure portions of the financed company's management in order to avoid waiting passively for its fulfilment, with the risk that the debtor may become insolvent. The objective is thus to ensure that the company's strategic decisions are implemented in a prudent manner and taking into account the interests of all parties involved[37].

When creditor involvement is not episodic, but has a constant influence on decision-making processes, it is known as 'lender governance', i.e., the more or less

[35] G. Nini-D. Smith-A. Sufi, *Creditor Control Rights and Firm Investment Policy*, in 36 *Journal of Financial Economics* 92 (2009).

[36] C. Zimmermann, *An Approach to Writing Loan Agreement Covenants*, in 58 *Journal of Commercial Bank Lending* 2 (1975).

[37] In this way the creditor aims to prevent a business crisis by bringing forward the monitoring phase.

direct management of the company by its creditors[38]. This phenomenon arises when covenants are breached. The breach of the obligations contained in the covenants betrays the debtor's inability to meet the commitments related to the financing, as this would lead to the default of the company[39]. On the other hand, the creditor, aware of the debtor's objective inability to meet the payment obligation, rather than implementing the forfeiture of the benefit of the term, enters into new negotiations, renegotiating the terms of the loan. The gradual mechanism triggered by the breach of covenants and the subsequent renegotiation gives the creditor progressively more involvement in the management of the company. This is, in any case, a physiological outcome, given how easy it is to breach covenants and the consequent need for directors to provide explanations to lenders[40].

The lender at this point prefers to keep the relationship with the financed company alive, assuming partial or even total control of it. Such a solution may in fact prove to be more fruitful than the abrupt termination of the financing, where the risk of the debtor's incapacity becomes even more apparent. Conversely, through lender governance, the financed enterprise is guided towards more prudent management.

It is therefore necessary to investigate the actual impact of creditors on the company's choices, on the assumption that the phenomenon is widespread not only in the crisis phase but also in the contractual practice correlated to the normal course of business[41]. It is also essential to consider a possible convergence between the interests of the shareholders and those of the creditors, with the aim of identifying an efficient allocation of decision-making powers in view of increasing the value of the company[42].

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[38] A.D. Scano, *Debt covenants e governo delle società per azioni solventi: il problema della* lender governance, in *Nuovo dir. soc.,* 2011. p. 14 ss.

[39] Tung, *Leverage in the Boardroom: The Unsung Influence of Private Lenders in Corporate Governance,* cit., p. 135.

[40] Scano, *Debt covenants e governo delle società per azioni solventi: il problema della* lender governance, cit., p. 22; M. Roberts-Sufi, *Control Rights and Capital Structure: An Empirical Investigation*, in 64 *Journal of Finance* 1657, 1666 (2009).

[41] Undoubtedly, the worsening of the company's economic-financial conditions increases the prevalence of the phenomenon, although forms of intervention, including some that are fairly invasive, can occur even if the company does not go bankrupt.

[42] L. Miotto, *Il controllo creditorio difensivo*, Giappichelli, Torino, 2017, p. 151 ss.

This rapprochement could also be brought about by the objective of monitoring the actions of the directors, which are characterised by a greater propensity to risk. In this perspective, the exchange of information, obtained by each actor through different channels, together with the reaction instruments attributed to them by law or by contract, may prove useful for the creation of a more efficient model of corporate governance[43].

Lender governance therefore leads to a rethinking of corporate governance, which is thus conceived in a dynamic and 'interactive' perspective where the set of management rules is produced by the interaction between the various actors[44]. If all parties involved in the management of the enterprise adhere to the goal of limiting managerial slack, the action of the creditor bank, structurally able to devote adequate resources to monitoring the debtor, can benefit all other stakeholders unable to exert sufficient influence on the debtor. The sharing of signals and information among the various creditors is also reflected in the activation of remedies, which vary according to the type of relationship. Thus, a system is generated in which each actor reveals the information he obtains about the debtor's activity to the others, delegating the monitoring and reaction to the subject that, by structure and capacity, is able to act more efficiently.

This results in a broader conception of governance, aimed at maximising the value of the company and also including the perspective of the stakeholders. In structural terms, it is divided into a supervisory phase, in which data on the company's management is acquired and processed, and a reaction phase, which is only implemented when the supervisory phase has identified an unfavourable scenario.

However, it must be borne in mind that there remains a risk to other creditors that the bank will take actions to consolidate its position to the detriment of other stakeholders. American scholars generally identify four types of conflicts: (i) those

[43] In fact, directors may be induced to adopt a more responsible conduct as a result of the activation or prospect of sanctions and remedies, such as the forfeiture of the operation of the acceleration clause, the implementation of voice powers, the revocation of one or more managers. In addition, any action taken by one actor may also benefit the other categories involved, especially those who, in relation to the specific event, have greater incentives to intervene in a reactive manner. See M.J. ROE-F. CENZI VENEZZE, *A capital market, corporate law approach to creditor conduct*, in 112 *Michigan Law Review* 59 (2013).

[44] TRIANTIS-DANIELS, *The role of debt in interactive corporate governance*, cit., p. 1079.

generated by the bank's premature exit from the lending relationship, for reasons other than the correction of managerial slack; (ii) those generated by the bank's negligence, which takes action too late due to the limitation of management opportunism iii) those related to the deterioration of the economic conditions of the debtor company and the consequent exploitation by the bank to renegotiate the terms of the agreement to its own advantage; iv) those connected to the bank's implementation of remedies aimed at correcting the management's action but orienting the management of the company to its own exclusive liking[45]. In fact, it is evident that debt can lead to the bankruptcy of the financed company, where the latter is unable to satisfy the creditor's claims, or to the decrease in the value of shareholdings, increasing the risk of acquisition[46].

The objective of this article is in fact not to recommend one model over another, but rather to prompt reflection on the advisability and consequences of the entry of creditors into the governance of the debtor company. In this sense, it cannot be denied that the recourse to debt and the entry of creditors into management pushes directors to maximise profitability and avoid bankruptcy – also to avoid reputational repercussions in the reference market –. Debt also influences investment policies, since the limitation imposed by covenants on the company's financial management, if accompanied by shrewd decisions of the directors, can result in an increase in company performance[47]. Hence, greater debt exposure offers managers with more honed management skills the opportunity to show their qualities, distinguishing themselves from their counterparts who expose themselves to a greater risk of bankruptcy[48]. Conversely, however, managers with established experience are more likely to operate with lower leverage or spread over longer terms in order to escape from the constant influence of creditors over their actions[49].

[45] Triantis-Daniels, *The role of debt in interactive corporate governance*, cit., p. 1090.

[46] On this point, see C.K. Whitehead, *The Evolution of Debt: Covenants, the Credit Market, and Corporate Governance*, in 34 *Journal of Corporation Law* 641 (2009).

[47] Consider also that, by increasing the debt, the contractual obligation to make future payments reduces agency costs related to cash flow, as there is less liquidity available to the directors for discretionary use. On this point, see R.M. Stulz, *Managerial Discretion and Optimal Financing Policies*, in 26 *Journal of Financial Economics* 3 (1990).

[48] Grossman-Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, cit., p. 691.

[49] G.T. Garvey-G. Hanka, *Capital Structure and Corporate Control: The Effect of Antitakeover Statutes on Firm*

Debt governance thus represents a fundamental piece of corporate governance. If properly managed, debt can boost corporate productivity by disciplining managers and containing agency costs produced by conflicts between the various actors involved in the company's affairs. It is no coincidence that lender governance has also been discussed in doctrine as a 'missing lever' of corporate governance, i.e., as an innovative and efficient tool capable of revolutionising traditional corporate governance[50].

However, the acquisition of control by the lender also exposes the company to opportunistic conduct by the latter. While it is true that banks are endowed with incentives and structural requirements that prevent the formation of typical director biases, it is also evident that the lender, unlike managers, is not subject to a fiduciary duty towards the company. Therefore, the maximisation of the lender's welfare does not necessarily lead to the maximisation of the financed company's wellbeing. It is useful to emphasise that, notwithstanding the lender liability that can be incurred by the creditor/manager for engaging in abusive conduct to the detriment of the debtor, there are at least two factors that severely limit the possibility of the lender engaging in opportunistic conduct.

First, if the creditor's action consists of a breach of contract, they are without doubt liable for damages for non-performance, having to bear additional costs over and above those associated with monitoring the debtor.

Another key factor is that of reputation. As a rule, the bank lender is larger than the financed company and does not limit its relations to the latter or to companies in the same sector. Engaging in misconduct could then result in damage to the good name of the institution, which, in light of the fierce competition in the credit market, could potentially prove very risky[51].

However, the resilience of the model outlined so far is closely related to the

Leverage, in 54 *Journal of Finance* 519 (1999); L.L. LUNDSTRUM, *Entrenched Management, Capital Structure Changes and Firm Value*, in 33 *Journal of Economics and Finance* 161 (2009).

50 This expression is taken from D.G. BAIRD-R.K. RASMUSSEN, *Private Debt and The Missing Lever of Corporate Governance,* in 154 *University of Pennsylvania Law Review* 1209 (2006).

51 D. FISCHEL, *The Economics of Lender Liability*, in 99 *Yale Law Journal* 131, 138 (1989). This is further corroborated by the growing phenomenon of reputational algorithms, on which see for e.g., Trib. Roma, 4 April 2018, with a note by G. GIANNONE CODIGLIONE, *Algoritmi reputazionali e confini dell'autonomia dei privati*, in *Dir. inf.*, 2019, p. 520 ss.

flexibility it can show with respect to changes in the credit market. From the traditional lack of liquidity linked to the existence of debt, the last few years have seen an increase in free cash flow and greater competition at a qualitative and quantitative level between the various intermediaries[52]. The possibility of resorting more easily to various credit risk reduction instruments, above all factoring, is resulting in a reduced interest on the part of banks to exercise the prerogatives attached to credit until maturity[53]. The same consequence leads to competition among the sector's operators, who are incentivised to turn to the secondary market on which to relocate credits - all the more so when they have high risk profiles[54]. These solutions are certainly more economical than the establishment of a system of monitoring and control over the financed company, although at present there is no certainty as to the definitive abandonment of lender governance schemes following the development of credit derivatives and the secondary credit market.

5. The rise of contract governance

The preceding paragraphs have demonstrated the need to take into account the effects on the reference market of the choices related to debt management and the hetero direction taken by the creditor. Cost-effectiveness must therefore be assessed not only

[52] PICARDI, *Il ruolo dei creditori*, cit., p. 119; C.K. WHITEHEAD, *Creditors and Debt Governance*, Cornell Law School Research Paper No. 011-04, February 12, 2011, available on the <website http://ssrn.com/abstract=1760488>.

[53] This scenario has led to the emergence of a true market for impaired loans, within which the most widespread operation is certainly the securitisation of loans under Law 130/1999. On this point, see for example, U. VIOLANTE, *La circolazione del credito «distressed»*, Giuffrè, Milano, 2013.

[54] P. SCHLESINGER, *Il primato del credito*, in *Riv. dir. civ.,* 1990, I, p. 825, argues for the centrality of the credit industry as vital to the development of other economic sectors, highlighting the shift from a system based on the static enjoyment of goods to one based on contractualisation and business activity, in which a crucial role is played by financial and service-producing activities, and in which obtaining credit is essential to be able to operate in the market. This subject has recently been taken up by V. CONFORTINI, *Primato del credito. Responsabilità patrimoniale ed espropriazione privata nell'economia del debito*, Jovene, Napoli, 2020, which emphasises how the primacy of credit has led to a progressive commodification of credit and the financialisation of the economy, characterised by companies making recourse to tradable securities rather than bank financing and the consequent expansion of intermediaries' activities in the trading of securities rather than in the granting of credit. In essence, what is being traded is not so much the asset or money itself as the access to these assets.

with regard to the mere creditor-debtor relationship, but also in view of the systemic repercussions. In this perspective, then, it seems appropriate to read the issue from the perspective of contract governance, which serves as a link between the theory of governance and the general theory of the contract[55]. Whilst governance is defined as the institutional matrix within which transactions are negotiated and executed, its rules are necessary where risks of opportunism arise, or third-party interests are involved[56]. From a contractual perspective, the use of governance structures becomes crucial where the agreement does not consist of a one-off exchange, but rather of long-term or network relationships, where the risk of opportunistic behaviour is particularly high[57].

However, the focus on contract governance is fairly recent, as, traditionally, scholars have studied governance only with regard to the organisation of the corporate structure. Undoubtedly, corporate governance has played (and still plays) a crucial role since it is able to address familiar themes from a new, sometimes much broader, research perspective. It is not simply limited to ordering the architecture of the internal structures of a company, but also takes into account their market-oriented nature. Moreover, in an increasingly financial and global economy, corporate governance provides a common language that transcends borders and makes it easier to compare legal rules and facts.

That said, the financial crises have made clear the need to pursue not only the stability of individual players but that of the market as a whole. And, in this sense, contract governance plays a much broader role than corporate governance. It provides a research approach that deals with the institutional framework within which contractual relationships are put in place and which verifies what consequences the economic, legal,

[55] The most complete contribution on this subject is that of *Contract Governance. Dimensions in Law & Interdisciplinary Research*, edited by S. Grundmann-F. Möslein-K. Riesenhuber, Oxford University Press, Oxford, 2015. See also the review by F. Mezzanotte in *Annuario Del Contratto 2015*, directed by A. D'Angelo-V. Roppo, Giappichelli, Torino, 2016, p. 246 ss.

[56] Cfr. O.E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, in 22 *Journal of Law and Economics* 233 (1979).

[57] Möslein, *Contract Governance within Corporate Governance – A Lesson from the Global Financial Crisis*, in *The Organizational Contract. From Exchange to Long-Term Network Cooperation in European Contract Law*, edited by Grundmann-F. Cafaggi-G. Vettori, Routledge, London-New York, 2013, p. 293 ss.

social and cultural effects of the agreement may generate in the relevant market[58]. This approach is consistent with the idea of contract law as an auxiliary infrastructure, intended both to give market participants as much contractual freedom as possible, but also to support the long-term stability of markets[59]. Ultimately, the contract is not regarded as having effects only between the parties, but its impact on third parties is assessed in a systematic manner[60].

Hence, contract governance can be understood in a twofold sense: on the one hand, governance by contract[61], which emphasises the regulatory function pursued through the contract, and on the other hand, governance through contract[62], understood as the sum total of the negotiating instruments adopted to manage a relationship between two subjects[63].

[58] S. PATTI, *Contractual Autonomy and European Private Law*, in *Rules and Principles in European Contract Law,* edited by J. Rutgers-P. Sirena, Intersentia, Cambridge-Antwerp-Portland, 2015 p. 123 ss.; MEZZANOTTE, *Regulation of Business-Clients Relationships through 'Organisational Law'*, in *European Review of Contract Law*, 2017, p. 123 ss., esp. p. 126.

[59] H. COLLINS, *Regulating Contracts,* Oxford University Press, Oxford, 2002, spec. p. 225 ss.

[60] A. ZOPPINI, *Autonomia contrattuale, regolazione del mercato, diritto della concorrenza* in *Contratto e Antitrust,* edited by G. Olivieri-Zoppini, Laterza, Roma-Bari, 2008, p. 3 ss.; ID., *Funzioni del diritto privato e tecniche di regolazione del mercato*, in *Funzioni del diritto privato e tecniche di regolazione del mercato*, edited by ZOPPINI-M. MAUGERI, Il Mulino, Bologna, 2009, p. 15; V. RICCIUTO, *Regolazione del mercato e "funzionalizzazione" del contratto* in *Studi in onore di Giuseppe Benedetti,* Napoli, 2008, p. 1615 ss.

[61] J.E. FISCH, *Governance by Contract: The Implications for Corporate Bylaws*, in 106 *California Law Review* 373 (2018); RIESENHUBER, '*Schatten des Rechts – Contract Governance und Governance der Vertragsverhandlungen bei der SE-Mitbestimmung*' in *Festschrift for Klaus Hopt*, Berlin, 2010, p. 1225 ss.

[62] P. ZUMBANSEN, *The Law of Society: Governance Through Contract*, in 14 *Indiana Journal of Global Legal Studies* 191 (2007) underlines also that: "*Contracts, in this view, reflect society's differentiation into many, highly specialized areas of social activity. This approach sees contracts as constituting a radicalized form of an endless self-reproduction of differences, which reflects and is intimately linked to the eternal destruction of societal unity into fragmented, functional societal discourses*". See also ID., *Law, Economics, and More: The Genius of Contract Governance*, in *Contract governance*, edited by Grundmann-Möslein-Riesenhuber, cit., p. 80 ss.

[63] The central role of contract governance emerges especially in view of the progressive European integration at economic level. From this perspective, the contract, as regulated *ab externo*, contributes to the smooth functioning of the European Union's single market by removing obstacles to the protection of competition and the free choice of consumers, investors, and customers. This is discussed at length by ZOPPINI, *Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza*, in *Riv. dir. civ.,* 2008, p. 515 ss. and MEZZANOTTE, *Regulation of Business-Clients Relationships through 'Organisational Law'*, cit., p. 123 ss. Concerning the same function performed by all private law rules, see R. WEIGMANN, *L'interpretazione del diritto societario armonizzato nell'Unione*

The first definition thus allows for purposes beyond those envisaged by the parties to enter into the contract[64]. This view was generated with the advent of regulation which implied a functionalisation of the relationship between private parties that was quite evident, as opposed to the objectives that the legislature intended to achieve with the civil code, which was essentially aimed at dictating the conditions of recognisability and validity of the individual contractual act[65]. From this new perspective, the contract becomes the most suitable instrument for resolving failures: regulation extends its assessment to the market impact of the individual transaction, verifying its advantageousness within the system[66]. Such a function is absent in the logic of the Italian civil code, where the focus is placed solely on the correct procedure for the formation of the will of the individual, without the consideration, on a broader scale, of the congruity between the interest pursued by the parties and the impact, on the market in which the transaction is placed, of the benefits obtained[67].

Concerning the second notion, this emphasises the capacity of the contract to regulate a transaction that is more complex than the contractual case typified by the Italian civil code. The contract is no longer the object of mere interpretation and qualification but becomes the ideal means of channelling the changing needs of the

europea in *Contr. impr. Eur.,* 1996 p. 487 ss.; G. COMPARATO-H.W. MICKLITZ, *Regulated Autonomy between Market Freedoms and Fundamental Rights in the Case Law of the CJEU*, in *General Principles of EU Law and European Private Law*, edited by U. Bernitz-X. Groussot-F. Schulyok, Wolters Kluwer, Alphen aan den Rijn, 2013, p. 121 ss. See also M. LIBERTINI, voce *Concorrenza*, in *Enc. dir., Annali*, Milano, 2011, p. 191 ss. e D. CORAPI, voce *Impresa (diritto comunitario)*, in *Enc. dir., Annali*, Milano, 2007, p. 734 ss.

[64] This is the perspective of the so-called "libertarian paternalism", respect to which, see R.H. THALER-C.R. SUNSTEIN, *Libertarian Paternalism,* in 93 *American Economic Review* 175 (2003); THALER-SUNSTEIN, *Nudge. Improving Decisions About Health, Wealth, and Happiness,* Penguin Publishing, New York, 2008; SUNSTEIN, *Deciding by Default*, in 162 *University of Pennsylvania Law Review* 1 (2013).

[65] ZOPPINI, *Autonomia contrattuale, regolazione del mercato, diritto della concorrenza*, cit., p. 3 ss.

[66] ZOPPINI, *Funzioni del diritto privato e tecniche di regolazione del mercato,* cit., p. 15 ss.

[67] D. SIMEOLI, voce *Contratto e potere regolatorio (rapporti tra)*, in *Dig. disc. priv., sez. civ.*, agg., Torino, 2014, p. 94 ss.; F. VENOSTA, *Contratti regolati e rimedi civilistici*, in *Oss. dir. civ. comm.*, 2016, 98 e segg.; C. FERRARI, *I contratti dei mercati regolati,* Giappichelli, Torino, 2018, p. 156 ss.; A. NERVI*, Il contratto come strumento di conformazione dell'assetto di mercato* in *I poteri privati e il diritto della regolazione*, edited by P. Sirena-Zoppini, Roma Tre University Press, Roma, 2018, p. 507 ss.; C. SOLINAS, *Il contratto amministrato*, ESI, Napoli, 2018, p. 193 ss.

parties into a long-term relationship[68].

Moreover, one of the most innovative aspects introduced by governance theory is related to the focus on human behaviour, and thus on the incentives and ways in which actors make decisions[69]. The revolutionary scope of this approach made it possible to overcome the rigid dichotomy between the State and private actors, which had characterised the phase of 'dirigisme' in the 1970s and had nevertheless led to a crisis of law, summarised by the term *'steuerungskrise des rechts'*[70]. The advent of governance, on the other hand, broadened the view to include the interactions between the public and private elements, in order to verify the impact on the system of both the rules and the actions of citizens[71]. This is based on a precise conviction in policy terms: that lesser rigidity in the rule is accompanied by a greater range of reactions on the part of the private actor. This is exactly what happens in the contractual sphere where the parties' conduct is guided by mutual consent in the presence of flexible and non-hierarchical rules[72]. If, therefore, the parties are able to negotiate even if they may be in conflict with

[68] F. BARTOLINI, *Strutture contrattuali complesse. Problemi della trilateralità nei contratti di finanziamento*, ESI, Napoli, 2019, p. 13 warns, however, that the perspective of contract governance and in particular that of governance through contract, while sharing the function of constructing contractual regulation outside the mere dynamics of the exchange of goods or services, should not be confused with the concept of normative contracts. The latter, according to the author, "*is a category that – even though their effects and notion are debated, and despite the fact that their boundaries are very fluid – finds indirect typifications in the civil code and in specific legislation, in a framework that, albeit original, remains within the traditional framework of the contract identified in the traditional way by the codified model of general and special parts*". For a more in-depth look at normative contracts, see, amongst others, G. GUGLIELMETTI, *I contratti normativi,* Padova, 1969; A. GENTILI, *Sull'interpretazione dei contratti normativi*, in *Contr. impr.*, 1999, p. 1162 ss.; A. ORESTANO, *Accordo normativo e autonomia negoziale*, Cedam, Padova, 2000; G. GITTI, *Appunti sull'accordo normativo*, in *Riv. dir. priv.*, 2002, p. 249 ss.

[69] On *behavioral law and economics* as an approach that can anticipate the responses of individuals to legal norms, see the essays contained in *Oltre il soggetto razionale*, edited by ROJAS ELGUETA-VARDI, cit.

[70] E. SCHMIDT-ASSMANN, *Gefährdungen der Rechts- und Gesetzesbindung der Exekutive'* in *Festschrift for Klaus Stern*, C.H. Beck, München, 1997, p. 745 ss.; *Contract Governance*, edited by Grundmann-Möslein-Riesenhuber, cit., p. 42.

[71] ZOPPINI, *Il diritto privato e i suoi confini*, Il Mulino, Bologna, 2019, p. 171 ss., esp. p. 177 s. (See also the review by A.M. BENEDETTI, in *Riv. dir. civ.*, 2021 p. 608 ss.)

[72] RIESENHUBER, *A Need for Contract Governance?,* in *Financial Services, Financial Crisis and General European Contract Law. Failure and Challenges of Contracting,* edited by Grundmann-Atamer, Wolters Kluwer, Alphen aan den Rijn, 2011, p. 61 ss.

the predefined rules of contract law, legislators cannot fail to anticipate such contractual behaviour when drafting the rules. In essence, the contract governance perspective admits that the regulator's awareness of the reactions of private parties, engendered by a given provision, can lead to it becoming more effective[73].

From the perspective of contract governance, the interpretation of the phenomenon of creditor intervention in the management of the financed company points therefore, first of all, to the need to verify the repercussions of the relationship between the lender and the financed entity at systemic level. Specifically, it is necessary to identify the usefulness of the clauses that give rise to the phenomenon in maintaining the stability of market structures. From this point of view, the choice of remedy is crucial, given that, in light of the role played by a given company in its production sector, any abrupt cut in financing could lead to the insolvency of the company itself and, as a knock-on effect, to the onset of economic difficulties for the companies doing business with it. The function played by agreements that, by means of renegotiation, attribute powers of involvement to the creditor, must certainly be analysed not only for their legitimacy, but also from the perspective of the proper functioning of the market[74]. In this view, the restriction of the debtor's private autonomy could be justified in the light of the greater efficiency achieved from keeping open the relationship with the lender compared to interrupting it. This is because the positive trend of the reference sector also produces favourable consequences for the financed company itself, which, otherwise, would place itself and the other subjects with which it interacts at risk of insolvency.

However, placing this phenomenon within the prism of contract governance

[73] V. Roppo, *Il contratto*, in *Tratt. Iudica-Zatti*, II ed., Giuffrè, Milano, 2011, p. 974 states that the more complex a phenomenon becomes, the greater the need for instruments that allow it to be 'governed' appropriately, emphasising also how contract governance implies above all the preparation and activation – at times by law, at times by private autonomy – of the most suitable mechanisms for managing the critical issues that arise in the development of the relationship between the parties: in short, contractual remedies. In this sense too, the subject of remedies thus proves to be the true heart of contract law and contract theory above all others.

[74] Finally, the *Guidelines on loan origination and monitoring,* issued by the *European Banking Authority* on the 29 May 2020 (that can be consulted freely on the website of the Authority), in paragraph 8.4, entitled "*Monitoring of covenants*", underline the crucial role played by *covenants* in the timely detection of a company crisis. The aim of the European regulator is to strengthen the predictivity of early warning models in order to identify positions whose credit quality is at risk of deterioration, thereby preventing disruptions in the market structure.

involves considering the clauses that give rise to it as instruments of contractual architecture themselves. Within the complex relationship that is established between creditor and debtor, where the debtor's interest in keeping the contract alive and the creditor's interest in the return of the investment can be discerned, the provision of covenants that regulate power relations can play a role in the simplification and regulation of the entire structure at stake. In essence, the intention is to affirm that the complexity of the relationship and the plurality of the interests involved, including the public interests tied to market stability, may justify the inclusion in the contract of a series of stipulations that more adequately reflect the needs of the parties[75].

[75] This view can be traced back to the idea of *Private Ordnung* (on which see G. BACHMANN, *Private Ordnung. Grundlagen ziviler Regelsetzung*, Mohr Siebeck, Tübingen, 2006 and S. MEDER, Ius non scriptum. *Tradizioni della produzione privata del diritto*, trad. it., Editoriale Scientifica, Napoli, 2011), according to which forms of self-regulation of economic and social activities are increasingly being sought out, to the point of arriving at scenarios in which public regulation is relegated to a marginal role. See also M. GRONDONA, *Poteri dei privati, fonti e trasformazioni del diritto: alla ricerca di un nuovo ordine concettuale*, in *I poteri privati e il diritto della regolazione*, edited by Zoppini-Sirena, cit., p. 5 ss.