THE BUMPY EVOLUTION IN JUDICIAL DECISIONS REGARDING DERIVATIVE CONTRACTS IN ITALY: APPROPRIATE UNDERSTANDING OF DERIVATIVE CONTRACTS AND RECEPTION OF THE CONTRIBUTION OF LEGAL DOCTRINE

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RESUMEN: Una desigual evolución en las decisiones judiciales ha tenido lugar en Italia. La evolución en cuestión es una evolución en la comprensión adecuada de los problemas relacionados con los contratos de derivados, así como en la influencia de la doctrina sobre las decisiones relativas a los contratos de derivados. El artículo 118, párrafo 3, de las disposiciones preliminares del Código de Procedimiento Civil italiano prohíbe citar la doctrina jurídica en las sentencias. A pesar de esta disposición, la influencia ya mencionada parece ser relevante.

ABSTRACT: A bumpy evolution in judicial decisions has taken shape in Italy. Specifically, the evolution in question is an evolution in the appropriate understanding of issues related to derivative contracts as well as in the reception of the contribution of legal doctrine. Article 118, paragraph 3, of the preliminary dispositions of the Italian Civil Procedure Code does not allow juridical authors to be quoted within judicial decisions. Despite such provision, the impact (and/or the missing impact) of legal doctrine (considered as the product of the activities of legal researchers and legal scholars) upon decisions regarding derivative contracts seems to be relevant.

PALABRAS CLAVE: Tribunales nacionales, desigual evolución, decisiones judiciales, contratos de derivados, mark to market, invalidez, nulidad, doctrina jurídica, influencia de la doctrina jurídica.

KEY WORDS: National courts, bumpy evolution, judicial decisions, derivative contracts, mark to market, invalidity, nullity, legal doctrine, contribution.

SUMARIO: I. Introduction: decisions, legal doctrine and derivative contracts. II. Withdrawal from derivative contracts and the relevance of the so-called "mark to market": contribution of legal doctrine and partial reception in judicial decisions. III. The missing reception of the contribution of legal doctrine. IV. The turning point and the last step in the evolution. V. Conclusions. VI. Bibliography.

I. Introduction: decisions, legal doctrine and derivative contracts

Art. 118, paragraph 3, of the preliminary dispositions of the Italian Civil Procedure Code does not allow juridical authors to be quoted within judicial decisions. Actually, it is permissible to report the opinions of juridical authors, but their names may not be indicated.

Nevertheless, the impact (as well as the missing impact) of legal doctrine (considered as the product of the activities of legal researchers and legal scholars) upon judicial decisions regarding derivative contracts[1] appears to be not negligible.

Indeed, the contribution of legal doctrine seems to have been internalized, step by step (in the context of a bumpy evolution), by specific decisions as to the method for the calculation of the value of the so-called "mark to market", as well as concerning the necessity of indicating the criteria used to carry out the appraisal of the "mark to market". In this regard, a national Court has only recently really assimilated the meaning of the contribution made by legal doctrine. The article analyzes the conclusions reached by the national Courts and the related consequences.

Accordingly, an analysis of the choices made by judges within their decisions is worthwhile.

The bumpy evolution in question is an evolution in the appropriate understanding of relevant issues, related to derivative contracts, as well as in the reception of the contribution of legal doctrine.

[1] A definition of "derivative contract" may be found on the website of ISDA, International Swaps and Derivatives Association: "Derivative is a risk transfer agreement, the value of which is derived from the value of an underlying asset. The underlying asset could be an interest rate, a physical commodity, a company's equity shares, an equity index, a currency, or virtually any other tradable instrument upon which parties can agree", currently available at http://www.isda.org/educat/faqs.html#1. Furthermore, regarding the definition of derivative contracts, see J.C. HULL, *Options, Futures, and Other Derivative Securities*, Prentice Hall, Upper Saddle River, 1993, p. 1.

II. Withdrawal from derivative contracts and the relevance of the so-called "mark to market": contribution of legal doctrine and partial reception in judicial decisions

In the case of withdrawals from derivative contracts[2], it is essential to consider – as legal doctrine[3] has pointed out – the appraisal of the so-called "mark to market", namely, the appraisal of the measure of the so-called "differential"[4], and accordingly, the appraisal of the measure of the object of the contract[5]. The party who desires to exercise the right to withdraw has the obligation to pay the sum of money resulting from the appraisal in question to the other party in the case of a negative "mark to market"[6]. The value of the "mark to market" cannot be considered as the value of the object[7] of a derivative contract at the time of the withdrawal, but rather as the value of the object of a derivative contract as foreseen for the date established (by the parties) for the natural expiration of the contract[8].

As a consequence, the judge may be requested to decide a controversy regarding the relevant aspects, among which the appraisal of the "mark to market" may deserve particular attention.

In the aforesaid context, the efforts of the legal doctrine seem to be tangible, and allusions to the contribution of an eminent author (even without the indication of his name) are likely to be detected in the judicial decisions. The contribution is twofold: On the one hand, attention has been

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[2] Also known as "derivatives".

[3] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *Banca, borsa e titoli di credito*, II, 2011, pp. 800-801.

[4] The so-called "differential" (in Italian, "il differenziale") refers to the difference arising out of the comparison between the two prices, namely, the price at the moment of the closing and the price at the moment of the expiration of the contract: E. GIRINO, *I contratti derivati*, Giuffrè, Milano, 2010, p. 17. In the case, for example, of an interest rate swap, the difference corresponds to "the value of an interest rate swap". Indeed, "[t]he value of an interest rate swap to a counterparty is the net difference between the present value of the payments the counterparty expects to receive and the present value of the payments the counterparty expects to make. At the inception of the swap, the value is generally zero to both parties, and becomes positive to one and negative to the other depending on the movement of interest rates. Present value is the value of a quantity to be received in the future, adjusted for the time value of money (interest foregone while waiting for the quantity)", definition given by ISDA, International Swaps and Derivatives Association; this definition is currently available at http://www.isda.org/educat/faqs.html#1.

[5] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801. The "differential" is the object of a derivative contract: *id.*, *I contratti derivati*, *cit.*, p. 17. The "oggetto del contratto", ie the "object of the contract" (arts. 1346-1349 of the Italian Civil Code), as far as the Italian law is concerned, may be defined as "l'*id* sul quale (si manifesta la volontà) si forma il consenso", ie "that specific thing upon which the parties agree": P. PERLINGIERI, *Manuale di diritto civile*, Edizioni Scientifiche Italiane, Napoli, 2014, p. 496.

[6] According to the international banking practice, as explained by the legal doctrine: E. GIRINO, *I contratti derivati*, *cit.*, p. 458. "Negative for the client" means that the client has the obligation to pay; this is so for the bank, when the "mark to market" is negative for the bank.

[7] The object of a derivative contract is the so-called "differential".

[8] G. DE NOVA, "I contratti derivati come contratti alieni", *Rivista di diritto privato*, 2009, p. 19.

paid to the correspondence between the method for the calculation of the value of the "mark to market" and the method for the calculation of other costs or prices; on the other hand, concerns have been raised about the possible consequences arising from the absence of the indication of the parameters[9] by means of which the appraisal is performed.

As to the first profile[10], legal doctrine has underlined the necessity of referring, when dealing with the method of calculation, to the evaluation techniques and to the so-called "best practice"[11]; as will be seen, the references in question have subsequently been internalized by a national Court. Indeed, as the legal doctrine has affirmed, the appraisal of the "mark to market" corresponds to the appraisal of the so-called "fair value"[12]. The "fair value" (and thus also the "mark to market") – following the reasoning of the same author[13] – in compliance with art. 2427 *bis*, paragraph 1, no. 1, *a)*, of the Italian Civil Code and with art. 203, paragraph 2, of the Italian Consolidated Law on Finance[14], should be appraised[15] according to the evaluation models and techniques commonly accepted, as well as with regard to the "best practice"[16]. Similarly, as reported (and evidently, assimilated) by the decision[17], "the MTM is that fair value, which art. 2427, *bis*, paragraph 1, of the Italian Civil Code states must be indicated within the integrative note to the balance sheet and appraised according to the evaluation models and techniques generally accepted. Also art. 203 of the Italian Consolidated Law on Finance refers to the best practice"[18].

As far as the second aspect is concerned[19], the same doctrine[20] has noted that allowing one of the parties to carry out the appraisal of the "mark to

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[9] The criteria and the methodologies.
[10] Namely, the method for the calculation of the value of the so-called "mark to market".
[11] E. GIRINO, *I contratti derivati*, *cit.*, p. 462.
[12] Ibidem, p. 462.
[13] Ibidem, p. 462.
[14] "The Italian Consolidated Law on Finance" is (as currently indicated on the institutional website) the official translation of the original Italian version "Testo unico della finanza" (adopted by means of decreto legislativo 24 February 1998, no. 58), available at http://www.consob.it/mainen/documenti/english/laws/fr_decree58_1998.htm.
[15] E. GIRINO, *I contratti derivati*, cit., p. 462.
[16] Ibidem, p. 462.
[17] Tribunale di Milano, 19 April 2011, no. 5443, p. 24, footnote 43, available at http://www.ilcaso.it/giurisprudenza/archivio/3965.pdf.
[18] According to the original Italian version: "Del resto il MTM altro non è che quel *fair value* che espressamente l'art. 2427 *bis* comma 1 n. 1 c.c. impone di indicare nella nota integrativa di bilancio e che deve stimarsi secondo modelli e tecniche di valutazione generalmente accettati. Così pure l'art. 203 TUF rimanda alla miglior prassi": ibidem. MTM is the acronym for "mark to market". It has to be noted that the decision in question, when referring to art. 2427 *bis*, paragraph 1, of the Italian Civil Code and to art. 203 of the Italian Consolidated Law on Finance, did not mention, in this specific frame, the word "derivatives" or the word "derivative", but the subject matter of the decision is represented by derivative contracts.
[19] Namely, the evaluation of the possible consequences arising out of the missing indication of the criteria and the methodologies.
[20] E. GIRINO, *I contratti derivati*, *cit.*, pp. 460, 464.

market" (through a specific clause or a subsequent agreement[21]), without enabling the other to verify the criteria and the methodologies deployed to this end[22], would result in a violation of the rule contained in art. 1346 of the Italian Civil Code[23]. According to this article, the object of the contract must be "possible, lawful, determined or determinable"[24]. Otherwise, the contract is not valid in compliance with art. 1418, paragraph 2, of the Italian Civil Code[25]. What is indeterminable, in the case of derivatives, is not *stricto sensu* the object (in the context of derivatives, that is represented by the so-called "differential"), but the criteria and the methodologies (if not indicated, and therefore, if not verifiable) deployed to perform the appraisal of the "mark to market". The latter[26] is defined as the appraisal of the measure of the "differential", and therefore, as the appraisal of the measure of the object of a derivative contract[27]. As a result, the appraisal of the "mark to market" is strictly and intrinsically connected to the object of the contract. In this regard, the same Court[28] has acknowledged the relevance of the "mark to market", but it appears to have only partially grasped the meaning of the abovementioned remarks[29]. Indeed, as stated in the decision[30], even if a separate agreement – through which the parties agree to carry out the appraisal[31] – is considered to be admissible, there nevertheless is no suggestion that a specific clause should be inserted allowing one of them to carry out the appraisal, nor is there a recommendation that the criteria and the methodologies deployed to this end should be indicated. In fact, in the view of the Court, "the mark to market might only be the object of an agreement (ancillary to a derivative) with which the parties expressly agree to perform the abovementioned appraisal"[32].

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[21] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801, footenote 17.

[22] Namely, the criteria and the methodologies deployed to perform the appraisal of the "mark to market".

[23] E. GIRINO, *I contratti derivati*, *cit.*, pp. 460, 464.

[24] In compliance with art. 1346 of the Italian Civil Code, "l'oggetto del contratto deve essere possibile, lecito, determinato o determinabile" (original Italian version).

[25] In this case, the invalidity is represented by the "nullity of the contract", ie "nullità del contratto" in the original Italian version, included in arts. 1418-1424 of the Italian Civil Code. In particular, art. 1418, paragraph 2, states that the "nullity of the contract" is also caused by the "mancanza nell'oggetto dei requisiti stabiliti dall'art. 1346 c.c.", ie by the "lack of the legal requirements listed in art. 1346 of the Italian Civil Code".

[26] The appraisal of the "mark to market".

[27] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801.

[28] Tribunale di Milano, 19 April 2011, no. 5443.

[29] Remarks on the necessity of the indication and verifiability of the criteria and the methodologies.

[30] Tribunale di Milano, 19 April 2011, no. 5443.

[31] The appraisal of the "mark to market".

[32] According to the original Italian version: "Ne deriva che, al più, il MTM potrebbe essere ritenuto l'oggetto di un patto accessorio al contratto su derivati; ad esempio un patto con cui le

III. The missing reception of the contribution of legal doctrine

An important decision (of a national Court of Appeal)[33] has warned of the possible invalidity (the "nullity")[34] of a derivative contract, due – as has been affirmed – to the indeterminableness of the amount of the commission to be paid to the "*mandatary*"[35]. In the opinion of the Court of Appeal[36], the amount of the commission shall be clearly established by the parties and shall not constitute a hidden cost in compliance with art. 1709 of the Italian Civil Code[37]. Otherwise, the contract would not be valid. As a result, the invalidity (the "nullity") of the contract would be caused by the indeterminableness of the commission[38]. Indeed, the Court of Appeal upheld

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parti convengono espressamente di operare la suddetta stima, cioè la finzione di scadenza anticipata con frequenza giornaliera e quindi di accantonare i relativi margini a reciproca garanzia, come se realmente il contratto dovesse essere eseguito, così creando una sorta di deposito cauzionale. Ovvero un patto volto a disciplinare le modalità di recesso anticipato dal contratto di durata": Tribunale di Milano, 19 April 2011, no. 5443. It has to be noted that the right of one party to perform the appraisal is not contemplated in the decision in question.

[33] Corte di Appello di Milano, 18 September 2013, no. 3459, R. DI RAIMO, "Interest rate swap, teoria del contratto e nullità: e se finalmente dicessimo che è immeritevole e che tanto basta?", *Rassegna di diritto civile*, 2014, pp. 295-320.

[34] In this case, the invalidity is represented by the "nullity of the contract", ie "nullità del contratto" in the original Italian version, included in arts. 1418-1424 of the Italian Civil Code.

[35] The term "*mandatary*" is used to indicate the party to a contract of "mandate" who has the obligation to undertake a juridical act (or more juridical acts) on behalf of the other party ("*mandator*"). For an explanation of the use of this term, see J.L. GRAUBERGER, "From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana", *Tulane Law Review*, 1997, p. 263. In the original Italian version, the term "*mandatary*" corresponds to the term "*mandatario*" and the term "*mandator"* corresponds to the term "*mandante*".

[36] Corte di Appello di Milano, 18 September 2013, no. 3459.

[37] "La mancanza dell'indicazione del *mark to market* al momento della conclusione del contratto consente di occultare il suo compenso, rappresentato dai c.dd. costi impliciti, all'interno delle condizioni economiche dell'atto gestorio", ie "The lack of the indication of the mark to market, at the moment of the closing of the contract, allows the commission (made up of implicit costs) to be hidden inside of the economic conditions of the contract of mandate": ibidem. In addition, always with respect to the opinion of the Court of Appeal, "il compenso deve, al contrario, essere determinato nel contratto o deve essere determinabile in virtú di un criterio (modello matematico di *pricing*) condiviso *ex ante* dall'intermediario e dal cliente. Ad esempio con la pattuizione, separata, di una *fee*, e non certo 'annegato' dentro le condizioni economiche dell'atto gestorio", ie "the commission has to be determined within the contract or determinable by virtue of criteria, *ex ante* shared by both parties (the bank and the client). For example, by means of a separate agreement establishing a specific fee and not 'drowned' inside of the economic conditions of the contract of mandate": ibidem.

[38] According to the decision in question, "Il che determina la nullità del contratto derivato anche in ragione del difetto di accordo sul requisito essenziale del compenso *ex* art. 1709 c.c., il quale dispone che, nel mandato oneroso, il compenso del mandatario sia consapevolmente stabilito dalle parti", ie "This entails the invalidity (the 'nullity') of the derivative contract even on the grounds of the lack of an agreement on the commission. The latter is an essential element and is established by art. 1709 of the Italian Civil Code. In compliance with this article, the commission has to be determined (knowingly) by both parties": ibidem. In this case, the invalidity is represented by the "nullity of the contract", ie "nullità del contratto" in the original

that the commission is linked to the context of the "mark to market"[39]. As such, the amount of the commission is likely to be indeterminable[40]; therefore, this indeterminableness might lead to the invalidity (the "nullity")[41]. As just noted, according to the decision reported[42], the legal nature of the derivative contract is that of a contract of "mandate"[43] on the basis of art. 21 of the Italian Consolidated Law on Finance[44]. The article in question states that the bank, when proposing the investment strategies, must comply with the standards of diligence, correctness and transparency, which are specifically requested for that kind of client. As a matter of fact, in this phase, it is very possible to detect a sort of contract of mandate, given that the bank must act in the client's best interest (in compliance with the abovementioned art. 21) by suggesting the type of investment that best suits his profile.

However, when the client becomes a party to a derivative (and for this reason, an investor), the bank is not in a position to pursue the client's interest, since both parties have different[45] and/or opposed[46] interests. Indeed, suffice it to mention the so-called "hedging cost", which is included within the so-called "confirmation"[47] of a derivative, in cases in which

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Italian version, which is included in arts. 1418-1424 of the Italian Civil Code. It might be assumed that the decision refers to art. 1418, paragraph 2, by virtue of which the nullity of the contract is also caused by the failure to meet the legal requirements listed in art. 1325, paragraph 1, no. 1 (the lack of an agreement probably, in the view of the Court of Appeal, refers the lack of an agreement on the commission): In this regard, see Ibidem.

[39] Ibidem.

[40] Ibidem.

[41] Ibidem.

[42] Ibidem.

[43] As to the definition of the contract of mandate, reference must be made to art. 1703 of the Italian Civil Code, according to which "the mandate is a contract by means of which a party has the obligation to undertake a juridical act (or more juridical acts) on behalf of the other party". The original Italian version of the art. 1703 is: "Il mandato è il contratto col quale una parte si obbliga a compiere uno o più atti giuridici per conto dell'altra". The contract of mandate is different from the contract of agency. To gain a better understanding of this difference, see J.L. GRAUBERGER, "From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana", *cit.*, p. 263.

[44] Actually, this opinion might have been suggested by an isolated (and not shareable) expression of legal doctrine: D. MAFFEIS, "Intermediario contro investitore: i derivati over the counter", *Banca, borsa e titoli di credito*, I, 2010, pp. 779-796. However, this is not completely verifiable, due to the content of the abovementioned art. 118, paragraph 3, of the preliminary dispositions of the Italian Civil Procedure Code. Furthermore, the conclusions, reached by the decision, in terms of the correlation between the "mark to market" and the commission cannot be taken for granted.

[45] This is the case of derivatives used to hedge pre-existing risks. Regarding the derivatives used to hedge pre-existing risks, see T.E. LYNCH, "Gambling by Another Name; The Challenge of Purely Speculative Derivatives", *Stanford Journal of Law, Business & Finance*, 2012, p. 67.

[46] This is the case of derivatives used to speculate. In this regard, see Ibidem, p. 67.

[47] A definition of "confirmation" may be found on the website of ISDA, International Swaps and Derivatives Association: "In jurisdictions where close-out netting is enforceable, all transactions under the ISDA Master Agreement constitute a 'single agreement' between the two counterparties instead of being separate contracts. The confirmation of a transaction serves

derivatives are used to hedge pre-existing risks[48] and in cases in which derivatives are used to speculate[49]. The cost in question is contemplated by the bank in order to manage the market risk (and is considered[50] to be paid by the client). In so doing, the client (hypothetically, the "*mandator*", if an alleged existence of the contract of mandate is admitted) would pursue the interest of the bank (hypothetically, the *mandatary*). This fact would stand in stark contrast to the client's interest, and accordingly, to the "causa"[51] of the contract of mandate. Indeed, the client's interest is not related to holding the bank free from risk, but to the achievement of a positive outcome[52].

Actually, the "causa" in the contract of mandate, as far as Italian law is concerned, consists of pursuing the interest of the *mandator*[53], even in the case of the contract of mandate called "*in rem propriam*"; the contract of mandate "*in rem propriam*"[54] is characterized by the pursuit of both parties' interests (namely, including the interest of the *mandatary*). This, however, should not have a result that is detrimental to the *mandator*'s interest; in fact, a contract of mandate without adequate protection of the interest of the *mandator* is not conceivable.

As a consequence, in the context of derivatives, applying the rules regulating the contract of mandate as provided by the law within the Italian Civil Code (arts. 1703-1730 of the Italian Civil Code)[55] is not admissible, nor may the aforesaid correlation between the "mark to market" and the commission be considered correct.

Therefore, the remarks on invalidity ("nullity")[56] due to indeterminableness must be carried out only with reference to the lack of the indication and verifiability of the criteria and the methodologies

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as evidence of that transaction, and each transaction is incorporated into the ISDA Master Agreement", available at http://www.isda.org/educat/faqs.html#1.

[48] T.E. LYNCH, "Gambling by Another Name; The Challenge of Purely Speculative Derivatives", *cit.*, p. 67.

[49] Ibidem, p. 67.

[50] Considered by the bank.

[51] The "causa of the contract" ("causa del contratto" in the original Italian version, arts. 1343-1345 of the Italian Civil Code), as far as Italian law is concerned, may be defined as the "interesse 'perseguito' dalle parti", ie as the "interest 'pursued' by the parties", and at the same time, as the "sintesi 'degli effetti essenziali' del contratto", ie as the "synthesis 'of the essential effects' of the contract": P. PERLINGIERI, *Manuale di diritto civile*, *cit.*, pp. 488-489.

[52] In cases of derivatives used to hedge pre-existing risks and in cases of those used to speculate.

[53] G. BAVETTA, "Mandato", *Enciclopedia del diritto*, Giuffrè, Milano, 1975, XXV, p. 324; P. PERLINGIERI, *Manuale di diritto civile*, *cit.*, p. 723.

[54] Ibidem, p. 724; the commission due to the *mandatary* is not related to the interest of the same *mandatary* that is necessary to have the contract of mandate "*in rem propriam*": U. CARNEVALI, "Mandato", *Enciclopedia giuridica* Treccani, Roma, 1990, XIX, pp. 11-12.

[55] Arts. 1703-1730 govern the contract of mandate.

[56] In this case, the invalidity is represented by the "nullity of the contract", ie "nullità del contratto" in the original Italian version, included in arts. 1418-1424 of the Italian Civil Code.

deployed to perform the appraisal of the "mark to market", and not with respect to the indeterminableness of the *mandatary*'s commission[57].

In reality, a commission may be established, but it cannot be referred to a contract of mandate, given that, for the reasons already explained, the existence of a contract of mandate cannot be conceived in such a context[58]. Indeed, the commission, in the context of derivatives, is due to the bank as a fee for the service rendered, and it is indicated by the expression "mark up"[59], but is unrelated to a contract of mandate.

The asserted correlation[60] between the "mark to market" and the commission[61] demonstrates, with clarity, that the Court of Appeal did not take into account the contribution (offered by legal doctrine)[62] related to the appraisal of the "mark to market", namely, enabling one of the parties to perform the appraisal of the "mark to market"[63], as well as indicating[64] the criteria and the methodologies deployed to this end.

IV. The turning point and the last step in the evolution

It is only recently that a national Court[65] has really (and completely) grasped the meaning of the contribution of legal doctrine by assimilating the necessity for the deployment of the elements mentioned directly above[66], namely, the indication and the verifiability of the criteria and of the methodologies used to carry out the appraisal of the "mark to market"[67].

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[57] As stated (instead) in the decision of the Corte di Appello di Milano, 18 September 2013, no. 3459, according to which the indeterminableness relates to the *mandatary*'s commission.
[58] Namely, in the context of derivatives.
[59] As stated in the "confirmation", in percentage terms on the total amount.
[60] Established by the Corte di Appello di Milano, 18 September 2013, no. 3459.
[61] Commission to be paid to the "*mandatary*".
[62] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801, footnote 17; *id.*, *I contratti derivati*, *cit.*, pp. 460, 464.
[63] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801, footnote 17.
[64] The indication is aimed at the verifiability of the criteria and the methodologies: E. GIRINO, *I contratti derivati*, *cit.*, pp. 460, 464.
[65] The national Court is the Tribunale di Milano, 16 June 2015, no. 7398, available at http://www.ilcaso.it/giurisprudenza/archivio/12916.pdf.
[66] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801, footnote 17; *id.*, *I contratti derivati*, *cit.*, pp. 460, 464.
[67] "Se così è, quindi, dovendo l'oggetto del contratto e, quindi, tutte le sue componenti, essere determinate o quanto meno determinabili, pena la nullità del contratto stesso, sarà necessario che nel regolamento contrattuale venga indicato il metodo di calcolo di tale valore; in difetto, risolvendosi la quantificazione dell'MTM in una determinazione di una delle parti (la banca), non verificabile dall'altra, deve concludersi come esso non risulti determinabile, implicando la nullità dell'intero contratto ex art. 1418 c.c.", ie "all the elements of the contract must be determined or determinable. Consequently, the method of appraisal of the MTM (mark to market) must be indicated; otherwise, the appraisal of the mark to market carried out by one of the parties, without the possibility of being verified by the other, would result in a violation of

In fact, performing the appraisal of the "mark to market" without enabling the other party to verify the aforesaid criteria and methodologies (deployed, but not indicated) would result in a violation of the rule contained in art. 1346 of the Italian Civil Code[68], according to which "the object of the contract must be possible, lawful, determined or determinable". Consequently, the contract would not be valid[69] on the basis of the failure to meet the legal requirements listed in art. 1346, as established by art. 1418, paragraph 2, of the Italian Civil Code[70]. This would not be due to the indeterminableness of the object of the contract *stricto sensu*, but to the indeterminableness of the criteria and the methodologies, given that the appraisal in question is strictly and intrinsically connected to the object of the contract. Indeed, the appraisal of the "mark to market" is the appraisal of the measure of the "differential", and accordingly, the appraisal of the measure of the object of the derivative contract[71].

This last decision[72] has marked the turning point, and at the same time, the last step in a (bumpy) evolution in the context of the judicial decisions of the national Courts regarding the "mark to market", as well as the implications of its appraisal.

As already mentioned, the evolution in question is an evolution in the appropriate understanding of issues regarding derivatives as well as in the reception of the related contribution of legal doctrine.

Without a doubt, as to the decisions examined, the first step in the evolution is represented by a partial acknowledgement of the relevance of the "mark to market". Indeed, the first decision that was analyzed, on the one hand, considered the method for the calculation of the value of the "mark to market"; on the other hand, the decision in question did not contemplate the right of a party to perform the appraisal, the indication of the criteria and the methodologies, the verifiability[73] (by the other party) or the consequent invalidity (the "nullity") of a derivative contract[74].

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the rule contained in art. 1418 of the Italian Civil Code and would cause the nullity of the contract": Tribunale di Milano, 16 June 2015, no. 7398.

[68] Ibidem; E. GIRINO, *I contratti derivati*, *cit.*, pp. 460, 464. According to art. 1346 of the Italian Civil Code, the object of the contract must be "possible, lawful, determined or determinable". The "nullity" is caused by the indeterminableness of the object of the contract.

[69] Tribunale di Milano, 16 June 2015, no. 7398; in this case, the invalidity is represented by the "nullity of the contract", "nullità del contratto" in the original Italian version, included in arts. 1418-1424 of the Italian Civil Code: In this regard, see Ibidem.

[70] Ibidem. Art. 1418, paragraph 2, states that the nullity is also caused by the "mancanza nell'oggetto dei requisiti stabiliti dall'art. 1346 c.c.", ie by the "lack of the legal requirements listed in art. 1346 of the Italian Civil Code".

[71] E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *cit.*, pp. 800-801.

[72] Tribunale di Milano, 16 June 2015, no. 7398.

[73] The verifiability of the criteria and the methodologies.

[74] Tribunale di Milano, 19 April 2011, no. 5443.

The second step[75] consists of the awareness of the possible invalidity[76] of a derivative contract; however, according to this decision, the invalidity would be due to the indeterminableness of the commission to be paid to the "*mandatary*" and not to the indeterminableness concerning the appraisal of the "mark to market"[77].

Lastly, the third step is characterized by the statement of the Court[78] that the invalidity of a derivative contract would be caused by the indeterminableness of the object of the contract on the basis of the lack of the indication and verifiability of the criteria, and of the methodologies deployed to perform the appraisal of the "mark to market"[79].

V. Conclusions

Within the decisions, it is possible to detect a bumpy evolution in the appropriate understanding of issues regarding derivatives; at the same time, in the context of the bumpy evolution, it is possible to detect the reception of the contribution of legal doctrine (even if not in all decisions considered).

A thoughtful investigation of the phenomenon, which is possible through a deeper analysis of the contribution of legal doctrine, would allow the arrival at different decisions. This actually has happened only recently (after a bumpy pathway), when a national Court[80] established the invalidity (the "nullity") of a derivative contract arising from the lack of the aforesaid indication and verifiability. The decision in question[81] definitely marked the turning point, and simultaneously, the last step in the abovementioned evolution.

As a matter of fact, the opportunity to quote the legal doctrine (including the indication of the name of the authors – not currently permitted by art. 118, paragraph 3, of the preliminary dispositions of the Italian Civil Procedure Code) would have enabled the issue to be tackled in a more adequate manner, given that the judge would have been compelled to get to the bottom of the issue itself in order to avoid ascribing an incomplete thought to a certain author.

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[75] Corte di Appello di Milano, 18 September 2013, no. 3459.
[76] In this case, the "nullity".
[77] Corte di Appello di Milano, 18 September 2013, no. 3459.
[78] Tribunale di Milano, 16 June 2015, no. 7398.
[79] Without any reference whatsoever to the commission to be paid to the "*mandatary*".
[80] Tribunale di Milano, 16 June 2015, no. 7398.
[81] Ibidem.

VI. Bibliography

D. MAFFEIS, "Intermediario contro investitore: i derivati over the counter", *Banca, borsa e titoli di credito*, I, 2010, pp. 779-796.

E. GIRINO, *I contratti derivati*, Giuffrè, Milano, 2010, pp. 17, 458, 460, 462, 464.

E. GIRINO, "Sviluppi giurisprudenziali in materia di derivati over the counter", *Banca, borsa e titoli di credito*, II, 2011, pp. 800-801.

G. BAVETTA, "Mandato", *Enciclopedia del diritto*, Giuffrè, Milano, 1975, XXV, p. 324.

G. DE NOVA, "I contratti derivati come contratti alieni", *Rivista di diritto privato*, 2009, p. 19.

J.C. HULL, *Options, Futures, and Other Derivative Securities*, Prentice Hall, Upper Saddle River, 1993, p. 1.

J.L. GRAUBERGER, "From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana", *Tulane Law Review*, 1997, p. 263.

P. PERLINGIERI, *Manuale di diritto civile*, Edizioni Scientifiche Italiane, Napoli, 2014, pp. 488-489, 496, 723, 724.

R. DI RAIMO, "Interest rate swap, teoria del contratto e nullità: e se finalmente dicessimo che è immeritevole e che tanto basta?", *Rassegna di diritto civile*, 2014, pp. 295-320.

T.E. LYNCH, "Gambling by Another Name; The Challenge of Purely Speculative Derivatives", *Stanford Journal of Law, Business & Finance*, 2012, p. 67.

U. CARNEVALI, "Mandato", *Enciclopedia giuridica* Treccani, Roma, 1990, XIX, pp. 11-12.

http://www.consob.it/mainen/documenti/english/laws/fr_decree58_1998.htm.

http://www.ilcaso.it/giurisprudenza/archivio/12916.pdf.

http://www.ilcaso.it/giurisprudenza/archivio/3965.pdf.

http://www.isda.org/educat/faqs.html#1.