How Do Civil Law Legal Institutions React to Ex-Ante Transaction Costs? A Focus on Italian Regulation

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This paper aims to investigate the role of contracts and property as fundamental tools for achieving market efficiency, analyzed through the lens of Law and Economics. The contract is presented as a tool for optimal resources allocation, where the transfer of goods and rights enhances individual and social welfare. However, transaction costs, particularly ex-ante costs, often hinder the full potential of contractual arrangements, leading to an inefficient use of resources.

The contribution examines how Italian legal Institutions address the ex-ante obstacles, aiming to create a regulatory environment that reduces transaction costs and supports market efficiency.

Additionally, the analysis highlights mechanisms such as third-party arbitration, the contract for a person to be named and pre-contractual liability, all intended to foster balanced, cooperative exchanges that drive economic value. This interdisciplinary approach underscores the complementary nature of legal and economic perspectives, advocating for a legislative model that aligns private law institutions with their inherent economic functions to support market dynamics.

Keywords: ex-ante transaction costs, efficiency, contract, property, arbitration, liability

INTRODUCTION

One of the most debated issues in law and economics is related to transaction costs. As is known, property rights and contract law provide the legal framework for allocating resources and distributing wealth.

Property rights are crucial in the sense that they define the powers of individuals over resources, thereby creating a space of freedom with respect to interference by others. Property generates a zone of privacy in which owners can exercise their will over goods without being answered to others.

This concept is perfectly expressed in the Italian Civil Code: article 832 defines property as a legal institution granting the owner the right to use and dispose of the things in an absolute way, albeit sometimes subject to certain obligation imposed by law.

A strong theoretical background and many experiments have shown that a well-defined and clear system of property rights encourages people to bargain and so the whole economic system performs.

The contract, instead, plays a vital role in contemporary capitalism especially because it permits to shift resources to more valuable uses. In his most notable essay, "The Problem of the Social Cost (1960)", Professor Ronald Coase has stressed the potential of contracts to achieve efficiency and correct externalities.

This tool, considered as final result of the bargaining process occurs when a potential buyer values a resource more than its current owner, creating an opportunity for negotiation. This situation allows for bargaining because both parties stand to benefit. The resulting agreement generates a social surplus, which satisfies all involved parties and enhances overall efficiency.

Building on this assumption, the economic theory of contract has reconceptualized it in terms of game theory, describing it as a cooperative game between parties that allows them to achieve mutual advantages.

Even though for methodical reasons contract and property are seldom studied separately, the most are well-aware about the existence of a deep interconnection between them. It is due by the fact that contract represents the main tool to acquire property over resources. From a legal viewpoint, technically it consists in a derivative way to acquire property over resources, which is transmitted from the old owner to the actual.

That given, it is quite clear that both contract and property are the legal institutions involved in transactions, thus enabling them to correct externalities.

However, when it is desirable, to conclude a transaction is not always so simple because of transaction costs.

Through this term we denote all the costs of exchange, and consequently all the obstacles to bargain. Kenneth Arrow has defined them as the cost of running economic system.

Such costs could impede and in particular cases completely block the formation of markets. So, the main objective of contract and property law consists of reducing transaction costs in such a way to facilitate agreements and create efficiency.

That given, the purpose of this paper is to analyze how Italian Private Law tries to solve the problem of ex-ante transaction costs, which are identified in all those costs that precedes the moment when the contract comes into light.

LITERATURE REVIEW: FROM COASE'S THEORETICAL FOUNDATIONS TO CONTEMPORARY DEVELOPMENTS.

Transaction cost is a key concept in the field of Law and Economics. Many scholars have provided several definitions of transaction costs: we denote them as the costs associated with economic exchanges. As everyone knows, a successful negotiation requires to find a counterpart, and frequently it is not so simple. Furthermore, complex negotiations require many time and once an agreement has been reached, it must be enforced.

The idea that the role of institutions must consist in reducing transaction costs to facilitate exchanges comes from John Commons. He has theorized the relevance of transactions as the essential unit of economic analysis, rather than good or services. His framework has been enriched over time by sever commentators, making this topic as central in this discipline.

The very foundation in the study of transaction cost is Ronald Coase's seminal paper "The Problem of the Social Cost" (1960), whose outcome consists in his theorem, which asserts that in absence of transaction costs, a private agreement determines an efficient allocation of resources, regardless of the starting assignment of property rights.

Someone has "leveraged" this normative prescription as the conceptual linchpin of economic liberalism, thus asserting that public intervention is unnecessary.

Some other has criticized Coase's Theorem arguing that transaction costs are not negligible so denying the reality of assumption.

However, Professor Coase was aware that a world without transaction costs does not belong to this reality. He has not predicted in the sense that transaction costs are negligible; on contrary he has emphasized that transaction costs are rarely (better to say, never) zero.

He observed that high transaction costs can make bargaining impractical or impossible; consequently, the law plays a crucial role in structuring how these costs are managed.

His major contribution is shifting the focus of law and policy away from correcting “market failures” through direct intervention and toward reducing transaction costs so that markets can solve externalities on their own. The role of law is to establish the conditions under which parties can effectively negotiate and to provide clear rules when negotiation fails.

The impact of such a theorem has been not just theoretical, but also practical. It has been applied in various legal and economic contexts. For instance, environmental law has taken into account such implications: in fact, rather than relying solely on government regulation, some environmental policies are designed to facilitate bargaining between polluters and those affected by pollution.

Oliver Williamson has extended the foundational ideas introduced by Professor Coase. Whereas Coase primarily focused on the role of transaction costs in determining the allocation of resources, Williamson stressed the organizational consequences of transaction costs, exploring why firms and hierarchies can mitigate them.

One of his main contributions has consisted in changing the assumption of neoclassical economics in addressing this issue. Firstly, he denies full rationality, where individuals are presumed to make optimal decisions based on complete information. On the contrary, he assumes that individuals have bounded rationality and consequently they are limited in elaborate information and foresee future contingencies. Due to that, contracts are inevitably incomplete in the sense that they cannot anticipate every possible future scenario. This incompleteness generates potential transaction costs, as unforeseen events may require parties to renegotiate or adapt the contract, which can be costly.

Secondly, he has provided the picture of another version of “Homo Economicus”, namely the “Homo contractus”, whose behavior is characterized by being opportunistic. He defines this as “self interest seeking with guile”, meaning that individuals may not act in their own interest but may also exploit opportunities, engage in deception or behave opportunistically when contracts are incomplete or circumstances change.

Another critical assumption in Williamson’s framework is uncertainty: he has emphasized that transactions seldom involve high rates of uncertainty about future states of the world. The consequence is that more uncertain and complex a transaction, the greater the potential for disputes, renegotiation or breakdown of cooperation, all of which raise transaction costs.

So, contract law comes into play by providing mechanisms to fill these gaps and interpret contracts when disputes arise. In particular, contract law plays a crucial role in deterring or mitigating opportunistic behavior.

In the last recent years, this topic has also been addressed by institutional economists. Douglas North has stressed the point that formal and formal institutions present a vocation to reduce transaction costs and whether they achieve such a goal they can survive over time. He has studied also the linkage between the quality of legal and social norms in relation to their attitude to reduce exchange costs and the economic growth. According to someone, North was a pioneer in relating law and economics topics (which are totally based on the microeconomic paradigm) to macroeconomics.

Currently, many commentators are focused on the problem of transaction costs, and the debate has evolved with numerous contributions related to the challenges of globalization and digitalization. This is due to the necessity to adapt legal and social institutions to new technologies and global dynamics.

METHODOLOGY

The paper focuses on the legal framework aimed at solving the problem of ex-ante transaction costs. The discussion is not general but it is projected upon Italian Civil Law (with a brief comparison with the German legal order in the section devoted to pre-contractual liability).

The methodology begins by performing a dogmatic analysis of the legal institutions, focusing on their formal legal structure, classification, and underlying principles. This step is crucial in that a deep comprehension of the exact legal nature of an institution is not merely a theoretical exercise; it provides the foundation for assessing its real-world functionality. By clarifying its dogmatic characteristics—such as whether it operates as a contract, a mandate, or a legal transaction—we can better understand how these structures interact with the legal system and society. This understanding is crucial for applying economic analysis effectively, as it enables us to assess how efficiently the institution fulfills its intended role in facilitating transactions, reducing costs, or promoting cooperation.

After establishing the legal foundation, the focus shifts to the economic analysis, examining how the institution impacts resource allocation, market behavior, and overall economic efficiency. Understanding the legal structure allows us to pinpoint inefficiencies, transaction costs, or other barriers that may hinder optimal outcomes.

Finally, the analysis leads to policy evaluations, examining whether such legislations are well-oriented to reduce transaction costs and promote efficiency. The goal is to highlight how legal reforms could better align with economic principles, ensuring that these institutions support a more dynamic and efficient market environment. By targeting specific legal provisions, we will demonstrate where and how adjustments can drive better economic outcomes.

A Brief Classification of Transaction Costs and a Focus on Ex Ante Transaction Costs

Transaction costs can be classified into three main categories based on the timing of their occurrence in relation to the contract: ex ante costs, negotiating costs, and ex post costs.

Ex ante costs occur before the contract is concluded. These encompass the difficulty of finding a counterpart (e.g., locating a rare asset or party to trade with), the asymmetry of information where one party has more knowledge than the other, and the possibility of unreasonable behavior during the pre-contractual phase, such as unfair or hostile negotiation tactics.

Negotiating costs arise during the actual process of contract negotiation. These involve the time, effort, and resources invested in reaching a mutually acceptable agreement. These costs can be driven up by complex bargaining, legal consultations, or strategic behavior aimed at gaining an advantage.

Ex post costs are incurred after the contract is signed, and relate to the enforcement, monitoring, and possible renegotiation or modification of the contract terms. These could include costs associated with ensuring compliance, resolving disputes, or addressing unforeseen circumstances that require adjustments to the agreement.

That given, the main issue can be summarized through this question: *"How does Italian private law respond to ex ante unreasonableness?"* To answer this question, the following institutions will be addressed:

a) Arbitration, where a third party determines the subject matter of the contract as a tool to counter the danger of a manifestly inequitable division of the surplus;
b) The contract for a person to be named, in relation to the transaction cost of hostility;
c) The system of pre-contractual liability, conceived as a remedy against the risk of unfair conduct by the parties during negotiations and as a corrective for asymmetric information.

Arbitration: A Tool to Mitigate Inequitable Surplus Division

The term arbitration can be conceived in a twofold meaning. Procedural law describes arbitration as an ADR (alternative dispute resolution) aimed to devolve the solution of a case to a person chosen by the parties instead of the competent judge.

This term is also related to private law, in order to denote a third subject who has the power to determine certain aspects of the contractual relationship in the place of parties. Very often —if not almost always — his or her determination concerns the setting of the contract price.

Private and non-procedural arbitration is the subject of our analysis. The Italian Civil Code, article 1349, provides the legal framework for arbitration and it states that: "The parties may provide in the contract that the determination of certain aspects of the contractual relationship shall be entrusted to one or more arbitrators".

This provision emphasizes some aspects of arbitration. Firstly, party autonomy: the parties have the freedom to choose how they want to resolve conflicts, allowing for tailored solutions that reflect their specific circumstances. Secondly, the selection of arbitrators: parties can select arbitrators with relevant expertise, which can lead to more accurate and well-accepted decisions. Thirdly, flexibility in the process, in the sense that the arbitration process can be customized regarding procedures and timelines, thereby enhancing efficiency.

From a strictly legal viewpoint, Italian doctrine debates regarding the dogmatic nature of this institution. One part of legal scholarship, which has found little support in both academia and the courts, considers the arbitrator's activity to be an intellectual service, involving the execution of a task with varying degrees of discretion, depending on the powers granted by the parties.

A more widely accepted thesis classifies arbitration as a legal transaction. It is conceived as a clear manifestation of intent in which all parties agree to assign to a third party the task of determining the subject matter of the contract. Arbitration is thus configured as an accessory agreement by means of which the subject matter is determined by an external decision, but based on a express will of the parties.

The dominant legal doctrine and jurisprudence tend to align this institution with the concept of mandate, as the arbitrator performs a substitutive function on behalf of the parties, contributing to the formation of their contractual will with respect to that agreement. Following this approach, the provisions of the civil code regarding mandate should be applied analogously.

From an economic analysis perspective, arbitration serves as a pivotal tool for parties seeking to resolve disputes efficiently while minimizing transaction costs. Many aspects convince us that arbitration reduces such costs.

The primary advantage of arbitration lies in its ability to resolve disputes more quickly than the parties themselves can during the bargaining process. So, the quicker resolution reduces the time that parties should have devoted to the dispute, allowing them to focus on their core business activity.

Moreover, the specialized knowledge of arbitrators brings several benefits in terms of fairness of decisions, due to their skill to understand complexity of contractual relationships. This reduces the likelihood of appeals of further disputes.

Another important aspect is the confidentiality of arbitration proceedings, which helps create a more amicable environment for negotiations.

Given this, we can evaluate in what terms the Italian legislator has harnessed the potential of arbitration to reduce transaction costs and how legislation should be improved in this regard.

Italian contract law distinguishes two different types of arbitrations: the first is denominated "arbitrium boni viri", the second "arbitrium merum".

When the party do not specify the criteria that must be used to determine the specific aspect of the contractual relation, the arbitrator is required to perform the task according to the principle of "equitable judgment" (arbitrium boni viri). This is a general clause, vague and nuanced, whose precise definition has required several judicial and doctrinal clarifications.

In defining equitable judgment, legal professionals have drawn from the sociological rational behind arbitration clauses: typically, parties include such clauses in the contractual framework to avoid the failure of the entire settlement due to disagreement over a specific point, which in most cases concerns the object of the contract. So, the interest of "conflicting" parties is thus replaced by the impartiality of the third party, who becomes the guarantor of the contractual balance.

The criteria that should guide the third party's assessment in determining the object of the contract are proportionality and balance, ensuring that one party's interest is not excessively sacrificed to the benefit of the other. This need to reach a determination — even if not directly derived from the parties' own will — inspired by reasonableness and balance, is also evident in the regulation of how the arbitrator's decision can be appealed.

In the case of arbitrium boni viri, the arbitrator exercises considerable discretion to ensure that the outcome is fair and balanced, even when explicit contractual terms are absent or unclear. This interpretative freedom enables the arbitrator to bridge gaps in the contract, taking into account the overall intent and expectations of the parties. However, this discretion is not absolute; it is subject to judicial review if one of the parties claims that the arbitrator's decision violates principles of reasonableness and equity.

On the other hand, arbitrium merum limits the arbitrator's role to applying specific, pre-established criteria agreed upon by the parties. In this type of arbitration, the arbitrator acts almost as an executor of the parties' precise wishes rather than as a judge of fairness. The principle of party autonomy is particularly pronounced here, as the parties dictate the exact parameters within which the arbitrator must operate. This minimizes the risk of subjective interpretation, giving parties a greater sense of control over the arbitration's outcome.

The distinction between these two types of arbitration reflects a balance in Italian law between flexibility and certainty. Arbitrium boni viri offers flexibility and adaptability to unique or unforeseen contractual circumstances, whereas arbitrium merum provides a degree of predictability and security for parties who prefer to minimize interpretative ambiguity. This dual approach aligns with the economic rationale behind arbitration, allowing parties to tailor the dispute resolution process to their specific needs and objectives.

Furthermore, Italian doctrine considers that these types of arbitration also influence the enforceability of the arbitrator's decisions. In arbitrium boni viri, the courts may scrutinize the arbitrator's decision more closely to ensure it aligns with principles of fairness, while in arbitrium merum, judicial intervention is more limited since the arbitrator's role is primarily executory.

In sum, Article 1349 of the Italian Civil Code not only recognizes the practical advantages of arbitration but also provides a nuanced framework that accommodates different levels of discretion based on the parties' preferences. By enabling the choice between arbitrium boni viri and arbitrium merum, Italian law enhances the versatility of arbitration as a tool for private ordering, which in turn supports efficient dispute resolution and reinforces the contractual balance. The continued evolution of arbitration in Italy will likely focus on refining this balance to ensure that parties can rely on arbitration both for fairness and predictability, ultimately reducing transaction costs and fostering more efficient contractual relationships.

The Contract for a Person to Be Named

The contract for a person to be named is regulated under Article 1401 of the Italian Civil Code and consists of a mechanism that permits a party to reserve the right to name a specific individual or entity to assume the contract's rights and obligations at a later stage.

This contract is not typically classified under traditional agency or representation law, as the initial party to the contract does not act directly on behalf of the later-designed person.

Instead, it serves as a preparatory agreement, contingent upon the future nomination of a third party to replace the initial contracting party. This substitution takes effect retroactively, meaning that from the moment of nomination, the named person is treated as if he or she was the original signatory.

The legal doctrine surrounding this contract has evolved to highlight its practical utility, particularly in complex transactions where parties seek flexibility and discretion in the negotiation process.

Viewed through an economics lens, this arrangement is particularly effective in addressing transaction costs, which can otherwise impede the efficiency of market operations.

The flexibility offered by a contract for a person to be named enables parties to mitigate several types of costs, such as search and information costs, bargaining expenses, and enforcement costs.

This contract is really useful in high-stakes transactions like real estate, where premature disclosure of identity or intent might otherwise lead to increase negotiation complexity and inflated prices due to strategic positioning. By delaying the identification of the ultimate contracting party, the mechanism offers strategic advantages, allowing the initiating party to explore negotiation terms without revealing potentially sensitive information.

This postponement reduces ex-ante transaction costs, such as those associated with gathering information and establishing terms, while providing a layer of neutrality that helps parties avoid biases and conflicts often rooted in personal dynamics. The delay in party disclosure fosters a smoother negotiation environment, reducing interpersonal conflicts that might disrupt the bargaining process.

This reduction in ex-ante costs emphasizes how the contract aligns with the core objectives of Law and Economics, particularly by facilitating a negotiation phase that minimizes emotional and strategical biases, allowing decisions to driven by economic, rather than personal, considerations.

From the perspective of cooperative game theory, the contract for a person to be named functions as a tool for maximizing the cooperative surplus, creating a mutually beneficial framework in which parties can reach an agreement without requiring excessive signaling.

In this context, cooperative game theory emphasizes that successful bargaining is more likely when parties can concentrate or shared economic goals rather than adversarial concerns about identity and personal stakes. For instance, when a potential buyer of a high-value asset wishes to prevent the seller from inflating the price based on perceived wealth or desperation, this contractual arrangement allows for negotiation without full disclosure, thus preserving the transaction's economic rationality.

Law and Economics theory recognizes this strategy as a means to reduce opportunistic behavior, thereby creating an environment where market transactions prioritize economic value over personal perceptions.

Moreover, the contract serves to address issues of information asymmetry, a frequent distortion in market efficiency where one party possesses more or better information than the other.

The contract for a person to be named offers a partial remedy to this problem by allowing one party to withhold certain details- such as their identity or true interest in the transaction- until a later stage. This is strongly advantageous in high-value transactions where the revelation of identity or intentions can influence the other party's behavior, often to a detriment of an efficient bargaining process. For instance, in a real-estate negotiation, if a potential buyer's identity or intent to develop the property were disclosed prematurely, the seller might respond by raising the price, anticipating higher willingness to pay, or bay altering their bargaining strategy in expectation of future gains.

As shown, this arrangement can mitigate these market failures by postponing specific disclosures, thereby shifting the focus back to the economic fundamentals of the transaction rather than strategic posturing. This delay enables the less informed party to evaluate the deal based on its intrinsic terms, without the distortions often introduced by asymmetrical information.

As a result, this contractual tool contributes to market efficiency by reducing the likelihood that transactions will fail or produce suboptimal outcomes due to skewed information dynamics.

Thus, by minimizing the strategic advantages conferred by asymmetry, the contract for person to be named aligns with the Law and Economics objective of promoting fair and efficient market interactions.

Good Faith and Pre-Contractual Liability

The process of contract formation may include a particularly delicate phase, namely negotiation, during which the parties gauge the mutual convenience of the settlement and expose their legal spheres to the influence of the other.

The purpose of negotiation is to find a convergence point that allows the parties to construct a shared set of interests that satisfies both and is thus mutually accepted. In terms of intention, each party seeks to secure the most favorable contractual conditions for themselves. Therefore, the need arises to balance individual self-interests with a mutual solution that enables the contract to fulfill its intrinsic function of creating social value.

In this scenario, altruism, understood as the willingness to sacrifice a "unilaterally maximal" benefit, becomes the only means by which parties can meet their own egoistic desires. This form of altruism, however, is not motivated by selflessness or justice but rather by impulses rooted in individualism. Consequently, the legislator must account for both the principles guiding parties' behavior and the need for a sanctioning mechanism that makes it "costly" for parties to disregard these behavioral obligations.

Thus, the legal order has provided a system of pre-contractual liability, based on a few and general dispositions; emphasizing the little attention the legislator has devoted to pre-contractual duties.

The Italian Civil Code remains almost entirely silent on the types of conduct that could give rise to pre-contractual liability. While it lays down the general principle of good faith in Article 1337, it only codifies a single instance of pre-contractual liability in the following provision: the failure to disclose to the counterparty any known or reasonably knowable grounds for contract invalidity.

This approach is strongly influenced by the traditions of a longstanding legal doctrine, particularly in the way it interprets the intersections between legal positivism, codification, and liberalism. This tradition has aimed to uphold the parties' freedom to decide whether or not to enter a contract and to minimize pre-contractual information duties, as the negotiation phase was not seen as a source of obligations, which would arise only upon the conclusion of the contract.

The legislator focused the core of the liability system on situations where a contract had already been perfected, operating under the assumption that only the breach of contractual obligations (obligationes ex contractu) was worthy of significant protection. However, over the past few decades, the emphasis on the constitutional principle of social solidarity and the influence of German jurist Rudolph von Jhering 's theory has led to increased sensitivity on this issue in both legislative and judicial spheres.

Legislative and judicial shifts towards recognizing pre-contractual duties highlight an evolving perspective, driven in part by the Law and Economics Approach. From this perspective, pre-contractual liability can serve as a mechanism to increase market efficiency by holding parties accountable for information asymmetries even before a contract is formally concluded. By compelling parties to act in good faith and disclose critical information during negotiations, the legal system can reduce the potential for costly transactional breakdowns that might arise from hidden information. This shift not only aligns with economic theories that promote transparency but also responds to the demands of a market that increasingly values cooperation and informed decision-making as pillars of economic interactions.

From a legislative standpoint, the evolution of pre-contractual liability has primarily occurred in special legislation outside the Civil Code, where the conduct of parties in negotiation phases has been procedurally defined in relation to specific types of contracts. This has largely occurred in areas where there exists a notable imbalance in the parties' bargaining power (e.g., subcontracting, banking contracts) or where fundamental rights of the individual are at stake (e.g., healthcare contracts).

In terms of judicial developments, the courts have formulated principles designed to regulate the reciprocal conduct of parties during negotiations. Jurisprudence has expanded protections by establishing, in Supreme Court rulings 26724 and 26725/2007, the possibility of pre-contractual liability even when a party's improper conduct during negotiations did not prevent the formation of a valid and effective contract but instead negatively affected its content, creating a disproportionate arrangement to the detriment of the other party. These judicial advancements recognize that merely concluding a contract does not equate to an efficient or fair outcome. When parties are able to introduce unfavorable terms through misleading or incomplete disclosures, they create inefficiencies by distorting the balance of negotiated interests. This expanded interpretation of pre-contractual liability reinforces the incentive structure that promotes honest negotiation behaviors, thereby reducing the likelihood of exploitative arrangements and supporting more efficient, welfare-enhancing outcomes.

Despite the overall framework remaining somewhat unstructured and fragmented, judicial implementation has been substantial. The following analysis aims to examine the extent to which judicial solutions have effectively reduced transaction costs by comparing these solutions to those provided in two other legal systems used as points of comparison — the French and German systems — both of which have recently formalized the principle of "culpa in contrahendo."

This comparative approach highlights the economic relevance of liability regimes that emphasize pre-contractual obligations. In systems like those of France and Germany, which have embedded culpa in contrahendo into their legal frameworks, there is an explicit recognition that transaction costs can be minimized by establishing clear expectations and accountability during the negotiation phase. By formalizing pre-contractual obligations, these systems enable the reduction of risk associated with opportunistic behaviors that frequently disrupt efficient contracting processes.

Both legal scholars and economists are acutely aware of the "corrective" function of pre-contractual liability, as it primarily aims to remedy one of the most significant market failures: informational asymmetry. In this context, the analysis of culpa in contrahendo regimes will involve pairing behavioral models from microeconomic theory with the regulatory responses that legislators are expected to implement to steer markets toward allocative efficiency.

The consequences of informational asymmetries in transactions have been the subject of detailed analysis, notably by economists Stiglitz, Akerlof, and Spence, who were awarded the Nobel Prize in 2001 for their work on markets with asymmetric information.

Economic science posits that informational asymmetry arises when one party in an economic transaction has more information than the other. In commercial practice, the most common form of asymmetry relates to the scenario of "hidden characteristics."

In this context, hidden characteristics refer to the situation where one party involved in a negotiation is aware of certain attributes that pertain to the transaction, while the other party remains unaware. Typically, in most markets, the seller has better knowledge of the product than the buyer, though there are markets in which the more informed party is the buyer.

From an economic perspective, these hidden characteristics represent a critical issue, as they undermine the fairness and efficiency of market exchanges. When sellers conceal important information about a product, buyers are unable to make fully informed decisions, often resulting in the suboptimal allocation of resources. Pre-contractual liability thus becomes essential, as it compels the more informed party to disclose relevant information, thereby restoring balance to the negotiation process and ensuring that the transaction can achieve a level of efficiency and fairness that might otherwise be compromised.

Historically, the solution to the problem of informational asymmetry was relatively straightforward: in the 19th century, there was a general exclusion of any duty to disclose information. Legal doctrine and case law of the time supported the notion that each contracting party was fully entitled to pursue their own interests, even if this was at odds with the interests of the counterparty. Moreover, they could fully exploit any advantages derived from their superior knowledge, professional skills, and other such factors. Notably, Kronman 's theory had significant resonance in this regard: he posited that information was a costly good, thereby becoming the rightful property of the person who had invested in acquiring it. Consequently, there was no obligation to disclose costly information. According to this view, those who invest in information gain a competitive advantage that is entirely theirs to keep.

Kronman's approach aligns with a free-market review, where the cost of acquiring information is seen as an investment, and the resulting informational advantage incentivizes individuals to make such investments. This solution was consistent with the liberalism of the time and the assumption that it was not the responsibility of the legal system to correct imbalances, even those involving available information. Such a theory had a significant diffusion in Common Law jurisdictions, where the principle of "caveat emptor" (buyer beware) was applied in the 19th century: each party was considered to act at their own risk and peril; in such a context, without an explicit warranty, the buyer could not complain about any defects or hidden flaws, even if the seller was aware of them.

However, from a broader welfare perspective, this approach can lead to market failures by allowing significant information imbalances to persist. When parties retain crucial information to secure a personal advantage, the market suffers due to potential inefficiencies, such as adverse selection and moral hazard. Thus, modern shifts towards mandating disclosure reflect an economic recalibration, where legal interventions are used to promote transparency, align interests, and mitigate the welfare losses that can arise from extreme informational imbalances.

Over time, Kronman's view gradually faded. It soon became apparent that market efficiency required a correction to this fundamentally distortive mechanism: awareness grew of the need to structure the (pre-)contractual economic relationship so that the better-informed party would convey relevant information to the less-informed party. Consequently, there is a need for a signaling mechanism to address hidden characteristics.

This evolution reflects the economic awareness that the costs of non-disclosure — in terms of market distortions and inefficiencies — can outweigh the individual benefits of secrecy. The introduction of signaling mechanisms aims to restore efficiency by requiring the better-informed party to disclose certain information, thereby reducing the risk of adverse selection and promoting trust in transactions. This approach incentivizes efficient market outcomes by ensuring that resources are allocated based on accurate information, thereby aligning individual interests with overall market efficiency.

That said, this issue raises two central legal questions. First, it is necessary to establish a criterion that distinguishes the information that must be disclosed from that which may be withheld, given that not all information has the same relevance. The lack of precise regulatory guidelines necessitates a systemic interpretation, which must begin with the underlying function intended for pre-contractual liability.

Given that Law and Economics emphasizes the contract as a tool of cooperation between parties, the negotiation phase allows them to assess whether the arrangement of interests can truly increase their utility, understood as well-being. Parties engage in negotiations to "be better off than before," thereby aiming to maximize a utility function, using terminology familiar to economists and mathematicians. As the negotiation process evolves, each party's expected utility increases; otherwise, they would halt the negotiation. Each party is responsible not only for their own well-being but also, to some extent, for the well-being of the other. Within this framework, the value of "information" becomes relevant. Concealing or providing false information would eliminate the "minimum expected utility" that motivates an individual to enter into a negotiation.

Such a focus on utility reflects the importance of transparency for the stability of cooperative agreements. When each party has a minimum level of expected utility — guaranteed by accurate information — the negotiation process becomes more efficient and is more likely to result in a contract that increases overall welfare. The disclosure of relevant information enables both parties to make informed decisions, optimizing their personal outcomes and contributing to a well-functioning market where resources are allocated efficiently.

As said, the identification of a criterion for disclosure must relate to the concept of minimum expected utility. This can be defined as the minimum level of satisfaction associated with the conclusion of a contract based on its underlying purpose. An example may help illustrate this: the seller of a piece of land is obligated to inform the other party about aspects concerning the land's buildability, as these relate to the core purpose of a land sale. However, they are not required to disclose the existence of an oil field in the neighboring area, since the sale of land does not aim to secure incidental gains for the buyer. Thus, the duty to disclose information is linked to the contract's underlying purpose.

This logic is more tangibly appreciated when one examines certain legal provisions that illustrate the legislator's adoption of this approach: the regulatory framework concerning warranties for defects in sales contracts embodies the need to align the contract's functionality with its purpose. Here, "information" serves as a vehicle for achieving this goal, specifically to support the buyer's minimum expected utility.

The warranty regime underscores the functional role of information as a corrective tool, reducing the inefficiencies that arise when goods are misrepresented. By requiring sellers to disclose known defects or risks, the law minimizes information asymmetry, allowing buyers to make informed decisions that reflect their true valuation of the good. This alignment between the buyer's utility and the product's characteristics enhances market efficiency by ensuring that transactions are based on accurate assessments of value. Such frameworks further demonstrate how legal interventions can reduce transaction costs by structuring contract obligations to align with the economic incentives of both parties.

In light of this, the emerging criterion is that there is a duty to disclose information whenever it is functional to the realization of the contractual purpose inherent to that specific type of contract.

A particular sensitivity to informational obligations is found in German law, where the principle of pre-contractual liability is applied broadly. Article 311, paragraph 2 of the German Civil Code (BGB), enshrines "Treu und Glauben" (good faith) as a general principle, requiring parties to maintain fair conduct throughout the entire contractual relationship, from negotiations to the full execution of the contractual program.

The German approach reflects a focus on trust and fairness as mechanisms to reduce transaction costs. By embedding good faith as a continuous obligation, the legal framework discourages opportunistic behaviors and promotes transparent negotiations. This broad application of pre-contractual duties encourages efficient market interactions, as parties can rely on a stable legal standard that penalizes dishonesty and incentivizes cooperation. In this way, good faith operates as a regulatory signal, creating a predictable environment that supports mutually beneficial exchanges.

German law emphasizes the value of solidarity by establishing a duty of truthfulness during negotiations that can be considered directly proportional to the degree of informational asymmetry. The more informed party could, in fact, be assigned a "position of guarantee," as their possession of surplus information makes them responsible for maintaining the contractual balance.

Once it is determined whether and to what extent a general duty to disclose exists, the next question concerns the sanctions that arise from violating such a duty. Here too, economic analysis provides a deeper insight into the effectiveness of the legal system's punitive response.

In a Law and Economics framework, sanctions serve a dual purpose: they not only punish violations but also deter future breaches by making non-compliance costly. An efficient sanction system balances these objectives by assigning penalties that correspond to the economic harm caused by the breach. This cost-benefit approach ensures that legal sanctions serve as incentives for maintaining fair, information-driven negotiations, deterring behaviors that might otherwise disrupt the efficient functioning of the market.

It is well understood that a system of sanctions serves two main functions. The first can be defined as repressive in the strict sense, as it aims to "compensate" the injured party for the wrongdoing committed.

The second function is deterrence, since a sanctioning system, by threatening the imposition of a penalty, should dissuade the individual from engaging in harmful conduct.

Commentators argue that "a fine is a price," meaning that every sanction effectively establishes a price. Traditional economics views prices as tools to guide individual behavior through incentives and disincentives: in normal conditions, a high price discourages an individual from consuming the associated good, while a lower price incentivizes purchase.

This same reasoning applies to the analysis of sanctioning systems: after all, a sanction is simply the price that an individual must pay to engage in a certain behavior (which can be equated to a consumption good).

This approach emphasizes the role of sanctions as economic signals that influence market behavior. By attaching a monetary "price" to undesirable actions, the legal system provides a clear disincentive that discourages individuals from breaching their duties. An optimal sanctioning system therefore aligns the cost of violations with the societal impact of the behavior, ensuring that only actions that contribute positively to market efficiency are pursued.

Traditional political economy teaches that the higher the price, the lower the demand for a good. The legislator can apply this principle by establishing a sanctioning system that makes it "excessively costly" for an individual to engage in harmful conduct.

This logic helps to explain why the violation of pre-contractual obligations has been removed from the framework of tort liability and placed instead within the domain of contractual liability.

As is well known, the regime under Article 1218 (contractual liability) is far more unfavorable to the liable party than that under Article 2043 (tort liability) and is thus significantly more costly. For a long time, however, the violation of pre-contractual obligations fell within the category of tort liability, based on the reasoning that a contract had not yet been formed and therefore could not be subject to contractual liability.

The reclassification of pre-contractual liability reflects a shift towards aligning legal obligations with economic incentives. By treating pre-contractual violations as contractual breaches, the law increases the potential penalties, thereby enhancing the deterrent effect and promoting transparency. This shift emphasizes the importance of good faith in negotiations and supports more efficient contract formation by ensuring that parties adhere to fair practices from the outset.

As a result, the protection for the injured party during negotiations was relatively weak, primarily due to evidentiary challenges. Italian jurisprudence, recognizing the low effectiveness of this liability regime, took the appropriate step of looking toward a more effective system.

The shift in Italian jurisprudence reflects the need for a more robust framework to handle pre-contractual issues effectively. By adopting principles from systems with stronger protections, such as German law, Italian courts have created a system that better aligns with market efficiency. This approach not only enhances the protection of parties in negotiations but also promotes fair practices that reduce information asymmetry and support the efficient allocation of resources in the marketplace.

CONCLUSIONS

The interplay between legal institutions and economic principles, as explored in this paper, underscores the crucial role of private law in promoting market efficiency by mitigating ex-ante transaction costs. Through an in-depth analysis of arbitration, the contract for a person to be named, and pre-contractual liability, we have identified how Italian legal frameworks strive to strike a balance between autonomy and regulation, thereby reducing inefficiencies in economic exchanges. These mechanisms demonstrate that legal tools are not merely procedural formalities but essential instruments in correcting market failures and promoting cooperative bargaining.

The findings emphasize that Italian private law, while grounded in robust principles, must continue evolving to meet the challenges posed by globalization, technological advancements, and increasing market complexities. Mechanisms such as arbitration underscore the importance of flexibility and impartiality in resolving disputes, while tools like the contract for a person to be named offer innovative solutions to mitigate information asymmetry and strategic behavior. Pre-contractual liability, rooted in the principle of good faith, aligns with the broader objective of fostering trust and transparency, essential for efficient transactions.

However, the analysis also reveals areas for improvement. The fragmented and sometimes outdated nature of certain regulatory approaches may hinder their effectiveness in reducing transaction costs. A more cohesive and economically oriented legislative framework could further enhance the efficiency of legal institutions, ensuring that they remain aligned with the dynamic needs of modern markets.

In conclusion, this interdisciplinary exploration reaffirms the symbiotic relationship between law and economics. By aligning legal institutions with economic imperatives, policymakers can create a regulatory environment that not only supports efficient transactions but also fosters sustainable economic growth.

ENDNOTES

1. This main profile distinguishes property rights with respect to contractual rights; which are relative (and not absolute) in the sense that the creditor can enforce his right just against the debtor. Property rights, instead, are guaranteed erga omnes.
2. Although this definition is general, it can be considered applicable only with regard to goods intended for strictly personal use. There are types of goods, such as cultural assets or rural land, whose ownership is subject to numerous restrictions, also linked to the pursuit of public interest
3. The economic literature, both empirical and theoretical, has indeed shown that private negotiation is often far more effective in reducing negative externalities than public interventions related to taxation or subsidies.
4. For instance, if the potential seller evaluates the pleasure of owning and driving its car 300 and the potential buyer evaluates such a pleasure 500, the cooperative surplus amount 200 and there is scope for bargaining. Each party will benefit by bargaining with the other.
5. According to the legal system, contracts and inheritance are the only tools enabling to acquire the property in a derivative way.
6. In other words, transaction costs avoid or reduce the exploitation of the social surplus.
7. Arrow’s theories on transaction costs highlight how costs related to information and negotiation can hinder market efficiency. His contributions have underscored the limitations of markets in reaching efficiency under real-world conditions.
8. Commons was a pioneer in figuring out that economic transactions are not solely driven by individual preferences, but are embedded within a framework of social and legal institutions. Commons’ perspective was instrumental in challenging the classical economic assumption of perfect markets and promoting a broader view of how economies function in real world.
9. One of the main counter-argument to Coase’s Theorem is that even in absence of transaction costs, individuals are not so rational to split in a reasonable way the cooperative surplus.
10. Several examples of concrete applications of such a theory come from intellectual property and natural resources regulation.
11. Moving from the assumption of bounded rationality, some scholars argued stating that the role of law does not consist in reducing transaction costs, but the law must do the effort to assign rights to the parties who value them most, so avoiding the exigence of bargaining. This theory is also notable as “Hobbes Theorem”
12. North has so linked institutional economics with the economic analysis of law.
13. Such an aspect emphasizes that a contract is the result of a complex procedure which involves several steps. This means that the objective of the legislation must consist in simplifying each step, taking into account all the scenarios suitable to paralyze it.
14. Even though arbitration is rarely used to solve private disputes, it is diffused to solve disputes arising between States.

15. In most of the cases, the decisions are well-accepted by the parties because they are aware these have been adopted by an impartial and neutral subject, namely the arbitrator.
16. This profile involves that the arbitrator must posses a knowledge of the physiological aspects underpinned to the bargaining process.
17. Given that an ideal optimal decision realizes a perfect division of the cooperative surplus, to achieve a balanced determination means being closed to a perfect split of the cooperative surplus among parties.
18. This means that eventually a decision will be adopted by a judge.
19. Representation is characterized by a distinction between the formal party (who materially bargains) and the substantive party (namely the subject with respect to the legal effects are produced).
20. This profile explains the reason why the contract for a person to be named cannot be classified under representation law.
21. Consequently it is reduced the space to opportunistic behavior.
22. The reciprocal exposition of legal spheres without the existence of a contract is defined by commentators as "qualified social contact".
23. This problem has been indirectly addressed in Adam Smith's masterpiece "The Theory of Moral Sentiments", who has emphasized the counter-intuitive assumption that altruism and self-interest are not opposite entities, but they are strictly related.
24. The legislator must anticipate and discipline potential unfair and opportunistic behaviors by parties.
25. According to this viewpoint, what was happened before the formal existence of the contract must be considered as almost irrelevant.
26. Rudolph Von Jhering was a 19th-century German jurist and legal scholar, known for his influential work on legal philosophy and the sociological approach to law. His key contributions include the concept of "legal consciousness" and the idea that law serves social and economic purposes.
27. As well known in the economic literature, in addition to monopolies, public goods and externalities, information asymmetries compose the category of market failures, namely such factors deviating the market to pursue efficiency.
28. In such cases, the need of a correct information is strictly related with the protection of Constitution-based rights.
29. Even though the Italian legal order belongs to the legal tradition of Civil law (which is not based on "stare decisis" rule), the judgment of Supreme Courts must be taken into account by the lower courts (Tribunal and Appeal Courts).
30. This aspect emphasizes the relevance of judicial decision-making and its determinants on economic efficiency.
31. In particular, the economic literature has investigated the effects of information asymmetries using the paradigm of the car market.
32. He is best known for his contributions to the fields of contract law and jurisprudence, particularly his analysis of information as an economic good and its implications for justice and efficiency in markets. His influential work integrates Law and Economics with moral philosophy.
33. To reduce information asymmetries means to increase transparency and the trust of people with respect to the entire market system.
34. Even though German scholars are seldom focused on the dogmatic aspects of legal problems, the Academic system has given more space to the law and economics perspective in last recent years.
35. The constitutional value of solidarity presents many practical declinations in the field of private law. The pre-contractual liability system is the excellent paradigm of such an application.
36. This conception of punishment has been particularly diffused in the model of "Ethical State" (which represents mostly an experience of the past).
37. This regime is unfavorable to the liable party under several aspects, in particular with respect to the discipline of evidences.

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