LUISS

Undergraduate School

Bachelor's Degree in Economics and Business

Principles of Civil Law

Dealing in financial instruments: *alea* of the contract, lawfulness, and profiles of worthiness, with particular reference to swap contracts

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Academic Year 2025/2026

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Introduction

Financial markets have undergone profound transformations in recent decades, characterised by the growing diffusion of financial instruments designed to manage and reallocate economic risk. Among these, financial derivatives occupy a position of particular significance: they are contracts whose value depends on, or "derives" from, the performance of an underlying asset, an index, or a financial parameter, and whose distinctive feature lies precisely in the fact that such value is not intrinsic, but dependent on the future performance of the underlying, rendering the contract inherently exposed to risk. This embedded exposure places the concept of *alea* at the centre of the legal analysis of derivative contracts.

In this context, Italian case law has played a decisive role in shaping the relevant legal framework. The judgment of the Joint Civil Sections of the Court of Cassation No. 8770 of 12 May 2020 marked a turning point, identifying the conditions under which the *alea* inherent in derivative contracts may be considered "rational" and therefore compatible with the requirement of *meritevolezza* under Article 1322 of the Italian Civil Code. More recently, the Court of Cassation has readdressed the issue through two orders, Nos. 2262 and 2358, delivered in February 2026, which further clarified the relationship between the rational character of the *alea* and the determinability of the contractual object, whilst, as will be argued, substantially departing from the principles affirmed by the nomophylactic ruling of 2020.

This thesis explores the concept of *alea* in contract law, focusing on its role within derivative financial instruments, with particular reference to swap contracts. The analysis investigates the relationship between contractual risk, the lawfulness of the contractual arrangement, and the requirement of legal worthiness (*meritevolezza*), so as to ensure that the parties' interests align with the fundamental values of the legal system. Derivative contracts constitute a particularly significant case study, given that they are structured around the negotiation and allocation of risk and raise fundamental issues concerning the balance between contractual autonomy and investor protection, issues that the most recent case law has rendered more pressing than ever.

The thesis is structured as follows. Chapter I traces the historical and systematic evolution of *alea* within the Civil Code, examining its conceptual origins and its progressive doctrinal

elaboration, so as to arrive at its current formulation under Article 1469 of the Civil Code, with particular attention to the structure and typologies of aleatory contracts and their paradigmatic manifestations in the typical contractual forms expressly regulated by the legislator. Chapter II examines the relationship between contractual autonomy and the *meritevolezza* of interests in risk-based agreements, with specific focus on Judgment No. 5657 of 23 February 2023 of the Joint Civil Sections of the Court of Cassation, addressing the criteria governing the assessment under Article 1322, paragraph 2, of the Civil Code and the inapplicability of the remedies of commutative justice to aleatory contracts. Chapter III investigates the historical origin and evolution of derivative contracts, analysing the contractual risk inherent in futures, options, and swaps, and concludes with a critical examination of the legal framework established by Judgment No. 8770/2020 of the Joint Civil Sections and of the extent to which the new direction charted by the two orders of February 2026, Nos. 2262 and 2358, departs from the principles therein affirmed.

From a methodological perspective, the study adopts an integrated doctrinal and jurisprudential approach, combining the main theoretical interpretations with the analysis of relevant statutory provisions and case law. Particular attention is devoted to the most recent decisions of the Court of Cassation, which provide essential insights for understanding the current legal framework and its ongoing evolution.

Ultimately, this research argues that the presence of *alea* does not, *per se*, undermine the validity of a contract. Rather, contractual risk represents a legitimate component of economic transactions, provided it is rationally structured, transparent, and consciously assumed by the parties. In this light, recent case law suggests a more refined framework, one that reconciles the freedom of contract with the rigorous transparency required by modern financial markets.

1. The notion of *alea* (contractual risk)

The term *alea* means fate, in its objective profile, and also risk, in its subjective profile[1]. Before referring to danger, risk, or chance, the Latin *alea* denotes the die and, by extension, gambling.
It must nevertheless be observed that aleatoriness, although closely connected to the ludic phenomenon of games and wagers, is distinguished from it by its considerably broader scope.

To use the words of authoritative legal scholarship, *alea* represents a condition in which hope and fear coexist[2], or, alternatively, the possibility of a gain accompanied by the probability of a loss[3]. In more general terms, *alea* permeates a large part of an individual's conduct and of the situations arising in social life, and is capable of affecting personal integrity, property, and even existence itself[4]. In itself, *alea* has a neutral character: in its empirical aspect, it relies on the possibility of a future event that is not necessarily unfavourable to the individual.

In the contractual sphere, *alea* represents only one of the modes of existence of the aleatory contract, as an original and distinctive element "which colours and qualifies the causal scheme of the contract"[5].
In this respect, under our legal system, contracts may be regarded as aleatory where the extent of the performance depends on chance, that is, on uncertain or unknown facts beyond the parties' control; in other words, in aleatory contracts the parties assume the risk that, as a result of chance, the performance incumbent upon them may be increased, or that the expected performance may be reduced or even entirely eliminated[6].

1.1 Brief historical overview of aleatory contracts

Already in classical Roman law the meaning of *alea* was known and, in this sense, the term *periculum* was used, although with reference to different contexts, to denote not only a

[1] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *Le Rassegne – Obbligazioni e contratti,* January 2012, p. 58.
[2] BOSELLI, *Alea*, in *Novissimo Digesto Italiano*, vol. I, no. 1, Turin, 1957, p. 469.
[3] CARAVELLI, *Alea*, in *Digesto Italiano*, vol. I, Turin, 1884, note 8.
[4] MOSCO, *Onerosità e gratuità degli atti giuridici*, Milan, 1942, p. 83.
[5] NICOLÒ, *Alea*, in *Enciclopedia del Diritto*, vol. II, Milan, 1958, p. 1029.
[6] ROPPO, *Il contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 421.

dangerous situation but also damage, not in potential but in actual terms, though always referable to a prior risky occurrence.

In this context, the issue of aleatoriness mainly concerned the allocation of *periculum obligationis*, that is, the determination of which party, or whether both parties, to the relationship must bear the loss of the expected advantage in a speculative transaction resulting from a supervening impossibility of performance not attributable to either party[7].

However, the concepts of risk and contractual liability were often confused with one another, so that the issue of *periculum* not infrequently turned into a problem of liability for fortuitous events.

In this regard, various doctrinal approaches considered it necessary to carry out a preliminary assessment aimed at excluding the attribution of non-performance to the "sphere of control" of one of the parties and at ascertaining whether the contract contained clauses extending the debtor's liability or shifting the risk to the detriment of the creditor; only after such assessments did they consider it possible to resolve the issue of identifying the party required to bear the loss of the *commodum obligationis*, which had occurred as a result of the altered allocation of interests agreed upon by the contracting parties[8].

It was only with the great financial crisis that affected the Late Empire, and with the emergence of new ethical concerns championed by the Church[9], that, unlike the Roman law of "formal contracts", the "substantive" principle of *iustum pretium* came to be affirmed as a means of protection for those who, due to economic weakness, had been induced to enter into obligations on markedly unbalanced terms: indeed, the Constitution attributed to Emperor Diocletian, *De rescindenda venditione*, dates back to the year 285 A.D.[10], nevertheless, it remained largely unknown in the West throughout the Early Middle Ages, largely because of the absence of a genuine market, especially in relation to transactions involving immovable property[11].

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[7] BURDESE, *Manuale di diritto privato romano*, 2nd ed., Turin, 1964, p. 705.
[8] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *Le Rassegne – Obbligazioni e contratti*, January 2012, p. 59.
[9] SESTA, *Comunione di diritti, scioglimento, lesione*, Naples, 1988, p. 17 ff.
[10] Even though the text is considered to have undergone an interpolation by the Justinian compilers. In this sense, see GRANDENWINTZ, *Interpolazioni e interpretazioni*, in *Bollettino dell'Istituto di diritto romano*, 1889, p. 14.
[11] CAPRIOLI, *Rescissione del contratto (storia)*, in *Enciclopedia del Diritto*, vol. XXXIX, Milan, 1988, p. 935.

The aleatory contract thus found its first emergence within *ius commune*, owing to the established necessity of the principle of proportionality of performances, extensively developed by the canonists and examined by Saint Thomas Aquinas[12]. Under the influence of Christian doctrine, the aspiration to contractual fairness entered the legal tradition and, consequently, the concept of commutative justice[13].

Along the same lines, the influence exerted by scholastic philosophy on canonical sources led to the affirmation of the *rebus sic stantibus* clause, which likewise constituted "a slow infiltration into the legal field of principles that had previously possessed a moral content"[14]. As noted by authoritative legal scholarship, there was a close connection between the remedy of rescission for lesion and the *rebus sic stantibus* clause, since, if the balance between performances was considered essential for the conclusion of a valid contract, it later appeared natural to conclude that, in order for the bond to remain valid, such balance had to persist until the moment of performance[15].

This development was consistent with the affirmation of *ius commune in spiritualibus*, which, more than Roman law, was responsive to the needs of medieval society and capable of exerting a strong influence on both practical life and contemporary legal doctrine[16].
Thus, a renewed conception of law came to be affirmed, shaped by the idea of *aequitas* as the highest value to be pursued and realized, together with the need to acknowledge the validity of those contracts that were increasingly spreading with the development of trade, such as insurance contracts, which were, however, intrinsically characterized by a significant imbalance in value between the performances and which, in light of the above-mentioned principles, could give rise to the suspicion that their conclusion was intended to conceal a usurious agreement[17].

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[12] BENEDETTINI, *Rescissione della vendita per causa di lesione. Appunti di storia e legislazione comparata*, in *Archivio giuridico*, 1910, p. 262 ff.
[13] MIRABELLI, *La rescissione del contratto*, Naples, 1962, p. 21 ff.
[14] OSTI, *La cosiddetta clausola "rebus sic stantibus" nel suo sviluppo storico*, in Rivista di diritto civile, 1912, p. 11 ff., ID., *Clausola "rebus sic stantibus"*, in *Novissimo Digesto Italiano*, vol. III, Turin, 1958, p. 353 ff.
[15] GALLO, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Milan, 1992, p. 80.
[16] CALASSO, *Lezioni di storia del diritto italiano. Le fonti del diritto (sec. V–XV)*, Milan, 1964, p. 350 ff.
[17] DI GIANDOMENICO, *I contratti speciali. I contratti aleatori*, in *Trattato Bessone*, vol. XIV, Turin, 2005, p. 15.

It was, moreover, only during the Enlightenment period, thanks to the affirmation of the principles of liberal economics and, shortly thereafter, to the first codifications within the European legal sphere, that aleatory contracts emerged as an autonomous category[18].
Classical contract doctrine was consequently scaled back, with greater emphasis being placed on the so-called "sovereignty of will" of private parties within an increasingly developed market, to the extent that heteronomous interventions typical of *iustitia commutativa* were significantly reduced[19].

Where *alea* had until that time been understood as an individual "occurrence" referable to specific contracts, the innovation introduced by Renaissance and seventeenth-century scholars instead lay in the attempt to affirm a general notion[20] of contracts characterized by *alea*.

The aleatory contract, as a category, found its first fully developed elaboration only in the work of Pothier, a reconstruction that did not emphasize the specific nature of the aleatory contract, but rather conceived it as a sub-category of onerous contracts, opposed, according to the "division" adopted by the French jurist, to commutative contracts.
Thus, aleatory contracts were defined as "those contracts in which one of the parties, without giving anything on his own part, receives something from the other, not by way of liberality, but as the price of the risk he has undertaken", whereas commutative contracts were described as "those in which each of the parties ordinarily gives and receives the equivalent of what he gives"[21].

It was the *Code Napoléon* which, although it reiterated the division elaborated by Pothier, directly opposed commutative contracts to aleatory contracts and provided, with regard to the latter, two distinct definitions, one set out in Article 1104 and the other in Article 1964, referring respectively to non-commercial contracts and to commercial contracts.

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[18] For a historical reconstruction, see GAMBINO, *L'assicurazione nella teoria dei contratti aleatori*, Milan, 1964, pp. 25–55, BOSELLI, *Rischio, alea ed alea normale del contratto*, in *Rivista trimestrale di diritto e procedura civile*, 1948, p. 785 ff., PINO, *Contratto aleatorio, contratto commutativo ed alea*, in *Rivista trimestrale di diritto e procedura civile*, 1960, p. 1234 ff., SCALFI, *Corrispettività e alea nei contratti*, Milan–Varese, 1960, pp. 112–114.
[19] See GALLO, *op. cit.*, p. 13 ff. and p. 73 ff.
[20] DOMAT, *Les Loix Civiles dans leur ordre naturel*, vol. I, Paris, 1777, pp. 27 and 42.
[21] POTHIER, *Trattato delle obbligazioni*, in *Opere contenenti i trattati del diritto francese*, vol. I, Italian translation, 2nd ed., Livorno, 1841, pp. 60, 90: «i contratti aleatori sono quelli nei quali ciò che l'uno dà, o si obbliga di dare all'altro, è il prezzo di un rischio che egli ha addossato… I contratti aleatori differiscono dai commutativi in ciò, che nei commutativi ciò che ciascun contraente riceve è il giusto equivalente di un'altra cosa ch'egli ha dato o che si è obbligato di dare all'altro, mentre nei contratti aleatori ciò che l'uno dei contraenti riceve non è l'equivalente di un'altra cosa che egli ha dato o che si è obbligato di dare, ma l'equivalente di un rischio ch'egli si è addossato, *suscepti periculi pretium*.»

Nevertheless, the earliest commentators on the French Civil Code already expressed strong criticism of the approach adopted by the legislator, preferring to trace aleatory contracts back to a subcategory of commutative contracts, albeit characterized by the fact that, in aleatory contracts, the equivalence between the performances constituted "une simple espérance"[22], a peculiarity which was not considered to preclude the existence of an exchange[23], since the risk assumed represented the consideration for the sacrifice borne in order to undertake it.

The general tendency of modern legal systems to include, within the treatment of contracts, the category of aleatory contracts came to constitute, from the Napoleonic codification onwards, an established feature, which would characterize the entire pre-unification legislation, including Italian law, thus the Albertine Code promulgated on 20 June 1837 and the Civil Laws of the Kingdom of the Two Sicilies of 1819, whereas the Austrian Code of 1811, in force in Lombardy-Venetia, differed in this respect by expressly providing for gratuitous aleatory contracts[24].

Substantial elements of novelty were introduced by the Civil Code of 1865, which, after providing, in Articles 1099, 1100 and 1101, the definitions of bilateral and unilateral contracts, onerous and gratuitous, defined in Article 1102 as aleatory or contracts of chance those contracts in which "for both parties or for one of them, the advantage depends on an uncertain event", and continued by stating that "such are the insurance contract, the loan at one's own risk, gaming and wagering, and the life annuity contract".

Compared to the previous legislative framework, the opposition between aleatory contracts and commutative contracts was thus abandoned, so that the view already mentioned appeared to prevail, according to which commutative contracts constituted a broad genus, within which aleatory contracts were also included, these being in themselves characterized by the fact that the equivalent, rather than consisting in something actual and certain, amounted to nothing more than a hope[25].

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[22] MOSCO, *op. cit.*, p. 83.
[23] BIANCA, *Diritto civile*, vol. III, 2nd ed., Milan, 2000, p. 491: «i contratti aleatori non si contrappongono, invece, ai contratti corrispettivi, in quanto l'aleatorietà non esclude la corrispettività delle prestazioni. L'alea si traduce nella incertezza totale o parziale di una delle prestazioni ma il diritto ad una prestazione incerta costituisce pur sempre termine di scambio verso la controprestazione».
[24] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *Le Rassegne – Obbligazioni e contratti*, January 2012, p. 60.
[25] BALESTRA, *Il contratto aleatorio e l'alea normale*, Padua, 2000, p. 33.

1.2 The aleatory contract in the current Civil Code

The current Civil Code addresses aleatory contracts in Article 1469, which, however, provides no definition thereof, merely declaring inapplicable to them the rules on excessive onerousness set out in Article 1467 of the Civil Code, and those on rescission for lesion set out in Article 1448 of the Civil Code, and regulating, under Article 1472 of the Civil Code, the sale of future goods.

The reason for such exclusion is easily understood when combined with the commonly accepted understanding of the aleatory contract, namely a contract in which one party undertakes an obligation with the awareness, from the very moment of conclusion, of the possibility of receiving nothing in return, or of receiving a performance of a value significantly lower than that rendered[26], and, therefore, with the fact that, for this type of contract, the risk of alteration of the economic balance of the transaction and of the terms of the relationship constitutes an intrinsic feature of the causal scheme.

According to the traditional approach, the so-called functional conception[27], developed along the lines of the *Code Napoléon* and shared by case law[28], the aleatory contract is distinguished by the fact that, for each of the parties, its conclusion entails indeterminate possibilities of gain or loss, with uncertainty affecting, from the outset, the economic outcome of the contract.

According to another strand of legal scholarship[29], by contrast, the aleatory contract would be characterized by the fact that the uncertain event does not affect the economic value of the performances, but rather their *an* or their *quantum*, the so-called structural conception. According to a third approach, in order for a contract to qualify as aleatory, both the requirement of indeterminacy of the performances and the absence of correlativity between the performances themselves would be necessary[30].

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[26] GALGANO, *Trattato di diritto civile*, vol. II, Padua, 2010, p. 533.
[27] CARIOTA FERRARA, *Il negozio giuridico nel diritto civile italiano*, Naples, n.d., p. 209, MESSINEO, *Il contratto in genere*, in *Trattato Cicu e Messineo*, Milan, 1968, p. 774 ff., MOSCO, *op. cit.*, p. 83 ff., F. SANTORO PASSARELLI, *Dottrine generali del diritto civile*, Naples, 1976, p. 244 ff.
[28] Among many others, see Cass., 26 January 1993, no. 948, in *Giustizia civile*, 1993, I, p. 3021, with a note by Costanza, Cass., 31 May 1986, no. 3694, in *Repertorio Foro italiano*, no. 335, Cass., 9 April 1980, no. 2286, in Giustizia civile, 1980, I, p. 1503.
[29] DI GIANDOMENICO, *Il contratto e l'alea*, Padua, 1987, p. 60, ROTONDI, *Istituzioni di diritto privato*, Milan, 1942, p. 341. In case law, see Cass., Joint Civil Sections, 26 January 1993, in Giustizia civile, 1993, I, p. 3023 ff., with a note by Costanza, Cass., 7 June 1991, no. 6452, in Repertorio Foro italiano, 1991, no. 401, Cass., 11 March 1966, no. 699, in Temi napoletani, 1966, I, p. 162.
[30] DI GIANDOMENICO, *Il contratto e l'alea*, cited work, p. 303.

Within the framework of the current contractual system, a particularly widespread distinction is that between aleatory contracts and commutative contracts.

Commutative contracts are those in which the synallagma is not characterised by risk factors beyond the normal *alea* inherent in the contract, namely the ordinary risk connected with market price fluctuations. In such cases, the risk is generic in nature and becomes relevant at the stage of performance; it may be economic, linked to the normal development of market conditions, or legal, as in the case of a suspensive or resolutive condition affecting the effectiveness of the contract.

Aleatory contracts, by contrast, are those in which risk constitutes a defining element of the causa, resulting in a variation of the performances depending on the risk factor contemplated by the parties. In this case, the risk is specific in character and becomes relevant already at the stage of formation of the contract.

Beyond the various theoretical reconstructions that have emerged over time, it is in fact appropriate to give prominence to those legal theories aimed at clarifying the nature and structure of the aleatory contract, by identifying *alea* in its legal sense as the original and essential element of that contract, which "colours and qualifies the causal scheme"[31] thereof, without which it would lose its distinctive character.

According to the prevailing doctrinal approach, the risk that renders a contract aleatory is the legal and economic risk inherent in the performance.

In other words, it is not the purely economic risk relating to the cost of the performance due, or to the value or utility of the expected performance, since every contract entails a certain degree of economic risk. By way of example, in a contract for the performance of work, the contractor bears the risk that the execution may prove more burdensome, in terms of effort and costs, than initially anticipated, thus rendering the price no longer remunerative, while the client bears the risk that the work may not provide the expected benefits. Likewise, in a contract for the sale of shares, their value may, in relation to various factors, remain stable, double, or be reduced by half within a short period of time. According to this approach, the contract is not aleatory even where it entails a very high

[31] NICOLÒ, *op. cit.*, p. 1029.

economic risk. In such cases, in fact, there is uncertainty as to the cost or the utility of the performance, but not as to the performance as such, which is certain and defined[32].

From the *alea* proper to aleatory contracts, the so-called normal *alea* must instead be distinguished, understood as the "risk, in terms of normal, and therefore foreseeable, fluctuations in the costs and values of performances, originating from ordinary market fluctuations"[33], to which the parties submit by entering into any contractual relationship. It depends primarily on the contractual type, since each type incorporates a different scheme for the allocation of risks between the parties. To this, the assessment of any other personalizing elements that contribute to shaping the scheme for the allocation of risks concretely adopted by the parties must be added. The *alea* proper to contracts is relevant for the purposes of termination for excessive onerousness, pursuant to Article 1467, and constitutes, according to the doctrine cited, the purely economic risk.

Legal risk, by contrast, is understood as that which arises when it is the performance itself, independently of its cost or its economic value, that depends on the course of events. Such risk is likewise considered, in itself, insufficient to qualify a contract as aleatory. By way of example, in a conditional contract, the performance is legally at risk because a future and uncertain event, namely the fact constituting the condition, may render it ineffective. The contract is not, however, aleatory, because the risk affects both performances equally, which are subject to the same outcome. In other words, this is a neutral risk, which does not alter the economic balance of the contract, since the event that releases one party from the performance due also deprives that party of the counter-performance, whereas, conversely, the event that imposes the performance on one party likewise confers upon it the right to the counter-performance.

The risk inherent in an aleatory contract properly so called is a risk that is at once legal and economic.

It is "the risk that affects the performance in itself, and not merely its cost or value, and affects it in a unilateral and unbalancing manner, so as to benefit one party and disadvantage the other on an economic level"[34]. This occurs, for example, in insurance contracts, where, while the payment of premiums by the insured remains fixed, the performance of the

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[32] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 422.
[33] TERRANOVA, *L'eccessiva onerosità nei contratti (artt. 1467–1468)*, in *Commentario Schlesinger*, Milan, 1995, p. 155.
[34] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 422.

indemnity in its favour arises only in the event of a loss, whereas, in the absence of such loss, it does not arise, in gaming and wagering, where the party who stakes the wager will either win or lose, and, in the former case, may win either little or much, depending on how chance or human skill directs events, in life annuity contracts, where, while the transfer of capital or immovable property remains fixed, the performance of the annuity is measured by the uncertain duration of human life, as well as, and most relevant for present purposes, in stock exchange differential contracts and in contracts relating to derivative financial instruments, such as futures and swaps, in which, against the performance of the investor, the amount of the counter-performance depends on the future trend of rates, currencies, or indices relating to other financial instruments.

The distinction between legal and economic risk, which is characteristic of aleatoriness, and purely economic risk may be subtle, and the qualification of a contract as aleatory or non-aleatory may therefore prove uncertain[35]. By way of example, a clause in a contract of sale excluding warranty and liability for defects of the goods does not, as a rule, render the contract aleatory, because it places upon the buyer a purely economic risk, however, where such a clause also covers defects capable of leading to an order for the destruction of the goods by a public authority, the buyer's risk becomes one of failing to obtain the performance, and the contract becomes aleatory. Likewise, a sale of shares, at a price fixed today, to be transferred one year later is not aleatory, whereas a contract in which the consideration is measured by the value that those shares will have after one year is aleatory.

It must also be observed that, if, as a result of the operation of *alea*, one party finds itself burdened with its own performance while being deprived of the counter-performance, the contract does not, for that reason, become gratuitous, since the onerous or gratuitous nature of a contract must be assessed *ex ante*, that is, at the moment of the conclusion of the contract, and not *ex post*, in the light of subsequent events[36].

Article 1469 of the Civil Code suggests that a contract may be aleatory "by its nature" or "by the will of the parties". The former category comprises typical aleatory contracts, in which the legal and economic risk inherent in the performance characterizes the contractual type itself, such as gaming or wagering, insurance, and life annuity contracts. In the latter case, atypical aleatory contracts are involved, in which the parties conclude a contract that

[35] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 423.
[36] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 423.

is not typically aleatory but modify the discipline of the contractual type through clauses that expose the performance to legal and economic risk. By way of example, the sale of a future thing is not typically aleatory, but it becomes so where the parties place upon the buyer, who remains in any event obliged to pay the price, the risk that the thing may not come into existence, the so-called *emptio spei*, or where they conclude an atypical contract characterized by the presence of such risk. In more general terms, an atypical aleatory contract may be created by the prior waiver of the right to invoke statutory liability and warranties; by the inclusion in the contract of an object that is determinable *per relationem* to future and uncertain data, the risk of which is borne entirely by one party; or by the attachment of a condition not to the contract as a whole, but solely to the performance owed by one party to the other[37].

Since risk characterizes the *causa* of the aleatory contract, the absence of risk may render the contract void for lack of *causa*, as in the case of *emptio spei*, where it is already certain, at the time of the conclusion of the contract, that the thing will or will not come into existence.

It cannot be overlooked that aleatory contracts have historically been conceived as a "transitional" category, in that not only insurance, but also other contracts have passed through this category before eventually falling within that of commutative contracts; moreover, even today new contracts often arise as aleatory, only later assuming specific economic and social functions. At the same time, it must also be acknowledged that the evolution of the legal system is moving towards the marginalization, if not the outright overcoming, of the category of aleatory contracts[38]; nevertheless, aleatoriness in all its forms is expanding as a phenomenon affecting contracts in general, rather than being confined to specific contractual types.

An illustrative example of this tendency is stock exchange contracting. In this context differential contracts appear, at first glance, to take on a connotation typical of gaming, since no other immediate functions seem to be performable by such economic operations[39]; this impression, however, is misleading, as will be observed shortly.

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[37] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè, Milan, 2011, p. 424.
[38] FERRARI, *Il problema dell'alea contrattuale*, Naples, 2001, p. 84.
[39] ASCARELLI, *Aleatorietà e contratti di borsa*, in *Banca, borsa, titoli di credito*, 1958, I, p. 435 ff., E. GABRIELLI, *Contratti di borsa, contratti aleatori e alea convenzionale implicita*, in Banca, borsa, titoli di credito, 1986, p. 570 ff., ID., *Tipo negoziale, prevedibilità dell'evento e qualità della parte nella distribuzione del rischio contrattuale*, in Giurisprudenza italiana, 1986, I, 1, col. 1705 ff.

1.2.1 The Structure and Typologies of Aleatory Contracts

Within the category of contracts traditionally classified as aleatory, a distinction must be drawn between purely aleatory contracts and exchange contracts characterized by an aleatory component:

a) Purely aleatory contracts are those in which no form of exchange can be identified, with the consequence that the only justificatory reason lies in the risk itself, as in the case of gaming and wagering contracts, which are in fact regarded with distrust by the legal system.

b) Contracts of exchange with an aleatory component, on the other hand, are those in which the *causa* justifying the arising of the contractual relationship consists in an exchange of performances, the extent of which is indeterminate *ex ante* but dependent upon the occurrence of unforeseeable events, as in the case of insurance against damage.

Within aleatory contracts, it is possible to distinguish between typical and atypical ones:

a) Typical aleatory contracts, pursuant to Article 1469 of the Civil Code, are those in which the *causa* is characterized by a risk factor by reason of the very nature of the contract and, therefore, in light of the contractual type, by express provision of law.

b) Atypical aleatory contracts, by contrast, are those in which the contractual type corresponds to the structure of a commutative contract, but the parties, in the exercise of their contractual autonomy, decide to configure it as atypical by introducing a risk factor into the synallagma.

1.2.2 Typical aleatory contracts in the civil code

The Civil Code expressly regulates certain contractual figures traditionally regarded as paradigmatic manifestations of aleatory agreements. In these typified models, uncertainty does not operate merely as an external circumstance, but constitutes a structural element of the contractual scheme, shaping the allocation of risk between the parties.

The examination of such contracts makes it possible to observe how the legislator has regulated the validity, enforceability, and legal consequences of agreements inherently characterized by *alea*.

1.2.2.1 Life Annuity

A particularly widespread aleatory contract is the life annuity[40], within which it is possible to identify different types:

The life annuity is the contract by which one party, the so-called annuity provider, in exchange for the transfer of ownership of one or more assets, undertakes to perform a periodic prestation by paying a sum of money or other fungible goods in favour of the annuitant. In this case, the risk factor consists in the duration of the annuitant's life, since it is not possible to foresee *ex ante* the length of time for which the sum will have to be paid.

In addition to the life annuity in its traditional configuration, doctrine and case law also recognize the so-called improper life annuity, in which the obligation of the annuity provider consists not merely in the payment of a sum of money, but in prestations of *facere* that may take various forms:

a) The maintenance annuity, characterized by a complex prestation combining *facere*, consisting in the direct provision of personal assistance services and household care, and dare, which may concern money and goods necessary to satisfy the person's needs.

b) The support annuity, aimed not at satisfying primary needs of the person, but at ensuring a higher standard of living.

c) The personal assistance contract, characterized by prestations of a strictly personal nature through personal assistance and of dare towards another.

The Joint Civil Sections of the Court of Cassation, in 1990, ruled that the improper life annuity is incompatible with the application of Article 1878 of the Civil Code, which provides that termination of the contract is not possible in the event of non-payment of instalments due, taking into account that the party has the guarantee granted by the annuity provider.

The contract is void for lack of *causa* where the person is already deceased or at the point of death, since the characteristic element of *alea* would be lacking.

[40] GAZZONI, *Manuale di diritto privato*, *Edizioni Scientifiche Italiane*, XIX ed., p. 1245.

1.2.2.2 Insurance

Among typical aleatory contracts there is the insurance contract[41], under which an insured party undertakes to pays a premium in exchange for coverage against the risk of a harmful event, with the insurer being obliged to pay an indemnity should the insured event occur.

A distinction is traditionally drawn between insurance against damage, which performs an indemnity function, and life insurance, which instead fulfils a provident function.

The contract is void for lack of *causa* where the risk proves to be non-existent or has ceased before the conclusion of the contract, since the essential element of *alea* would be lacking.

At the same time, nullity arises in the presence of claims-made clauses that render the synallagma excessively unbalanced, thereby compromising the relationship between performance and counter-performance.

1.2.2.3 Gaming and Wagering

Gaming and wagering contracts[42] are typical aleatory contracts governed by Articles 1933 and 1935 of the Civil Code.

Gaming consists in an aleatory agreement with reciprocal prestations whereby two or more parties undertake to pay a sum of money as a consequence of the outcome of a competition of a sporting or other nature carried out between them.

Wagering, on the other hand, consists in an aleatory contract under which one party undertakes to pay a sum of money to another depending on the occurrence of an uncertain event, typically where one of the parties correctly predicts the outcome of an event or indicates the correct answer to a question.

From the reading of the relevant provisions of the Criminal Code and the Civil Code, case law and scholarship consider that three types of gaming contracts must be distinguished:

a) Fully protected gaming and wagering contracts, namely those provided for in Articles 1934 and 1935 of the Civil Code, relating to sporting competitions or other events of national and international interest as well as authorized lotteries, with respect to which a positive judgment of meritoriousness and lawfulness has been expressed.

[41] GAZZONI, *Manuale di diritto privato*, *Edizioni Scientifiche Italiane*, XIX ed., p. 1249.
[42] GAZZONI, *Manuale di diritto privato*, *Edizioni Scientifiche Italiane*, XIX ed., p. 1264 ff.

b) Prohibited gaming and wagering contracts under Article 723 of the Criminal Code, characterized by being held in a public place or open to the public and in which the winnings are wholly or almost wholly aleatory, and therefore criminally relevant. With regard to civil consequences, the prevailing view considers the contract void, alternatively for violation of mandatory rules or of public policy principles, with the consequence that restitution is permitted. According to another view, they are void for violation of morality, and therefore Article 2035 of the Civil Code would preclude restitution.

c) Tolerated gaming and wagering contracts, those not expressly prohibited but at the same time not expressly protected, characterized by the modest value of the sums wagered or by the not particularly pronounced aleatory character.

With regard to these, Article 1933 provides that: "No action lies for the payment of a gaming or wagering debt, even if the gaming or wagering is not prohibited. The loser, however, may not reclaim what has been voluntarily paid after the outcome of a gaming or wagering in which there has been no fraud. Restitution is in any case permitted if the loser is incapable."

As to their nature, they are considered natural obligations arising from moral and social duties, from which the rule of non-restitution derives.

The gaming or wagering contract is often concluded together with other contracts, including the loan contract.

A loan is a real contract producing real effects, whereby one party, the lender, transfers to the borrower a sum of money or other fungible goods, of which the latter acquires ownership, being then obliged to transfer an equivalent sum or goods of the same kind.

The issue that arises concerns the need to assess the consequences where a sum of money is lent in order to enable gaming activity, and therefore the fate of the financing contract and, in particular, whether the regime under Article 1933 extends also to the loan.

According to a first view, the fate of the financing contract is always linked to the fate of the principal contract, namely the gaming contract:

a) in the case of lawful gaming, the loan contract will also be lawful;

b) in the case of prohibited gaming, the loan contract may suffer the same fate, where the overall transaction is suitable to infringe morality;

c) in the case where gaming is merely tolerated, debate arises as to the consequences.

According to another, prevailing view, a distinction should be drawn between two different cases:

First, where the loan has been concluded for gaming purposes, whether between players or granted by the gaming house, and such purpose is established, the existence of a causal link entails the extension effect under Article 1933 also to the loan contract.

Secondly, where the loan is granted outside any gaming purposes, in the absence of a contractual connection with the gaming contract, the extension effect under Article 1933 does not operate. In such a case, the lender retains the right to claim performance of the credit, and, where the gaming contract is void, the borrower may bring an action for restitution.

1.2.2.4 Contract Concerning a Future Object

Particular attention must be paid to contracts concerning future goods[43], which raise significant issues regarding the allocation of the risk of non-existence.

In this respect, the role of the object of the contract becomes central, since the uncertainty surrounding the very existence of the good directly affects the structure and validity of the contractual arrangement. Pursuant to Article 1325 of the Civil Code, the object constitutes an essential element of the contract and must be possible, lawful, and determined or at least determinable.

The notion of object has traditionally been the subject of doctrinal debate, in the absence of an explicit definition provided by the legislator.

According to a first view, the object of the contract is the good affected by the contractual effects, as may be inferred from numerous provisions of the Civil Code.

However, this approach has been criticized on the ground that, if the object is defined in this way, certain contracts would lack an object (for example, the employment contract), while at the same time contracts that are different in nature would be identical from the point of view of their object (for example, a sale or a lease of the same immovable property).

[43] GAZZONI, *Manuale di diritto privato*, *Edizioni Scientifiche Italiane*, XIX ed., Naples, p. 1098 ff.

According to a second view, the object of the contract consists in the set of prestations to which the parties bind themselves, thereby overcoming the two problems previously mentioned.
With regard to contracts producing obligatory effects, the object of the contract coincides with the object of the obligation. By contrast, with regard to contracts producing real effects, in which under the consensual principle the good is transferred by mere consent, there is no perfect coincidence between the object of the contract and the object of the obligation.

According to a third view, which appears preferable, the object consists both in the prestation, which constitutes the so-called immediate object, and in the good affected by the contractual effects, which constitutes the so-called mediated object.

When referring to content, what must be taken into consideration is the object illuminated by the *causa*, and therefore the prestation contained in the contract, evaluated in light of the practical reason that justifies its performance.

Having said this, it should be noted that, although the legislator does not provide an explicit definition, it requires that the object of the contract be possible, lawful, determined or determinable, the latter requirements being alternative to one another.
These elements assume relevance in a negative sense, since their absence gives rise to structural nullity of the contract pursuant to Article 1418(2) of the Civil Code[44].

With regard to impossibility, what is relevant is original impossibility, since if the impossibility is supervening the consequence is termination rather than not nullity.
Moreover, the impossibility must be absolute, given that a partially possible prestation does invalidate the contract if the creditor still retains an interest in its performance, and objective, deriving from technical, physical, or legal factors.

As to unlawfulness, it arises where the prestation, considered in itself, is *contra ius*, whereas where what is unlawful is not the prestation but its inclusion in the contract, the unlawfulness concerns the *causa*.

[44] Italian Civil Code (*Codice Civile*), Article 1418(2).

Finally, with regard to indeterminacy or indeterminability, these render the contract void because they prevent the parties from understanding what they are required to perform and what they may expect to receive.

The issue concerning the relationship between contract formation and object is relevant insofar as the parties tend to define the content of the contract in the exercise of their contractual autonomy.

In particular, since the object must be determined or at least determinable, the parties may freely choose either to define in a detailed and specific manner the extent of the prestation in the contract itself or to refer to external sources that nevertheless render it determinable.

In any case, pursuant to Article 1374 of the Civil Code, it is possible to supplement the content with heteronomous sources, which operate in a supplementary manner upon the object in completion of the contractual regulation.

In consumer contracts, the object must be particularly detailed in order to protect the weaker party.
In contracts negotiated outside business premises, there is a close correlation whereby the stronger party is required to provide a series of information which, if missing, becomes part of the content of the contract.

A relevant issue concerns the need to assess whether it is possible to configure a contract concerning a future object, meaning by object in this case the mediated object, namely the good affected by the contractual effects.
It should be noted that, when reference is made to contracts concerning future objects, this may alternatively concern the obligation to produce future things under Article 1348 of the Civil Code, or the sale of goods whose future coming into existence is uncertain under Article 1472 of the Civil Code[45].

With specific reference to the contract for the sale of a future thing, Article 1472 provides that: "In a sale having as its object a future thing, ownership is acquired as soon as the thing comes into existence. If the object of the sale consists of trees or fruits of a fund, ownership is acquired when the trees are cut or the fruits are separated. Where the parties did not

[45] Italian Civil Code (*Codice Civile*), Article 1472

intend to conclude an aleatory contract, the sale is void if the thing does not come into existence."

From this perspective, there is no obligation consisting in a duty to produce the good whose coming into existence depends on external circumstances. Consequently, the parties may choose to conclude the contract either as a commutative or as an aleatory contract, thereby, allocating, or not allocating, the risk of non-existence of the good.

1.2.3 Derivative Contracts

Although primarily governed by special financial legislation rather than expressly regulated within the Civil Code, derivative contracts are commonly regarded as falling within the broader category of aleatory agreements, insofar as their structure is intrinsically based on the allocation of risk connected to an uncertain future event.

Derivatives are financial instruments whose value "derives" from the performance of an underlying asset or from the occurrence of an objectively observable future event. The underlying may consist of commodities, currencies, interest rates, securities, market indices, or other measurable economic variables.

The essence of the derivative lies precisely in this structural dependence: the economic outcome of the contract is contingent upon fluctuations in the value of the underlying, thereby rendering the contractual equilibrium uncertain *ex ante* and inherently exposed to *alea*.

Among derivatives, the swap contract is particularly widespread. It is a contract not typified by the Consolidated Financial Act but widely used in practice, involving the purchase of financial products at fixed and floating interest rates, through which the parties stipulate an agreement consisting in the determination of an interest rate calculated in relation to the same notional principal used for the purchase.

At a certain maturity, one of the parties is required to pay the difference between the fixed rate and the floating rate. If the floating rate agreed upon exceeds the fixed rate, it is the financial intermediary who must pay the differential.
If, on the other hand, the floating rate is lower than the fixed rate, the client must pay the difference.
In this regard, a distinction may be drawn between the following types of derivatives:

a) hedging derivatives, which are contracts of exchange with an aleatory component and whose function is to reduce and cover the financial risk connected with a pre-existing portfolio (for example, a loan concluded at a high interest rate which one decides to "hedge" through a derivative);

b) purely speculative derivatives, which raise issues from the perspective of *causa*, since they are aimed at achieving profit, materializing in a financial wager;

c) arbitrage derivatives, intended to obtain risk-free profit through combined transactions on the derivative and the underlying, capturing possible valuation differences.

In light of the substantial distrust traditionally shown by the legal system toward contracts characterized by pure *alea*, the legitimacy of purely speculative derivatives was called into question.

In a judgment delivered by the Joint Civil Sections in 2020, the Court of Cassation held that such instruments are not *per se* always prohibited, admitting their validity provided that the *alea* is balanced and rational, and therefore knowable, such that the private party is placed in a position to understand the principal operating mechanisms of the implicit costs, namely the mark-to-market, that is, the value of the derivative at that specific moment. Consequently, the contract will be void in the presence of an irrational *alea*, whose symptomatic element is opacity.

The criticism directed at the Joint Civil Sections concerns the fact that predicating the irrationality of *alea* by linking it to knowledge is unreasonable, since irrationality would then concern not the contract as such, but rather the conduct of the party who concludes the contract without providing adequate information, for example due to negligence or fraudulent conduct.

It would therefore seem that the scheme of rationality or irrationality of *alea* operates as the evaluative criterion necessary to justify the admissibility of these contracts, as will be examined in greater depth in the following chapters.

2. Contractual autonomy and worthiness in aleatory contracts

It is well established that contract law accords central relevance to the autonomy of the parties, pursuant to Article 1322 of the Civil Code. Such autonomy is safeguarded through a system of remedies primarily aimed at preserving the effects freely intended by the parties and at giving due weight to the interests they concretely pursue, by providing forms of protection that are most consistent with the free will they have expressed. This results in the provision of either preservative or invalidating remedies, designed to ensure the arrangement of interests intended and pursued by the parties.

This purpose is served both by the recognition of the criterion of *meritevolezza* of interests, as a corollary of the principle of contractual autonomy, and at the same time its inherent limit, and by the emphasis placed on the *causa concreta* of the contract. The latter, departing from a generalizing and public-law-oriented approach, shifts the focus of analysis to the individual dimension, with the aim of giving due relevance to the parties' free will, even where it manifests itself outside the framework of typical contractual forms.
Within this framework, the concept of contractual balance should not be understood as aiming to ensure an economic–substantive equalization between opposing contractual parties, but rather as ensuring the configuration of interests as freely intended and arranged by the parties themselves.

This centralization of protection, aimed at enhancing the parties' free will and preserving the interests they have arranged (reflected, inter alia, in the principle of validation of a void contract where provided by law, the doctrine of conversion of a void contract, the preservation of the contract even in cases of partial nullity, the principle concerning the seriousness of non-performance, the mechanism of reduction to equity in the event of rescission, and the doctrine of *dolus incidens*) is further confirmed by the contractual remedies themselves. Accordingly, save for cases of invalidity, the focus of assessment shifts to the conduct of the parties, with their free autonomy assuming decisive relevance.

This entails that, once an initial review of the contract's lawfulness has been carried out pursuant to Article 1418 of the Civil Code[46], a further assessment must be conducted concerning its *meritevolezza* under Article 1322 of the Civil Code. This is followed by an inquiry into the foundations of contractual autonomy and, consequently, by an evaluation

[46] Italian Civil Code (*Codice Civile*), Article 1418

as to whether any impairment of one party's contractual freedom has occurred, either at the stage of contract formation or in its functional phase, particularly with regard to supervening circumstances capable of prejudicing one party's interests. To safeguard this requirement, the legal system provides a wide range of remedies. With specific reference to *meritevolezza*, it is therefore necessary to examine how this assessment has been articulated and applied in the case law of the Court of Cassation.

2.1 The judgment of the Joint Civil Sections no. 5657 of 23 February 2023

In this regard, the most recent case law of the Court of Cassation has reaffirmed that "the assessment of *meritevolezza* pursuant to Article 1322, paragraph 2, of the Civil Code must be conducted with reference to the purpose pursued by the parties, rather than to the convenience, clarity, or aleatory nature of the contract or of its clauses"[47].
The Supreme Court has further held that the assessment of *meritevolezza* under Article 1322, paragraph 2, of the Civil Code does not coincide with the assessment of the lawfulness of the contract, its object, or its cause.

As noted in legal doctrine, the decision confirms that the test of *meritevolezza* concerns the practical result pursued by the parties and cannot be reduced to a judicial review of the economic convenience of the contractual arrangement[48].
According to the Explanatory Report to the Civil Code, *meritevolezza* is an assessment that must concern not the contract as such, but rather the result pursued by the parties through it, namely the practical purpose, or *causa concreta*, as it may be termed[49]. The result of the contract is to be regarded as unworthy of protection only where it is contrary to civil conscience, the economy, good morals, or public order as stated in the Explanatory Report to the Civil Code[50].

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[47] Court of Cassation, Joint Civil Sections, Judgment No. 5657 of 23 February 2023 (Rv. 667188-01); Third Section, Order No. 28998 of 18 October 2023 (Rv. 669322-01).
[48] GRIMOLIZZI, *Leasing indicizzato: stop all'eterogenesi dei fini del giudizio di meritevolezza?*, *Pactum-Rivista di diritto dei contratti*, 2023, case note on *Court of Cassation, Joint Civil Sections, 23 February 2023, no. 5657*.
[49] Court of Cassation, Joint Civil Sections, Judgments Nos. 4222, 4223, and 4224 of 17 February 2017; Third Section, Judgment No. 10506 of 28 April 2017.
[50] Explanatory Report to the Civil Code, § 603, second paragraph.

This principle, although predating the promulgation of the Constitution, was subsequently taken up and enshrined therein, in Articles 2, second sentence; 4, second paragraph; and 41, second paragraph, of the Constitution.

A contract, therefore, cannot be deemed "unworthy of protection" merely because it is economically disadvantageous to one of the parties. The legal system, in fact, protects the contracting party whose consent has been vitiated or overridden, not the party who, freely and with full awareness, has made contractual choices that are not fully satisfactory in terms of their economic interests.

Accordingly, for an atypical agreement to be considered "unworthy of protection" under Article 1322 of the Civil Code, it is necessary to ascertain that the result it pursues (rather than the agreement as such) is contrary to the principles of solidarity, equality, and non-prevarication, which the legal system places at the foundation of private relationships.

In the aforementioned judgment, the Joint Civil Sections clarified that, accordingly, contracts or contractual agreements have been deemed unworthy of protection under Article 1322, paragraph 2, of the Civil Code where, although formally compliant with the law, they pursue or produce the effect of:

a) conferring upon one of the parties an unjustified and disproportionate advantage, without any corresponding benefit for the other party[51];

b) placing one of the parties in a position of indeterminate subjection *vis-à-vis* the other[52];

c) compelling one of the parties to engage in conduct contrary to the superior duties of solidarity imposed by the Constitution[53].

Having said this, it must be observed that aleatory contracts are not, in themselves, devoid of *meritevolezza*.

It must also be emphasized that the assessment of the *meritevolezza*, or lack thereof, of a contractual clause cannot be based solely on its aleatory nature or on the imbalance it may produce. Economic risk, which is inherent in every contract, must not be confused with legal risk which, according to the doctrinal approach previously outlined, is of a juridical-

[51] Court of Cassation, Judgments Nos. 22950/2015; 19559/2015.
[52] Court of Cassation Judgments Nos. 4222/2017; 3080/2013; 12454/2009; 1898/2000; 9975/1995.
[53] Court of Cassation, Judgment No. 14343/2009.

economic nature and instead constitutes the very object of the contract and one of its essential elements, namely the *susceptio periculi*.

The Joint Civil Sections of the Supreme Court have therefore reiterated that an aleatory contract is not, for that reason alone, unworthy of protection under Article 1322 of the Civil Code.

The sale of a future harvest (*emptio spei*), term life insurance in the event of death, and the life annuity are all aleatory contracts; where the law permits their conclusion, aleatoriness cannot in itself be regarded as a characteristic capable of rendering a contract "unworthy" of legal recognition.
Nor are the parties precluded from entering into atypical aleatory contracts. The Court of Cassation has in fact already affirmed the lawfulness and *meritevolezza* of aleatory contracts not expressly provided for by statute, for example in the field of the so-called atypical life annuity (*vitalizio atipico*)[54].
Nor is it prohibited to introduce elements of aleatoriness into a commutative contract.

In exercising their power of contractual autonomy, the parties to a contract may contemplate the occurrence of supervening events that affect, or may affect, the equilibrium of the reciprocal performances, and may accordingly assume the related risk, whether reciprocally or unilaterally. In doing so, they alter the typical structure of the commutative contract and render it, in this respect, aleatory, with the effect of excluding, should such supervening events occur, the rebalancing mechanisms provided under the ordinary law of contracts[55].

As already clarified by the Supreme Court, the assumption of such risk may also arise implicitly from the contractual arrangement devised by the parties and from the manner in which they have structured their respective obligations.
In this regard, the Supreme Court has reiterated that "contract law is not an egalitarian Procrustean bed that imposes absolute parity between the parties in terms of contractual conditions, terms, and advantages". Contractual freedom constitutes a cornerstone of the legal system and of contract law. The legal system affords equal protection both against abuses of dominant positions and in favor of the right to economic initiative. While a party entitled to engage in credit activity is required to comply with the rules of the game and to

[54] Court of Cassation, Joint Civil Section II, Judgment No. 8209 of 22 April 2016; Third Section, Judgment No. 2629 of 27 April 1982.
[55] Italian Civil Code *(Codice Civile),* Articles 1467 and 1664.

act in good faith, it nonetheless retains the right to freely plan its entrepreneurial and commercial strategies, as repeatedly affirmed by the case law of the Court of Cassation[56].

It is therefore not the "gap" between performance and counter-performance that may render a contract "unworthy of protection" under Article 1322 of the Civil Code, where such disparity has been fully understood and accepted in conditions of freedom and autonomy. Indeed, the imbalance between performances cannot be equated with the convenience of the contract. A party who has entered into a disadvantageous transaction cannot seek to be released from the contract by invoking an alleged "imbalance of performances." Judicial intervention in contractual relationships must be confined to exceptional cases only, failing which the fundamental principle of contractual freedom would be infringed[57].

In general terms, the Court of Cassation has held that an economic imbalance between performances, where it is original in nature, may justify recourse to rescission for lesion, whereas where it is supervening, it may justify the remedy of termination for supervening excessive onerousness, subject to the necessary exceptions applicable to aleatory contracts. The existence of such remedies therefore excludes the very necessity of resorting to imaginative constructions concerning the alleged "unworthiness" of a contract providing for "imbalanced performances".

It may be debated whether any allegedly "imbalancing" clauses are valid *per se* under Article 1341 of the Civil Code, due to their formal or substantive characteristics; whether they result from the exploitation of a state of need; or, again, whether they were not adequately disclosed at the pre-contractual stage. In the first case, the appropriate remedy is nullity; in the second, rescission; and in the third, either annulment of the contract on the grounds of mistake or compensation for damages.

In conclusion, the Supreme Court has reiterated that "the assessment of 'unworthiness' referred to in Article 1322 of the Civil Code must never turn into a magical Ishtar Gate through which an inadmissible judicial intervention into the convenience of the transaction is allowed to pass."

Ultimately, the assessment of the "unworthiness" of a contract under Article 1322, paragraph 2, of the Civil Code cannot be carried out in the abstract and *ex ante*, by merely

[56] Court of Cassation, Civil Section I, Judgment No. 1184 of 21 January 2020; Third Section, Order No. 28022 of 14 October 2021.
[57] Court of Cassation, Civil Section VI-2, Order No. 36740 of 25 November 2021 (Rv. 663148-01).

considering the objective content of the contractual terms, but must instead be conducted in concreto and *ex post*, by identifying, of course, *iuxta alligata et probata partium*, the purpose pursued by the parties.

2.2 The inapplicability of remedies of commutative justice to aleatory contracts

The classification of a contract as aleatory entails significant legal consequences, in that the remedies of rescission for lesion[58] and termination for supervening excessive onerousness[59] do not apply to it.

With specific regard to rescission for lesion, which Article 1448 of the Civil Code expressly declares inapplicable to aleatory contracts, the provision means that a party who suffers a lesion, in the sense that the value given proves to be seriously disproportionate to the value received under the contract, may not invoke this remedy where the lesion arises *ex post* as a consequence of the realization of the assumed *alea*. In other words, a person who gambles and loses, or who takes out insurance without the insured risk subsequently materializing to their detriment, performs a prestation without receiving any counter-performance in return; nevertheless, such an outcome falls within the very logic of the aleatory contract. According to authoritative doctrine, the inapplicability of the remedy would be certain even in the absence of Article 1448 of the Civil Code expressly providing for it.

Conversely, the same doctrine maintains that even an aleatory contract may be subject to rescission "where the lesion emerges *ex ante* as a disproportion between the extent of the performance incumbent upon the contracting party in a state of need and the extent of the risk contemplated by the contract[60], for example, a wager accepted at odds of 3 to 1 although, given the probability of the uncertain event, it would normally be priced at 10 to 1.

As regards termination for supervening excessive onerousness, the rationale for excluding aleatory contracts from this remedy is even more evident.
By entering into the contract, the party is aware that the performance is exposed to risk, since contractual risk forms part of the very *causa* of the contract. Where that risk

[58] Italian Civil Code *(Codice Civile),* Article 1448, paragraph 4.
[59] Italian Civil Code *(Codice Civile),* Article 1469.
[60] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè Editore, Milan, 2011, p. 843.

materializes and affects the performance, even as a result of an event not specifically foreseeable, such an outcome remains consistent with the contractual program.
The rationale for the exclusion, however, also delineates its limits. Aleatory contracts must be regarded as excluded from the remedies against supervening onerousness only insofar as the supervening event gives effect precisely to the risk that constitutes the *alea* of that particular contract; conversely, where a greater or qualitatively different risk materializes, such remedies remain applicable.

This applies not only to typical aleatory contracts but also to atypical ones, constructed as aleatory by the parties. In such cases, however, the assessment may prove more complex, since it becomes necessary to interpret the contractual provisions as a whole in order to determine how risks are allocated to the parties and whether those risks properly constitute that juridical-economic risk without which *alea* cannot be said to exist in the technical sense[61].

[61] ROPPO, *Il Contratto*, in *Trattato di diritto privato*, Giuffrè Editore, Milan, 2011, p. 961.

3. Origin and evolution of derivative contracts and differential contracts

The expression *differential contracts* currently refers to agreements whereby the parties undertake to exchange the difference between the market value of a given underlying asset at a specified future date and the value attributed to that same asset at the time of the conclusion of the contract.

At the time of entering into the agreement, the purchaser does not provide the full capital that would be required for the actual acquisition of the underlying asset. Instead, only a fraction of the total exposure is posted, typically in the form of a margin. This margin may subsequently be adjusted, and, where necessary, increased in accordance with fluctuations in the value of the underlying asset over the life of the contract.

When used for speculative purposes, such contracts are classified as aleatory contracts.
The historical origin of differential contracts is closely linked to the development of forward financial markets. They first emerged in the seventeenth century within an economic framework predominantly based on commercial exchange, in which the merchant class was active and capable of exerting a significant influence on economic policy[62].

In this economic setting, the deferred contract of sale came to be used increasingly, not merely as a means of transferring wealth, but as an instrument for allocating the risk arising from fluctuations in value and, ultimately, as a wager on price movements.
At the expiry of the agreed term, instead of performing the contract in accordance with its proper *causa*, namely, the delivery of the securities and the payment of the price, the parties would settle only the difference between the agreed price and the market price on the date fixed for performance.

The advantages of such an arrangement soon became evident: on the one hand, the seller was not required to allocate resources in advance for the acquisition of the goods contemplated by the contract; on the other hand, the buyer was spared the need to immobilize the capital that would otherwise have been necessary to fulfil the contractual obligations.

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[62] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne*, *Obbligazioni e contratti*, January 2012, 61.

In practical terms, this mechanism resulted in a significant expansion of the circle of potential investors.
This generated increasing interest among economic operators in transactions of this kind, which were essentially speculative in nature, as they required only a limited financial outlay[63].

Government securities were soon incorporated into forward markets. However, in light of the significant indebtedness of the monarchy, transactions involving such securities were often concluded at declining prices. As a result, first King Louis XV of Bourbon in 1724 and later Louis XVI in 1785 enacted legislative measures aimed at restricting, and at times even prohibiting, the conclusion of forward contracts, even where such transactions were supported by adequate coverage.

Nevertheless, attempts to limit recourse to forward transactions proved ineffective, to the extent that the legislature of the subsequent period effectively remained silent in the face of the growing diffusion of the phenomenon. Similarly, the courts, which had initially applied the royal prohibitions rigorously, ultimately had no choice but to acknowledge the validity of such contracts. This was particularly so in cases where, although the contract was performed solely through the settlement of differences, the parties had originally concluded it with the intention of carrying out the actual delivery of the securities and the payment of the agreed price.

Italian case law, both at the level of the courts of first instance and of the Supreme Court, adhered to this approach[64].

It was only towards the end of the nineteenth century, in response to increasingly pressing demands from banking operators and merchants, that the French legislature intervened. With the Law of 28 March 1885, the French legislature repealed the regulatory measures previously enacted by the monarchy and formally recognised the validity of forward contracts.
Nevertheless, in the immediate aftermath, lower courts case law continued to distinguish

[63] For a comprehensive analysis of the historical evolution of differential transactions, see BALESTRA, *op. cit.*, 190; SUPINO, *Le operazioni di borsa secondo la pratica, la legge e l'economia politica*, Torino, 1875, 59 ff.; ID., *La questione ultrasecolare dei contratti differenziali*, in *Dir. comm.*, 1927, 212 ff.; FERRERO, *Contratti differenziali*, in *Contratto e impresa*, 1992, 475.
[64] See Trib. Napoli, 3.5.1926, in *Riv. dir. comm.*, 1927, II, 103.

between “serious” contracts, in respect of which the gaming exception could not be invoked, and “non-serious” contracts.

By contrast, in Germany, the failure of the democratic revolution of 1848, followed by the establishment of the Reich, and the subsequent rise of capitalism, coupled with the collapse of several banks, prompted Parliament to adopt a strict and prohibitionist approach towards differential transactions. This policy was aimed, in particular, at excluding forward contracts relating to cereals and milled grain products.

In other respects, no distinction was made between forward contracts and differential contracts, save for the clarification that the rules governing stock-exchange gaming were inapplicable to the latter.

It was only with the entry into force of the German Civil Code on 1 January 1900 that the differential contract acquired not only a legislative definition but also a comprehensive regulation which, *inter alia*, assimilated it to gaming.
An agreement for the future delivery of securities or goods was classified as such where the parties had concluded it with the intention of performing the contract by settling the difference between the agreed price and the market price at the time fixed for performance[65].

The Italian legislature adopted an explicit position on differential contracts between the late nineteenth and early twentieth centuries, largely in response to persistent pressure from the Chambers of Commerce. These bodies had repeatedly urged legislative intervention to address the absence of a specific regulatory framework governing financial activities, advocating in particular the formal recognition of the validity of forward stock-exchange transactions.

The first legislative intervention dates back to Law No. 1971 of 14 June 1874, which affirmed the validity of forward sales of public debt securities, including those issued by “the State, the provinces, the municipalities and other corporate bodies,” as well as shares, corporate bonds, and “any other securities of a similar nature,” provided that such contracts were executed using stamped forms. This formal requirement was subsequently repealed

[65] BELLI, *Contratti aleatori. L’alea nei contratti differenziali*, in *rivista Le Rassegne*, *Obbligazioni e contratti, January 2012, 61.*

by Law No. 3326 of 13 September 1876, which also removed the obligation to rely on public brokers for the conclusion of forward contracts[66].

The comprehensive reorganisation of the regulatory framework governing financial activity, which had become increasingly necessary in the wake of the international crisis of 1907, was accomplished by Law No. 272 of 30 March 1913, regarded at the time as the cornerstone of the regulation of Italian stock-exchange activity[67].

Differential contracts were accordingly brought within this new regulatory framework and granted full legal protection on the same footing as other stock-exchange contract. The possibility of invoking the so-called gaming exception in relation to such contracts was expressly excluded[68].

The statute set out a systematic definition of stock-exchange contracts. Pursuant to Article 34, these included:

a) contracts concluded on or off the exchange, whether for cash or for future delivery, including firm, option (*a premio*), and carry-over (*riporto*) transactions, as well as any other contract consistent with commercial usages, concerning public debt securities, shares and corporate bonds (including mortgage bank bonds), and, more generally, any securities of a similar nature, whether domestic or foreign;

b) sales of commodities or goods concluded in accordance with stock-exchange practices, whether on the exchange or off it, "provided that in the latter case, one or more registered brokers intervene".

Equally indicative of the expansion of such transactions was the provision of Article 47, according to which "forward transactions in securities or financial instruments shall be deemed acts of commerce"[69].

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[66] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne*, *Obbligazioni e contratti,* January 2012, 61.
[67] See VIVANTE, *I contratti differenziali secondo la nuova legge sulle borse*, in *Riv. dir. comm.*, 1913, I, 925.
[68] See INZITARI, *Il contratto di swap*, in *I contratti del commercio, dell'industria e del mercato finanziario*, edited by Galgano, III, Torino, 1995, 2466: «la ragione della eccezione risiede nel fatto che pur essendo la struttura del contratto differenziale ritenuta del tutto assimilabile al gioco e per questo ricompresa nel diritto comune tra quelle fattispecie per le quali è prevista la eccezione di gioco, nell'ambito delle operazioni di borsa l'applicabilità della stessa eccezione viene esclusa in quanto il contratto differenziale trova in quest'ambito una piena tutela al pari di ogni altro contratto di borsa».
[69] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne, Obbligazioni e contratti*, January 2012, 62.

The reorganisation of the stock-exchange system, as established by the aforementioned statute, acquired a distinctly public-law character throughout the twentieth century, with the declared objective of curbing the growing abuses that had previously emerged in speculative trading. In this context, extensive supervisory, including inspection, powers were conferred upon the Chambers of Commerce, the brokers' associations, and, at the level of central administration, the Ministries of Agriculture, Industry, Commerce, and the Treasury.

Within this framework, the principle of free access to the stock exchange for market operators was likewise affirmed, qualifying as a genuine subjective right enforceable before the judicial authorities.

3.1 The aleatory nature of so-called simple differential contracts

For many years, legal scholarship debated not only the validity but also the very nature of differential contracts[70]. This uncertainty was largely attributable to the difficulty of subsuming such transactions within a single, coherent legal category.

In its most elementary form, the differential transaction, generally referred to as a "simple differential contract", outwardly resembles a deferred sale, characterised by the parties' intention not to fulfil their reciprocal obligations of delivering the securities and paying the price at maturity, but instead to settle the difference between the price of the securities at the time of conclusion of the contract and the market price prevailing at the expiry of the agreed term[71].

Doctrinal inquiry has focused, in particular, on whether the contract should be subsumed under the scheme of sale or rather under that of gaming and wagering.

In this regard, the former solution was deemed preferable whenever the speculative intent assumed relevance merely as the motive inducing the parties to conclude the transaction.

However, following the monetary devaluation that occurred during the First World War, both the legislature and part of the scholarly community adopted a more cautious, and at times distrustful, attitude towards the stock-exchange market. Within a short period, after

[70] Some authors even denied their very existence. Among them, SALANDRA, *Il commercio fittizio dei cambi*, in *Riv. dir. comm.*, 1928, I, 102.
[71] Thus CARNELUTTI, *Nullità di vendita di cambiali allo scoperto*, in *Riv. dir. comm.*, 1923, II, 493.

drawing a clear distinction between sale and differential contracts, they ultimately came to classify differential transactions as gaming and wagering contracts[72].

Nevertheless, the recognition, characteristic of a modern economy, of the existence of a market in constant evolution, continually subject to fluctuations in the values traded, increasingly brought light to the advantages associated with this form of contracting. It was regarded as generating "new sources of wealth, strengthening the credit of States, and increasing public prosperity by fostering the rapid multiplication of movable assets"[73]. Case law likewise did not fail to observe that differential contracts performed "an essential economic function"[74].

It was Law No. 272 of 20 March 1913 that proved decisive for the affirmation of the validity and effectiveness of differential contracts, thereafter included among stock-exchange contracts, as genuine sales, having as their object the transfer of securities and goods from one party to the other.

However, although some authors sought to draw a sharp distinction between differential transactions and forward contracts *stricto sensu*, subsuming the former within the broader and less clearly defined genus of aleatory contracts, the prevailing view in legal scholarship did not endorse this position.

On the other hand, a different position appeared difficult to sustain in light of the literal wording of Article 15 of the 1913 Law, subsequently repealed by Legislative Decree No. 58 of 20 February 1998, which allowed the conversion of a differential contract into a typical contract of sale: "the forward purchaser shall always be entitled to obtain from the seller the early delivery of the securities acquired and of carry-over transactions against payment of the agreed price."

Upon closer examination, however, the parties' intentions, as structured in such contracts, reveals an economic and social function markedly different from that inherent in an exchange-based contract of sale. From the outset, the parties undertake not to deliver the securities and pay the price at maturity, but rather to pay, in favour of one and to the

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[72] See BIANCHI D'ESPINOSA, *I contratti di borsa. Il riporto*, Milano, 1969, 404; RUOPPOLO, *Le borse e i contratti di borsa*, in *Giur. sist. Bigiavi*, Torino, 1970, 209.
[73] See MOSSA, *Diritto commerciale*, I, Milano, 1937, 352: «il sistema delle differenze... agevola la speculazione di borsa a ceti sprovvisti di consistenza e di esperienza economica; il mercato opera, infatti, sulle differenze, che sono a portata di mano invece che sulla massa dei titoli».
[74] See Court of Cassation, 25 July 1927, in *Giurisprudenza italiana*, 1927, I, 1, p. 912.

detriment of the other, the difference between the price of the securities at the time of conclusion and at that prevailing at maturity[75].

In more recent times, following the entry into force of the Consolidated Financial Act (T.U.F.), a significant arbitral award rendered on 19 July 1996 (President Casella) affirmed that differential contracts constitute a form of derivative financial instrument. The award emphasised their aleatory nature and confirmed their validity, distinguishing them from wagers on account of their hedging function within the financial sphere. In doing so, it endorsed the view that such contracts are not unenforceable, but rather fully protected under civil and commercial law.

It was further clarified that differential contracts are agreements in which the payment of differences constitutes the sole and immediate object of the contract: the difference between the price of the securities at the time of conclusion and that prevailing at maturity represents the exclusive subject matter of performance, while delivery of the securities is excluded.
The parties thus defer the determination of value to a future and uncertain event that cannot be established *ex ante*. Consequently, the aleatory nature of the simple differential contract becomes evident, as does its incompatibility with the contract of sale, since the quotation of the securities, commodities, or exchange rates on the date fixed for performance serves not only to determine the *quantum* of the obligation but also to identify which party will ultimately be required to perform[76].

The award nonetheless recognised the hedging function of such contracts, distinguishing them from mere wagers and affirming their full validity and enforceability in accordance with financial regulation[77].

3.2 Trading in derivative financial instruments

Following the collapse, in August 1971, of the agreements concluded at Bretton Woods in 1944, the dollar lost its role as an international means of payment, and global markets entered a prolonged period of economic instability. This development led to an increase in financial risks, particularly those associated with fluctuations in interest rates and exchange

[75] RICCIO, *Dell'eccessiva onerosità*, in *Comm. Scialoja e Branca*, sub artt. 1467–1469, Bologna-Roma, 2010, 592.
[76] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne, Obbligazioni e contratti*, January 2012, 62.
[77] See Article 23(5) of the Consolidated Financial Act (T.U.F.), which excludes the application of Article 1933 of the Civil Code to stock-exchange differential transactions.

rates, prompting legislators to undertake a profound transformation of the economic and financial instruments made available to market operators in order to restore stability to the system[78].

During the 1980s, the scenario became even more critical as a result of various cyclical factors, including recessionary trends, high inflation, rising oil prices, and the heightened risk of insolvency among developing countries.

These changes resulted in significant volatility in interest rates, which policymakers sought to contain through the progressive internationalisation of markets and the development of appropriate instruments designed to hedge against price fluctuations[79].

As a result, the economic landscape gradually evolved, giving rise to a new framework characterised by the free movement of capital, direct access to capital markets, and an increasing integration of financial markets.

Currency fluctuations were no longer regarded by operators in a supranational commercial market as exogenous risks that could only be passively endured[80]. Rather, such risks came to be perceived as comparable to industrial risk, for example, the risk associated with achieving (or failing to achieve) a required technological standard in the production process, or to commercial risk, such as the misjudgment of public demand for a new product[81].

Beginning in the nineteenth century, with the aim of devising appropriate remedies against price volatility and persistent exchange-rate fluctuations, the technique of forward markets was tested within the financial sector. Such instruments were employed both on regulated markets and over-the-counter markets, through direct agreements between operators and their banking counterparties, often incorporated into the very contract from which the underlying risk arose.

It was in this context that modern financial derivatives developed in the United States and later spread to Japan and Europe. However, the real expansion of the derivatives market

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[78] A comprehensive analysis of the events that characterised those years can be found in FARONI, *L'evoluzione dei mercati finanziari e la situazione italiana*, in GOURLAOUEN, *I nuovi strumenti finanziari*, Milano, 1993, 5.
[79] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne, Obbligazioni e contratti,* January 2012, 63.
[80] CAVALLO BORGIA, *Le operazioni su rischio di cambio*, in *I contratti del commercio, dell'industria e del mercato finanziario*, edited by Galgano, Torino, 1995–1997, 2396.
[81] BALESTRA, *op. cit.*, 213.

occurred in the post-Bretton Woods period, when increasing exchange-rate volatility and major international events, such as the Gulf War and the crisis of the European Monetary System[82], significantly boosted the demand for hedging instruments.

More recently, this expansion has been accompanied by the enactment of a series of legislative measures aimed at regulating the functioning of the derivatives market.

However, precisely because of the limited legislative guidance available to define their essential features, as well as the technical and complex nature of the subject matter, derivative contracts have long given rise to interpretative difficulties. As a result, legal scholarship and case law have not always reached consistent conclusions.

Indeed, derivative contracts are not exhaustively defined at the statutory level. Article 1 of the Consolidated Financial Act[83] identifies certain categories, including, among financial and derivative instruments, forward contracts (so-called *futures*), exchange contracts (so-called *swaps*), option contracts (so-called *options*), and differential contracts, as well as other instruments providing for cash settlement determined by reference to securities, currencies, interest rates, yields, commodities, indices, or other measurable parameters.

These new contractual forms have emerged in connection with the trading of derivative financial instruments, whose value depends on other assets or instruments traded on different markets. In other words, derivative contracts are characterised by the fact that their value is derived from the performance of an underlying asset or from the occurrence, in the future, objectively observable event, such as a bond, a share, a market index, an interest rate, the availability of a commodity, or even a meteorological event. Variety thus represents the distinctive hallmark of derivatives.

The asset or event, which may be of any nature or type, is referred to as the *underlying* of the derivative product.

These financial instruments are primarily used for three purposes:

a) Hedging, to reduce the financial risk associated with the underlying asset in a pre-existing portfolio;

[82] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne, Obbligazioni e contratti,* January 2012, 63.
[83] Legislative Decree No. 58 of 24 February 1998 (Consolidated Financial Act).

b) Speculation, to assume risk exposure with the aim of generating profit;

c) Arbitrage, to obtain a risk-free profit through combined transactions in the derivative and the underlying asset, thereby exploiting possible discrepancies in valuation.

According to one strand of scholarship, derivative instruments share the structural features of the differential contract, which is performed through the settlement of differences and does not entail the circulation of wealth, but rather the transfer of the risk inherent in fluctuations in value[84].
Other authors[85], however, argue that derivative instruments cannot be subsumed within a single, unitary category, as they encompass heterogeneous legal arrangements.

A persuasive view in the literature maintains that differential contracts represent only one of the various forms included within the broader and multifaceted category of derivative financial instruments. Accordingly, particularly in light of the recent amendments to the Consolidated Financial Act, it would be reductive to regard the differential contract as a general and all-encompassing category. Rather, it constitutes merely one among the multiple types of derivative financial instruments, alongside futures, options, and swaps[86].

With regard to contracts concerning derivative financial instruments, Article 23(5) of the Consolidated Financial Act lays down a general provision establishing the inapplicability of Article 1933 of the Civil Code, concerning actions for payment, to such contracts. In doing so, it excludes the classification of these instruments as gaming or wagering contracts and thereby recognises full legal protection for stock-exchange differential transactions, regardless of the form in which they are concluded.

The most complex issue relating to derivatives concerns the determination of their value. This aspect is considered particularly critical and requires careful analysis, since variations in value occur in connection with the performance of the underlying asset, according to a relationship specific to each derivative, typically expressed through a mathematical function.

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[84] FERRARINI, *I derivati finanziari tra vendita a termine e contratto differenziale*, in *I derivati finanziari*, edited by Riolo, Bologna, 1988, 17.
[85] CAPUTO NASSETTI, *I contratti derivati finanziari*, Milano, 2007, 3–4.
[86] RICCIO, *op. cit.*, 589.

From a causal-functional perspective, part of the scholarly literature has maintained that the *causa* of derivative contracts lies in the exchange itself. However, the more recent position adopted by the Joint Civil Sections of the Supreme Court in 2020 is grounded in the concept of the "worthiness" (*meritevolezza*) of the interests concretely pursued by the parties and places emphasis on the manner in which the agreement was concluded, taking into account the characteristics of the contracting parties[87].

In this regard, a distinction may be drawn between the following types of derivatives:

a) hedging derivatives, which take the form of exchange contracts with an aleatory component and whose function is to reduce and cover the financial risk associated with a pre-existing portfolio (for example, a loan concluded at a high interest rate in respect of which it is decided to "hedge" the exposure through a derivative);

b) purely speculative derivatives, which raise issues from the perspective of *causa*, since they are aimed at the pursuit of profit and may materialise in the form of a financial wager.

In light of the substantial distrust traditionally shown by the legal system towards contracts characterised by pure *alea*, the legitimacy of purely speculative derivatives has long been called into question.

However, in the aforementioned judgment, the Supreme Court affirmed that such instruments are not *per se* prohibited, admitting their validity where the *alea* is balanced and rational, and therefore knowable, such that the private party is placed in a position to understand the principal mechanisms governing the implicit costs and, consequently, the value of the derivative at the relevant point in time.
Accordingly, the contract will be void only where the *alea* is irrational, the symptomatic element of which lies in its opacity.

The scheme of the rationality or irrationality of the *alea* thus becomes the evaluative criterion necessary to justify the admissibility of such contracts.

[87] RUM, *I contratti derivati. Una disamina sullo stato dell'arte*, in *Diritto Amministrativo*, Riv. Giur., 1 April 2021.

3.2.1 Contractual risk in futures

The future contract originated as a deferred contract of sale, whereby one party undertakes to deliver, or to take delivery of, a specified quantity of commodities, agricultural products, or other goods on an official exchange at a predetermined future date[88].

It is a contract capable of different modes of performance. Although at maturity it is in principle possible to carry out its typical function, namely the actual exchange of the underlying goods, in practice the parties usually close out their positions prior to the agreed settlement date by entering into an equal and opposite transaction on the market, thereby triggering the mechanism of offsetting[89].

Futures traded on regulated exchanges generally contain standardised clauses designed for repeated and heterogeneous applications. As a result, contractual autonomy in determining the content of the agreement is significantly constrained, being effectively limited to the determination of price.

The organisation of the market within which trading takes place provides for a specific institutional body, the *Cassa di Compensazione e Garanzia* (Clearing and Guarantee Fund), which acts as counterparty to all contracts, thereby ensuring the proper performance of transactions *vis-à-vis* each operator.

Historically, in Italy, the first comprehensive regulation of the futures market was introduced in Law No. 1 of 2 January 1991. This was followed, in February 1992, by provisions governing the trading of forward contracts on government securities and stock indices; subsequently, in November 1994, by the "Regulation governing the operation of the electronic trading system of the stock exchanges for the negotiation of standardised forward contracts on financial instruments linked to securities or indices of such securities"; and finally, futures were included among the so-called "financial instruments" (a concept replacing that of "transferable securities") by Legislative Decree No. 415 of 23 July 1996[90].

The financial innovation that has characterised markets in recent decades has concerned, in particular, standardised forward financial contracts (so-called *financial futures*), which are

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[88] CAPUTO NASSETTI, *op. cit.*, 255; SALANITRO, *Società per azioni e mercati finanziari*, Milano, 1996, 235; RIGHINI, *I valori mobiliari*, Milano, 1993, 265.
[89] BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in *rivista Le Rassegne, Obbligazioni e contratti,* January 2012, 63.
[90] BALESTRA, *op. cit.*, 225; RICCIO, *op. cit.*, 597; FERRARINI, *Sollecitazione del risparmio e quotazione di borsa*, in *Trattato delle società per azioni*, X, 2, Torino, 1993, 75 ff.

distinguished from traditional futures by the nature of their underlying asset. Unlike commodity futures, their object consists not of tangible goods, but of financial instruments, debt securities, or market indices.

The considerations set out above apply equally to these transactions: although they may, in principle, be performed through the actual delivery of the underlying asset, they are generally settled either by entering into an offsetting transaction opposite to the original position, or by payment of a sum corresponding to the difference between the price agreed upon at the time of conclusion and the quotation of the asset on the date fixed for maturity. In this way, they reproduce the structural features of the complex differential transaction.

According to certain authors, the different modes of performance may affect the aleatory nature of the futures contract. In particular, where the possibility of actual delivery remains and the so-called structural conception of the aleatory contract is adopted, the contract would lose its aleatory character. In such cases, the uncertain event would affect only the arrangement of interests established by the parties, altering the economic value of performances already determined *ab origine*[91]. Consequently, such contracts should be classified as commutative, albeit without the possibility of invoking termination for excessive onerousness under Article 1467 of the Civil Code, since fluctuations in economic conditions must be regarded as falling within the normal contractual risk[92].

Conversely, where performance occurs through the settlement of differences, the contract would be considered aleatory[93], in that the uncertain event determines not only the *quantum* of the obligation, but also which party is required to perform it. According to a further view, however, the contract would remain commutative, albeit characterised by an unlimited normal *alea*[94].

In either case, however, termination for excessive onerousness would not be available, since fluctuations in the value of the underlying asset, even if significant, must be regarded as inherent in that type of contract.

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[91] Thus FERRARINI, *I derivati finanziari tra vendita a termine e contratto differenziale*, cit., 40 ff. Contra VALLE, *Il contratto future*, Padova, 1996, 75, who considers it possible to classify as aleatory not only the index future but also the future on government securities.
[92] CAPUTO NASSETTI, *op. cit.*, 284; A. RICCIO, *op. cit.*, 600.
[93] BALESTRA, *op. cit.*, 230.
[94] SERRA, *Le operazioni dei mercati mobiliari: prospettive degli anni Novanta*, in *Il diritto della borsa nella prospettiva degli anni Novanta*, edited by Minervini, 147.

3.2.2 Contractual risk in options

An option is a contract whereby one party, upon payment of a premium, reserves the right to purchase (*call option*) or to sell (*put option*) a specified quantity of goods or other rights, or to conclude a contract concerning a financial instrument, at a predetermined price and on a specified date. The object of the contract may include swaps, financial futures, and, more generally, derivative instruments.

Part of the scholarly literature[95] maintains that there are substantial differences between the option contract governed by Article 1331 of the Civil Code and financial options, to the extent that the latter should be excluded from the application of the remedy of termination for excessive onerousness under Article 1467 of the Civil Code. In this view, supervening events other than those deemed relevant under the Regulations of *Borsa Italiana* must be regarded as falling within the normal contractual risk.

Those authors[96], who identify the option contract as the structural model underlying financial options, nonetheless maintain that, although the contract is formally commutative, like the option contract under Article 1331 of the Civil Code and the simple premium exchange contract, the financial option is characterised by an unlimited economic *alea*.
This feature, they argue, precludes the application of termination for excessive onerousness arising from supervening circumstances.

In practice, moreover, the standard contractual frameworks governing options traded on regulated markets, as approved by ministerial decrees, expressly exclude termination on the grounds of excessive onerousness. Such provisions effectively confirm, at an operational level, the inherently aleatory dimension of these instruments.

3.2.3 Contractual risk in swaps

A swap is a contract whereby two parties, typically a bank (or other financial intermediary) and an economic operator, undertake to exchange cash flows at predetermined future dates and according to a structure agreed in advance. The exchange cash flows may be denominated in different currencies or calculated by reference to specified financial parameters.

In its classical configuration, particularly in the context of international trade, the swap is designed to manage and redistribute the risk associated with exchange-rate fluctuations

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[95] See PANZARINI, *Il contratto di opzione*, I, *Struttura e funzioni*, Milano, 2008, 382.
[96] CAPUTO NASSETTI, *op. cit.*, 358.

occurring between the date of conclusion of a commercial transaction and its execution. This exposure typically arises where performance of the underlying transaction is deferred in time and the entrepreneur is required to accept payment in a foreign currency, so that exchange-rate movements may significantly alter the economic balance of the operation.

The swap therefore enables the parties to preserve the intended economic equilibrium of the transaction by allocating between them the advantages and disadvantages resulting from currency movements.
It is precisely in response to this exposure to exchange-rate risk, as manifested in commercial practice, that specific contractual models have progressively developed, aimed at controlling or neutralising the patrimonial consequences of currency fluctuations[97].

Swap contracts are generally classified among derivative financial instruments, in that their economic value depends on the performance of the underlying financial variables, such as interest rates, exchange rates, commodities, or market indices.
The term *swap* derived from the English verb *"*to swap*"*, meaning "to exchange", denotes a contractual arrangement under which two counterparties undertake reciprocal payment obligations structured according to predefined parameters.

From a structural standpoint, a swap is characterized by reciprocal obligations undertaken by the parties to make payments at future dates. However, at the time of performance, only one party will generally be required to make payment, depending on the outcome of the calculation carried out according to the agreed contractual formula. In most cases, performance does not consist in the exchange of the respective gross amounts, but rather in the payment of the net balance resulting from the application of the agreed calculation method. The specific criteria governing the calculation of cash flows determine the distinction between the various types of swap contracts.

A *domestic swap* refers to a contract concluded between two operators exposed to the same foreign currency, whereby the parties undertake to exchange, in domestic currency, the exchange-rate differential calculated between the date of conclusion of the contract and the date of maturity.

[97] GAZZONI, *Manuale di diritto privato*, *Edizioni Scientifiche Italiane*, XIX ed., p. 1333.

In its classical configuration, the domestic swap is linked to underlying commercial transactions denominated in the relevant currency and typically involving opposite exchange-rate exposure.

At maturity, the agreed rate is compared with the prevailing market rate: if the currency has appreciated, one party will pay the corresponding difference; if it has depreciated, the parties offset the effects of exchange-rate movements during the relevant period, thereby ensuring the reciprocal neutralisation of the respective exchange-rate exposures.

Although originally conceived as a subcategory of so-called parallel loans, swap transactions evolved significantly from the 1970s onwards, particularly in the United States and the United Kingdom. Over time, the swap emerged as a distinct, albeit not entirely autonomous, contractual category, primarily concerning interest rates (Interest Rate Swaps) and currencies (Currency Swaps). Their widespread diffusion was facilitated by the increasing involvement of banking institutions, which centralized such transactions and managed the resulting financial exposure through portfolio-balancing strategies, consolidating the swap as a standardized instrument of financial intermediation.

More specifically, the Interest Rate Swap (IRS) represents the most widespread form of swap contracts. Under this arrangement, the counterparties agree to exchange, on predetermined future dates and until a specified maturity, cash flows calculated by applying different interest rates to a predetermined amount, commonly referred to as the "notional principal".
The notional principal serves solely as a reference amount for calculating the cash flows; it is neither transferred between the parties, nor does it constitute an amount that either party is required to pay.

Typically, the cash flow owed by party A is determined by applying a fixed interest rate, which remains constant throughout the duration of the contract, to a predetermined notional principal. Conversely, the cash flow owed by party B is calculated by reference to a floating interest rate, commonly linked to benchmark rates such as LIBOR or Euribor, and usually adjusted by a spread, applied to the same notional principal.

Where the floating rate exceeds the fixed rate, party A receives the corresponding differential from party B; conversely, where the floating rate falls below the fixed rate, party B receives the difference from party A.
Only the net balance resulting from this comparison is settled between the parties.

The Currency Swap, while structurally similar to the Interest Rate Swap, introduces an additional variable, namely the currency component. Under this arrangement, the counterparties exchange cash flows denominated in different currencies, calculated by applying interest rates to two notional principals expressed in the respective currencies.

In certain cases, the parties may also agree to exchange the notional principal themselves, both at inception and at maturity. A further element of variability lies in the structure of the applicable interest rates: they may both be fixed (albeit different, as they relate to two distinct currencies), both floating (again different, as linked to separate currencies), or structured as a combination of fixed and floating rates.

Thus, the Currency Swap combines interest-rate risk and exchange-rate risk within a single contractual framework, allowing the parties to manage cross-border financial exposure through a structured exchange of cash flows.

The term *Commodity Swap*, by contrast, mirrors the structure of an Interest Rate Swap in that one party pays a fixed amount while the other pays a floating amount. Its distinguishing feature lies in the nature of the notional reference: rather that representing a financial capital sum, it corresponds to a specified quantity of the underlying commodity (for example, barrels of oil).

Under its most common structure, a Commodity Swap has a predetermined duration and provides for periodic settlement dates, at each of which, the parties compare two amounts: a fixed price for the commodity, agreed at inception of the contract and payable by party A, and the market price of the same commodity observed on the date, payable by party B. The party whose amount is lower must pay the resulting differential to the other. Accordingly, fluctuations in the market price determine which counterparty is required to make the payment.

Finally, the structure of an *Equity Swap* closely resembles that of an Interest Rate Swap. It involves a predetermined notional principal and a fixed duration, at the end of which the parties settle the respective cash flows. However, both legs are variable in nature.

Party A undertakes to pay to party B an amount calculated by applying an interest rate, typically a floating benchmark such as LIBOR, to the notional principal. Conversely, party B undertakes to pay to party A an amount determined by reference to the performance, over

the agreed reference period, of a share, a stock index, or a portfolio of securities, calculated on the same notional amount.

As in other swap structures, performance does not normally consist in the exchange od gross cash flows, but rather in the payment of the net balance resulting from the difference between the two amounts due.
Like all derivative instruments, swaps are generally used for three essential purposes: hedging against risk, speculation, and arbitrage.

The mechanism of settlement by differences, which characterises the domestic swap and, in most cases, the Interest Rate Swap, has led part of the doctrine to classify such transaction within the category of simple differential contract.

However, this conclusion has not found support in the prevailing legal doctrine. Such opposition rests, on the one hand, in the view that differential contracts are generally not recognized as an autonomous legal category and, on the other, in the argument that swap agreements do not necessarily embody a speculative intent[98].

The difficulty lies in inferring, from what constitutes merely a mode of performance, one which, at the legal level, does not extinguish the principal obligations, any specific purpose of the parties, such as a speculative intent. It has therefore been argued that settlement by differences may, at most, explain the aleatory nature of the contract, but cannot in itself reveal the aims pursued by the parties. Such aims must instead be specifically ascertained and may, in general, be inferred from the existence or absence of underlying transactions[99].

Even so, it has been argued that this element would not, in itself, suffice to establish the *causa* of the contract, unless one adheres to the notion of *causa in concreto*[100], as endorsed by recent case law of the Supreme Court[101]. Indeed, the only viable path through which any underlying transactions might acquire relevance from a causal perspective would be to investigate the economic and social function of the contract, demonstrating that the motives

[98] CAVALLO BORGIA, *op. cit.*, 2422. See also CAPALDO, *Profili civilistici del rischio finanziario e contratto di swap*, Milano, 1999, 92.
[99] BALESTRA, *op. cit.*, 247–248.
[100] ROLLI, *Causa in astratto e causa in concreto*, Padova, 2008, 66 ff. and 247 ff.; UNGARITRANSATTI, *La Cassazione sposta la tesi della causa in concreto del contratto*, in *Riv. notariato*, 2007, 1, 184.
[101] Court of Cassation, 8 May 2006, Judgment No. 10490.

which led the parties to conclude it have become objectivised, taking the form of genuine interests that the contract is intended to realise[102].

It nonetheless remains that the swap constitutes an atypical contract which cannot readily be subsumed under any of the functions characteristic of typical contracts, in particular sale or deposit, despite certain elements of affinity.

Indeed, the classical model of sale, identified in the exchange of a good or a right for a price, proves inadequate to account for the complex economic operation underlying a swap, unless one were to distort the very concept of sale.

The prevailing view in legal scholarship therefore qualifies the swap as an aleatory contract, especially in the case of interest rate swaps and domestic swaps, where performance occurs through the settlement of differences.

3.3 The recent ruling of the Joint Civil Sections of the Court of Cassation on swaps: judgment nos. 8770 of 2020 on the issue of worthiness

The Joint Civil Sections of the Supreme Court, in judgment No. 8770 of 12 May 2020[103], ruled on a case involving, as parties to the proceedings, a bank and a local authority, namely the Municipality of Cattolica.

The dispute submitted to the Court concerned a specific type of derivative contract known as an Interest Rate Swap, which, as previously noted, represents the most widespread form of swap encountered in financial practice.

As previously explained, under this type of derivative the parties undertake, for a predetermined period, to exchange the difference between the interest payments that each would otherwise owe in relation to the financing of a notional principal amount. Typically, one leg of the swap is calculated at a fixed rate, while the other is determined by reference to a variable rate, usually indexed to a benchmark.

Where a party is bound by a fixed-rate financing arrangement and considers that the floating rate applicable to the counterparty's position will be lower than its own fixed rate, it may

[102] BIANCA, *op. cit.*, 434; BELLI, *Contratti aleatori. L'alea nei contratti differenziali*, in rivista *Le Rassegne*, Obbligazioni e contratti, January 2012, 64.
[103] Court of Cassation, Joint Civil Sections, 12 May 2020, No. 8770, Rv. 657963-01.

foresee a benefit from entering into the swap. Conversely, a party subject to variable-rate financing may enter the agreement anticipating that the reference rate will surpass the fixed rate agreed upon in the swap.

Through this exchange of cash flows, each party assumes the risk associated with interest rate fluctuations, with the prospect of obtaining a corresponding economic benefit.

A derivative contract may be described as *par* when it is balanced at inception, or *non-par* where an initial imbalance exists between the performances contemplated by the contract. Typically, a derivative contract is *non-par* when concluded between a financial intermediary and a client, with the imbalance operating to the detriment of the latter. In such cases, the intermediary may provide a compensatory payment, a sum intended to rebalance the contractual relationship, known as an *upfront* payment.

However, in commercial practice, the *upfront* payment often proves insufficient to achieve an effective rebalancing of the contractual performance. In many instances, it effectively operates as a form of financing granted by the intermediary to the client, since the latter will ultimately be required to repay it, often in an increased amount, if, during the performance of the swap, the contractual equilibrium shifts to its detriment.

The extent of the potential imbalance between the two rates over the course of the contractual relationship is measured by the so-called *mark-to-market* parameter. This constitutes an estimated future value necessary to delineate the object of the swap contract, which, pursuant to Article 1346 of the Civil Code, must be possible, lawful, and determined or at least determinable, on pain of nullity of the contract.

The appeal before the Supreme Court thus raised two closely connected and central issues for assessing the validity of swap contracts entered into by municipalities: first, whether the assumption of obligations by a local authority entering into such a derivative contract could be classified as indebtedness aimed at financing expenditures other than investments; and second, the identification of the competent body authorised to approve such a transaction.

Before addressing the specific issues referred by the lower chamber, however, the Supreme Court emphasised the need, for the purposes relevant to the case, to broaden the perspective on the phenomenon underlying the dispute.

In this regard, the Court observed that the field of derivative instruments, which engages multiple branches of law, has long attracted the attention of both legal scholarship and case law, and that even the existence of a unifying definition of derivative contracts remains a matter of debate.

Indeed, the absence within the Italian legal system of a general definition of "derivative contract," as previously noted, is justified by the fact that derivatives originated in financial practice and were only subsequently, and only partly, incorporated into the regulatory framework of the legal system.
Moreover, the considerable heterogeneity of the contractual schemes encompassed within the category of derivatives renders the identification of a unitary notion particularly complex. The phenomenon, in fact, may be fully comprehensible only from an economic perspective.

For these reasons, the Court of Cassation observed that this context explains the provision contained in Article 1(2-bis) of the Consolidated Financial Act, which delegates to the Minister of Economy and Finance the power to identify new potential categories of derivative contracts. In essence, the Italian legislature followed the same approach as the European Union legislator, opting for an enumeration of specific types of derivative contracts and leaving to the interpreter the task of achieving a possible *reductio ad unum*, where feasible.

The Supreme Court further observed that the case submitted to its attention concerned a swap agreement and, more specifically, an Interest Rate Swap.
An Interest Rate Swap is a derivative contract under which the parties reciprocally undertake, on predetermined dates, to exchange interest payments calculated on the same sum of money, taken as an abstract reference and referred to as the notional principal, over a specified period of time. On this basis, and in line with established lower court case law, the Supreme Court identified the essential elements of such a contract as follows:

a) the date of conclusion of the contract (*trade date*);

b) the reference principal amount (*notional principal amount*), which is not exchanged between the parties but serves solely for the calculation of interest;

c) the effective date (*effective date*), from which interest begins to accrue (normally two business days after the trade date);

d) the maturity or termination date (*maturity date* or *termination date*);

e) the payment dates (*payment dates*), namely the dates on which the interest cash flows are exchanged;

f) the applicable interest rates (*interest rate*) to be applied to the notional principal.

The Joint Civil Sections of the Court of Cassation further clarified that, where a swap is *non-par* at inception, that is, where the initial reciprocal positions of the parties are economically unbalanced, such disequilibrium may be offset by the payment, at the time of conclusion, of a sum of money to the party accepting the less favorable terms, commonly referred to as an *upfront* payment.

Such a contract may be *non-par* not only at inception, but may also become so in the course of its performance. At any given moment, a supervening imbalance between the respective cash flows, once discounted to present value, may be reassessed on a prognostic basis and may induce the parties to terminate the contract prematurely.

For the purposes of such operations, the Supreme Court attributed particular relevance to the so-called *mark-to-market* (MTM), also referred to as replacement cost, more precisely, to its method of estimation. MTM represents the cost at which a party may terminate the contract prior to maturity, or the price at which a third party would be willing, on the valuation date, to assume the derivative position. In practical terms, it reflects the current market value of the swap. The calculation method essentially consists of a daily hypothetical simulation of the closing-out of the contractual position, followed by an estimation of the resulting credit or debit balance between the parties at that time.

The *mark-to-market* is therefore, in technical terms, a value rather than a price: it is a theoretical monetary figure calculated on the assumption of early termination of the contract prior to its natural expiry. More precisely, it constitutes a method for valuing financial assets that stands in contrast to the historical or acquisition cost method, updated through monetary adjustment indices. It consists in attributing to such assets the value they would have in the event of renegotiation of the contract or dissolution of the relationship before its natural maturity.

Having set out these premises, the Joint Civil Sections thus proceeded to observe that, to date, the issue of the *causa* of the swap remains highly debated.

In this regard, part of the Supreme Court's case law, supported by a segment of legal scholarship, had tended to identify in the swap contract the *causa* of wagering.

This conclusion, however, was not endorsed by the Court, which considered it difficult to accept the notion that an Interest Rate Swap, designed to regulate multiple financial relationships over extended periods and involving substantial capital flows across major international markets, could be equated to a mere "lottery". In reality, what distinguishes the swap from an ordinary wager lies precisely in the structural complexity of the transaction and in the professional nature of the parties involved.

A more nuanced approach has identified the *causa* of the Interest Rate Swap in the negotiation and monetisation of risk, insofar as this contractual instrument: arises within the financial market, governed by its own rules, often customary and specific to the community of investors; concerns a financial risk that may belong to the parties, but may equally not pertain directly to them; relates to differentials calculated on cash flows expected to arise over a more or less extended period of time; reflects a probabilistic logic, as it does not concern a specifically and precisely determined entity; and originates from a legal tradition distinct from our own.

The Joint Civil Sections thus observed that, for purely descriptive and simplifying purposes, one might characterise the Interest Rate Swap as a form of differential financial wager[104], the latter adjective referring to the merely probabilistic determination of its effects and to the temporal duration of the relationship.

A preliminary issue thus arose concerning the validity of a contractual instrument characterised by this particular configuration of the *causa* of the swap.

More specifically, it became necessary to resolve, as a preliminary matter to any other issue referred by the ordinary chamber of the Court of Cassation, whether such contracts pursue interests worthy of protection under Article 1322 of the Civil Code and whether they are supported by a valid *causa in concreto*.

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[104] In a critical perspective on such qualification, see GALASSO, *La decisione delle Sezioni Unite in materia di contratti derivati: profili di criticità della sentenza n. 8770/2020*, in *Ricerche giuridiche*, 2020, p. 269 ff., who argues that fluctuations in interest rates amount to a merely economic form of alea, external to the causal structure of the transaction, and observes that the performances under an Interest Rate Swap are determined or at least determinable ab origine, so that the characterisation of the contract as structurally aleatory appears open to question.

Indeed, for the purposes of assessing their lawfulness, it was essential to verify whether an agreement existed between the intermediary and the investor as to the extent of the *alea*, calculated according to scientifically recognised and objectively verifiable criteria. The legislature, in fact, permits this category of so-called "rational wagers" on the assumption of their social utility, understood as an evolved form of the ancient wagers founded purely on chance or skill.

Such agreement must not be confined to the *mark-to-market* value alone, but must also extend to the probabilistic scenarios, since the former is merely a numerical figure providing limited information into the actual scope of the *alea*.

The agreement should therefore encompass both the qualitative and quantitative dimensions of the *alea*, and thus also the extent of the costs involved, including implicit ones.

In this regard, the Joint Civil Sections of the Court of Cassation emphasised that the monetary obligations arising from a derivative contract cannot be regarded as mere homogeneous obligations to pay fungible sums of money. Rather, in determining their amount, due weight must be attributed to the calculation parameters upon which they are based, parameters that are themselves determined by variations in interest rates (in the case of an Interest Rate Swap) and, where relevant, exchange rates over time.

The Supreme Court thus observed that the significance of the aforementioned calculation parameters lies in the fact that, through them, the function of financial risk management can be effectively realised, with the distinctive feature that the selected parameter, at maturity, reflects the combined effect of multiple underlying variables.

In this respect, reference had to be made to Article 23(5) of the Consolidated Financial Act (T.U.F.), which provides that: "Within the framework of the provision of investment services and activities, Article 1933 of the Civil Code shall not apply to derivative financial instruments or to analogous instruments identified pursuant to Article 18(5)(a)".
As previously noted, this provision excludes the application of the action for payment ordinarily available in gaming and wagering contracts.

Such provision, however, was not intended to authorise a wager *sic et simpliciter*, but rather to delimit, according to a subjective criterion, the *causa* of the swap, expressly linking it to the financial sector.

In this way, a specific model was outlined, giving rise once again to the question whether all derivatives correspond to a single legal type or whether the relevant distinctions operate at the level of broader classes of derivatives or, instead, at the level of individual swap contracts.

It was further observed that the financial intermediary acts as an agent of the investor, being required to provide personalised recommendations to the client. Accordingly, where, in the provision of investment services, the intermediary executes a transaction that it ought to have refrained from carrying out, or proceeds without the investor's consent, the acts performed cannot produce legal effects, irrespective of whether the intermediary's conduct is characterised as a breach of contract or as giving rise to nullity, with consequent liability for damages.

Within this framework of proper performance of intermediation activity, particular attention must also be paid to the disclosure of so-called implicit costs, to which the initial imbalance of the *alea*, measured in probabilistic terms, may be attributed.

The Joint Civil Sections proceeded to acknowledge the usefulness of construing swaps as contracts characterized by a variable *causa*, since, depending on the circumstances, they may perform either an insurance-like function or a risk-hedging function in relation to underlying exposures. The function pursued by the transaction must therefore be ascertained through an examination of the specific circumstances of the case.
In the absence of an adequate causal characterisation, the transaction will be affected by a fundamental indeterminacy, rendering the contract null for lack of a clear and defined, or at least definable, causal profile.

Having set out these principles, the Joint Civil Sections then turned to examine the questions referred by the ordinary chamber concerning the conclusion of derivative contracts, in particular swaps and Interest Rate Swaps, by public entities in general and by local authorities, as well as the identification of the competent territorial body authorised to approve recourse to such instruments[105].

Leaving aside those specific matters, which fall outside the scope of the present analysis, it may be observed that the 2020 Joint Civil Sections decision, in the field of derivative

[105] See Court of Cassation, Joint Civil Sections, Judgment No. 8770 of 12 May 2020 (Rv. 657963-01).

contracts, and Interest Rate Swaps in particular, established a series of guiding principles concerning the worthiness (*meritevolezza*) of the interests pursued by the parties.

Given that the concrete *causa* of derivative financial instruments may be hedging, speculative, or arbitrage-oriented, the Supreme Court held that the weaker contracting party, not operating within a sector with which it is familiar, must be fully informed by the stronger party, namely the financial intermediary, of every essential aspect of the agreement.

Indeed, it is precisely through knowledge of the characteristics of the contract that the purpose of the economic and financial transaction may be discerned.
Where such purpose is not intelligible, a potential breach of the principle of *meritevolezza* arises, which may lead to a declaration of nullity of the contract.

Article 1322 of the Civil Code requires that, in the case of hedging transactions, such operations be undertaken with the aim of reducing the risk exposure of other positions held by the client, and that a high degree of correlation exists between the object of the hedging strategy and the financial instrument employed.

Where the risk assumed proves to be irrational, the derivative contract would be null for lack of *meritevolezza*[106].

3.3.1 Case law

With specific reference to the derivative contract of swap, and recalling the arguments developed above in relation to the *meritevolezza* of aleatory contracts, it should be noted that the Supreme Court of Cassation, First Civil Section, in Judgment No. 24014 of 6 September 2021[107], had already clarified that the swap contract falls within the category of aleatory contracts recognised by the legal system. Accordingly, the *meritevolezza* of the interests pursued through it cannot be excluded in abstract terms.

Rather, it is necessary for the judge to assess, in *concreto* and *ex ante*, the existence of such a requirement, without conducting an *ex post* evaluation, that is, without judging in light of the economic effects subsequently produced by the contract.

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[106] RUM, *I contratti derivati. Una disamina sullo stato dell'arte*, in *Diritto Amministrativo*, Riv. Giur., 1 April 2021.
[107] Court of Cassation, First Civil Section, Judgment of 6 September 2021, No. 24014, Rv. 662385-01.

The panel seized of the matter affirmed this principle in full compliance with the criteria set out by the Supreme Court, which had already clarified[108] that an Interest Rate Swap with an *upfront* payment, that is, involving an actual initial financing to be repaid, is not *per se* null for lack or unlawfulness of *causa*. Rather, it is necessary to assess, on a case-by-case basis, the concrete contractual arrangement established by the parties.

Accordingly, such a contract must be regarded as valid where the aleatory *causa* of the swap and that of the underlying financing relationship, although connected, remain autonomous and distinct, without being distorted and without resulting in any alteration of the risk borne by the commercial operator.

The Supreme Court further observed that it had recently clarified[109] that the swap contract is not, in itself, unworthy of protection, since it falls within the scope of contractual autonomy under Article 1322(2) of the Civil Code.
Consequently, claims of nullity cannot be grounded on economic outcomes that materialise *ex post*, still less on assessments advanced by the client that lack evidentiary value.
In particular, the Court clarified that "the calculation methods may prove difficult to understand, especially where the counterparty does not qualify as a professional client," and nonetheless held that "such indication is in any event capable of determining the investor's consent with regard to the distribution of the *alea* and the costs of the contract."

Indeed, it has been emphasised that the Interest Rate Swap (IRS) is frequently concluded precisely for the purpose of hedging against potential future fluctuations in interest rates, fluctuations which, in common experience, are neither impossible nor necessarily negligible. By contrast, any alleged "impossibility" of an increase in interest rates would have to be established in advance in order to argue that the concrete hedging function pursued had been prejudiced.

This is because "aleatory contracts are recognised by the legal system and do not, in themselves, give rise to a judgment of unworthiness"; rather, the assessment of the contract "must at least be carried out *ex ante*, not *ex post*, so as to avoid deeming swap contracts worthy of protection when the investor has gained and unworthy when the investor has lost"[110].

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[108] Court of Cassation, 18 July 2017, No. 18781.
[109] Court of Cassation, 13 July 2018, No. 18724 (unpublished).
[110] Court of Cassation, 13 July 2018, No. 18724, cit.

An *ex post* evaluation may, at most, concern whether the transaction ultimately favoured one party or the other in light of the supervening circumstances that were foreseen and subsequently materialised. By contrast, the assessment of the existence of a concrete hedging function must necessarily be conducted *ex ante*, that is, by verifying whether the derivative is capable of transforming variable financial flows into fixed cash flows, thereby neutralising the effects of the *alea* associated with fluctuations in the variable rate corresponding to the debtor position previously undertaken.

It appears that this decision confirms the so-called "probabilistic scenario approach", since it once again refers to the requirement of "the "plausible reasonableness" at the level of consciously choosing what one is entering into (that is, of having been genuinely placed in a position, or at least having had the concrete opportunity, to understand the meaning of the derivative contract being concluded)"[111].

This jurisprudential position is confirmed by Judgment No. 21830 of 2021[112], which describes the so-called plain vanilla interest rate swap concluded for hedging purposes. The Court clarified that even in this type of contract "each of the contracting parties must take into account, at the time of conclusion, not only the possibility of gain but also, as in a game of chance, the possibility of loss, and therefore of having to pay, that is, of becoming debtor of, a certain sum to the counterparty." It is self-evident that "even in such cases (…) a margin of risk connected to the fluctuation of interest rates remains, since an actual trend unfavourable to the expected forecasts may generate negative differentials lacking adequate coverage."

Thus, as observed by the Court of Cassation in Judgment No. 21830 of 2021, even hedging operates "as" a "game of chance". Where a derivative has been concluded for hedging purposes but does not contain an agreement on the transparency requirements, mark-to-market value, implicit costs, calculation criteria, and probabilistic scenarios, the contract is null and void.

These transparency requirements apply irrespective of whether the purpose is hedging or speculation: they do not concern the parties' interests as such, but rather the formation of

[111] MAFFEIS, *La scommessa razionale di swap e lo scopo di copertura*, in Rivista Persone e Mercato, 2022, no. 2, Essays (Saggi), pp. 193–201.

[112] Court of Cassation, Civil Division I, Judgment No. 21830/2021, hearing of 5 May 2021, deposited on 29 July 2021.

consent. Indeed, Judgment No. 21830 states that "the failure to expressly indicate such elements essentially results in the absence of consent with respect to them."

As noted at the outset, the very idea that the investor can conceive of his or her own hedging interest, that is, the coverage of a specific risk through a particular instrument, presupposes knowledge of the relevant probabilities[113].

By order of 10 August 2022[114], the First Civil Section of the Supreme Court of Cassation reiterated that, in matters concerning Interest Rate Swaps, the validity of the contract requires verification as to whether an agreement exists between intermediary and investor regarding the extent of the *alea*[115], calculated according to scientifically recognised and objectively shared criteria.

Such agreement cannot be confined to the *mark-to-market* value, namely, the amount corresponding to the effective value of the derivative at a given date, at which a party may terminate the contract early or a third party would be willing to assume the position, but must also extend to the relevant probabilistic scenarios. It must therefore encompass both the qualitative and quantitative dimension of the aforementioned *alea*, including implicit costs.

Particular relevance is attributed to the calculation parameters of the monetary obligations arising from the agreement[116], since these are determined in accordance with fluctuations in interest rates over time.

By means of this ruling, the Supreme Court, while acknowledging the delicate and complex nature of the subject matter, endorsed the legal principle that investor protection, in the case of derivative transactions characterised by hidden costs, operates at the level of contractual nullity.

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[113] MAFFEIS, *La scommessa razionale di swap e lo scopo di copertura*, in *Rivista Persone e Mercato*, 2022, no. 2, Essays (Saggi), pp. 198–199.

[114] Court of Cassation, First Civil Section, Order of 10 August 2022, No. 24654, Rv. 665628-01.

[115] On this point, see GALASSO, *La decisione delle Sezioni Unite in materia di contratti derivati: profili di criticità della sentenza n. 8770/2020*, in *Ricerche giuridiche*, 2020, p. 276 ff., who observes that the alleged "incalculability" of the alea, where it depends on the investor's lack of knowledge of the relevant calculation parameters, concerns a subjective dimension of the transaction rather than an objective indeterminacy of the performance, which remains technically determinable according to recognised financial models.

[116] In the case at hand, the Supreme Court quashed the appellate decision, which had excluded that, in derivative transactions, the concealment of hidden costs to the detriment of the client could affect the validity of the contract.

The Court clarified that this is not the so-called "virtual nullity" under Article 1418(1)[117] of the Civil Code, as examined in two well-known Joint Civil Sections decisions[118], which excluded the applicability of nullity in cases of breach of intermediary's information duties. Rather, it concerns a structural nullity under Article 1418(2) of the Civil Code, relating to essential elements of the contract. In the 2020 decision, reference is made in this respect to both the object and the *causa* of the transaction.

In a recent order of 17 February 2025[119], the First Civil Section of the Supreme Court of Cassation reaffirmed that, in relation to *interest rate swaps*, the elements and criteria used for the determination of the *mark-to-market* must be knowable in advance by the investor in order to enable the formation of an agreement concerning the qualitative and quantitative scope of the *alea*, including probabilistic scenarios. In the absence of such agreement, the *causa* of the contract remains essentially indeterminable[120].

Furthermore, the advance knowability of these elements also assumes relevance for establishing the bank's liability for breach of its disclosure and contractual fairness obligations imposed by Legislative Decree No. 58 of 24 February 1998[121] and by CONSOB Regulation No. 11522 of 1 July 1998[122], which govern the conduct of financial intermediaries towards investors, particularly with regard to suitability, transparency and disclosure duties.

After reiterating the consistent line of Supreme Court case law concerning the *causa* and the conditions for validity of Interest Rate Swap contracts[123], and after affirming that, for the purpose of establishing the lawfulness of the *causa* of an IRS contract, it is not sufficient merely to ascertain the existence of a hedging function in relation to an underlying financing agreement[124], the Court observed that the contract is intrinsically aleatory and that the *alea* constitutes a legally protected *causa* only under certain conditions.

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[117] Article 1418(1) of the Italian Civil Code (Codice Civile).
[118] Court of Cassation, Joint Civil Sections, 19 December 2007, Nos. 26724 and 26725.
[119] Court of Cassation, First Civil Section, Order of 17 February 2025, No. 4076, Rv. 673850-01.
[120] In a critical commentary on the reasoning adopted by the Joint Civil Sections in judgment no. 8770/2020, see GALASSO, *La decisione delle Sezioni Unite in materia di contratti derivati: profili di criticità della sentenza n. 8770/2020*, in *Ricerche giuridiche*, 2020, p. 274 ff., who suggests that the alleged indeterminacy of the causa reflects informational asymmetries affecting the investor rather than an objective structural defect of the contract, and questions the recourse to structural nullity on such grounds.
[121] Legislative Decree No. 58 of 24 February 1998 *(Consolidated Financial Act – Testo Unico della Finanza).*
[122] CONSOB Regulation No. 11522 of 1 July 1998.
[123] See, in particular, Cass., Joint Civil Sections, No. 8770/2020 with reference to the parts of the decision not specifically addressing the validity of such contracts when concluded by local public entities.
[124] Court of Cassation, 2022, No. 32705.

This is because the legal system, and, in particular, Article 23(5) of the Consolidated Financial Act (T.U.F.), "does not intend to authorise a wager *sic et simpliciter*, but rather to delimit, according to a subjective criterion, the *causa* of the swap, expressly linking it to the financial sector"[125].

Hence the necessity "that the elements and criteria used for the determination of the *mark-to-market* be made available to the investor in advance, for the purpose of forming an agreement concerning the extent of the *alea*, in the absence of which the *causa* of the contract remains substantially indeterminable"[126], with the consequent nullity of the contract.

Such nullity, it is important to clarify, "is not the so-called virtual nullity under Article 1418(1) of the Civil Code, addressed in two well-known Joint Civil Sections decisions[127], which excluded its applicability in cases of breach of the intermediary's disclosure duties, but rather a structural nullity under Article 1418(2) of the Civil Code, relating to essential elements of the contract"[128].

In other words, it is necessary "to ascertain, for the purposes of assessing the lawfulness of such contracts, whether there exists an agreement between intermediary and investor concerning the extent of the *alea*, calculated according to scientifically recognised and objectively shared criteria, since the legislature authorises this type of 'rational wager' on the assumption of the social utility of rational wagers, understood as an evolved form of the ancient wagers based purely on chance or skill.
Such agreement must not be confined to the *mark-to-market* value alone, but must also extend to probabilistic scenarios, as the former is merely a numerical figure that conveys little as to the actual scope of the *alea*. It should concern both the qualitative and quantitative dimensions of the *alea*, and thus also the extent of the costs involved, including implicit costs"[129], so as to ensure the "presupposition of social utility" that renders only such "rational wagers" worthy of legal protection when concluded within the qualified and regulated framework of the "financial sector"[130].

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[125] Court of Cassation, Joint Civil Sections, No. 8770/2020.
[126] Court of Cassation, Joint Civil Sections, No. 8770/2020.
[127] Court of Cassation, Joint Civil Sections, 19 December 2007, Nos. 26724 and 26725.
[128] Court of Cassation, First Civil Section, Order of 10 August 2022, No. 24654.
[129] Court of Cassation, Joint Civil Sections, No. 8770/2020.
[130] LA LUMIA, CARMICINO, *Interest rate swap, contratto nullo senza l'indicazione del Mark to Market e dei relativi costi impliciti*, in *Rivista Norme e Tributi Plus*, 19 January 2025.

3.3.2 The new direction charted by the 2026 orders of the Court of Cassation: orders nos. 2262 and 2358

With two closely timed orders[131], deposited in early February 2026 and issued by the First Civil Division in the same deliberation chamber, the Court of Cassation once again intervened on the subject of interest rate swaps, providing a structured reconstruction of the criteria governing the validity of derivative contracts in light of the principles laid down by the Joint Civil Sections in Judgment No. 8770/2020 and subsequent case law of the Supreme Court[132].

The Court clarified that the parameter of "rational *alea*" is primarily relevant to the contract's worthiness of protection under Article 1322(2) of the Civil Code, rather than constituting a criterion that automatically affects the requirements of object or cause.

Accordingly, the absence of a rational *alea*, understood as awareness of the qualitative and quantitative extent of the risk undertaken, is primarily relevant as a defect in the worthiness of protection of the practical result pursued. By contrast, nullity for indeterminability of the object remains confined to cases in which the structural elements necessary to identify the reciprocal performances are lacking.

The Court further reiterated that the interest rate swap (IRS) constitutes a contract with a variable cause, capable of serving either a hedging function or speculative purposes, and that the relevant assessment must be conducted *ex ante* by verifying the consistency between the contractual framework and the specific function concretely pursued by the parties.

From this perspective, the assessment cannot be influenced by the economic outcome of the transaction, nor may it serve as a tool for the subsequent rebalancing of the contractual relationship.

The Court of Cassation also devoted particular attention to the role of the mark-to-market value, characterizing it as the result of a calculation capable of verification and grounded in scientifically recognised and objectively shared criteria.

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[131] Court of Cassation, Civil Division I, Order No. 2262 of 3 February 2026; Order No. 2358 of 4 February 2026.

[132] Cf. Court of Cassation, Civil Division I, Order No. 2262 of 3 February 2026; Court of Cassation, Civil Division I, Order No. 2358 of 4 February 2026.

Although it does not constitute the object of the contract in a strict technical sense, the mark-to-market value contributes to the construction of a rational *alea*, as it allows the risks and the costs, including implicit costs, inherent in the transaction to be quantified.

Within this framework, the Court addressed and clarified the notion of probabilistic scenarios. It rejected the interpretation that they should be understood as forecasts of future interest rate trend, explaining instead that they must be linked to historical data, measures of volatility, and the objective factors employed in calculating the mark-to-market value.

Probabilistic scenarios therefore assume relevance as a means of verifying the process through which the *alea* is determined, rather than as forward-looking representations of future interest rate movements.

A further central element of the Court's approach concerns the distinction between plain vanilla IRSs and complex (so-called exotic) derivatives.

The Court states that the content and scope of the information relevant to a rational *alea* vary according to the structure of the specific contract. In the case of plain vanilla swaps, particularly where the IRS operates as a hedging instrument and effectively converts an exposure from a floating rate to a fixed rate, the contractual structure may refer to standard market criteria sufficient, without requiring a detailed representation of probabilistic scenarios.

By contrast, in the case of more complex derivatives, greater importance is placed on a rigorous verification of the consistency between the contractual structure, the criteria for determining the *alea*, and the specific function concretely pursued.

Taken together, the two orders outline an interpretative framework that clarifies the relationship between nullity, worthiness of protection, and the structure of the IRS contract, specifying the legal meaning of mark-to-market value and of probabilistic scenarios, and highlighting a methodological distinction between standard instruments and complex transactions[133].

These indications are likely to have a significant impact on the structuring of interest rate swap contracts, particularly with regard to the identification of the elements relevant to the

[133] SATTA, *Contratti Interest Rate Swap: i confini tra meritevolezza, causa e oggetto del contratto*, in *Il Quotidiano Giuridico – Società, Banche e Imprese*, Altalex, 20 February 2026.

measurement of the *alea* and the differentiation of contractual models according to the complexity of the instrument.

Indeed, although the two decisions expressly state that they do not intend to contradict the previous case law on derivative contracts, referable, as noted, to Court of Cassation, Joint Civil Sections, No. 8770/2020, and describe as "hierarchically superior" and as a guiding authority for the interpretation of the case, in line with the role attributed by our legal system to the Joint Civil Sections pursuant to Article 374 of the Code of Civil Procedure, they nonetheless advance, to a considerable extent, novel considerations.

Such considerations, notwithstanding the stated intentions, do not appear fully aligned with the holdings of the aforementioned decision, nor with the extensive subsequent case law of the same First Civil Division developed between 2021 and 2025, cited above, which consistently adhered to the principles of law established by Court of Cassation, Joint Civil Sections, No. 8770/2020.

As noted, in their essential content the orders under comment, unlike all previous decisions, which had variously traced the issue either to a defect of the object[134] or to a defect of the cause[135], exclude that the lack of transparent disclosure and sharing between the parties of information concerning the mark-to-market value of the swap and its method of calculation, the implicit costs, and the probabilistic scenarios associated with the OTC IRS may affect the object and/or the concrete cause of the derivative contract.

Instead, they confine its relevance to a sphere external to the contractual document, limiting it solely to the assessment of the worthiness of protection of the atypical contract under Article 1322 of the Civil Code, and in particular to the characterisation of the *alea* associated with the contract as "rational", that is, as consciously assumed.

In light of this, it is natural, upon reading the two orders, to question which interpretative approach, whether the majority view expressed in the nine decisions of the First Civil Division published over the past five years or the approach advanced in the two orders under comment, more faithfully reflects the principles of law laid down by the Joint Civil Sections in 2020 and should consequently prevail.

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[134] Court of Cassation, Civil Division I, No. 21830/2021; No. 7368/2024; No. 7412/2024.
[135] Court of Cassation, Civil Division I, No. 4076/2025; No. 32705/2022.

In this regard, starting from the classification of the over-the-counter (OTC) IRS contract, which the Court of Cassation, Joint Civil Sections, No. 8770/2020 characterised, in essence, as a contract through which the parties negotiate and exchange a financial risk, whether or not that risk originally belongs to them. In that decision, the Joint Civil Sections identified as central those elements which, in the specific type of transaction at issue, constitute in financial market practice the "true core" of the contractual scheme: the mark-to-market value, its method of calculation, the costs of the transaction, and the probabilities of the contract's outcome.

Precisely because the swap contract is classified as a contract for the necessarily conscious exchange of financial risks, neither the Joint Civil Sections in 2020 nor the subsequent decisions of the First Civil Division delivered between 2021 and 2025 ever cast doubt on the value of the mark-to-market as a component of the contract's object or its cause, if not of both.
In particular, they went so far as to state that it is "inconceivable that the quality and quantity of the *aleae*, which form the subject matter of the contract, should be unknown to one of the contracting parties because they remained extraneous to the object of the agreement"[136].

By contrast, as the most recent scholarship has observed[137], the two orders under discussion adopt a wholly different perspective, effectively denying relevance to the mark-to-market value and to the other elements identified by the Joint Civil Sections in 2020 with reference to the profiles of the object and the cause of the contract.

In particular, in light of the principles of law laid down by the Joint Civil Sections in 2020 and of the related reconstructive framework (which the two orders expressly declare their intention to follow), it remains unclear how the decisions under comment can maintain that, in a contract in which, according to the very nomophylactic ruling adopted by the orders as their interpretative benchmark, an exchange of financial risks between the parties takes place, the components that describe and identify such risk (and which, according to the Joint Civil Sections themselves, affect the cause of the swap and should also form part of the "agreement on the measurability/determination of the object") are nevertheless entirely irrelevant both to the object and to the cause of the IRS.

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[136] Court of Cassation, Civil Division I, No. 21830/2021.
[137] ZAMAGNI and ACCIARI, *IRS e giurisprudenza di legittimità: osservazioni critiche su due recenti ordinanze*, in *Rivista Diritto Bancario*, 24 February 2026.

Even more problematic is the apparent tension between this conclusion and the order's simultaneous assertion that the contract's worthiness of protection is at stake. According to the most recent commentators on these decisions, this crucial argumentative step appears to be entirely lacking in the orders under examination.

Following the affirmation, in the decisions under comment, of the irrelevance of the mark-to-market value and of the other elements functional to the rational delimitation of the *alea* with respect to the profiles of the object and the cause of the contract (though not, as noted, for the purposes of worthiness), two significant consequences follow: on the one hand, there is a substantial reduction in relevance attributed to the method for calculating the mark-to-market value and of probabilistic scenarios for the purposes of determining consent with regard to the *alea*, particularly in relation to OTC plain vanilla IRSs; on the other hand, there emerges a certain overlap between the concepts of probabilistic scenarios and the methods for determining the mark-to-market value, which, as is well known, were expressly kept distinct in the ruling of the Joint Civil Sections[138].

In addressing probabilistic scenarios, the orders first maintain that their qualification, and the corresponding relevance, as a weighted estimate of the possible final outcomes of the derivative contract should be abandoned, on the ground that this would not provide the client with a "certain probability" of that outcome.

On the contrary, the orders contend that the Joint Civil Sections in 2020 did not intend to refer to the common and generally accepted meaning of the term. If interpreted in that sense, probabilistic scenarios would amount to an element characterised by a "lack of objectivity, as they would merely reflect subjective and non-univocal assessments that do not allow for an accurate prediction of future interest rates."

Conversely, according to the orders, the expression "probabilistic scenarios" used by the Joint Civil Sections should be understood as referring to the set of information relating to historical data, primarily average returns and volatility, employed in the determination of the mark-to-market value and capable of revealing the "quality" of the *alea* and, therefore, the very measure of the costs, even where implicit.

Thus, the notion of "probabilistic scenario" is said to rest on a historical analysis of the average performance of the financial product, based on the assumption that the future will

[138] ZAMAGNI and ACCIARI, *IRS e giurisprudenza di legittimità: osservazioni critiche su due recenti ordinanze*, in *Rivista Diritto Bancario*, 24 February 2026.

replicate the behaviour of the past, and to exclude any assessment of corrective variables in forward-looking expectations.

Moreover, since, as the orders further contend, the Joint Civil Sections required that probabilistic scenarios be grounded in "scientifically recognised and objectively shared criteria," the alleged absence of such criteria would, in substance, render information concerning future scenarios associated with the contracts irrelevant for IRSs, at least for the purpose of contributing to the rational character of the *alea*.

Moreover, it must be observed that these decisions appear to be driven by the pursuit of a certainty of the "data" that is notoriously alien to the logic underlying derivative finance. In doing so, they do not embrace, but rather substantially reject, the position affirmed by the Joint Civil Sections in 2020, namely that the pursuit of such an objective in the context of an OTC IRS contract is illusory and misleading, "given that such contractual instrument is formed within the financial market, according to its own rules, often customary and typical of the community of investors", and that it "is the expression of a probabilistic logic, not having as its object an entity that is specifically and precisely determined."

What has thus emerged is a definition of 'probabilistic scenario' that looks to the past and appears crafted in such a way as to facilitate its subsequent dismissal as irrelevant, thereby effectively sidelining the reference to scenarios made by the Joint Civil Sections and thereby distancing itself from the reasoning underlying the nomophylactic ruling of 2020.

Although the Joint Civil Sections were fully aware of the absence of regulatory references to scenarios prior to 2009, at least until the Consob Communication of 2 March 2009 on illiquid products and, subsequently, the adoption of the PRIIPs Regulation[139], as well as of the lack of a "generally shared" notion of scenario among legal scholars, they did not specify which methodology should be adopted to represent probabilistic scenarios.
This was certainly not an oversight, but a deliberate choice.

As clarified in the reasoning of the 2020 judgment, the derivative contract is "the result of a legal tradition different from our own" and, in practice, "is formed within the financial market, according to its own rules, often customary and typical of the community of investors." It would therefore have been illogical, in laying down general principles, for the Supreme Court, which adjudicates on matters of law, not on technical methodologies, to

[139] Cf. Regulation (EU) No. 1286/2014 and Commission Delegated Regulation (EU) No. 653/2017.

impose upon the derivatives market one technical methodology rather than another for the representation of such scenarios, thereby stifling the evolution of financial technique and of the market itself.

By refraining from prescribing a specific technical methodology for calculating probabilities, the Joint Civil Sections effectively affirmed that the task of "crystallising" the chosen probabilistic model within the contractual framework does not lie with the judge, but, in the absence of legislative guidance, with private autonomy.

The only external limit, one indeed imposed upon financial intermediaries, who, under EU and consequently Italian financial regulation, are regarded as the "strong parties" in the contractual relationship and shape its practices, is that the technique adopted in the contract must not be arbitrary, but must instead comply with "scientifically recognised and objectively shared criteria," thereby clearly referring to the standards of financial science.

In this respect as well, the approach adopted by the two orders under comment departs from that of the Joint Civil Sections in 2020.

Indeed, rather than confining themselves to questions of law, the orders effectively go so far as to "dictate" to the market, and to the trial court called upon to assess compliance, the specific elements that should technically define probabilistic scenarios. Having characterised probabilistic logic as misleading and therefore to be abandoned, the orders contend that the scenarios referred to in the nomophylactic judgment in relation to OTC IRSs should consist precisely in the disclosure and sharing of historical, that is, past, data, and in particular in the communication of the "returns and volatility used in determining the mark-to-market value and indicative of the quality of the *alea* and thus of the very measure of the costs, even where implicit."

In essence, this approach places upon intermediaries the burden of disclosing with the client elements that bear no direct relation to the market value of a swap or to its determination.

By contrast, if the mark-to-market value represents the present value of the payments expected over the life of the contract by each of the parties, past returns or historical interest-rate data would appear to have no relevance to its determination.

In summary, as the most recent commentators cited above have observed, "the overlap between probabilistic scenarios (as reinterpreted) and the formula for determining the mark-to-market of an IRS, as found in the two orders, reflects a (truly equivocal) notion of

mark-to-market as a ‘‘probabilistic estimate projected into the past’’, rather than as the present value of future financial flows determined on the basis of the forward interest rate curve prevailing at the valuation date”.

The latter definition, adopted by the Joint Civil Sections, makes it clear that neither historical returns nor historical interest-rate volatility (emphasised by the two orders as central) are relevant, since the value of the contract is a function of the term structure of forward rates and of the discount curves prevailing at the date of its conclusion.

Such historical data must, moreover, be regarded as unreliable and potentially misleading for the investor with respect to the *alea*, which would not be assumed rationally on that basis, but rather blindly[140].

Indeed, as recalled by the First Civil Division of the Court of Cassation itself only a few months earlier, “the knowability of the aforementioned elements is also relevant for the purpose of establishing the bank’s liability for breach of the information and fairness obligations imposed upon it by Legislative Decree No. 58 of 1998”[141].

Even if one shifts to the distinct plane of the duty of information, this would ultimately entail providing the client with information which, to use the wording of Commission Delegated Regulation[142], “masks, diminishes or obscures important items, statements or warnings”, and attributing decisive importance to past information in respect of which the current EU framework requires intermediaries to inform the client that “such indication is not the most prominent element of the communication”[143].

It is therefore difficult to be persuaded that such information, which, even within the EU regulatory framework governing disclosure obligations, is clearly classified as ancillary, should instead constitute the basis upon which the court assesses the worthiness of protection of the contract and regards its *alea* as rationally assumed.

Finally, even with regard to the determination of the mark-to-market value in plain vanilla IRSs, the two orders stand in clear contrast to the other decisions of the First Civil Division

[140] ZAMAGNI and ACCIARI, *IRS e giurisprudenza di legittimità: osservazioni critiche su due recenti ordinanze*, in *Rivista Diritto Bancario*, 24 February 2026.
[141] Court of Cassation, Civil Division I, Judgment No. 4076 of 17 February 2025.
[142] Commission Delegated Regulation (EU) 2017/565, Article 44(2)(e).
[143] Commission Delegated Regulation (EU) 2017/565, Article 44(4)(a) and (5)(b).

of the Court of Cassation delivered after the 2020 nomophylactic ruling, as well as to the very *regulae iuris* laid down by the Joint Civil Sections.

Indeed, the two orders under comment appear to "empty" the informational significance of the mark-to-market itself, essentially suggesting that, at least in the case of so-called "simpler" derivatives (which are, in fact, far from simple, given that Consob Communication No. 0097996/2014 already classified all OTC derivatives, including those with an elementary structure, as highly complex products), the precise disclosure of the mark-to-market value at the time of the IRS's conclusion may even be omitted.
According to this view, the straightforward application of the discounted cash flow method would be sufficient.

Moreover, without pausing to consider whether this holds uniformly across different categories of investors, the orders appear to adhere axiomatically to an assumed "technical truth", namely that, in the case of simpler derivatives, application of the discounted cash flow method would, in itself, lead, without substantial uncertainty and in a univocal manner, to the determination of the instrument's negotiated price.

By contrast, it would be more accurate to observe that such a method constitutes merely a common methodological premise underlying the various pricing formulas employed by market operators. That premise is then further developed and "filled with content" through discretionary assumptions which, if "neither agreed nor disclosed", may significantly affect the product's pricing, the determination of its costs, and ultimately even the quantitative and qualitative description of the derivative's *alea*, outcomes that may, if not diametrically opposed, be profoundly divergent.
This perspective is already suggested by Court of Cassation, Civil Division I, No. 21830/2021, para. 2.11.

It follows that, in the absence of a prior and shared determination between the parties of such elements, as well as of others (including the applicable discount curve, the financial conventions adopted, the possible inclusion of credit adjustments, and the criteria for valuing market quotations), the mere reference to the discounted cash flow method does not appear at all sufficient to guarantee a univocal result.

On the contrary, it may lead, in respect of the same contract, to markedly different valuation results as regards the negotiated price of the swap. Consequently, rather than endorsing the apodictic assertions contained in the orders, it would seem far more appropriate to clarify

that the final value of the swap, namely its mark-to-market, is determined not merely, and not primarily, by the application of the discounted cash flow method as such, but above all of the technical assumptions underlying its implementation.

Conclusion

The foregoing analysis has examined the concept of *alea* within contract law and its application in the context of derivative financial instruments, with particular reference to swap contracts. What has thus emerged is that contractual risk, far from constituting an anomalous or pathological element of the legal system, represents a structural and often essential component of modern financial transactions, one that the legislator has long recognised and that the courts have progressively sought to regulate within a coherent interpretative framework.

A central outcome of this analysis is the recognition that the validity of derivative contracts cannot be assessed solely on the basis of the presence of risk. Rather, what becomes crucial is the quality of that risk, that is, whether it is rational, transparent, and effectively understood and consciously assumed by the parties.

In this regard, the historical and systematic analysis conducted in the preceding chapters has demonstrated that the legal treatment of *alea* has undergone a progressive and significant evolution, from its earliest elaboration within the framework of *ius commune* and the canonical tradition, through the codifications of the nineteenth century, to its current formulation under Article 1469 of the Civil Code. Throughout this evolution, the category of aleatory contracts has never been regarded with uniform distrust by the legal system; rather, the legislator and the courts have consistently sought to identify the conditions under which the assumption of risk may be regarded as legally protected, distinguishing between a rational and a merely arbitrary exposure to *alea*. It is within this broader trajectory that the case law on derivative contracts must be situated. The analysis of swap contracts, and of Interest Rate Swaps in particular, has demonstrated that the issues of determinability of the contractual object and *causa*, the adequacy of information disclosed to the parties, and the conscious assumption of the *alea* are not peripheral concerns but constitute the very core of the assessment of contractual validity. The interpretative framework developed by the Joint Civil Sections in 2020 and consistently applied by the First Civil Division in the years that followed, represents, in this respect, the most coherent and rigorous articulation of the conditions under which derivative contracts may be regarded as worthy of legal protection.

In this perspective, the concept of rational *alea*, as articulated by the Joint Civil Sections in Judgment No. 8770 of 2020, emerges as the key criterion for distinguishing between

legitimate financial operations and contractual arrangements that, by reason of their opacity or structural imbalance, raise concerns as to their lawfulness and their worthiness of protection under Article 1322 of the Civil Code. The requirement of *meritevolezza*, in turn, operates as the fundamental instrument through which the legal system evaluates the admissibility of atypical contractual schemes such as derivatives, ensuring that the interplay between contractual autonomy and investor protection is maintained within principled and coherent boundaries.

The two orders of February 2026 (Civil Section I, Nos. 2262 and 2358) have introduced elements of uncertainty into this framework. As has been argued, their approach does not appear fully aligned with the principles affirmed by the nomophylactic ruling of 2020, raising the question of whether the legal qualification of derivative contracts remains stable or is subject to further, and not uncontroversial, evolution.

It may therefore be concluded that derivative contracts represent a legitimate expression of contractual autonomy, provided that the underlying risk is properly structured, rationally delimited, and transparently disclosed to the parties, conditions that, as the present analysis has sought to demonstrate, were coherently and rigorously articulated by the Joint Civil Sections in 2020 and that the most recent developments in the case law of the Court of Cassation render it necessary to reaffirm with clarity. In this evolving context, the concept of *alea* continues to play a central role, not as a static notion, but as a dynamic legal category through which the law engages with the complexity of financial innovation and its implications for contractual justice, one that demands from the interpreter both doctrinal rigour and a sustained awareness of the irreducibly probabilistic logic that, as the Joint Civil Sections themselves observed, lies at the very core of derivative finance.

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