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UNCOVERING
EUROPEAN PRIVATE LAW

A STUDENT HANDBOOK

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11. Financial Crises and European Private Law

Guido Comparato

Abstract

Does private law play a role in the occurrence of financial crises, and how does it react and change in response to them? The chapter illustrates the relationship between private law and financial crises by looking at the constitutive role of law for finance, the impact of crises on private law relations, the ways in which the law can be used to mitigate the impact of crises on consumers, the relationship between financial regulation and contract, the reform of private law to achieve financial stability and, more fundamentally, the societal significance of financial crises for European private law itself: what do we expect from private law in a financialised society and how has the European private law project evolved since the last global crisis?

1. Introduction

One of the events that had the greatest impact on the development of European law in the new millennium was the Global Financial Crisis (GFC) of 2007–2008. Starting in the US as a subprime mortgage crisis, it soon spread internationally and turned into the eurozone crisis in the EU, which at its peak seemed to threaten the entire European integration process as it had been pursued so far. The crisis highlighted the need for better regulation of the banking and financial system, but its profound effects have also called into question the societal role of private law and EU law, leading us to look more critically at aspects such as the political economy of private debt, the relationship between law and finance, the interplay between financial regulation and contract law, as well as the perspectives of further Europeanisation of private law. This chapter undertakes to introduce the interrelationship between financial crises and European private law considering the socio-economic context in which the law operates.

It is well known that regulatory frameworks are highly relevant to the stability or instability of financial institutions and, as a consequence, of financial systems

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more broadly: if supervision and regulation did not limit the possibility of engaging in excessively risky or unsustainable practices, investors, depositors or banks could suffer economic losses and the viability of a financial institution, or, in particularly dramatic cases, the economy of a country, could be jeopardised. Indeed, some private institutions are 'systemically important' enough—or, in the usual parlance, 'too big to fail'—to the point that they could drag the whole economy into disaster if they were to run into serious difficulties. Conversely, reducing supervision and regulation could increase systemic risk: it has been noted that many relatively recent crises have occurred after financial deregulation.[1] It is therefore common for financial crises to be followed by reforms of the regulatory and supervisory infrastructure intended to address practices that are seen as having caused previous economic disasters, with the expectation that re-regulation will prevent such events from recurring.[2]

> The GFC was followed by a plethora of institutional reforms at various levels: notably, the creation of the Financial Stability Board at the international level, the establishment of new European Supervisory Authorities[3] and the attempt to complete a Banking Union in the EU,[4] as well as several reforms of the domestic regulatory infrastructure in countries such as the United Kingdom and, on the other side of the Atlantic, the United States of America.

While financial crises routinely lead to a re-discussion of the architecture of financial regulation and supervision, the role of private law must also be considered.[5] In fact, private law in general, and contract law in particular, is extremely relevant to the financial sector and, consequently, to financial crises. The basic institutions of private law—property, contract, tort—enable the creation and maintenance of capital and tradable commodities.[6] Financial products are contracts. In this sense, there is a natural link between contract law and finance.[7] An efficient and fair contract law therefore appears to be crucial to the well-functioning of the financial system as much as institutional reforms. But what should the role of private law, and contract law in particular, be?

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1 J. Furman and J. E. Stiglitz, 'Economic Crises: Evidence and Insights from East Asia', *Brookings Papers on Economic Activity* 29.2 (1998), 1–136; A. Musacchio, 'Mexican Financial Crisis of 1994–1995', in G. Caprio (ed.), *The Evidence and Impact of Financial Globalization* (London: Elsevier, 2012), pp. 657–667; S. Jönsson, *A Comparative History of Bank Failures. From Medici to Barings* (London: Routledge, 2021), p. 118.

2 F. S. Mishkin, 'Lessons from the Asian crisis', *Journal of International Money and Finance* 18 (1999), 709–723.

3 Regulations No 1093/2010, No 1094/2010, and No 1095/2010 establishing the European Securities and Markets Authority, European Banking Authority, European Insurance and Occupational Pensions Authority.

4 See the contributions in D. Busch and G. Ferrarini (eds), *European Banking Union*, 2nd edn (Oxford: Oxford University Press, 2020).

5 M. Bridge and J. Braithwaite, 'Private Law and Financial Crises', *Journal of Corporate Law Studies* 13 (2013), 361–399.

6 K. Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019).

7 J. Black, 'Reconceiving Financial Markets. From the Economic to the Social', *Journal of Corporate Law Studies* 13 (2001), 401–442.

Traditionally, the role of private law in this context is understood as being concerned with the interpretation and enforcement of contracts as freely agreed by the parties, in the light of the most basic principles of freedom of contract and sanctity of contract. The role of regulation, on the other hand, would be to set the framework within which these interactions take place and to intervene prudently in the limited number of situations where externalities or market failures might arise. However, while it may be functional to ensure economic certainty and financial innovation, a view that limits the role of private law to one of safeguarding the sanctity and freedom of contract does not seem to be appropriate to counter the risk of instability and to offer viable solutions in times of crises. In other words, this view would be 'a theory for good times in finance, not for bad times'.[8] How, then, should European private law operate in the 'bad times' of a crisis?

In the next part on the 'legal context', three instances of the more complex interaction between private law and financial crises will be considered: the question whether binding contracts can be amended following a crisis, the interaction of contract law and financial regulation, and the reform of contract law in light of the goals of financial stability and consumer protection. The remaining part will broaden the perspective and discuss the 'societal relevance' of European private law in this context.

2. Legal Context

The financial market is legally constructed and relies on the enforcement of freely concluded contracts, but a strict adherence to the principle of sanctity of contract might exacerbate the effects of a crisis. Paradoxically, as Katharina Pistor noted, there are 'bad times' in which the full enforcement of legal commitments might lead to the financial system's demise and the full force of the law will need to be suspended in the interest of the financial market itself.[9] This does not mean that a hypothetical state of emergency allows to disregard the law—although the question whether public authorities did follow the law when they attempted to govern the effects of the GFC has indeed been raised[10]—but, when stability at large is under threat, the law might have to respond in an 'elastic' way. In this sense, the sanctity of the contract principle in private law too could be loosened. At the same time, Pistor critically noted that the financial system tends to be elastic at the top but rigid at the periphery: in other words, insolvent banks might expect to be rescued (through bailouts or other procedures which have also been introduced or improved in recent years), but defaulting mortgage borrowers are

8 K. Pistor, 'A Legal Theory of Finance', *Journal of Comparative Economics* 41 (2013), 315–330.

9 Ibid., p. 315. In the perspective of system theory, this can be regarded as a crisis of the distinction between cognitive and normative expectation structures: M. Renner, 'Death by Complexity. The Financial Crisis and the Crisis of Law in World Society', in P. F. Kjaer, G. Teubner, and A. Febbrajo (eds), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), pp. 93–111.

10 In the US: E. A. Posner, *Last Resort. The Financial Crisis and the Future of Bailouts* (Chicago, IL: University of Chicago Press, 2018).

more likely to be held responsible for their debts. To what extent is European private law insensible to financial, and consequently, social crises?

a. Between *pacta sunt servanda* and *rebus sic stantibus*

To introduce this multifaceted topic, let us first consider the question of the effects of worsened financial conditions on the ability of parties to perform their obligations. A contract obliges parties to keep their promises, but performance might unexpectedly become excessively onerous or perhaps even impossible in the context of a severe economic crisis. Should non-performance of monetary obligations be excused in that case, or should we instead assume that one contract party must always have the money to perform (in fact, the performance of a monetary obligation can technically never become impossible because money can never perish)? To make a few concrete examples involving both financial and non-financial contracts, should a commercial tenant be entitled to a rent reduction if, because of economic recession, his or her business is no longer profitable to the point that the tenant is unable to meet his or her obligations? Should a mortgage borrower be relieved of his or her payment obligations if he or she can no longer pay the instalments due to extraordinary inflation or due to losing his or her job because of an economic crisis? This dilemma keeps reoccurring in 'bad times' and underlies contract law in all its manifestations: in B2C (business-to-consumer), B2B (business-to-business), as well as even in relationships between private investors and sovereigns.

In that latter regard, even States facing severe economic crises might have to restructure their debt avoiding repaying in full the holders of government bonds, which raises the question whether those investors are entitled to payment.

> The Argentine default of 2001, the largest sovereign default ever recorded in history,[11] resulted in a wave of lawsuits brought by dissatisfied bondholders who opposed the restructuring of Argentine debt, insisting on full repayment. The dispute raised a plurality of questions at the interface between contract and public international law,[12] involving issues of immunity, international investment law, and state of necessity. In Europe, the German Federal Constitutional Court was called to pronounce itself on the question whether Argentina could avail itself of a possible exception based on a state of necessity rooted in international law, but ultimately answered the question in the negative, finding that no general rule of international law entitles a State to 'temporarily refuse to meet private-law payments claims due towards private individuals by invoking state necessity declared because of inability to pay'.[13]

In private B2B and B2C disputes, the question whether a worsened financial situation

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11 S. Takagi, 'Argentina's Default of 2001', in G. Caprio (ed.), *The Evidence and Impact of Financial Globalization* (London: Elsevier, 2012), pp. 709–719.

12 For an analysis, see S. Grund, 'Restructuring Argentina's Sovereign Debts. Navigating the Legal Labyrinth', (2019), https://ssrn.com/abstract=3485370

13 German Federal Constitutional Court, 2 BvM 1/03, 2 BvM 2/03, 2 BvM 3/03, 2 BvM 4/03, 2 BvM 5/03, 2 BvM 1/06, 2 BvM 2/06, 8 May 2007.

due to the macroeconomic scenario might excuse debtors from performing their obligations is a vexed one. The starting point—although by no means the only principle—of contract law is that promises should be kept, which is often referred to with the Latin phrase *pacta sunt servanda*. This is nonetheless counterbalanced by a plurality of other doctrines with different denominations and characteristics in various jurisdictions,[14] expressions of the *rebus sic stantibus* principle, which on the contrary may allow one party to be excused for non-performance when a fundamental and unexpected change of circumstances has occurred.

> Despite its extensive and illustrious historical origins, the *rebus sic stantibus* principle was not initially recognised in most codifications, as it conflicted with ideals of legal certainty and sanctity that were predominant in codes inspired by more formalistic and individualistic values. Nonetheless, it developed mostly through legal scholarship and judicial practice in the face of the increased complexity of modern times. Even if the German Civil Code (BGB) did not explicitly recognise the doctrine, German courts in the 1920s accepted that some events, such as the dramatic hyperinflation of those years, could affect the foundation of the contract.[15] That doctrine was later codified through a reform of the BGB. More recently, a doctrine allowing the revision of a contract that has become excessively onerous, as opposed to impossible, was also included in the reform of the French Civil Code.

Could such an approach be employed to offer relief to customers who have become over-indebted due to a crisis?[16] In fact, as exceptions to the binding force of the agreement, these doctrines are formulated and interpreted in a narrow way, which makes it difficult to rescind, terminate, or revise transactions. Courts in various European jurisdictions might reach different conclusions based on the application of different general contract law doctrines[17] but, in the aftermath of the GFC, they have overall been cautious when it comes to invalidating or terminating agreements.[18]

> It has been argued that the different approaches by various national judges might be explained by 'the different frequency and intensity of financial crises' in each country.[19] For instance, in austerity-plagued Greece, Courts have occasionally and exceptionally

14 Frustration, *Störung der Geschäftsgrundlage, imprévision, eccessiva onerosità sopravvenuta*, etc. It's important to note that each of these possesses distinct meanings and application criteria, yet they all have in common the objective of acknowledging the effects of a fundamental change of circumstances on the contract.

15 See the case studies in E. Hondius and E.C. Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge, UK: Cambridge University Press, 2011), p. 218 ff.

16 J. Pulgar, 'A Contractual Approach to Overindebtedness: rebus sic stantibus Instead of Bankruptcy', in L. Nogler and U. Reifner (eds), *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven International Publishing, 2014), p. 534.

17 R. Momberg Uribe, 'Beyond the Risk: Swaps, Financial Crisis and Change of Circumstances. Comparative Case Note. Supreme Court of Portugal—10.10.2013. Conclusions', *European Review of Private Law* 23 (2015), 149–151.

18 For an overview of the legal doctrines which could at least theoretically be used in a few jurisdictions, see B. Başoğlu (ed.), *The Effects of Financial Crises on the Binding Force of Contracts—Renegotiation, Rescission or Revision* (Cham: Springer, 2016).

19 R. Serozan, 'General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision', in Başoğlu (ed.), *The Effects of Financial Crises*, pp. 3–32 (p. 28).

resorted to the general principle of good faith to revise the price of private commercial leases.[20] A point worth further consideration involves contemplating how significant socio-economic events within a country affect the interpretation of legal rules.

The possibility of being released from an unfavourable transaction in the aftermath of a crisis relying on general doctrines such as *rebus sic stantibus* thus exists but is particularly limited. It might thus appear at first glance that the sanctity of contract principle remains the rule and *rebus sic stantibus* the narrow exception, indicating an inelasticity of the system at its periphery. Other legal strategies might nonetheless prove appropriate to navigate the effects of a crisis.

1) Contractual Approach to Crises

Attention can be paid first to the precise terms of the contract. The agreement might in fact include terms which, appropriately construed, offer a solution to some of the described issues.

With regard to the above-mentioned sovereign debt contracts, comparable problems to those seen during the Argentine default occurred during the eurozone crisis with regard to the Greek government-debt crisis. In order to restructure its debt, Greece could retrospectively insert Collective Action Clauses in its Greek-law-governed sovereign debt contracts. These are terms which establish that a supermajority of bondholders can agree to a 'haircut' which then becomes binding on all investors. That approach was challenged by some investors who lamented the violation of their fundamental right to property. However, the Greek approach was deemed lawful by courts in Europe, notably including the European Court of Human Rights, which placed particular emphasis on the exceptional background of the measures.[21]

In B2B transactions—where strong forms of statutory controls on the contents of the contract are generally lacking—contract terms could allow renegotiation or termination due to exceptional circumstances. For instance, so-called '*force majeure* clauses' can be included in long-term contracts to relieve a party from an obligation when something beyond the party's reasonable control prevents them from performing. However, it must be noted that, in line with the *rebus sic stantibus* principle, these terms too tend to be interpreted in a particularly restrictive way and, consequently, they are not always likely to apply to situations in which performance was made impracticable due to the effects of a financial crisis.

In a 2010 English case involving the sale of a jet aircraft, one party tried to claim that the 'unanticipated, unforeseeable, and cataclysmic downward spiral of the world's financial markets'[22] of that period triggered a *force majeure* clause which excused their

20 N. A. Davrados, 'Financial Turmoil as a Change of Circumstances Under Greek Contract Law', in Başoğlu (ed.), *The Effects of Financial Crises*, pp. 145–162 (p. 154).

21 ECtHR, *Mamatas and Others v Greece*, Appl. Nos. 63066/14, 64297/14 and 66106/14, judgment of 21 July 2016.

22 *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), para. 38.

non-performance. The Court noted that '[i]t is well established under English law that a change in economic / market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a *force majeure* event. Thus a failure of performance due to the provision of insufficient financial resources has been held not to amount to *force majeure*'.[23] As a point for further reflection: in explaining the correct interpretation of the clause, the Court mentioned that 'matters relevant to the delivery of the aircraft [...] would be caught by that clause, such as the seller being unable to deliver the aircraft on time due to a pandemic causing a dearth of delivery pilots';[24] one can reflect on the similarities and differences between events such as a global financial crisis and a pandemic crisis in terms of their possible effects on the binding force of a contract.

2) Unfair Terms in Consumer Contracts

The existence of legislation creating statutory rights for consumers is relevant for the invalidation of contract terms which might be responsible for the onerousness of financial transactions. Specific contract terms in B2C relationships have in fact been tested for unfairness and declared to be non-binding on the consumer applying the 1993 Unfair Contract Terms Directive.[25] The importance of this instrument is demonstrated by a wave of cases which in the wake of the GFC reached the Court of Justice of the European Union (CJEU) and that demonstrate the relevance of contract law to cope with social problems, as consumers in countries facing severe socio-economic crisis used that legislation to challenge terms in their now unsustainable loan agreements.[26] Unfair terms legislation—with particular emphasis on its transparency requirements[27] and occasionally read in light of fundamental rights[28]—has been used to test foreign-currency-indexation clauses,[29] floor clauses,[30] and acceleration clauses[31] in mortgage loan agreements.

One interesting aspect to note in this respect is that in those instances the instrument employed by the courts was indeed the Unfair Contract Terms Directive—thus a relatively old instrument designed to apply to all consumer contracts instead of being specifically intended to regulate financial transactions: why was 'general' consumer law more effective in coping with this issue than the supposedly more detailed rules of financial regulation? Is this a sign of the inadequacy of EU rules on consumer credit

23 Ibid., para. 40.

24 Ibid., para. 46.

25 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

26 H. W. Micklitz and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *Common Market Law Review* 51 (2014), 771–808.

27 C. Leone, 'Transparency Revisited—On the Role of Information in the Recent Case-Law of the CJEU', *European Review of Contract Law* 10.2 (2014), 312–325.

28 CJEU, Case C-34/13, *Monika Kušionová v SMART Capital a.s.* [2014] ECLI:EU:C:2014:2189.

29 CJEU, Case C-26/13, *Kásler and Káslerné Rábai* [2014] ECLI:EU:C:2014:282; C-260/18, *Kamil Dziubak and Justyna Dziubak v Raiffeisen Bank International AG* [2019] ECLI:EU:C:2019:819.

30 CJEU, Joined Cases C-154, 307, and 308/15, *Gutiérrez Naranjo*.

31 CJEU, Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (*Catalunyacaixa*) [2013] ECLI:EU:C:2013:164.

and mortgage credit to deal with such burning social issues? To address this question, let us now move on to consider European financial contract law.

b. Contract Law and Financial Regulation

In the aftermath of the GFC, investors have occasionally claimed that they had been mis-sold financial products without being properly informed about the risks involved in the transactions. Such a claim can be based on the violation of a private law duty of care but has often been based on the alleged violation of the information duties imposed by financial regulation. This leads to a question: to what extent do contract law principles interact with financial regulation?

When interpreting general private law concepts, we could in theory look for guidance in financial regulation, where precise rules of conduct detail certain behaviours to be expected from financial service providers, outlining the way in which they must behave towards their customers. Contract law creates rights and obligations between parties providing remedies for the non-breaching party, whereas financial regulation mandates specific rules of conduct that financial service providers must adhere to when offering their services. In this sense, regulation overlaps with notions to be found in general contract law with the result of intersections between contract law and financial supervision[32] and regulation.[33] This relationship has mostly been explored in relation to the implications of financial supervision and regulation for civil liability:[34] could the violation of a regulatory rule of conduct lead to the recognition of a private law remedy—such as contract avoidance or damages either in contract or tort—for the investor or consumer who has suffered a loss? In this regard, there is no clear-cut answer in European private law, as different jurisdictions adopt different approaches: in some cases, regulation and private law are kept separate, in other cases they interact more clearly.[35]

> The 2014 Markets in Financial Instruments Directive—known as MiFID II—is an important piece of EU legislation intended to provide a framework for the regulation of investment services[36] and that imposes relevant obligations on financial service providers, such as the duty to act in the best interest of the client and so called 'know your customer' and 'know your product' obligations. While some of these duties seem to echo existing private law duties, are such rules of conduct capable of creating contractual rights for investors? Interpreting the 2004 version of MiFID, the CJEU had already accepted that

32 Y. Svetiev and A. Ottow, 'Financial Supervision in the Interstices Between Private and Public Law', *European Review of Contract Law* 10.4 (2014), 496–544.

33 O. Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law', *European Business Organization Law Review* 22.2 (2021), 147–172.

34 See contributions in O. Cherednychenko and M. Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Cheltenham: Elgar, 2020).

35 M. Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses. A Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law* (Cham: Springer, 2020).

36 On the evolution of the EU regime of investment services regulation, see N. Moloney, *EU Securities and Financial Markets Regulation* (Oxford: Oxford University Press, 2014), pp. 327 ff.

> Member States could reinforce financial regulation with private law remedies.[37] An explicit intersection of the two domains of financial regulation and private law is visible in instruments such as the amended Credit Rating Agencies Regulation, which now gives investors or issuers a right to claim damages from a credit rating agency that committed an infringement intentionally or with gross negligence.[38]

This might all sound a bit technical, perhaps. However, the blurring of the line between regulation and private law is not just a matter of technics, but rather tells us something about the rationale of the rules. In fact, regulation is inspired by a number of sometimes competing goals—market integrity, financial stability, competition, sustainability, and so on—which might be different from those—freedom of contract, commutative justice, efficiency, and so on—which are traditionally said to inspire private law. Yet it is not always useful nor possible to clearly distinguish between those, with the result of considerable intersections at the level of both technics and values. The next section illustrates this with regard to consumer credit and mortgage law.

c. The Reform of Private Law in Light of Financial Stability

The regulation of contracts can be inspired by policy objectives explicitly aimed at ensuring investor protection or even financial stability[39] instead of simply giving effectiveness to the will of the parties. This is particularly clear in the case of EU private law which, as various scholars have highlighted either in critical or in approving terms, has a strong ‘instrumentalist’ dimension. This is well-illustrated by the case of consumer credit.

It should be noted that a contract law which places emphasis on freedom of contract may facilitate over-lending: on the one hand, lenders are not constrained in their freedom to offer loans to consumers who on the other hand have the necessity to access finance. In ‘good times’ lenders tend to lower the lending standards so that more customers will have access to credit. This is further facilitated by financial practices which allow the lender to minimise the credit risk—as in the case of securitisation—or to make an immediate profit by selling additional and possibly unnecessary financial products to the consumer—as in the case of cross-selling and mis-selling[40] of services (for instance, a bank might agree to grant a loan only on condition that the consumer additionally purchases a payment protection insurance).

Access to credit is of course crucial for the economy and consumer welfare, but when lenders have an incentive to lend easy money to borrowers in financial need regardless

37 CJEU, Case C-604/11, *Genil v Bankinter* [2013] ECLI:EU:C:2013:344.

38 Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, Title IIIA, Article 35a.

39 G. Comparato, ‘Financial Stability in Private Law: Intersections, Conflicts, Choices’, *Common Market Law Review* 58.2 (2021), 391–430.

40 See Better Finance, ‘A Major Enforcement Issue. The Mis-selling of Financial Products’, Briefing Paper (April 2017), https://betterfinance.eu/wp-content/uploads/publications/Misselling_of_Financial_Products_in_the_EU_-_Briefing_Paper_2017.pdf

of the possible inability of the latter to repay—i.e. their so-called 'credit-worthiness'—the problem of over-indebtedness might emerge.[41] Such excessive accumulation of household debt is likely to increase consumers' vulnerability to external shocks[42] and is even regarded by various economists as one of the reasons behind financial crises.[43]

> Should private law encourage consumers' access to finance, or should it be more cautious in order to avoid over-indebtedness? Where is the line to be drawn? In EU law, the 2008 Consumer Credit Directive[44] did follow at least in part a freedom of contract approach since, as the culmination of a complex legislative history, it ended up including a rather toothless principle of responsible lending.[45] The Directive, which did not also apply to mortgage loans, provided in one of its recitals that Member States 'should take appropriate measures' to ensure responsible practices and 'determine the necessary means to sanction creditors' engaging in irresponsible lending,[46] but failed to outline the consequences of a violation of that principle. Later, the CJEU pushed for giving such obligations more teeth, ensuring that penalties are effective, proportionate and dissuasive as requested by the Directive.[47] The ineffectiveness of that Directive later led to a new and more detailed Consumer Credit Directive in 2023.

A possible deficiency of a private law design predicated on the freedom of contract and sanctity of contract approach emerges here; those principles allow for loosely restrained lending, while not also offering the instruments to cope with the resulting debt problems: as you remember from a previous section, contract law does not easily allow a debtor to be excused for non-performance of his or her obligations. Post-GFC reforms have attempted to address this mismatch in two ways.

On the one hand, there is an attenuation of freedom of contract. Newer reforms have attempted to restrain the freedom to provide loans when there is a risk that debt might become unsustainable for the customer. This includes stricter responsible lending rules[48] in the area of mortgage loans, as included in the 2014 Mortgage Credit Directive.[49] Considering that the GFC is rooted (at least in part) in the US subprime

41 H. W. Micklitz, 'Access to and Exclusion from Financial Markets after the Global Financial Crisis', in T. Wilson (ed.), *International Responses to Issues of Credit and Over-Indebtedness in the Wake of the Crisis* (Burlington, VT: Ashgate, 2013), pp. 47–75.

42 I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart, 2020).

43 S. Claessens, G. Dell'Ariccia, and D. Igan, L. Laeven, 'A Cross-Country Perspective on the Causes of the Global Financial Crisis', in Caprio (ed.), *The Evidence and Impact of Financial Globalization*, pp. 737–752; A. Mian and A. Sufi, *House of Debt. How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (Chicago, IL: University of Chicago Press, 2015).

44 Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC.

45 See Y. M. Atamer, 'Duty of Responsible Lending. Should the European Union Take Action?', in S. Grundmann and Y. M. Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Alphen aan den Rijn: Kluwer, 2011), pp. 179–202 (p. 179).

46 CCD, Recital 26.

47 CJEU, C-388/11, *Le Crédit Lyonnais* [2013] ECLI:EU:C:2013:120; C-449/13, *CA Consumer Finance SA v Ingrid Bakkaus* [2014] ECLI:EU:C:2014:2464; more recently: C-303/20, *Ultimo Portfolio Investment SA v KM* [2021] ECLI:EU:C:2021:479.

48 T. Wilson, 'The Responsible Lending Response', in T. Wilson (ed.), *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Farnham: Ashgate, 2013), pp. 109–134.

49 Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property.

mortgage crisis, the importance of rules on consumer mortgages clearly appears. The CJEU has had an occasion to reflect upon these rules explaining that their rationale is in fact rooted in the GFC and reveals the intention of the EU legislator to make lenders accountable, so that possibly more restrictive interpretations of consumer credit laws even outside the area of residential mortgages are consistent with EU law.[50] Moreover, the Mortgage Credit Directive (MCD) sets limits to the possibility of bundling and tying mortgages and additional financial services,[51] while obliging Member States to promote the financial education of consumers.[52]

> While EU directives oblige traders to provide consumers with detailed information, in practice this information might be of limited use if it is excessively abundant and complicated.[53] This problem is particularly evident in the case of financial contracts which might involve exceptionally complex details and jargon. The idea of financial education thus aims at ensuring that consumers have sufficient knowledge to understand the information they are presented with.[54] It should be noted that while European courts have often shown a willingness to protect vulnerable uninformed parties through the application of various contract law doctrines, the CJEU has more recently clarified that the fact that a consumer possesses a certain level of knowledge and expertise is not enough to take them outside the scope of the definition of 'consumer'—which is traditionally understood objectively by the Court[55]—and thus deprive them of the protection offered by EU law.[56] In other words: even if you are financially literate and have a perfect understanding of finance, you are still a consumer.

The MCD was then the blueprint for the reform of the Consumer Credit Directive (CCD): considering the shortcomings highlighted above, the EU undertook a reform of consumer credit law. The new CCD[57] shows continuity with the approach of the MCD instead and includes more precise rules on responsible lending, bundling and tying, and forbearance, explicitly aiming at counteracting the risk of consumer over-indebtedness.

On the other hand, a partial attenuation of the sanctity of contract principle should be noted. It has become apparent that insisting on debt repayment from vulnerable consumers who are struggling financially and at risk of social exclusion is not only unjust but might end up posing a threat to stability itself. Therefore, procedural forms of consumer debt restructuring similar to those already available to businesses[58]

50 CJEU, Case C-58/18, *Schyns* [2019] ECLI:EU:C:2019:467.

51 MCD, Article 12. CJEU, C-778/18, *Association française des usagers de banques* [2020] ECLI:EU:C:2020:831.

52 MCD, Article 6.

53 O. Ben-Shahar and C. E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014).

54 On financial literacy, V. Mak and J. Braspenning, 'Errare humanum est. Financial Literacy in European Consumer Credit Law', *Journal of Consumer Policy* 35 (2012), 307–332.

55 CJEU, Case C-110/14, *Horațiu Ovidiu Costea v SC Volksbank România SA* [2015] ECLI:EU:C:2015:538.

56 CJEU, Case C-208/18, *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825.

57 Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC.

58 In fact, when a business becomes insolvent, i.e. unable to pay all its debts, the law creates various procedures which are intended to ensure that most creditors get at least part of the sums they are due, also to minimise the risk that one debtor's insolvency might have a domino effect and lead to the

become necessary and most countries have introduced mechanisms of consumer insolvency.[59] In European law, while the EU has traditionally been less active in this area leaving that aspect to Member States under the auspices of the Council of Europe,[60] a renewed interest in the issue has emerged recently with EU law, which now explicitly encourages Member States to apply new rules on debt discharge to consumers.[61]

l) *Criticisms*

One should not hastily conclude, however, that the current reforms have somewhat 'fixed' the law and averted the possibility of new crises. Criticisms can be articulated at different levels. For example, the new approach to responsible lending raises doubts as to whether the new measures did have any impact at all or even contributed to the opposite problem of financial exclusion: contract law facilitated over-extension of credit in times of credit boom and restricted access in times of credit squeeze. Thus, it appears to have been pro-cyclical and mimicking already existing market dynamics[62] rather than steering them in a meaningful way.

> The inherent tension between ensuring access to credit and the need to avoid overlending has always been present in the regulation of financial services and keeps reappearing: if consumers do not have access to financial services offered by legitimate providers, will they more easily become victim of unregulated predatory lenders? In the UK, the regulator Financial Conduct Authority imposed limits to high-cost short-term credit, more commonly known as 'payday loans', which had become a problematic source of over-indebtedness for many vulnerable consumers.[63] This raised the question where those consumers could now gain access to finance. The answer of the FCA is that '[a]part from a short initial period we believe these customers will be better off not having taken out a loan',[64] on the basis of the consideration that '[o]ur research indicates that it is unlikely that these customers will turn to illegal money lending'.[65]

Furthermore, a certain moral overtone characterising debt as the result of individual fault or even guilt, and thus the indebted consumer as irresponsible, still appears

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collapse of other businesses. Incidentally, after the GFC, the laws relating to the insolvency of banks were also reformed.

59 I. Ramsay, *Personal Insolvency in the 21st Century. A Comparative Analysis of the US and Europe* (London: Bloomsbury, 2017).

60 Council of Europe, Recommendation CM/Rec (2007) 8.

61 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, Recital 21.

62 It should be recalled that, as C. P. Kindleberger, *Manias, Panics and Crashes: A History of Financial Crises* (London: Wiley, 2005), p. 10, notes discussing the common pattern of financial crises, 'the credit supply increases relatively rapidly in good times, and then when economic growth slackens, the rate of growth of credit has often declined sharply'.

63 On the topic, see J. Gardner, *The Future of High-Cost Credit. Rethinking Payday Lending* (London: Hart Bloomsbury, 2022).

64 The Financial Conduct Authority, 'Proposals for a Price Cap on High-Cost Short-Term Credit', CP14/10 (15 July 2014), https://www.fca.org.uk/publications/consultation-papers/cp14-10-proposals-price-cap-high-cost-short-term-credit, para. 1.27.

65 Ibid., para 1.28.

to permeate consumer credit and mortgage law. In the case of the restructuring of consumer debts, one can debate whether the above-mentioned reforms aimed at offering relief to debtors, occasionally even introduced in the context of international obligations, are in fact excessively skewed towards the interests of the creditors instead of being an instrument to offer actual relief to the debtor.[66]

> To demonstrate how deeply ingrained the moral conception of debt is, an interesting linguistic consideration is often proposed:[67] in German (as well as in Dutch) the word *Schuld* means both 'debt' and 'guilt'. If debtors are guilty, then they can only be *forgiven* if they atone for their guilt, possibly going through an expiatory path of punishment and rehabilitation, to partially regain their (credit-)*worthiness*. Insolvency procedures—even acknowledging a considerable plurality of approaches in comparative terms[68]—have traditionally shown a somewhat punitive approach towards debtors, becoming over time more focused on rehabilitation instead.

More radical criticisms may further question whether those interventions tackle the real socio-economic causes of financial crises in the first place rather than just their manifestations. To understand some of these broader criticisms, we will need to widen our view and consider the societal relevance of law.

3. Societal Relevance

While it is obviously important to look at the way in which specific rules might have facilitated laying down the conditions for crises and how reforms might make the financial system more stable or resilient, adopting a bird's-eye socio-legal view can also shed light on the role of private law in general in relation to the political economy of financial crises. It should be recalled in fact that 'finance is a social system like many others, and financial relations are socially and culturally embedded'.[69] It is useful to place private law within an economic sociology of law,[70] discussing the societal relevance of the rules discussed so far, and also to invite more critical reflections on European private law.

a. The Political Economy of Financial Crises

As the economists Carmen Reinhart and Kenneth Rogoff wrote at the start of an influential study of financial crises, 'excessive debt accumulation, whether it be by the government, banks, corporations, or consumers, often poses greater systemic risks

66 J. Spooner, 'The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: The Case of Ireland and the Troika', Modern Law Review 81 (2018), 790–824.

67 See already the discussion of guilt and debt in F. Nietzsche, *Zur Genealogie der Moral. Eine Streitschrift* (Leipzig: Naumann, 1887).

68 I. Ramsay, *Personal Insolvency.*

69 K. Pistor, 'A Legal Theory of Finance', p. 315.

70 See R. Swedberg, 'The Case for an Economic Sociology of Law', Theory and Society 32.1 (2003), 1–37. S. Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law', *Economic Sociology European Electronic Newsletter* 10.3 (2009), 20–25.

than it seems during a boom'.[71] If it is true that systemic risk is associated with debt accumulation, most notably including private debt, one could ask what are the reasons behind such accumulation and why it is so that credit bubbles appear to have become more frequent in recent decades. Does private law play a role in those dynamics as well?

One among many possible answers to this question has to do with the political economy of finance. Over the last few decades, financial services have become increasingly important for corporations, consumers, and the economy of entire countries—a phenomenon which is generally described with the evocative although somewhat unclear term 'financialisation'. The development has occurred because of innovations endogenous to the financial system itself but also as part of societal changes and a deliberate redefinition of the role of the State, in line with a view suggesting that the State should retreat as far as possible from direct interventions in the economy and leave ample market freedoms to private entities through privatisation and so-called deregulation.

With the development of a consumer society centred on mass production and consumption, there is on the one hand a societal expectation that citizens have access to the increased number of goods and services available on the market, and on the other hand a necessity of fostering consumer demand by offering them sufficient economic resources, thus sustaining production and economic growth. But how can this be achieved? Simplifying, one can say that in a possibly Keynesian model[72] such consumer demand could be fostered by increasing the labour force's bargaining power, recognising social rights and through public spending, which includes the consolidation of a welfare state that actively provides certain services and social benefits to citizens.

> In various countries, legislations and constitutions of the second post-war period show traces of this inspiration, as they portray an active role for the State in the economy. Such active role was the founding characteristic of the historical period, following the destruction caused by the war, that is known in France as the 'glorious thirty'[73] and that was generally characterised by economic growth and low unemployment. The same period, roughly from the mid 1940s to the mid 1970s, was also marked by the absence of major banking crises in the world (although the same cannot always be said of currency crises).[74]

This model was challenged by the development of monetarist and neoliberal theories which, intending to reverse phenomena of high inflation unexpectedly coupled with high unemployment, on the one hand put emphasis on price stability as the main

71 C. M. Reinhart and K. S. Rogoff, *This Time is Different. Eight Centuries of Financial Folly* (Princeton, NJ: Princeton University Press, 2009), p. xxv.

72 Keynesianism, based on the ideas of John Maynard Keynes (1883–1946), is an economic theory which places emphasis on aggregate demand and on the need for public spending in order to boost economic growth under certain circumstances.

73 J. Fourastié, *Les trente glorieuses ou la révolution invisible de 1946 à 1975* (Paris: Fayard: 1979).

74 F. Allen and D. Gale, *Understanding Financial Crises* (Oxford: Oxford University Press, 2007), p. 2. M. J. Oliver, 'Financial Crises', in M. J. Oliver and D. H. Aldcroft (eds), *Economic Disasters of the Twentieth Century* (Cheltenham: Elgar, 2007), p. 205.

objective of central banks[75] and on the other hand attempted to free the private sector from excessive government interference.

Deregulation and financial innovation would thus ensure that the market itself can make an increasing number of essential services available to citizens. Against that backdrop, it was private credit that started performing the task of fostering demand in capitalist economies. Citizens became financial citizens.[76] The shift from the public to the private sector,[77] which began in the 1970s in Europe and even earlier in the US, relied on the availability of credit to provide basic social needs satisfaction to individuals, but paid little attention to the possible negative consequences that might have followed a default.

Governing those market relations, private law had to perform an indirect macroeconomic function for which it was not necessarily well-equipped. It should be kept in mind that general private law is to a large extent inspired by individualist principles, as the question of the social function of private law has remained an open issue since at least the nineteenth century.[78]

> These tendencies, which in hindsight became apparent in Europe only during the GFC, had already manifested themselves elsewhere and before. Even the Great Depression in the US can be linked to an overextension of the financial sector which developed to take into account consumer needs not directly dealt with by the State: for several years US American courts, as notoriously seen at the start of the twentieth century in the Supreme Court's *Lochner* case,[79] had crippled the public powers to produce social legislation by way of outlining an unrestrained and constitutionally protected freedom of contract.[80] The notorious 'Lochner era' came to an end in the 1930s, but the idea of a constitutionalisation of freedom of contract has remained a subject of controversy in legal scholarship since then.

b. European and Comparative Law after the Crisis

The legal implications of financial crises as socio-legal phenomena far exceed those which are immediately visible when looking at the reforms of financial law. The GFC, and its European ramifications in the form of the eurozone crisis, led to a reconsideration of the European economic constitution[81] but also had repercussions on the European

75 Maintaining price stability is the primary objective of the European Central Bank as well; the general objectives of the Union are secondary goals.

76 D. Kingsford-Smith and O. Dixon, 'The Consumer Interest and the Financial Markets', in N. Moloney, E. Ferran, and J. Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015), pp. 697–735.

77 C. Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime', *The British Journal of Politics and International Relations* 11.3 (2009), 382–399.

78 See O. von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin: Springer, 1889).

79 *Lochner v New York*, 198 U.S. 45 (1905).

80 E. McGaughey, 'Introduction: A Social Law Beyond Public v Private, English translation of Otto von Gierke, The Social Role of Private Law', *German Law Journal* 19.4 (2018), 1017–1116.

81 C. Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis', in D. Patterson and Södersten (eds), *A Companion to European Union Law and International Law* (Oxford: Wiley, 2016), pp. 242–261.

polity itself: after years in which, following the events described above, the general understanding was that the benefits of the financial markets could and should be democratised, thus extended to consumers who could rely on finance to improve their welfare, the GFC damaged citizens' trust in the financial sector and, to an extent, in the political institutions which appeared to have failed at regulating the markets and to have taken inadequate corrective measures. As the crisis appeared to be international in nature and rooted in dynamics seemingly beyond the reach of national political institutions, the ever-present appeal of the nation and re-nationalisation increased. At first glance, this reaction seems counterintuitive: after all, addressing a phenomenon by definition international such as a GFC appears to require an internationally coordinated rather than an isolationist response. In fact, most reforms have envisioned a more coherent international approach to finance and as already mentioned new international bodies have been created to that purpose. Yet, one should consider the role that the national State, in contrast to transnational private networks rooted in an economic rationality, is still expected to play in ensuring some form of protection in 'bad times': an attempt, often prone to failure, to re-embed the economy in society in line with what Karl Polanyi described in the 1940s as a double-movement.[82] For example, over-indebted consumers primarily expect assistance from their welfare state. This scenario might be paradoxical, since on the one hand internationalisation appears to reduce the room for regulatory manoeuvre of the State (or at least some States) while on the other hand, it puts increased pressure on it.

This political climate further changed the priorities of the EU legislator and, consequently, of European legal scholarship. It is worth recalling that still in the first half of the 2000s, European legal scholarship was mainly occupied with the two political 'grand-projects' of the time: the European constitution and the European Civil Code.[83] The first project had already failed the test of democratic acceptance in two national referenda although it substantially survived in the reformed EU treaties. The ambitions of EU private law were even more clearly downplayed: the agenda in European private law continuously deflated in grandeur, moving from an ambitious conversation about something resembling a civil codification for Europe, to the idea of a common European sales law, and eventually to initiatives for the regulation of the digital market, which became the new main research focus of European private law scholarship. At the same time, the GFC seemed to inaugurate a promising new age of consumer law which now appeared to be more open to substantive social considerations.[84]

Against this backdrop, the aftermath of financial crises raises fundamental questions for comparative law. Many regard the post-GFC scenario of general re-

82 K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Boston, MA: Beacon Press, 2001).

83 H. W. Micklitz, 'Failure or Ideological Preconceptions? Thought on Two Grand Projects: The European Constitution and the European Civil Code', in K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe* (Farnham: Ashgate, 2010), pp. 109–142 (p. 109).

84 V. Mak, *Legal Pluralism in European Contract Law* (Oxford: Oxford University Press, 2020), p. 78.

nationalisation as one of the key themes that, exacerbating pre-existing sentiments, led to the most theatrical drawback in the history of EU integration, i.e. the withdrawal of the United Kingdom from the EU. In comparative law terms, this might breathe new life into the old distinction between English common law and continental civil law. While that opposition had been downplayed by comparative lawyers on the basis of the functionalist method and of historical considerations occasionally instrumental to the European integration project, that very distinction was on the contrary central to some comparative law and finance accounts which problematically predicated the superiority of one of those families in terms of economic efficiency.

> The common law appears to be a highly relevant legal regime for finance. As a telling example, the vast majority of over-the-counter derivative contracts worldwide are subject to either English law or the law of the State of New York. This is because those contracts incorporate a set of standard terms, drafted by an international association of financial institutions, which include a 'choice of law' and 'choice of forum' clause in favour of those jurisdictions. Disputes around the interpretation of those contracts, possibly even in seemingly domestic settings,[85] are therefore likely to end up being adjudicated by Anglo-American courts applying the common law of contract.

Yet that view might paradoxically be challenged by the reality of Brexit itself, as at least some financial service providers start relocating from London to other destinations in continental Europe to keep full access to the EU financial markets.

c. Is the Financial System Safe Now?

While different and possibly contrasting readings can be offered of the political-economic developments described so far, this simplified overview of events spanning over three centuries across two continents rather suggests that inquiring about the role of private law within financial crises cannot be reduced to a merely technical exercise in evaluating the economic efficiency of given rules, possibly inspired by the neo-positivist idea that there is one 'right' approach. Neither can contract law ignore the overall systemic rather than purely interpersonal implications of contractual relations. Consideration of the wider context is necessary instead, also in the interest of effective economic regulation as well as social cohesion. In fact, an exclusive emphasis on the current regulatory reforms risks overlooking further possibly relevant societal issues or underlying contradictions in the socio-economic system which might then constitute the trigger for new catastrophic developments. Just as financial crises are historically followed by re-regulation, re-regulation is followed by a general perception that because of the introduction of new rules issues have been solved.[86] In particular,

85 For a notable English case involving a swap contract concluded by two Italian parties, see *Dexia Crediop S.p.A. v Comune di Prato* [2017] EWCA Civ 428.

86 Reinhart and Rogoff, *This Time is Different*. Moreover, 'as soon as memories of the past crisis have faded, advocates of free markets will raise their heads again and demand the dismantling of regulatory structures that stand in the way of the private sectors' unconstrained debt minting', K. Pistor, *The Code of Capital*, p. 106.

the reforms which have been introduced in the last decade have been produced with an eye to the triggers of the GFC, which might make them appropriate to deal with a possibly similar new event, but might not be sufficient to avoid crises rooted in different causes—or even the same causes if one adopts a more pessimistic perspective on the effectiveness of the new rules. In that regard, current economic models still appear inadequate to predict when and how financial crises will occur: while economists learn from each crisis, the previous generation of models suddenly appears inadequate as soon as a new crisis occurs.[87] This holds true keeping in mind the wave of European re-regulation following the GFC: the financial system can be said to be safer but still not safe.[88]

More fundamentally and sceptically, crises may also be thought to be endogenous to the market itself.[89] The instability of capitalist economies has been highlighted by a long list of economic thinkers, from Marx to Keynes, pointing out the inherent contradictions of the economic system, and is now being more accepted in mainstream economics as well. The post-Keynesian economist Hyman Minsky, whose work enjoyed a renewed popularity after the GFC, stressed the innovative characteristic of banking and finance as profit-seeking activities and explained that 'over periods of prolonged prosperity, the economy transits from financial relations that make for a stable system to financial relations that make for an unstable system'.[90] This suggests that periods characterised by financial innovations have a tendency to destabilise the market, possibly triggering that sequence of 'manias, panics, and crashes' mentioned in the explicative title of Charles Kindleberger's influential work on financial crises.[91]

If this is true, it could be noted that the times we live in, characterised by unprecedented levels of innovation in a plurality of often under-regulated areas, seem particularly fertile for new unfavourable events. In this context, the law will at least need to ensure that episodes of instability are governed so as to make their consequences socially sustainable, through the recognition of the necessity of pursuing financial as well as more broadly social stability.

4. Points for Reflection

Q1: One of the key tensions within contract law is the one between the principle that promises must be kept and the one that non-performance of an obligation might be excused in exceptional circumstances. How should the right balance between

87 D. Rodrik, 'Who Needs Capital-Account Convertibility?', *Princeton Essays in International Finance* 207 (1998).

88 M. Hellwig, 'Twelve Years after the Financial Crisis—Too-big-to-fail is still with us' (2021) 7(1) Journal of Financial Regulation 175–187.

89 As well as more fundamentally to modernity itself, see H. Brunkhorst, 'The Return of Crisis', in Kjaer, Teubner, and Febbrajo (eds), *The Financial Crisis in Constitutional Perspective*, pp. 133–171.

90 H. P. Minsky, 'The Financial Instability Hypothesis', in Ph. Arestis and M. Sawyer (eds), *The Elgar Companion to Radical Political Economy* (Cheltenham: Elgar, 1994), pp. 153–158 (p. 157).

91 Kindleberger, *Manias, Panics and Crashes*.

the two be struck in the context of a financial crisis? More generally, is a crisis such an exceptional event which justifies a suspension of the normal application of the law?

Q2: To what extent should the line between regulation and private law be blurred? Is a closer relation between the two desirable, or can we think of good reasons why the two domains should instead be kept separate?

Q3: To what extent should contract law itself be concerned with further issues such as ensuring the stability of the financial system? Would this challenge the alleged inner rationality of contract law?

Q4: What are the long-term consequences of financial crises on the European private law project itself?

Bibliography

Allen, F., and D. Gale, *Understanding Financial Crises* (Oxford: Oxford University Press, 2007), https://doi.org/10.4337/9781785366468

Atamer, Y. M., 'Duty of Responsible Lending. Should the European Union Take Action?', in S. Grundmann and Y. M. Atamer (eds), *Financial Services, Financial Crisis and General European Contract Law: Failure and Challenges of Contracting* (Alphen aan den Rijn: Kluwer, 2011), pp. 179–202

Başoğlu, B. (ed.), *The Effects of Financial Crises on the Binding Force of Contracts—Renegotiation, Rescission or Revision* (Cham: Springer, 2016), https://doi.org/10.1007/978–3-319–27256–6

Ben-Shahar, O., and C. E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton, NJ: Princeton University Press, 2014)

Better Finance, 'A Major Enforcement Issue. The Mis-selling of Financial Products', Briefing Paper (April 2017), https://betterfinance.eu/wp-content/uploads/publications/Misselling_of_Financial_Products_in_the_EU_-_Briefing_Paper_2017.pdf

Black, J., 'Reconceiving Financial Markets. From the Economic to the Social', *Journal of Corporate Law Studies* 13 (2001), 401–442, https://doi.org/10.5235/14735970.13.2.401

Bridge, M., and J. Braithwaite, 'Private Law and Financial Crises', *Journal of Corporate Law Studies* 13 (2013), 361–399, http://dx.doi.org/10.5235/14735970.13.2.361

Brunkhorst, H., 'The Return of Crisis', in P. F. Kjaer, G. Teubner, and A. Febbrajo (eds), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), pp. 133–171.

Busch, D., and G. Ferrarini (eds), *European Banking Union*, 2nd edn (Oxford: Oxford University Press, 2020)

Cherednychenko, O., 'Two Sides of the Same Coin: EU Financial Regulation and Private Law', *European Business Organization Law Review* 22.2 (2021), 147–172, https://doi.org/10.1007/s40804–020–00202-y

Cherednychenko, O., and M. Andenas (eds), *Financial Regulation and Civil Liability in European Law* (Cheltenham: Elgar, 2020)

Claessens, S., G. Dell'Ariccia, and D. Igan, L. Laeven, 'A Cross-Country Perspective on the Causes of the Global Financial Crisis', in G. Caprio (ed.), *The Evidence and Impact of Financial Globalization* (London: Elsevier, 2012), pp. 737–752

Comparato, G., 'Financial Stability in Private Law: Intersections, Conflicts, Choices', *Common Market Law Review* 58.2 (2021), 391–430, https://doi.org/10.54648/cola2021024

Crouch, C., 'Privatised Keynesianism: An Unacknowledged Policy Regime', *The British Journal of Politics and International Relations* 11.3 (2009), 382–399, https://doi.org/10.1111/j.1467–856X.2009.00377.x

Davrados, 'Financial Turmoil as a Change of Circumstances Under Greek Contract Law', in B. Başoğlu (ed.), *The Effects of Financial Crises on the Binding Force of Contracts—Renegotiation, Rescission or Revision* (Cham: Springer, 2016), pp. 145–162

Domurath, I., *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart, 2020)

Financial Conduct Authority, 'Proposals for a Price Cap on High-Cost Short-Term Credit', CP14/10 (15 July 2014), https://www.fca.org.uk/publications/consultation-papers/cp14-10-proposals-price-cap-high-cost-short-term-credit

Fourastié, J., *Les trente glorieuses ou la révolution invisible de 1946 à 1975* (Paris: Fayard: 1979)

Frerichs, S., 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law', *Economic Sociology European Electronic Newsletter* 10.3 (2009), 20–25

Furman, J., and J. E. Stiglitz, 'Economic Crises: Evidence and Insights from East Asia', *Brookings Papers on Economic Activity* 29.2 (1998), 1–136

Gardner, J., *The Future of High-Cost Credit. Rethinking Payday Lending* (London: Hart Bloomsbury, 2022)

Gierke, O. von, *Die soziale Aufgabe des Privatrechts* (Berlin: Springer, 1889)

Grund, S., 'Restructuring Argentina's Sovereign Debts. Navigating the Legal Labyrinth' (2019), https://ssrn.com/abstract=3485370

Hondius, E., and E. C. Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge, UK: Cambridge University Press, 2011), https://doi.org/10.1017/CBO9780511763335

Joerges, C., 'The European Economic Constitution and its Transformation through the Financial Crisis', in D. Patterson and Södersten (eds), *A Companion to European Union Law and International Law* (Oxford: Wiley, 2016), pp. 242–261

Jönsson, S., *A Comparative History of Bank Failures. From Medici to Barings* (London: Routledge, 2021)

Kindleberger, C. P., *Manias, Panics and Crashes: A History of Financial Crises* (London: Wiley, 2005)

Kingsford-Smith, D., and O. Dixon, 'The Consumer Interest and the Financial Markets', in N. Moloney, E. Ferran, and J. Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015), pp. 697–735, https://doi.org/10.1093/OXFORDHB/9780199687206.013.25

Leone, C., 'Transparency Revisited—On the Role of Information in the Recent Case-Law of the CJEU', *European Review of Contract Law* 10.2 (2014), 312–325, https://doi.org/10.1515/ercl-2014-0012

Mak, V., *Legal Pluralism in European Contract Law* (Oxford: Oxford University Press, 2020)

Mak, V., and J. Braspenning, 'Errare humanum est. Financial Literacy in European Consumer Credit Law', *Journal of Consumer Policy* 35 (2012), 307–332, https://doi.org/10.1007/s10603-012-9194-0

McGaughey, E., 'Introduction: A Social Law Beyond Public v Private, English translation of Otto von Gierke, The Social Role of Private Law', *German Law Journal* 19.4 (2018), 1017–1116, https://doi.org/10.1017/S207183220002294X

Mian, A., and A. Sufi, *House of Debt. How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again* (Chicago, IL: University of Chicago Press, 2015)

Micklitz, H. W., 'Access to and Exclusion from Financial Markets after the Global Financial Crisis', in T. Wilson (ed.), *International Responses to Issues of Credit and Over-Indebtedness in the Wake of the Crisis* (Burlington, VT: Ashgate, 2013), pp. 47–75

Micklitz, H. W., 'Failure or Ideological Preconceptions? Thought on Two Grand Projects: The European Constitution and the European Civil Code', in K. Tuori and S. Sankari (eds), *The Many Constitutions of Europe* (Farnham: Ashgate, 2010), pp. 109–142

Micklitz, H. W., and N. Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)', *Common Market Law Review* 51 (2014), 771–808, https://doi.org/10.54648/cola2014061

Minsky, H. P., 'The Financial Instability Hypothesis', in Ph. Arestis and M. Sawyer (eds), *The Elgar Companion to Radical Political Economy* (Cheltenham: Elgar, 1994), pp. 153–158

Mishkin, F. S., 'Lessons from the Asian crisis', *Journal of International Money and Finance* 18 (1999), 709–723

Moloney, N., *EU Securities and Financial Markets Regulation* (Oxford: Oxford University Press, 2014)

Momberg Uribe, R., 'Beyond the Risk: Swaps, Financial Crisis and Change of Circumstances. Comparative Case Note. Supreme Court of Portugal—10.10.2013. Conclusions', *European Review of Private Law* 23 (2015), 149–151, https://doi.org/10.54648/erpl2015005

Musacchio, A., 'Mexican Financial Crisis of 1994–1995', in G. Caprio (ed.), *The Evidence and Impact of Financial Globalization* (London: Elsevier, 2012), pp. 657–667

Nietzsche, F., *Zur Genealogie der Moral. Eine Streitschrift* (Leipzig: Naumann, 1887)

Oliver, M. J., 'Financial Crises', in M. J. Oliver and D. H. Aldcroft (eds), *Economic Disasters of the Twentieth Century* (Cheltenham: Elgar, 2007), p. 205

Pistor, K., *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton, NJ: Princeton University Press, 2019)

Pistor, K., 'A Legal Theory of Finance', *Journal of Comparative Economics* 41 (2013), 315–330, http://dx.doi.org/10.2139/ssrn.2262936

Polanyi, K., *The Great Transformation. The Political and Economic Origins of Our Time* (Boston, MA: Beacon Press, 2001)

Posner, E. A., *Last Resort. The Financial Crisis and the Future of Bailouts* (Chicago, IL: University of Chicago Press, 2018)

Pulgar, J., 'A Contractual Approach to Overindebtedness: rebus sic stantibus Instead of Bankruptcy', in L. Nogler and U. Reifner (eds), *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven International Publishing, 2014), p. 534

Ramsay, I., *Personal Insolvency in the 21st Century. A Comparative Analysis of the US and Europe* (London: Bloomsbury, 2017)

Reinhart, C. M., and K. S. Rogoff, *This Time is Different. Eight Centuries of Financial Folly* (Princeton, NJ: Princeton University Press, 2009)

Renner, M., 'Death by Complexity. The Financial Crisis and the Crisis of Law in World Society', in P. F. Kjaer, G. Teubner, and A. Febbrajo (eds), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation* (Oxford: Hart, 2011), pp. 93–111

Rodrik, D., 'Who Needs Capital-Account Convertibility?', *Princeton Essays in International Finance* 207 (1998)

Serozan, R., 'General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision', in B. Başoğlu (ed.), *The Effects of Financial Crises on the Binding Force of Contracts—Renegotiation, Rescission or Revision* (Cham: Springer, 2016), pp. 3–32

Spooner, J., 'The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law: The Case of Ireland and the Troika', Modern Law Review 81 (2018), 790–824, https://doi.org/10.1111/1468-2230.12365

Svetiev, Y., and A. Ottow, 'Financial Supervision in the Interstices Between Private and Public Law', *European Review of Contract Law* 10.4 (2014), 496–544, https://doi.org/10.1515/ercl-2014-0023

Swedberg, R., 'The Case for an Economic Sociology of Law', Theory and Society 32.1 (2003), 1–37, https://doi.org/10.1023/A:1023005905397

Takagi, S., 'Argentina's Default of 2001', in G. Caprio (ed.), *The Evidence and Impact of Financial Globalization* (London: Elsevier, 2012), pp. 709–719

Wallinga, M., *EU Investor Protection Regulation and Liability for Investment Losses. A Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law* (Cham: Springer, 2020), https://doi.org/10.1007/978–3-030–54001–2

Wilson, T., 'The Responsible Lending Response', in T. Wilson (ed.), *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Farnham: Ashgate, 2013), pp. 109–134