Innovation and tradition in the safeguard of credit: the research of equilibrium

Technological progress, innovation, globalization of international markets, the increasingly perceived need of acceleration and simplification of commercial business relations and multiculturism are driving to search for the uniformity between the systems of the single States, considered a source of reduction of the costs of the economic transactions, even at the expense of the distinctive features of the internal juridical systems. The uniqueness and the cultural, historical, political and social wealth of a system risk to be intended more and more as barriers which prevent the process of uniformization rather than the heritage of civilization of a single State.

The research of security, of reliability and efficiency in the circulation of wealth accompanied by the lack of liquidity, by restrictions in the concession of bank loans, by deep uncertainty of the markets have had for some time a central role in the political and economic life, pushing procedures to create negotiating tools of transfer of wealth and of innovative credit guarantee, in order to shake up the domestic and international economies. These requirements ring out a certain inability of the Italian Legislator to put forward the requests of emerging protection and to offer the market virtuous, practical solutions which confer to the personal property guarantee system competitiveness, simplification, flexibility, without losing the traditional feature of reality, considered adequate to produce certainty .The distance between the European systems, in particular the German, French and English ones is always more evident. One considers not only the different forms of guarantee regulated by the German system, the French rechargeable mortgage, the English *legal mortgage* and *equitable mortgage* which are absolutely absent in the Italian system, but in general the complex issue of the so-called *smart contracts*, phenomenon which risks to open - if not governed accurately - an irreparable fracture between market and consumption, technology and protection against any form of cultural, social and economic exclusion.

This climate of aversion and dissatisfaction of the markets for those limited typical negotiating procedures available, at this point, unable to canalise and give proof to the various interests from time to time emergent, demonstrates with force, simultaneously, the advance of technological and scientific progress, that bears a natural need of change and acceleration, combined with the unavoidable trend of *depersonalisation* of intersubjective relationships.

For operators, new methods are to be understood, like goods susceptible of economic assessment, paving the way to potential scenarios of economic negotiation, which were once considered, some decades ago, as something completely unthinkable. One thinks of guarantee systems which are contained in the Civil Code of 1942, designated to regulate and protect goods endowed with a certain physical and static feature, which is in crisis, because it is not able to provide the same degree of certainty, security and reliability to those commercial transactions which have, as an object, a productive good, like that of a company, typical mutable good, or when you have to guarantee the financial potential of an entrepreneur in its infinite versions, dynamic and intangible good.

In trade negotiations the ability of the debtor to repay the loan at the agreed deadline has become very important. Therefore, an objective is to create measures of guarantee to fit the characteristics of the “financial” good to protect, declined and adapted to the specific changing needs of the situation, but above all, on the needs and interests of the creditor, in the hope that this may give a contribution in the revival of the economy and consumptions. This phenomenon, combined with the trend to contractualize the power of self-protection of

the creditor, as a means of prevention in the default of paying, disrupts the traditional system of guarantee. The negotiation on the defensive powers of the credit opens to a new season of thought on the institute of personal property guarantee, whose focal point is no longer identified in the propriety itself, but in the creditor himself, passing from a status owner of the guarantee to a status *intuitu personae*, adapted to the requirements and interests of the mandatory relationship of both parties.

The debtor obtains the power to negotiate and grant the creditor a wide range of rights in the safeguard of the loan, almost a *status* of protection, set forward since it is specifically suited to the needs and to the interests of the economic operation, no longer a simple conferred responsibility, typical of surety or a simple real guarantee of rights on a specific good in connection with determined credit. In this climate of change of the system, an important function has the influence of those European experiences on the subject of personal property guarantee and security of credit, above all, of the origin of *common law*, that can be seen mainly in circumstances of *bonds,* of *escrow account,* of *trusts* in function of segregation and of financial *covenants*.

The issue of investigation is focused on the relationship between innovation, progress and globalization on one side and, the legal systems, on the other, and therefore, on the role that the jurist has to, with courage, claim and wisely carry out to identify, to rationalise and conjugate the difficulties of the atypical negotiating circumstances, especially of foreign provenance, with the principles distinctive of the domestic legal system, starting with the typical characteristic, proceeding with the generic responsibility of the debtor, the *par condicio creditorum,* the prohibition of the agreement of forfeiture, the ancillary.

As long as innovation does not represent the irrational distortion of the constituted system, it is fundamental that the interpreter employs a rational approach to the issue of the new measures and methods of negotiation and guarantee and the legal information technology progress in the broader sense; in the judgement of the situation, meritocracy, proportionality, accuracy play an essential role in the valorisation of the emergent interests, in their equitable balancing, without ever forgetting the rights and the fundamental values of the Constitution.

We shouldn’t underestimate the inherent danger in the modern market economy of the oppression of the individual, of his fundamental rights and of his inviolable freedoms, through the expansion, without control, of measures and methods of negotiation and of commercialisation of rights.

In other words, the jurist must carry out efficiently the role of mediator of the conflict between the impulses, often disordered of the market, and the fear of change and the frenetic technological innovation, preventing, on one hand, the sacrifice of rights and the mitigation of protection and, on the other hand, the blind and irrational inactivity.