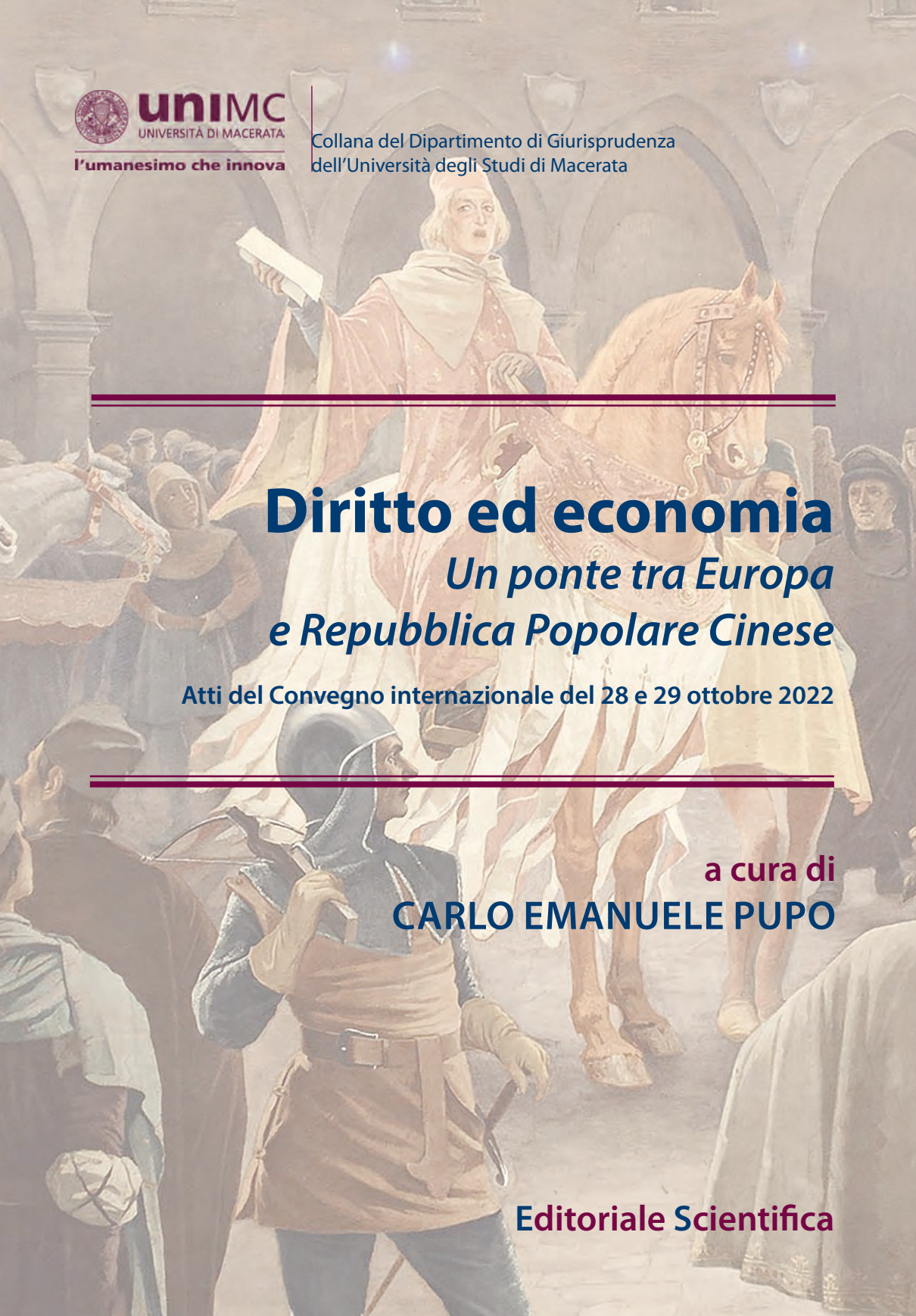

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Collana del Dipartimento di Giurisprudenza
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Diritto ed economia

Un ponte tra Europa e Repubblica Popolare Cinese

Atti del Convegno internazionale del 28 e 29 ottobre 2022

a cura di
CARLO EMANUELE PUPO

Editoriale Scientifica

DIRITTO ED ECONOMIA. UN PONTE TRA EUROPA E REPUBBLICA POPOLARE CINESE

ATTI DEL CONVEGNO INTERNAZIONALE
DEL 28 E 29 OTTOBRE 2022

A cura di **Carlo Emanuele Pupo**

EDITORIALE SCIENTIFICA

La pubblicazione del presente volume usufruisce di fondi del Dipartimento di Giurisprudenza dell'Università degli Studi di Urbino e della Cattedra Jean Monnet retta dal Prof. Alessio Bartolacelli

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INDICE

PREFAZIONE

Il presente volume raccoglie buona parte degli studi presentati al convegno tenutosi a Macerata il 28 e 29 ottobre 2022 e la sua suddivisione in riflessioni di stampo giuridico e analisi di natura economica ripropone quella che ha contraddistinto le due giornate maceratesi, caratterizzate – e anche di ciò questa pubblicazione è fedele specchio – da una preponderanza delle prime sulle seconde che era in fondo inevitabile, attesa la sede accademica – il Dipartimento di Giurisprudenza dell'Università degli Studi di Macerata – che ha dato vita al progetto di ricerca e visto la prima diffusione dei risultati scientifici cui il *team* di studiosi è pervenuto.

I mesi trascorsi dai lavori congressuali non hanno ovviamente reso meno interessante la tematica oggetto di riflessione, ovvero la comparazione su diversi piani e attraverso differenti strumenti d'indagine tra la realtà italiana e quella della Repubblica Popolare Cinese.

Come sa chi ha preso parte al percorso di ricerca sin dalla sua fase iniziale, la scelta della Cina come termine di riferimento dell'approccio comparatistico è stata sostanzialmente obbligata, in quanto dettata a un tempo vuoi dal più ampio progetto che aveva condotto l'anzidetto dipartimento nel novero dei Dipartimenti d'Eccellenza vuoi dai legami plurisecolari – e ciononostante tuttora vivacissimi e concernenti molteplici ambiti – tra la città e l'ateneo di Macerata e quello che un tempo era noto come il "Celeste Impero".

Tuttavia mai "imposizione" fu più benvenuta, perché sarebbe stato ben difficile approdare ad un *case study* maggiormente stimolante. Da un lato, infatti, qualsiasi studioso di scienze umane non può non avvertire il desiderio di comprendere come sia stato possibile che una nazione sia passata, nel giro di pochi decenni, da una condizione di assoluta povertà, contraddistinta dalla catastrofe della "Grande Carestia" (三年大饥荒, letteralmente: "Tre Anni di Carestia") all'assurgere a seconda economia del pianeta. Dall'altro, è forse di pari interesse il fatto che tale mutamento si sia avviato subito dopo gli anni del c.d. nichilismo giuridico, ovvero contrassegnati dalla dissoluzione dell'intero apparato normativo e giudiziale e più in generale dal rifiuto del concetto stesso di diritto inteso in senso moderno; anni cui avrebbe fatto seguito, con l'avvento al potere

di Deng Xiaoping, un percorso di ripristino dell'ordinamento e più in generale del sistema legale che non è a tutt'oggi concluso – e d'altronde il primo Codice civile della RPC (中华人民共和国民法典) è entrato in vigore solo il 1 gennaio del 2021 – e che è basato sulla coesistenza di numerosi elementi d'importazione con altri ascrivibili alla tradizione giuridica o quantomeno culturale cinese, in cui notoriamente rivestono un ruolo di primo piano i precetti del Confucianesimo.

In una seria disamina di questa transizione, non è possibile scindere il dato giuridico da quello economico e ciò rende una volta di più ragione delle due sessioni in cui si è articolato l'evento maceratese e, conseguentemente, anche la raccolta degli atti introdotta da questa prefazione.

L'apertura al mercato voluta da Deng Xiaoping sul finire degli anni '70 dello scorso secolo nasce infatti dalla constatazione che la Cina presentava un estremo bisogno di capitali e di tecnologia e ciò non consentiva più di mantenere un assetto in cui ogni realtà produttiva era necessariamente pubblica e in definitiva strutturata o come *State-Owned Enterprise* (国 有企业) a guida governativa o come *Collectively-Owned Enterprise* (集体企业), cioè come ente non societario controllato a livello locale. Le strutture in questione iniziano dunque a essere trasformate in società commerciali e a un sistema economico totalmente pianificato viene lentamente a subentrare il c.d. "socialismo con caratteristiche cinesi" (中国特色社会主义) o "socialismo di mercato" (市场社会主义), in cui trovano spazio anche le imprese straniere: nel 1979 viene difatti promulgata, con una decisione ritenuta rivoluzionaria, la legge sulle *Sino-foreign Equity Joint Venture* (中华人民共和国中外合资经营企业法) cui seguirà, nel 1986, l'emanazione della legge sulle società a capitale interamente straniero note come *Wholly Foreign-Owned Enterprise* (中华人民共和国外资企业法) e infine, nel 1988, l'introduzione delle *Cooperative* (o *Contractual*) *Joint Venture* (中 华人民共和国中外合作经营企业法).

Negli ultimi decenni il quadro è però ancora una volta mutato, divenendo oggetto di un'evoluzione che è in effetti ben lungi dall'essere conclusa. La Repubblica Popolare Cinese è oggi la maggiore destinazione nel mondo di capitale straniero ed è dunque venuta meno la principale *ratio* di una legislazione palesemente volta ad agevolare l'afflusso di risorse economiche dall'estero. Da qui, dunque, la cosiddetta *Foreign Investment Law* (外商投资法) del 2020, la quale ha disegnato un assetto in cui imprese estere e aziende cinesi dovrebbero competere su un piano di quasi-parità.

Lo scenario che in tal modo si pone di fronte agli occhi dello studioso – a prescindere dal fatto che si tratti di un giurista o di un economista – appare allora assolutamente originale e perciò evocativo di nuove categorie, come per l'appunto accade quando esso viene considerato un sistema di "capitalismo politico", in quanto tale contrapponibile al "capitalismo liberale", caratteristico delle democrazie occidentali.

Anche per questo motivo appaiono dunque particolarmente preziosi gli studi raccolti in questo volume. Al di là del loro oggettivo, intrinseco valore, essi infatti apportano degli elementi utili a offrire una risposta a un quesito che è il naturale portato delle vicende appena descritte, vale a dire alla necessità di comprendere se il lavoro di costruzione dell'attuale ordinamento cinese abbia avuto un rilievo determinante nella vertiginosa crescita dell'economia di quel Paese o se viceversa quest'ultima trovi la sua origine esclusivamente in elementi extra-giuridici. Certo, è ben difficile che dalla mera lettura dei lavori qui presentati si possa giungere a una conclusione definitiva al riguardo; ciò non toglie, tuttavia, che dalle pagine che seguono emergono innumerevoli e intriganti spunti di riflessione.

Detto ciò, il mio compito di prefatore termina con i doverosi e sinceri ringraziamenti, destinati innanzitutto a coloro che hanno reso possibile sia il progetto di studi di cui sono stato il responsabile scientifico sia il presente, correlato tomo, sostenendone i relativi costi. Il suddetto progetto è stato infatti finanziato dal già ricordato Dipartimento di Giurisprudenza dell'Università degli Studi di Macerata, mentre i fondi necessari alla collazione degli atti congressuali sono stati messi a disposizione dal Dipartimento di Giurisprudenza dell'Università degli Studi di Urbino – dove sono attualmente incardinato quale RTDb di diritto commerciale – e dal Prof. Alessio Bartolacelli attraverso la Cattedra Jean Monnet di cui egli è titolare.

Non posso però concludere questa introduzione se non esprimendo i più sentiti ringraziamenti a tutti gli Studiosi che hanno preso parte al percorso di ricerca sinteticamente tratteggiato in queste righe e più ancora a quelli fra loro che hanno acconsentito a che gli esiti delle proprie riflessioni confluissero in questa sede.

Bologna-Macerata, luglio 2023

Carlo Emanuele Pupo

SEZIONE I.

IL DIRITTO

Mariasofia Houben*

CAPITALE SOCIALE, PATRIMONIO E RESPONSABILIZZAZIONE DEGLI AMMINISTRATORI: BISOGNA CAMBIARE TUTTO AFFINCHÉ NULLA CAMBI?

1. *L'attualità di un dibattito sul capitale sociale*

L'istituto del capitale sociale ha giocato nel nostro ordinamento un ruolo di primaria importanza: nella vigenza del Codice di Commercio del 1882 esso era considerato *moderatore legale e contabile della vita sociale*, elemento sul quale si misuravano gli utili da distribuire, l'entità delle riserve, la necessità di addivenire a modifiche dello statuto o allo scioglimento della società[1]. Siffatta centralità è stata confermata dal codice civile del 1942: in tale occasione è stato formalizzato il suo valore organizzativo sul fronte corporativo e così il costituire parametro di misurazione delle posizioni (appunto corporative) dei soci oltre ad assolvere alla funzione di supplemento di garanzia per i creditori[2] e di strumento di produttività.

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[1] C. Vivante, *Trattato di diritto commerciale*[5], II, Milano, 1925 (rist.), n. 457, 192 ss.

[2] Per vero, sino al termine degli anni sessanta, era nettamente maggioritaria la posizione che riconosceva al capitale funzione di garanzia *diretta* e *in senso proprio* dei terzi: al riguardo si v. E. Simonetto, *Responsabilità e garanzia nel diritto delle società*, Padova, 1959; Id., *I bilanci*, Padova, 1967, 227 ss.; Id., *La conferibilità a capitale e l'iscrivibilità all'attivo del bilancio nella seconda direttiva comunitaria in rapporto alle società per azioni e alle società di persone*, in *Riv. soc.*, 1979, 1223 ss. e, per una ricostruzione, anche in chiave comparata, G.B. Portale, *Capitale sociale e conferimenti nella società per azioni*, in *Riv. soc.*, 1970, 33 ss.; Id., *Rileggendo la ristampa di un libro sul capitale sociale e la re-*

Col trascorrere degli anni, tuttavia, da una parte si è registrata una progressiva riduzione del valore reale del capitale minimo (solo parzialmente temperata dagli innalzamenti legislativi)[3], dall'altra sono emersi modelli alternativi e maggiormente flessibili per perseguire l'obiettivo della tutela dei creditori[4].

La dottrina si è quindi divisa: da una parte si sono schierati i fautori del superamento del modello basato sul capitale[5], dall'altra coloro che valorizzavano le numerose funzioni da esso assolte, non limitate né direttamente connesse alla tutela dei creditori[6].

sponsabilità interna nelle società di persone: il capitale sociale oggi, in *Riv. dir. impr.*, 2010, 202 ss.

[3] Cfr. M. Maugeri, sub *art. 2327,* in P. Abbadessa-G.B. Portale (a cura di), *Le società per azioni*, Milano, 2006, 161 ss.

[4] Si pensi ai *tests* di solvenza e liquidità di cui li § 500 del *Cal. Corp. Cod.* (1975) e nel *RMBCA* (1987) o alla regola *de solventia basada en la consideración de la liquidez*, che pone in capo agli amministratori il compito e la responsabilità di realizzare una valutazione prognostica dell'andamento dell'impresa nell'esercizio successivo e subordina la proposta di distribuzione di dividendi all'esito positivo di detta verifica. Su tali tematiche si v. G.B. Portale, *Capitale sociale e società per azioni sottocapitalizzata*, in *Trattato delle società per azioni*, diretto da G.E. Colombo e G.B. Portale, 1**, Torino, 2004, 31 ss.; F. Briolini, *Verso una nuova disciplina delle distribuzioni del netto*, in *Riv. soc.*, 2016, I, 64 ss. J.M. Garrido, *Capital social*, 538 ss. La dottrina maggioritaria ha tuttavia manifestato notevoli perplessità sull'adeguatezza e sufficienza di tale regola: si v. le considerazioni di G. Strampelli, *Distribuzioni i soci e tutela dei creditori. L'effetto degli IAS/IFRS*, Torino, 2013, 192 e M. Miola, *Capitale sociale e tecniche di tutela dei creditori*, in *La società per azioni oggi,* Milano, 2007, 436 ss. e 447 ss.

[5] La critica all'istituto del capitale ha preso avvio, com'è noto, dagli scritti di L. Enriques - J.R. Macey, *Raccolta di capitale di rischio e tutela dei creditori: una critica radicale alle regole europee sul capitale sociale*, in *Riv. soc.*, 2002, 78 ss. e L. Enriques, *Capitale sociale, informazione contabile e sistema del netto: una risposta a Francesco Denozza*, in *Giur. comm.*, 2005, I, 607 ss., e ha poi avuto ampio seguito. Si v., *ex multis* F. D'Alessandro, "*L'inutil precauzione?" (ovvero: dell'insolvenza come esternalità della funzione profilattica del capitale),* in *Riv. dir. comm.*, 2014, I, 1335; L. Salamone, *Funzione del capitale sociale e funzionamento del netto nella società a responsabilità limitata*, in *BBTC*, I, 2016, 14 ss.; J.M. Garrido, *Capital social y reglas de solvencia*, in Liber Amicorum *Jean Luis Iglesias*, Cizur Menor (Navarra), 2014, 522 ss.

[6] Per una prima difesa dell'istituto si v. F. Denozza, *A che serve il capitale? (Piccole glosse a L. Enriques - J.R. Macey,* Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules*)*, in *Giur. comm.*, 2002, I, 585 ss. Ha così preso avvio un ampio dibattito interno ed europeo sulla questione, in relazione al quale si rimanda alla puntuale ricostruzione di M. Miola, *Il sistema del capitale sociale e le prospettive di riforma del diritto europeo delle società di capitali*, in *Riv. soc.*, 2005, 1199 e ai contributi pubblicati nei volumi di M. Lutter (herausgegeben), *Das Kapital der Aktiengesellschaft*

Autorevole dottrina ha poi, com'è noto, sostenuto la tesi della necessaria non inadeguatezza del capitale sociale rispetto all'oggetto della società[7]. L'introduzione della possibilità di creare società a responsabilità limitata con capitale sociale di un euro (art. 2463, co. 4 e art. 2463-*bis*, co. 2, n. 3, c.c.) ha tuttavia messo in forte crisi tale posizione e ha apportato ulteriori argomenti a favore della tesi favorevole a un superamento delle regole sul capitale.

La questione merita oggi di essere nuovamente affrontata cambiando parzialmente prospettiva e segnatamente guardando non più all'esistenza di un principio di (non manifestamente in) adeguata capitalizzazione della società ma alla presenza di indici a favore di un principio di (non manifesta in)adeguata patrimonializzazione della società[8].

In tale prospettiva perde di rilevo l'interrogativo circa la necessità o meno che i soci apportino al momento della costituzione della società un

in Europa, Berlin, 2006 e H. Eidenmüller e W. Schön (a cura di), *Efficient Creditor Protection in European Company Law,* in *European Business Organization Review,* 7-2006/1. Per una valorizzazione del "capitale", in ragione dei molteplici significati da esso assunto e delle molteplici funzioni perseguite si v. E. Ginevra, *Il capitale sociale nel XXI secolo. Crisi e critica di un istituto*, in I. Capelli - S. Patriarca (a cura di),, *Il nuovo capitale sociale*, Milano, 2016, 17 ss. Una distinzione tra le varie accezioni del termine capitale sociale era già proposta da E. Simonetto, *Concetti e composizione del Capitale sociale*, in *Riv. Dir. Comm*., 1956, I, p. 50 s.

[7] Il riferimento è a G.B. Portale, *Capitale sociale e conferimenti nella società per azioni*, cit., 33 ss.; Id., *Capitale sociale e società per azioni sottocapitalizzata*, in Colombo-Portale, *Trattato delle s.p.a.*, 1**, Torino, 2004, 63 ss.; Id., *Dal capitale sociale «congruo» al capitale sociale zero*, in I. Capelli - S. Patriarca (a cura di), *Il nuovo capitale sociale*, Milano, 2016, 6. Per gli opportuni approfondimenti sul tema, non affrontabile nell'economia di questo lavoro, si v. G.B. Portale, *Capitale sociale e ragionevolezza nelle società di capitali*, in F. Barachini (a cura di), *Lezioni pisane di diritto commerciale*, Pisa, 2014, 58 ss. e, in maniera critica, Maugeri, sub *art. 2327 c.c.*, in Abbadessa-Portale (a cura di), *La società per azioni. Commentario*, Milano, 2016, 165 ss.; C. Angelici, *Le disposizioni generali sulla società per azioni*, in *Trattato Rescigno*, 16, Torino, 1985, 18 ss.; G. Niccolini, *Il capitale sociale minimo*, Milano, 1981, 6 ss. La posizione di Portale è stata fortemente criticata in ragione soprattutto dell'oggettiva assenza di principi capaci di definire con esattezza il rapporto di congruità tra capitale e oggetto sociale: per gli appunti più rilevanti si v. Tantini, *Capitale e patrimonio nella società per azioni*, Padova, 1980, 51 ss. e, per i rilievi sollevati in Germania ai sostenitori dell'obbligo di congruità o sufficienza del capitale sociale, gli A. citati in A. Cetra, *L'impresa collettiva non societaria*, Torino, 2003, 218, nt. 176.

[8] Sia consentito il richiamo a M. Houben, *Assetti patrimoniali (non manifestamente in) adeguati, doveri degli amministratori e (nuovo) art. 3°, lett.* a, *Codice della crisi d'impresa,* in *BBTC*, 2023, 106 ss.

capitale congruo o non manifestamente incongruo rispetto all'oggetto sociale, e diviene centrale la ricerca di elementi che confermino la presenza di una regola in base alla quale i gestore devono guardare al profilo dell'adeguata patrimonializzazione *durante societate* al fine di valutare correttamente la solvibilità prospettica delle società.

Considerato che il capitale sociale nominale rappresenta l'unica posta del patrimonio netto stabilmente asservita all'attività sociale, diviene evidente come l'accoglimento di tale posizione contribuisca anche a restituire importanza e centralità all'istituto del capitale.

Il tema risulta di interesse non solo nella prospettiva interna ma anche in quella internazionale. Il declino delle regole in materia di capitale sociale rappresenta infatti fenomeno diffuso, al quale però sovente si accompagna l'emersione di strumenti alternativi diretti ad assicurare l'operatività sociale e la protezione degli interessi degli *stakeholders* che ruotano interno alla società stessa. Di particolare interesse si presenta al riguardo l'ordinamento cinese, ove l'istituto del capitale è stato introdotto nel 1993, ma ha conosciuto un rapido declino per essere poi nuovamente valorizzato, in alcune sue declinazioni, nella recente proposta di modifica del diritto societario cinese del 30 dicembre 2022.

2. *Lo spostamento di attenzione dal capitale al patrimonio nella legislazione più recente: gli artt. 2467, co. 2 e 2086, co. 2, c.c.*

Come anticipato nel nostro ordinamento possono oggi rintracciarsi numerosi indici a sostegno dell'esistenza di un principio di non manifesta inadeguatezza del patrimonio netto rispetto all'oggetto sociale.

In primis milita a favore di tale posizione l'art. 2467, co. 2, c.c., laddove stabilisce che vanno considerati come finanziamenti soci "anomali", il cui rimborso è dunque postergato rispetto alla soddisfazione degli altri creditori, quelli "in qualunque forma effettuati, che sono stati concessi in un momento in cui, anche in considerazione del tipo di attività esercitata dalla società, risulta un eccessivo squilibrio dell'indebitamento rispetto al patrimonio netto oppure in una situazione finanziaria della società nella quale sarebbe stato ragionevole un conferimento".

La norma, com'è noto, è dettata in materia di s.r.l.; tuttavia è presente

una disposizione analoga in materia di direzione e coordinamento di società che dunque ne consente l'applicazione anche alle s.p.a. inserite in un contesto "di gruppo"[9].

I presupposti per l'operatività della postergazione del rimborso dei finanziamenti soci sono: a) il fatto che gli stessi siano stati concessi in un momento in cui vi era un eccessivo squilibrio dell'indebitamento rispetto al patrimonio netto o in una situazione finanziaria della società nella quale sarebbe stato ragionevole un conferimento; b) la permanenza di tali condizioni[10]. Attenta dottrina ha considerato la norma espressiva di

[9] Sul tema, v., da ultimo E. Fregonara, *I finanziamenti dei soci e infragruppo nelle società* in bonis *e nella procedura di liquidazione giudiziale*, in *RDS*, 4, 2021, 635 ss. e M. Houben, *Assetti patrimoniali,* cit.

[10] Per un chiarimento in merito a tali circostanze si v. M. Campobasso, *La postergazione dei finanziamenti dei soci*, in A. Dolmetta - G. Presti (a cura di), *S.r.l. Commentario* dedicato a G.B. Portale, Milano, 2011, 239 ss. La dottrina è divisa in merito all'indipendenza dei due concetti (ragionevolezza del conferimento ed eccessivo indebitamento) o all'unità del presupposto di postergazione da essi individuato: nel primo senso A. Stagno d'Alcontres - N. De Luca, *Le società. II. Le società di capitali*, Torino, 470; nel secondo Campobasso, in questa *nota,* 242, e in giur., Trib. Venezia, 14 aprile 2011. Assai controverso è se la postergazione dei finanziamenti soci operi solo in occasione di liquidazione concorsuale o volontaria della società o se invece spieghi efficacia già nell'ambito della fisiologia sociale: nel primo senso si esprimono G.B. Portale, *I "finanziamenti" dei soci nelle società di capitali*, in BBTC, 2003, 681; e, in giur., Trib. Milano, 4 giugno 2013, in *Giur. comm.*, 2015, II, 160 ss. e già in Trib. Milano, 24 aprile 2007, in *Giur. it.*, 2007, 2550, con nota di O. Cagnasso, *Prime prese di posizione giurisprudenziali in tema di finanziamenti dei soci di società a responsabilità limitata* e pubblicata altresì in BBTC, 2007, II, 610 ss. con nota di G. Balp, *Sulla qualificazione dei finanziamenti dei soci* ex *art. 2467 c.c. e sull'ambito di applicazione della norma.* A favore invece della tesi "sostanzialistica": A. Bartalena, *I finanziamenti dei soci nella s.r.l.*, in *AGE*, 2003, 395 e 397; M. Maugeri, *Finanziamenti "anomali" dei soci e tutela del patrimonio nelle società di capitali*, Milano, 2005, 109; G. Presti, sub *art. 2467*, in *Codice commentato delle s.r.l.*, diretto da Benazzo-Patriarca, Torino, 2006, 119 ss.; G. Balp, *I finanziamenti dei soci "sostitutivi" del capitale di rischio: ricostruzione della fattispecie e questioni interpretative*, in *Riv. soc.*, 2007, 364; O. Cagnasso, *Le società a responsabilità limitata*, in *Trattato* Cottino, Padova, 2007, 110 ss.; M. Campobasso, in questa *nota,* 252 ss.; N. Abriani, *Finanziamenti «anomali» dei soci e regole di corretto finanziamento nelle società a responsabilità limitata*, in *Il diritto delle società oggi. Innovazioni e persistenze. Studi in onore di G. Zanarone*, diretto da Benazzo, Cera, Patriarca, Torino, 2011, 337 ss., e in giur., Cass., 20 agosto 2020, n. 17421, in *Giur. it.*, 2021, 1135, con nota di E. Fregonara, *I finanziamenti dei soci: valutazione del presupposto e natura della postergazione*; Cass., 15 maggio 2019, n. 12994, disponibile sul sito www.ilSocietario.it; Trib. Roma, 6 febbraio 2017, in BBTC, 2018, II, 374 ss. con nota di Messore. La tesi sostanzialista afferma l'esistenza del dovere degli amministratori di valutare le condizioni di

«principi di pregnante valore sistematico» dai quali si ricava un dovere di subordinare le *distribuzioni ai soci* al superamento di un *solvency test*[11]. In ogni caso, è indubitabile il rilievo da essa attribuito all'aspetto dello "squilibrio dell'indebitamento rispetto al patrimonio netto" e in particolare il costituire una siffatta situazione un indice di allarme dal quale deriva un mutamento delle regole di comportamento che presiedono alle scelte sociali. Il legislatore richiama infatti l'attenzione dei gestori sul patrimonio netto e sulla sua consistenza "relazionale", chiedendo di valutarlo alla luce dell'attività svolta in concreto e dell'indebitamento della società, e ponendo quale parametro il "non eccessivo squilibrio" tra quello (patrimonio netto) e questo (indebitamento). Ciò pone, si badi bene, non la necessità di un equilibrio tra i due fattori indicati, difficilmente valutabile dai gestori con continuità, ma di un mero non *eccessivo squilibrio*, dichiarando la plausibilità e la fisiologicità di un eventuale sbilancio "relativo" fino al punto in cui questo non divenga così ampio da assumere la caratteristica di eccessività (anch'essa, a dire il vero, di non facile identificazione).

Nella stessa direzione pare orientato l'art. 2086, co. 2, c.c., ai sensi del quale "l'imprenditore, che operi in forma societaria o collettiva, ha il dovere di istituire un assetto organizzativo, amministrativo e contabile adeguato alla natura e alle dimensioni dell'impresa, anche in funzione della rilevazione tempestiva della crisi dell'impresa e della perdita della continuità aziendale, nonché di attivarsi senza indugio per l'adozione e l'attuazione di uno degli strumenti previsti dall'ordinamento per il superamento della crisi e il recupero della continuità aziendale".

Sul presupposto che l'assetto patrimoniale costituisca parte essenziale dell'assetto organizzativo[12], può allora affermarsi l'esistenza di un obbli-

solvibilità della società e procedere al rimborso dei finanziamenti ai soci solo in caso di esito positivo di detta verifica, facendo perno sull'estensione analogica dell'obbligo di conservazione dell'integrità del patrimonio sociale *ex* art. 2394, comma 1°, c.c. o sui principi generali della responsabilità contrattuale o extracontrattuale: per un esame dettagliato al riguardo si v. M. Campobasso, in *questa* nota, 252 e G. Presti, in *questa* nota, 119.

[11] F. Briolini, *Verso una nuova disciplina delle distribuzioni del netto*, in *Riv. soc.*, 2016, I, 80 ss.

[12] Per la ricomprensione dell'assetto patrimoniale all'interno degli assetti organizzativi si v. V. Buonocore, *Adeguatezza, precauzione, gestione, responsabilità: chiose sull'art. 2381, commi terzo e quinto, del codice civile,* in *Giur. comm.*, 2006, I, 5 ss.

go degli amministratori (anche di s.r.l.) di valutarne (costantemente) la *sufficienza* (o quantomeno la *non manifesta inadeguatezza*) rispetto alla programmata produzione. Tra i doveri dei gestori ai sensi dell'art. 2086, co. 2, c.c. (e già dell'art. 2381) potrebbe allora anche identificarsi quello di selezionare e garantire la permanenza nella società di risorse che possano dirsi sufficienti alla realizzazione dell'offerta produttiva programmata. In particolare essi sono chiamati a verificare che lo svolgimento dell'iniziativa si realizzi in un contesto che manifesti l'attitudine alla solvibilità e la correlata esistenza di una solidità patrimoniale e dunque l'esistenza e la persistenza di una situazione di equilibrio patrimoniale ed economico-finanziario.

La tesi è suffragata dall'insegnamento proveniente dagli studi di economia aziendale secondo il quale vi è una relazione di reciproca influenza tra gli elementi indicati, con la conseguenza che la mancanza di una solidità patrimoniale rischia di risolversi anche in una fragilità finanziaria (la mancanza di risorse finanziarie per far fronte alle proprie obbligazioni) e richiede in ogni caso ai gestori di valutare con particolare attenzione la sostenibilità dell'iniziativa[13]. Al contempo, in assenza di prospettive economiche i valori patrimoniali vedono compromesso il proprio significato, mentre mancando il necessario equilibrio finanziario appare pregiudicata anche la prospettiva economica[14]. Lo squilibrio di anche solo una delle componenti indicate, ad esempio quella patrimoniale (patrimonio

[13] Si tratta di insegnamento consolidato: si v. le pagine di G. Airoldi - G. Brunetti - V. Coda, *Corso di economica aziendale*, Bologna, 2020, 436, ove si sottolineano le «numerose e importanti interrelazioni» che intercorrono tra la gestione patrimoniale, finanziaria, "caratteristica" e tributaria, le quali manifestano il «carattere di unitarietà delle combinazioni economiche»; Id., *Lezioni di economia aziendale*[2], Bologna, 1997, 327; E. Cavalieri - R. Ferraris Franceschi, *Economia aziendale*, I, *Attività aziendale e processi produttivi*[4], Torino, 2010, 184 ss., i quali evidenziano «i rapporti di complementarietà che legano reciprocamente tutte le operazioni dell'impresa e spingono a sottolineare l'unitarietà della gestione»; L. Marchi, *Introduzione all'economia aziendale. Il sistema delle operazioni e le condizioni di equilibrio aziendale*[3], Torino, 2000, 519 ss.; P. Onida, *Economia d'azienda*[3], in *Trattato di economia*, diretto da Del Vecchio e Arena, IX, Torino, 1985 (ristampa), 443. Il tema è riproposto e sviluppato in ambito giuridico da A. Cetra, *L'impresa collettiva*, cit., 224.

[14] Vd. F. Capalbo, *L'analisi delle condizioni di squilibrio in sede di verifica dei requisiti di accesso alla composizione negoziata della crisi*, in *www.dirittodellacrisi.it*, 25 marzo 2022, 4, il quale osserva che in assenza di un equilibrio finanziario «nessuna prospettiva economica, per quanto positiva, potrà mai realizzarsi».

netto negativo) o economica (la realizzazione di perdite), rischia di riverberare in negativo sulle altre e di far precipitare la società verso uno stato di dissesto[15] e rappresenta allora una *red flag* per i gestori.

La mancanza di equilibrio tra le fonti di finanziamento, e *in primis* lo squilibrio tra mezzi propri e mezzi di terzi pone, d'altra parte, la società in una condizione di precarietà rendendola strutturalmente incapace di reagire agli eventi negativi che possono generarsi nell'ambiente in cui si svolge l'attività. In particolare, la mancanza di equilibrio economico e finanziario[16] espone la società a uno specifico rischio: quello di non essere in grado di reagire alle situazioni che gli studiosi di economia aziendale qualificano come *rischio-limite*: ossia agli eventi negativi che, sulla base dei dati a disposizione, si ha ragione di aspettarsi[17].

In tale prospettiva l'inadeguatezza del patrimonio non implica, *di per sé*, l'assenza di una prospettiva di continuità aziendale, ma rappresenta *un elemento di criticità* degli assetti in conseguenza del quale gli amministratori sono tenuti a prestare particolare attenzione alla situazione economico-finanziaria dell'impresa. I gestori sono pertanto tenuti a valutare se la dotazione patrimoniale e finanziaria di cui dispone l'impresa sia (anche a dispetto di un capitale "misero") adeguata alle (variabili) esigenze poste dal ciclo produttivo e dunque se la società sia in grado di far fronte agli impegni assunti anche al verificarsi dell'ipotesi peggiore tra quelle sospettabili alla luce delle circostanze esistenti. In mancanza di tali condizioni i gestori dovranno adottare i provvedimenti necessari[18].

[15] Si v. al riguardo le osservazioni di F. Capalbo, *L'analisi delle condizioni di squilibrio in sede di verifica dei requisiti di accesso alla composizione negoziata della crisi*, cit., 10: la presenza di uno squilibrio economico genera sempre, nel lungo periodo uno squilibrio finanziario e questo poiché un'entità che non genera valore non è neppure in grado di generare cassa. Ne consegue che, ad un certo punto, non disporrà più delle risorse finanziarie per far fronte ai propri debiti.

[16] La relazione biunivoca che lega questi due aspetti, e allora l'influenza reciproca che si genera tra l'assenza dell'uno e la successiva (o prodromica) assenza dell'altro si v. A. Cetra, *L'impresa collettiva,* cit., 224, richiamando i principi dell'economia d'azienda.

[17] Al riguardo v. P. Capaldo, *Reddito, capitale e bilancio di esercizio. Una introduzione*, Milano, 1998, 18 ss.; G. Racugno, *L'ordinamento contabile delle imprese*, in *Trattato di diritto commerciale*, diretto da V. Buonocore, I, 5, Torino, 2001, 30, nt. 100.

[18] A tal proposito, si pensi all'accesso alla richiamata composizione negoziata.

3. *Segue: Gli artt. 3, co. 3, lett. a, e 12, co. 1, Codice della Crisi d'impresa e la conferma dell'esistenza di un dovere degli amministratori di assicurare una patrimonializzazione non palesemente inadeguata della società*

Tale impostazione ha poi trovato conferma nel nuovo testo dell'art. 3, co. 3, lett. *a*, c.c.i.i., ove si richiede che, ai fini della rilevazione tempestiva della crisi d'impresa, gli assetti devono consentire, tra le altre cose, di rilevare eventuali *squilibri di carattere patrimoniale o economico-finanziario*, rapportati alle specifiche caratteristiche dell'impresa e dell'attività imprenditoriale svolta dal debitore.

L'uso della disgiuntiva "o" rende ben chiaro come lo squilibrio di anche solo uno dei due fattori (e per vero, anche solo quello economico o quello finanziario)[19] sia idoneo ad incidere sull'equilibro complessivo, rappresentando quelli differenti dimensioni di una stessa realtà. Gli assetti organizzativi possono allora costituire lo strumento per monitorare l'equilibrio economico-finanziario (e dunque l'esistenza di una situazione di solvibilità a medio-lungo termine)[20] e per realizzare una valutazione prognostica circa il futuro andamento della gestione.

I riflessi di tale cambio di prospettiva sono significativi: aderendo alla posizione enunciata si giunge ad affermare che il vincolo di non manifesta inadeguatezza del patrimonio entra a far parte dei doveri di corretta gestione degli amministratori, e se ne ammette allora l'esistenza in tutte le tipologie azionarie, comprese le s.r.l.[21]

Il punto è ribadito anche in un altro articolo del Codice della Crisi e dell'insolvenza e, segnatamente, all'art. 12, co. 1, in materia di proposta di composizione negoziata della crisi. Più precisamente, esso stabilisce che l'imprenditore commerciale e agricolo può chiedere la nomina di un esperto al segretario generale della camera di commercio, industria, artigianato e agricoltura nel cui ambito territoriale si trova la sede legale

[19] Al riguardo, anche per esempi pratici in merito al rapporto di influenza reciproca tra equilibrio/squilibrio economico ed equilibrio/squilibrio finanziario, v. F. Capalbo, *L'analisi delle condizioni di squilibrio in sede di verifica dei requisiti di accesso alla composizione negoziata della crisi*, cit., 10 ss.

[20] Così M. Spiotta, *Continuità aziendale e doveri degli organi sociali*, Milano, 2017, 149.

[21] Sulla questione, diffusamente, E. Ginevra - C. Presciani, *Il dovere di istituire assetti adeguati* ex *art. 2086* c.c., in *NLCC*, 2019, 1223.

dell'impresa quando si trovi "in condizioni di squilibrio patrimoniale o economico-finanziario che ne rendono probabile la crisi o l'insolvenza e risulta ragionevolmente perseguibile il risanamento dell'impresa".

Dalla lettura congiunta degli artt. 2086, co. 2, 2467, co. 2, c.c. e artt. 3, co. 3, lett. *a*, e 12, co. 1, Codice della Crisi e dell'insolvenza emerge allora una chiara indicazione del legislatore nella direzione dell'esistenza di un dovere degli amministratori di monitorare la società e in particolare di verificare che non via sia una situazione di "squilibrio" (non solo di carattere finanziario, ma anche e soprattutto di carattere) patrimoniale capace di portare la società verso l'insolvenza. Sembra dunque possibile ritenere che esista un principio di non manifesta inadeguata patrimonializzazione della società, chiamato a presiedere alle verifiche che i gestori sono tenuti a svolgere e che rappresenta un possibile indice di una situazione anomala capace di pregiudicare la solvibilità prospettica della società.

4. *La nascita e la perdita di fortuna dell'istituto del capitale in Cina*

L'indagine in merito all'evoluzione dell'istituto del capitale nell'ordinamento cinese deve prendere le mosse dalle peculiarità di tale sistema. Difatti, fino agli anni settanta, esso conosceva un'economia dominata dallo Stato: tutte le risorse erano sostanzialmente nelle sue mani e venivano distribuite secondo schemi decisi a livello amministrativo e politico. Al contempo, e in misura determinante, lo Stato e le società da esso interamente controllate erano gli unici soggetti autorizzati a intraprendere attività imprenditoriali e a realizzare investimenti, mentre ai singoli non era consentito creare associazioni a fini commerciali o non commerciali. Timidi cambiamenti in questo quadro si registrarono sul finire degli anni settanta, quando si decise di muovere verso un sistema economico maggiormente *market-oriented* dando avvio al noto *boom* economico[22]. Il 29

[22] Nonostante i notevoli passi in avanti, la transizione verso una piena economia di mercato non è tuttavia ancora stata pienamente realizzata, giocando lo Stato ancora un ruolo determinante soprattutto grazie alle società da esso controllate, che dominano determinati settori, anche in ragione dei trattamenti preferenziali garantiti a esse e ai loro dipendenti. Cfr. R. Chen, *From Legal Capital to Subscribed Capital*, in *German and Asian Perspectives on Company Law,* edited by H. Fleischer, H. Kanda, K.S. Kim and P. Mülbert, *Mohr Siebeck,* 2016, 183; R. Chen, *The Evolution of Corporate Law in China: A*

dicembre 1993 vide poi la luce la prima legislazione in materia societaria, la *Company Law of the People's Republic of China* (China's Company Law "CCL", entrata in vigore il 1 luglio 1994)[23]. Si trattava di un testo fortemente ispirato alle legislazioni continentali e, in particolare, incentrato sul concetto di capitale[24], declinato nel *minimal registered capital* e in regole volte a garantire la formazione del capitale reale e la sua conservazione nel tempo. Il sistema del capitale costruito nella CCL del 1994 ruotava essenzialmente intorno a quattro elementi: *a)* il capitale minimo, fissato dalla legge *b)* la "fissità" del capitale nominale cristallizzato dai soci, certificato da un ufficio pubblico e registrato nel registro delle società (the *State Administration of Industry and Commerce "SAIC")*, il quale poteva essere utilizzato solo per gli scopi sociali e non poteva essere restituito ai soci; *c*) l'obbligo di immediata liberazione (esclusivamente) in denaro del capitale sottoscritto; *d)* le limitazioni alle distribuzioni di dividendi e, più in generale, le restrizioni agli atti di disposizione della parte del netto corrispondente al capitale registrato[25].

In relazione al punto *a)*, il capitale sociale minimo richiesto per le *Companies limited by shares* (CLSs assimilabili alle *corporations* americane, definite anche *joint stock company*) era di 10 milioni di *renminbi* (RMB)(art. 78, CCL 1994) mentre quello previsto per le *limited liability companies* (LLCs) (che non svolgevano particolari tipi di attività) era di 500,000 RBM (equivalenti a circa 60,000 euro, art. 23, della CCL del 1994)[26].

Tale impostazione è stata sostanzialmente mantenuta nella prima

Mission Possible to Reform State-owned Enterprises?, in Wang/Chang/Shen (eds.), *Private Law in China and Taiwan: Economic and Legal Analyses*, Cambridge, 2016, passim.

[23] In merito all'evoluzione di questo sistema, in particolare le modifiche registrate a partire dal 1978 in avanti, suddivisa in diverse fasi (I:1978-1984; II:1984-1986; III:1987-1992; IV: 1993 - v. L.S. Liu, *Corporate finance and governance in China. Marketization and Company Law Reform in China*, disponibile su www.ssrn.com, p. 32 ss.

[24] Al riguardo, ancora L.S. Liu, *Corporate finance and governance in China*, cit.

[25] Per ulteriori dettagli si v. S. Wei, *Fading Registered Capital Rules under the Amended Chinese Company Law: Sweeping Changes in Uncertain Contexts*, in *International Company and Commercial Law Review*, 2014, 272.

[26] L'ordinamento cinese conosce difatti due "tipi" di società: la Limited liability companies (LLCs), simili alle *private companies* e le 2) *Companies limited by shares* (CLSs), al cui interno sono ricomprese le *public* and le *private companies*. Solo la seconda categoria include le società con azioni quotate sul mercato. Il limite previsto per la prima categoria era più elevato in caso di esercizio di determinate attività: v. al riguardo X. Li, *Intro-*

grande modifica del 27 ottobre 2005 (entrata in vigore il 1° gennaio 2006)[27], in occasione della quale si decise di incidere sul capitale minimo, portandolo – per le società non operanti in settori "speciali" – a 5 milioni di RMB per le CLSs (art. 81, CCL 2006) e a 30,000 RMB per le LLCs (art. 26, CCL del 2006). La tendenza ad "alleggerire" gli oneri cui erano soggette le società in sede di costituzione interessò anche le regole attinenti il capitale reale, stabilendosi un obbligo di immediato versamento del solo 20% del capitale registrato e sottoscritto, parzialmente "compensato" dalla fissazione di un lasso temporale ben preciso entro il quale effettuare i versamenti residui, pari a due anni per le società diverse da quelle di investimento e a cinque anni per queste ultime (art. 81, CCL 2006). Residuavano invece forti limitazioni in merito ai conferimenti in natura, permessi solo in limitate e prefissate ipotesi (art. 31, CCL 2006), sottoposti a un procedimento di stima da parte di un terzo e, comunque legislativamente limitati a una cifra non maggiore del 70% del capitale registrato (art. 27, CCL 2006).

La situazione è mutata significativamente nel 2013: a un cambio nella guida politica del Paese ha corrisposto una netta presa di posizione nella direzione della riduzione dei costi necessari per la costituzione di una società e dell'incoraggiamento degli investimenti nel settore privato[28]. Con la riforma del 28 dicembre 2013 (entrata in vigore il 1° marzo 2014)[29] lo *State Counsil* cinese ha abolito il "capitale sociale registrato minimo", le verifiche ad esso connesse, gli obblighi di effettuare un determinato ammontare di versamento minimo al momento della costituzione della società e le rigide tempistiche previste per il versamento dei decimi residui, e ha introdotto, al loro posto, il regime del *subscribed capital* che lascia

duction to the reform of the Corporate Capital System of Chinese Corporation law and some reflections, in *Arizona Journal of International & Comparative Law,* 33, 1, 106-107.

[27] (2006 Corporation Law).

[28] In merito agli obiettivi perseguiti dalla riforma e in particolare alla volontà di ridurre le barriere esistenti sul fronte dell'avvio di attività imprenditoriali e a quella di incrementare la libertà delle imprese v. X. Li, *Introduction to the reform of the Corporate Capital System of Chinese Corporation law and some reflections*, cit., 105 ss. e S. Wei, *Fading Registered Capital Rules under the Amended Chinese Company Law: Sweeping Changes in Uncertain Contexts*, in *International Company and Commercial Law Review*, 2014, 270 ss.

[29] Si tratta della *Registered Capital Regime Reform Plan*, emanata dallo State Council il 25 ottobre 2013 (2014 Corporation Law).

alla discrezionalità dei soci la scelta in merito al capitale da apportare e ai tempi della sua "liberazione"[30]. Ha altresì rimosso il limite relativo alla percentuale di apporti in natura, i quali non potevano in precedenza superare il 70% del capitale sottoscritto[31].

Si è così inciso sul capitale reale e sul capitale minimo, riducendo di effettività il primo ed eliminando il secondo, mentre si è lasciato in vigore e si è reso fulcro di tutto il sistema il c.d. capitale (nominale) fisso stabilito dai soci[32]. Siffatta 'impostazione "liberista" è poi stata mantenuta e proseguita con altri interventi volti a eliminare una serie di oneri associati all'esercizio dell'attività di impresa, che ne inibivano la stessa prosecu-

[30] Si v. al riguardo S. Wei, *Fading Registered Capital Rules under the Amended Chinese Company Law: Sweeping Changes in Uncertain Contexts*, cit., 272.

[31] Sono invece rimaste "formalmente" intatte le cautela associate alla corretta ed effettiva valutazione di questi beni: la legge del 2014 ha infatti mantenuto il procedimento di stima dei beni in natura e ha imposto agli azionisti di provvedere al versamento dell'eventuale differenza di valore, oltre a reputarli responsabili per l'eventuale discrepanza, anche in concorso con l'esperto (art. 31 e 208 CCL 2014). Regole dello stesso tenore presiedono agli aumenti di capitale e requisiti ancora più stringenti sono previsti per la sua riduzione, sostanzialmente incentrati sulla notifica ai creditori e sulla conseguente possibile loro opposizione (art. 178, CCL 2014). Precisi limiti circondano poi la distribuzione di dividendi, rendendoli possibile solo nella misura in cui si tratta di profitti che eccedono la cifra del capitale sociale (art. 167, CCL 2014). Su tutti questi aspetti v. R. Chen, *From Legal Capital to Subscribed Capital*, cit., 185 ss. Il procedimento di valutazione dei beni in natura è stato criticato poichè costoso da R. Chen, *From Legal Capital to Subscribed Capital*, cit., 189, il quale propone l'introduzione di strumenti alternativi prendendo spunto dall'approccio adottato negli ordinamenti anglosassoni e in quello statunitense, i quali richiedono rispettivamente l'inserimento di informazioni relative ai conferimenti in natura all'interno dello statuto oggetto di registrazione, rendendole così pubbliche (e limitando lo scrutinio delle corti agli aspetti formali), e impongono (il secondo) agli amministratori il compito e la responsabilità di compiere la valutazione.

[32] Giova al riguardo evidenziare come l'abolizione delle regole relative al capitale minimo non coinvolgano tutte le società, ma solo quelle che *non* si occupano di specifiche attività, avendo il legislatore cinese scelto di conservarsi la possibilità di fissare per queste ultime soglie minime di capitale obbligatorio (art. 26 PRC Company Law 2014). E, in effetti, limiti di capitale molto elevati sono ad esempio stabiliti per l'esercizio delle imprese di costruzioni "certificate" le quali dal 2016 devono avere un capitale minimo di 1 milione RMB che sale a 50 milioni per quelle che ambiscono alla qualificazione di imprese di "primo livello". Per le istituzioni finanziari e le cifre sono ancora più elevate: 200 milioni RMB per le società assicurative (art. 69, Insurance Law of the People's Republic of China, entrata in vigore il 1 agosto 2014) e 300 milioni per le società fiduciarie (trust companies; sec. 10, Rules on the Administration of Trust Companies del 1 marzo 2007).

zione[33] e con i recenti interventi diretti ad incentivare gli investimenti stranieri in Cina[34].

Il nuovo approccio (post 2014), condizionato dal forte sviluppo che il sistema economico cinese stava conoscendo, ha diviso la dottrina, che da una parte ha plaudito all'innovazione, reputata capace di imprimere una forte spinta al mercato e dall'altra ha manifestato profonde preoccupazioni in merito alla ridotta protezione dei creditori delle piccole e medie imprese che l'abolizione delle citate regole rischiava di determinare[35].

Messo a confronto con le regole precedenti, il descritto regime del "*subscribed capital*" si presenta capace di valorizzare la libertà contrattuale degli investitori e il funzionamento del mercato, lasciando agli azionisti e ai promotori la scelta esclusiva in merito all'entità e alla tipologia del capitale sottoscritto. Un approccio di tal sorta è apparso di particolare pregio nel contesto cinese, ove la forte burocratizzazione (e corruzione) rendeva(no) le rigide regole citate fonti di elevati costi amministrativi e transattivi per le società[36].

Il descritto allentamento delle verifiche ha tuttavia incrementato la possibilità di abusi del modello societario. La dottrina non ha mancato

[33] In occasione della promulgazione dello *Scheme for the Registration System Reform of Registered Capital* (2014) lo *State Council* ha sostituito la c.d. *annual inspection on the enterprise* con la *annual report*, eliminando in sostanza la necessità delle imprese di ottenere l'approvazione da parte degli uffici amministrativi dei loro *report* e sostituendo la "sanzione" della revoca della licenza commerciale prevista in caso di inadempimento al primo onere con un mero richiamo e l'inserimento in una lista di *abnormal business operation*. Per ulteriori dettagli in merito alle differenze tra i due adempimenti si v. D. Feo, cit., 2.

[34] Cfr. la *Foreign Investment Law of the People's Republic of China* emanata dal *National People's Congress* il 15 Marzo 2019 ed entrata in vigore il 1 gennaio 2020, la quale prevede che: "The forms of organisation, organisational structures and activities of foreign-invested enterprises will be governed by the Company Law and the Law of the Partnership Enterprise of the People's Republic of China, so that the competent authorities will not conduct a different system of administration for foreign-invested enterprises". Al riguardo si v. la notizia pubblicata da F. Monti, *La nuova disciplina straniera sugli investimenti stranieri*, in *Riv. soc.*, 2020, 331 ss.

[35] In senso critico si sono espressi R. Chen, *From Legal Capital to Subscribed Capital*, in *German and Asian Perspectives on Company Law,* edited by H. Fleischer, H. Kanda, K.S. Kim and P. Mülbert*, Mohr Siebeck,* 2016, 182; C. Hawes - A.K.L. Lau - A. Young, *Introducing the 1-Yuan Chinese Company: Impacts on the PRC Company Law Amendments on Shareholder Liability and Creditor Protection*, disponibile sul sito www.ssrn.com, 6 ss.

[36] R. Chen, *From Legal Capital to Subscribed Capital*, cit., 199.

di rilevare che attribuire ai soci il potere di determinare l'ammontare del capitale da immobilizzare nella società comporti l'indebolimento dello stesso obbligo di mantenere *un* capitale nella società e che ciò causi un significativo aumento delle c.d. *dwarf companies* (società "nane")[37]. In particolare, le preoccupazioni si sono concentrate sul venir meno di alcune regole prescritte a tutela del c.d. capitale reale in conseguenza delle quali la cifra che i sottoscrittori si impegnano a versare può essere ineffettiva o, che è lo stesso, "spalmata" in un arco temporale così ampio da renderla irrilevante (c.d. *gangster companies*)[38].

La questione è molto sentita dalla letteratura, che avverte come il mercato cinese, sebbene molto attivo, non abbia in sé gli strumenti per contrastare in maniera efficace tali fenomeni[39].

La scelta "stona" poi se posta a confronto con altre regole ancora in vigore: si pensi *in primis* all'acquisto di azioni proprie vietato in ragione delle possibili conseguenze sul fronte della riduzione sostanziale del capitale.

I timori espressi hanno tuttavia rivelato come il problema non sia solo e tanto quello dell'abolizione del capitale minimo, bensì la ridotta effettività del capitale reale[40]. I pericoli scaturiti dalla riforma del 2014 non sono cioè quelli di una sottocapitalizzazione formale delle società, in relazione alla quale unica misura efficace sarebbe stata quella dell'imposizione di un capitale minimo *adeguato* e *proporzionato* all'oggetto sociale.

La vera fragilità dell'attuale sistema cinese (post riforma del 2014) è piuttosto l'assenza di previsioni capaci di verificare se il capitale *dichiarato* sia effettivamente e attualmente a disposizione della società (e dunque liberato e mantenuto), se di ciò vi sia adeguata trasparenza nei confronti di coloro che forniscono alla società diverse tipologie di "capitale", *in primis* quello di debito, e se la dote patrimoniale di cui dispone la società

[37] Si v. R. Chen, *From Legal Capital to Subscribed Capital*, cit., 193, il quale richiamando P. Gan, *On the Underlying Circumstances for and Defects of the Revolution of the Corporate Capital System and Institutional Solutions,* 2014, Technoloy & Law, 498 ss. che le definisce come *companies with a very small amount of capital*.

[38] L'espressione è ancora di P. Gan, ed è citata da R. Chen, *From Legal Capital to Subscribed Capital*, cit., 193: sono tali le *large subscribed capital payable over an unreasonably long period of time*.

[39] R. Chen, *From Legal Capital to Subscribed Capital*, cit., 194.

[40] Per un'analisi dettagliata v., ancora, R. Chen, *From Legal Capital to Subscribed Capital*, cit., 197 ss.

sia capace di rispondere alle sue esigenze produttive e, così, di assicurarne la continuità e la produttività[41].

Si pensi, per fare un esempio dei possibili abusi che il sistema descritto rischia di generare, al caso in cui vi sia un alto capitale sottoscritto, ma non versato, e si proceda alla distribuzione di utili[42] così, sostanzialmente, aggirando le norme sul capitale registrato[43]. La questione assume particolare importanza poiché, nella formale permanenza del concetto di "*registered capital*", i diritti di voto dei soci, dunque le decisioni in punto di distribuzione degli utili, sono misurati in base al contributo di ognuno di essi a quella cifra (cfr. art 42 PRC Company Law).

Il punto interseca e si sovrappone, come è evidente, con quello delle finalità perseguite dalle regole sul capitale. Come anticipato, la dottrina cinese si presenta al momento ancora incline a rinvenirne il significato nella tutela dei creditori, e di conseguenza a valutare in relazione ad esso la loro adeguatezza o inadeguatezza[44]. E, difatti, ripercorrendo argomenti comuni anche nella nostra letteratura, lo strumento del capitale (e in particolare le regole sul capitale minimo) è stato reputato dagli stessi interpreti cinesi da una parte ineffettivo, almeno tenendo presente la situazione successiva alla riforma del 2006, che aveva notevolmente abbassato la cifra richiesta[45]; e dall'altra costoso per gli investitori, costituendo una

[41] Il punto emerge chiaramente in C. Hawes - A.K.L. Lau - A. Young, *Introducing the 1-Yuan Chinese Company. Impacts of the 2014 PRC Company Law Amendments on Shareholder Liability and Creditor Protection*, cit., ove si sollecita l'introduzione di un sistema di *disclosure* in merito alla effettiva situazione finanziaria e patrimoniale delle società.

[42] V. sul punto le critiche di R. Chen, *From Legal Capital to Subscribed Capital*, cit., 194.

[43] Esso rappresenta difatti l'elemento centrale preso in esame dai fornitori del capitale di debito ai fini della verifica della credibilità e affidabilità dell'iniziativa economica intrapresa: cfr. R. Chen, *From Legal Capital to Subscribed Capital*, cit., 188.

[44] In merito alla funzionalizzazione del sistema del capitale sociale alla tutela dei creditori v., pure, Gao Fei, *Reforming the Capital Maintenance Doctrine in the Context of China: From the Guiding Cases Perspective*, disponibile sul sito www.ssrn.com, 13, il quale afferma che «the main function of the capital maintenance doctrine is to protect creditors».

[45] Così, ad esempio. R. Chen,, *From Legal Capital to Subscribed Capital*, cit., 187-188, ha reputato le norme relative al capitale minino *not only ineffective, bus wasteful* poiché incentrate su un parametro statico e rigido, non funzionale ed efficace rispetto al perseguimento della tutela dei creditori.

barriera all'ingresso e dunque un ostacolo allo sviluppo di nuove iniziative imprenditoriali[46].

Queste considerazioni hanno spinto a realizzare le innovazioni descritte ma al contempo hanno costituito un freno alla loro accettazione, paventandosi appunto, i pericolosi effetti sul fronte della protezione dei creditori. Le innovazioni introdotte vanno tuttavia più correttamente lette alla luce del dibattito svoltosi nel nostro ordinamento, e dunque guardando alla *ratio* e alla finalità di ognuna di esse. Del resto, la stessa letteratura cinese ha iniziato a riconoscere che l'elemento al quale gli investitori guardano nel decidere se e quanto credito concedere a un'impresa non è più rappresentato (o almeno non solo) dal capitale, ma dalla *ability to perform* dell'impresa[47], e dunque dalla sua capacità di operare in una situazione di equilibrio e, così, di produrre ricchezza, la quale è destinata, tra le altre cose, a soddisfare le pretese dei creditori.

Il capitale non è in questa prospettiva la cifra che i soci destinano alla società al fine di proteggere i creditori dalla prospettiva patologica dell'incapacità della stessa di provvedere al pagamento dei propri debiti, ma piuttosto *una* delle risorse finanziarie che questa utilizza per poter svolgere la propria attività.

5. *Verso una riscoperta del capitale?*

Proprio la questione relativa all'effettività del capitale dichiarato si pone al centro della seconda bozza di revisione della legge sulle società elaborata dal Comitato permanente del tredicesimo Congresso nazionale del popolo (NPC) e resa pubblica (solo in lingua cinese) il 30 dicembre 2022. In essa infatti si punta a una responsabilizzazione di amministratori e soci in punto di copertura del capitale.

Ciò dimostra come la direzione nella quale il sistema cinese pare

[46] Lo studio riportato nello studio *Doing Business* 2015, relativo alla Cina, disponibile sul sito www.doingbusiness.org/data/esploreeconomies/china, evidenziava come, sotto il profilo degli adempimenti e dei costi necessari per intraprendere nuove iniziative economiche, la Cina si collocava nel 2014 al 128 posto (su 189 Paesi presi in esame), richiedendo appunti costi molto elevati.

[47] Si v., per tutti, Gao Fei, *Reforming the Capital Maintenance Doctrine in the Context of China: From the Guiding Cases Perspective*, disponibile sul sito www.ssrn.com, 12.

orientato non sia tanto quella di uno spostamento del *focus* sull'insieme dei mezzi propri della società, come si è visto per l'Italia, ma quella di una riscoperta e valorizzazione del capitale sociale.

La partita per vero è ancora tutta da giocare. Il testo citato è infatti stato sottoposto a una pubblica consultazione di 30 giorni, ad esito della quale verrà riavviata la riflessione e, dunque, potrebbe subire variazioni, anche di non poco momento. Proprio in questa prospettiva l'esame da parte della dottrina cinese delle esperienze straniere, comprensiva di quella italiana, potrebbe giocare un ruolo decisivo nell'orientare le scelte del Comitato permanente del tredicesimo Congresso nazionale del popolo (NPC).

Federica Monti*

VERSO UN *CODICE DI COMMERCIO* DELLA REPUBBLICA POPOLARE CINESE? LA LINGUA A SUPPORTO DI *ALTRE* TASSONOMIE: UNA SINERGIA NECESSARIA PER UN *NUOVO* DIRITTO CODIFICATO[1]

Agli occhi di chi *guarda*, il sistema giuridico cinese procede nel suo percorso e *cambia*.
Agli occhi di chi *vede*, il sistema giuridico cinese procede nel suo percorso ed *evolve*.
Agli occhi di chi *osserva*, il sistema giuridico cinese è fermo e si *adegua*.
F. Monti

1. *Premessa*

La Repubblica Popolare Cinese dalla fine degli anni Settanta vive un impetuoso sviluppo del proprio sistema giuridico, motore di espansione e crescita economica del Paese. Per cogliere al meglio quello che è il *mood* o lo spirito con cui la Cina si sta trasformando, prendo in prestito alcuni passaggi del discorso tenuto dal Presidente (per il terzo mandato) Xi Jinping, nel corso del ventesimo Congresso per Partito Comunista

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** Ogni riferimento di legge, di cui al presente lavoro, è fermo alla data del Convegno, in cui lo stesso è stato presentato. Esso non tiene pertanto conto degli emendamenti occorsi successivamente al 28 e 29 ottobre 2022.

[1] Contributo già pubblicato su *Il Nuovo Diritto delle Società*, Giappichelli, n. 5/2023. Si ringraziano i Direttori della rivista per aver consentito l'inclusione dello stesso nella presente collezione di atti.

cinese: «Il viaggio da percorrere è lungo e faticoso, ma con passi decisi raggiungeremo i nostri obiettivi. […] trasformeremo con fiducia la Cina in un Paese socialista moderno in tutti gli aspetti e, attraverso un percorso verso la modernizzazione, abbracceremo il grande ringiovanimento della nazione cinese. […] Il PCC e il popolo cinese hanno cercato a lungo e duramente un percorso verso la modernizzazione. La grandezza di questo compito è ciò che lo rende glorioso.»

Nel suo percorso di edificazione giuridica, la Cina si è spesso servita della tecnica del trapianto giuridico che meglio chiamerei oggi, *ibridazione giuridica*, con risultati non sempre perfettamente soddisfacenti ma comunque funzionanti grazie a dei meccanismi di intervento e correzione derivanti dal legame relazionale tra legge e politica.

2. *Il Codice Civile della Repubblica Popolare Cinese. Il significato oltre le* "parole"

Il 28 maggio del 2020 l'Assemblea Nazionale del Popolo (ANP) ha approvato il 中华人民共和国民法典 *Zhonghua renmin gongheguo minfa dian*, il primo *Codice Civile della Repubblica Popolare Cinese* (da qui in poi 'Codice') entrato in vigore l'1 gennaio del 2021, che ha segnato un passaggio epocale nella storia del diritto cinese e a cui sono state dedicate numerose riflessioni originate da interessanti prospettive di analisi.

Anzitutto, per l'osservatore *di confine* la compilazione del Codice ha rappresentato il frutto di un complesso percorso di sistematizzazione[2] del diritto civile «per oltre sessant'anni sogno»[3] del Paese, avvenuto in

[2] «编纂民法典不是制定全新的民事法律，而是对现行分别规定的民事法律规范进行科学整理。» [«La compilazione del codice civile non è finalizzata a formulare leggi civili completamente nuove, ma ad organizzare scientificamente le norme giuridiche di diritto civile già in vigore, formulate separatamente.»] ha asserito 李适时 [Li Shishi], *chairman* della Commissione per gli affari legislativi dell'ANP, nel commentare la bozza della *Parte generale del diritto civile delle Repubblica Popolare Cinese* (Principi generali). Si legga qui: http://www.xinhuanet.com//politics/2016-06/28/c_129097029.htm [in cinese] (ultimo accesso 21 marzo 2023).

[3] L'espressione è stata estrapolata da un intervento del Prof. 江平 [Jiang Ping], Professore di diritto romano, civile e commerciale presso la *China University of Political Science and Law*, fra i massimi esperti del diritto della Repubblica Popolare Cinese e tra i principali compilatori del Codice, il quale ha dichiarato "民法总则的通过实现了我们

due *step* secondo l'immagine del *liang bu zou* 两步走[4], letteralmente un percorso fatto di *due passi*: il primo, che si è concretizzato con la promulgazione e l'entrata in vigore, *autonoma,* della 中华人民共和国民法总则*Zhonghua renmin gongheguo minfa zongze*, *Parte generale del diritto civile della Repubblica Popolare Cinese*[5] (da ora in avanti più semplicemente 'Parte generale'); il secondo, con l'emanazione dell'intera opera codicistica e la contestuale abrogazione della Parte generale, assorbita poi fisiologicamente nel Libro I, di cui oggi rappresenta il contenuto.

I risultati dei *due passi* sono entrati in vigore ad oltre 3 anni di distanza l'uno dall'altro, grazie all'attività incessante del gruppo di lavoro coordinato in via principale[6] dalla Commissione per gli affari legislativi dell'ANP (隐性立法者, il cd. *legislatore invisibile*[7] cinese), per dare seguito alla Decisione del Comitato Centrale del Partito Comunista Cinese, del 23 ottobre 2014[8], con cui il progetto del Codice Civile della Repubblica Popolare Cinese ha iniziato ad assumere concretezza.

六十多年来的梦想" [*L'adozione dei Principi del diritto civile hanno realizzato un nostro sogno di oltre sessant'anni*], all'indomani della promulgazione della *Parte generale del diritto civile delle Repubblica Popolare Cinese*.

[4] Si legga la breve notizia apparsa sul sito ufficiale del Consiglio di Stato il 10 marzo 2017, pochi giorni prima della approvazione della *Parte generale*. 民法总则有多重要? 和我们日常生活有啥关系? [*Qual è l'importanza dei Principi generali? Cos'hanno a che fare con le nostre vite?*] disponibile qui: http://www.gov.cn/fuwu/2017-03/10/content_5176127.htm [in cinese] (ultimo accesso 16 novembre 2022).

[5] Letteralmente "*Principi generali del diritto civile della Repubblica Popolare Cinese*", titolo reso nelle varie lingue di traduzione, ora in italiano con "*Parte generale del diritto civile delle Repubblica Popolare Cinese*", ora verso l'inglese con "*General principles of civil law in PRC*": scelte – tutte – che evocavano, già in previsione, quella che sarebbe stata la loro successiva collocazione nel Libro I dell'intera opera codicistica. Mi sia consentito richiamare la primissima traduzione in lingua italiana, annotata, della '*Parte generale*' di F. Monti, Codice della Repubblica Popolare Cinese. Parte Generale, in *Leggi tradotte della Repubblica Popolare Cinese*, XI, Cedam, 2019, pp. 1-123.

[6] Tale Commissione è stata affiancata e coadiuvata dalla Corte Suprema, dalla Procura Suprema, dall'Ufficio per gli affari legislativi del Consiglio di Stato, dall'Accademia cinese delle scienze sociali e dall'Associazione cinese per le scienze giuridiche.

[7] L'appellativo è proposto da 卢群星 [Lu Qunxing], *隐性立法者——中国立法工作者的作用及其正当性难题* [Il legislatore invisibile. La funzione del legislatore cinese ed i problemi di legittimità], *浙江大学学报* (人文社会科学版) [Journal of Zhejiang University (Humanities & Social Sciences)] no. 2, 2013, pp. 74, 89, in *open access* qui: https://caod.oriprobe.com/articles/32068109/Invisible_Legislators__The_Function_and_the_Legiti.htm (ultimo accesso 21 marzo 2023).

[8] Il riferimento è alla 中共中央关于全面推进依法治国若干重大问题的决定, ht-

Quanto alla sua architettura, l'impianto codicistico pare ispirarsi ai modelli della tradizione romano-germanica, che alla Parte generale fanno seguire un *corpus* di norme *speciali* (分则 *fenze*) per la regolamentazione delle possibili manifestazioni delle relazioni civili; l'intero contenuto del Codice resta inoltre scandito da un livello di *astrazione* molto simile ad altre esperienze[9], che hanno dato vita al diritto romano della *pandettistica*.

Quattro sono i livelli del Codice cinese: Libri, Parti, Titoli, Capi.

Un'osservazione degna di nota riguarda il tono stilistico adottato dal legislatore, che nel rubricare la *Parte generale* si è avvalso del termine总则*zongze*, discostandosi dichiaratamente dalle precedenti e quasi omonime 通则 *tongze*, di cui nell'epigrafe delle 中华人民共和国民法通则 *Zhonghua renmin gongheguo mingfa tongze*, *Disposizioni generali del diritto civile della Repubblica Popolare Cinese* del 1986 (da ora in avanti 'Disposizioni generali', rimaste in vigore fino all'adozione del Codice[10] e ritenute un 准法典 *zhun fadian*, un *quasi-codice*) delle quali l'ormai Libro I rappresenta l'evoluzione.

Proprio al riguardo, il *quasi-codice* del 1986 era stato promulgato in coda alla *Legge sui contrati economici della Repubblica Popolare Cinese* [11] del 1981 e della *Legge sulle successioni della Repubblica Popolare Cinese* [12] del 1985 ed è servito per oltre tre decenni come primo riferimento giu-

tp://www.gov.cn/zhengce/2014-10/28/content_2771946.htm [in cinese] (ultimo accesso 21 marzo 2022).

[9] Si legga sul punto E. J. Epstein, *Codification of Civil Law in the People's Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law*, in *University of British Columbia Law Review*, vol. 32, no. 1, 1998, pp. 153-198.

[10] «从民法"通"则到"总"则：一字之变折射中国法治进步.» [Dalle 'disposizioni generali del diritto civile' ai principi generali del diritto civile: il cambio di una parola riflette il progresso dalla *rule of* law/*rule by law* della Cina], consultabile qui: http://www.xinhuanet.com//politics/2016-06/27/c_1119122013.htm [in cinese] (ultimo accesso 29 novembre 2022). Sulle possibili interpretazioni del termine *fazhi* (法治) che compare nel titolo poc'anzi richiamato, si legga: D. Cao, *Chinese Law*, Routledge, 2004, pp. 35-55.

[11] 中华人民共和国经济合同法 [Legge sui contratti economici della Repubblica Popolare Cinese] in 中华人民共和国法律汇编1979-1984 [Raccolta di leggi della Repubblica Popolare Cinese, anni 1979-984], 人民出版社 [People's Press] 1985, p. 234.

[12] 中华人民共和国继承法 [Legge sulle successioni della Repubblica Popolare Cinese], il testo integrale della legge è qui disponibile https://www.gjxfj.gov.cn/gjxfj/xxgk/fgwj/flfg/webinfo/2016/03/1460585589911640.htm [in cinese] (ultimo accesso 10 marzo 2023).

ridico per il coordinamento del diritto civile socialista, dopo il *fallimento* del Codice Civile della Repubblica di Cina[13], promulgato dal governo nazionalista nel 1929 e ancora oggi in vigore a Taiwan.

Esaltando così il *lifting* graduale del sistema giuridico e di *governance* nazionale, Li Shishi (李适时, cfr., *supra,* nota 1) all'indomani dell'approvazione della bozza della *Parte generale*, nel corso di un'intervista[14] ha dichiarato: «Il diritto civile è chiamato l'enciclopedia della vita sociale, è l'espressione legislativa dello spirito nazionale e dell'essenza dei nostri tempi».

Un *lifting* che non travolge solo il diritto *in re ipsa* ma anche il linguaggio con cui il legislatore di esprime.

Tornando alle riflessioni stilistiche che si introducevano poc'anzi e 'giocando' con la natura 'per immagini'[15] che caratterizza la lingua cinese, sarà semplice anche per i non sinologi notare come le due referenze – 通则 *tongze* e 总则 *zongze* – si differenzino solo nel penultimo carattere (总/通), portando lo studioso inevitabilmente a domandarsi quali possano essere stati i motivi alla base di una scelta di *lawmaking*, certamente consapevole ma *quasi* in sovrapposizione ed estremamente somigliante alla previsione normativa in vigore dal 1986.

Si sta parlando, peraltro, di occorrenze linguistiche, il cui significato intrinseco rischia di sfuggire alla resa traduttologica, tanto che entrambi i termini, per fare un esempio, potrebbero essere similarmente restituiti nella lingua italiana con "Principi generali" o "Disposizioni generali" quasi come fossero sinonimi, senza considerare il maggior grado di 'entropia' che si avrebbe, accettando la mediazione linguistica dell'inglese come *lingua franca*, alla luce della quale le confondenti traduzioni proposte sono *General principles* (per 通则 *tongze*) e *General provisions* (per 总则 *zongze*).

[13] C. S. Lobingier, *The Civil Code of the Republic of China. Book I – General Principles*, traduzione in inglese di Ching-Lia Hsia e James L. E. Chow, in *American Journal of International Law,* 24 (4), 1930, pp. 826-828.

[14] Traduzione dell'autrice. Il testo originale, tratto dall'intervista è il seguente: «民法被称为社会生活的百科全书，民法典是民族精神、时代精神的立法表达——全国人大常委会法工委主李适时。» in *中国人大杂志* [Rivista dell'Assemblea Nazionale del Popolo] 3, 2016.

[15] Cfr. M. Timoteo, *Il diritto per immagini. Aspetti del linguaggio giuridico cinese contemporaneo*, in B. Pozzo, (a cura di) *Lingua e Diritto: oltre l'Europa*, Giuffrè editore, 2014, p. 73 e ss.

Lo 现代汉语词典, definisce il termine *tongze* come «适合于一般情况的规章或法则» ovvero *regolamenti o leggi adatti a [n.d.a. normare] situazioni generali*, laddove *zongze* viene diversamente definito come « 规章条例的最前面的概括性的条文», ovvero *testo legislativo* [n.d.a. *di portata*] *generale*, *che precede regolamenti e/o* [n.d.a. *altri*] *atti normativi*.

Dalle precedenti definizioni sembra emergere un importante possibile elemento distintivo: le *tongze* sarebbero (state) delle *Disposizioni* caratterizzate da una connotazione *generale* ed *astratta* ma in un modo 'meno evidente' dei *zongze*, e cioè i *principi* contenuti nel Libro I del Codice civile, già *Parte generale*.

Lo stesso carattere 总*zong*, considerato singolarmente, suggerisce infatti un'area semantica di significati sufficientemente chiara per dare conforto a questa linea di pensiero: come avverbio richiama proprio l'idea di un 'elemento' *aggregato* e *unito assieme* ad un altro (总共), come verbo indica l'azione del *radunare* (总合, 总括), come sostantivo una *somma* (总数).

In realtà, già in occasione della promulgazione delle Disposizioni del 1986 si era posto il problema di quale potesse essere la migliore 'etichetta' da adottare; vennero quindi analizzate attentamente le scelte operate da altri Paesi e *in primis* quelle compiute dal Giappone, che sul finire dell'Ottocento aveva optato per il termine 総則 *sōsoku*[16] (sinonimo giapponese del cinese *zongze*, Parte generale) in resa di *Allgemeiner Teil*, di cui nel BGB tedesco[17].

L'eventualità, da parte della Cina, di abbracciare una scelta in assonanza, non era però supportata dalla situazione di quegli anni, la quale non consentiva al paese di conformarsi con leggerezza alla terminologia tedesca o giapponese, che avrebbe potuto suscitare nel lettore l'immagine di un'opera *solo* parziale e parte di un lavoro più ampio, creando l'attesa di un *addendum* "non previsto". Il momento storico (socio-economico e politico) non era ancora maturo e abbastanza stabile per accogliere un Codice civile e ciò portò in definitiva il legislatore cinese a preferire, nel 1986, il termine 通则 *tongze*.

[16] Cfr. 现代汉语词典 [Dizionario di cinese contemporaneo], 第七版 [7^ ed.], 商務印書館 [Commercial Press], 2017, voce '*Tongze*' p. 1312.

[17] Cfr. 现代汉语词典 [Dizionario di cinese contemporaneo], 第七版 [7^ ed.], 商務印書館 [Commercial Press], 2017, voce '*Zongze*' p. 1745.

L'adozione del Codice, allora, oltre a rappresentare un importante passo nel processo di *edificazione* e *modernizzazione* del Paese ed oltre a marcare l'inizio di una nuova era nella periodizzazione storica del diritto cinese moderno, può essere interpretata come una dichiarazione gius-politica della Cina, che testimonia di un ammodernamento giuridico e allo stesso tempo di un *cambiamento* di rotta dell'evoluzione socio-economica, facendo eco alla transizione degli ultimi anni Settanta da un'economia pianificata ad una economia socialista di mercato *con caratteristiche cinesi*, oggi nell'osservanza di valori, nel rispetto dei diritti e con la formalizzazione di principi (anche internazionalmente condivisi) codificati[18].

A tale riguardo, sebbene esuli dalla presente trattazione, non può essere omesso il legame che l'adozione del Codice ha inevitabilmente con il concetto del 法治*fazhi* (o 依法治国 *yifazhiguo*, che mette alla prova la dottrina, nel dialogo-fiume sul *rule of law* o *rule by law*[19]) il quale sul piano politico e nei piani del Comitato centrale del Partito Comunista Cinese, rappresenta un elemento fondamentale per il miglioramento del sistema economico socialista e la «promozione di uno sviluppo economico di alta-qualità»[20].

Il metodo più autentico per lo studio del sistema giuridico di un Paese (e la Cina non rappresenta una eccezione) non può prescindere, allora, dallo studio della storia socioeconomica e politica nonché dalla comprensione della *lingua dei tempi*; come scrive il Professor Graziadei (1999) «comparative law scholarship seldom delves deeply into the historical dimension of the law, but rather focuses on the present alone».

[18] Fin dagli ultimi anni dell'impero Qing, la Cina si è ispirata al percorso giuridico del vicino Giappone vuoi per la '*parentela*' linguistica vuoi per la vicinanza anche culturale. In questo senso il Giappone ha facilitato il percorso cinese di adattamento dei sistemi occidentali al proprio contesto socioculturale, fungendo da primo *filtro*. Trapiantare selettivamente il sistema giuridico di altri paesi avrebbe esposto la Cina, così come in generale espone tutti i Paesi con un sistema giuridico 'in fase embrionale', a problemi di non poco conto. Lo stesso Giappone si è trovato, prima della Cina, a dover scegliere il ceppo giuridico – se il *Civil* o la *Common Law* – da cui attingere nel proprio processo di modernizzazione ed occidentalizzazione giuridica. Si legga, sul punto, 郝铁川 [Hao Tiechuan], *论近代中国对大陆法系的选择* [Sulla scelta del sistema di *civil law* della Cina moderna], in *法制现代化研究* [Law and Modernization], 1996, 302-314.

[19] https://www.japaneselawtranslation.go.jp/ja/laws/view/3494/en (ultima consultazione 18 marzo 2023).

[20] E.J. Epstein, *op.cit.*

Non casualmente, ogni progetto di codice civile avviato in Cina è stato il riflesso di pagine di storia del Paese, del pensiero politico, della situazione economia e delle tradizioni sociali e culturali nelle varie epoche di riferimento e il Codice di nuova adozione non si discosta da questo *trend*.

Si pensi, a mero titolo d'esempio, al cd. Principio Verde (绿色原则 *lvse yuanze*), che eleva il Codice fra le opere più evolute e moderne della nostra epoca; un *Principio* che arriva in una fase avanzata del dialogo internazionale (a cui la Cina non si sottrae) su *sostenibilità*, su *corporate social responsibility*, su *obiettivi dell'Agenda globale 2030*, ecc.[21] e che riporta in vita principi per nulla nuovi nella cultura del paese; un *Principio* che si richiama, infatti, al Classico dei Riti (礼记, liji) attribuito a Confucio[22], il cui pensiero continua da sempre ad ispirare l'ideologia della cd. *leadership confuciana* dei Presidenti del Paese (soprattutto Xi Jinping) all'insegna dell'armonia e dell'integrazione, facendo rivivere quello *spazio senza tempo* chiamato *Tianxia* (天下)[23].

La forza del passato per la Cina si tocca leggendo anche un'altra pagina della storia cinese, quella di fine Ottocento sul tramontare della dinastia Qing e trafusa nelle vicende dell'illustre statista di alto rango Zhang Zhidong[24] (張之洞, 1837-1909, conosciuto fra gli intellettuali del tempo come 香涛Xiantao o 孝达Xiaoda), che nella sua opera 劝学篇 *Quan xue pian* (1898) rielaborò il pensiero già introdotto da Feng Guifen[25] (馮桂芬, 1809-1874), divenuto ben presto un importante principio-guida fra

[21] In C. Wang, Explanatory remarks on the civil code of the People's Republic of China (draft), disponibile al seguente link: https://s.wsj.net/public/resources/documents/2020%20Civil%20Code%20Draft%20EN.pdf (ultimo accesso 22 marzo 2023) si legge «Together with laws in other areas, civil law supports the state system and national governance system. […] Compilation of a civil code will further refine China's basic legal system and rules of conduct in the civil and commercial fields. This will help motivate the enthusiasm and ingenuity of parties to civil law, ensure the security of transactions and the order of the market, and build a market environment in which entities under all forms of ownership enjoy the same legal protections, thereby promoting high-quality economic development».

[22] Fra gli altri, può leggersi M.Y.K. Woo, *Law and discretion in contemporary Chinese courts*, in Turner, K.G., Feinerman, J. V., Guy, R. K. (a cura di) *The limits of the rule of law in China*, University of Washington Press, 2000, pp. 163 e ss.

[23] Cfr. C. Wang, *op. cit.*

[24] M. Graziadei, *Comparative law, legal history, and the holistic approach to legal cultures*, in *Zeitschrift fur Europaisches Privatrecht.* 1, 1999, pp. 530 e ss.

[25] http://theory.people.com.cn/n1/2020/0824/c40531-31833556.html

gli intellettuali dell'epoca: «舊學為體，新學為用» *jiuxue wei ti, xinxue wei yong*, affinato successivamente in «中學為體，西學為用» *zhong xue wei ti, xi xue wei yong* (noto anche in forma abbreviata come «中體西用 *zhong ti xi yong*») ovvero *il sapere tradizionale* [n.d.a. cinese]*, come sostanza; i nuovi saperi* [n.d.a. quello occidentale] *come mezzo*[26].

Accanto alle considerazioni sulla particolare 'genesi progressiva' – *in due passi* – sulla funzione gius-politica del Codice, ulteriori riflessioni muovono nuovamente dalle scelte linguistiche del legislatore cinese[27], che si confermano di sorprendente eloquenza per una lettura ragionata del Codice, spingendosi oltre il mero precetto.

Per la prima volta nella storia del diritto cinese della Repubblica Popolare (dal 1949 ad oggi) vi è il ricorso in senso tecnico al termine 典 *dian* (o 法典*fadian*) *Codice*[28].

La Cina, ha avuto altri codici nel corso degli anni, tuttavia l'uso del termine典*dian* in questo preciso momento storico ha un peso specifico di non poco conto, come a voler proclamare un *upgrade del sistema giuridico* di un Paese in cui, come in altre esperienze asiatiche, la cultura della legalità in senso occidentale non ha mai fatto parte della tradizione, prevalendo l'idea '*prima la moralità, poi la legge ed il diritto*'.

A questo proposito, mi pare di dover riflettere sul nome scelto per il Codice中华人民共和国民法典 *Zhonghua renmin gongheguo minfa dian* perché se da un lato è di interesse il fatto che in esso compaia la parola 'Codice', dall'altro è pure suggestivo che lo stesso termine ricorra *esclusivamente* nell'epigrafe e non anche nel corpo del testo, laddove il legislatore si serve della più generica referenza 法 *fa*, *legge*, per riferirsi alle disposizioni in esso contenute.

A titolo d'esempio, l'articolo 1 del Codice recita «La presente legge è promulgata in conformità della Costituzione al fine di proteggere i legittimi diritti ed interessi dei soggetti di diritto, disciplinare i rapporti

[26] Cfr. F. Fukuyama, *Confucianis and Democracy*, in *Journal of Democracy,* 6, 2, 1995, pp. 20-33, ma anche C.P. Low, S.L. Ang, *Management, the Confucian Way*, in *Educational Research*, 4, 2, 2013, pp. 82-90 e S. Kim, *Democrazia confuciana nell'Asia* orientale, ObarraO Ed., 2018.

[27] R. Pisu, *Tianxia, spazio senza tempo*, *Il Manifesto*, 25 settembre 2019, <https://ilmanifesto.it/cina-tianxia-spazio-senza-tempo> (ultimo accesso 20 febbraio 2023).

[28] Per informazioni di dettaglio sulla vita di Zhang Zhidong https://www.nfpeople.com/article/10072 [in cinese] (data di ultima consultazione 19 gennaio 2023).

civili, mantenere l'ordine sociale ed economico, in considerazione delle esigenze di sviluppo del socialismo con caratteristiche cinesi»[29].

La resa di 法 *fa*[30] con *legge*, che qui (ri)propongo, si scontra con la traduzione in italiano offerta da Huang Meiling[31], la quale traduce ogni ricorrenza 法 *fa* (nella medesima struttura grammaticale) con *Codice*.

La comparazione della traduzione qui proposta con quella della Professoressa Huang è obbligata, essendo l'unica traduzione in lingua italiana dopo quella da me offerta (*Supra*, nota 4).

Nella lingua cinese il sostantivo *Codice* corrisponde al composto di due caratteri法+典 *fa* + *dian*. Può essere utile, però, sapere che spesso nella lingua parlata e soprattutto in quella scritta e di registro formale, si ricorre a 'forme di troncamento' (简称 *jiancheng*) di morfemi polisillabici (ovvero composti da più caratteri). È difficile affermare che esista un criterio fisso per operare un troncamento; nella maggior parte dei casi viene utilizzato il carattere dei vari componenti che meglio identifica la parola e di solito questo è il primo.

Il composto 法典 *fadian* si presta perfettamente al caso, ma le scelte discordanti operate dal legislatore – rispettivamente nell'epigrafe e nel corpo del Codice – fanno emergere nel lettore alcune perplessità e dubbi interpretativi, con conseguenze giuridiche non trascurabili.

Come è già stato accennato, l'epigrafe dell'opera codicistica contiene il termine 典*dian* come troncamento del composto 'completo' 法典 *fadian*. In questo caso il troncamento è stato operato 'scegliendo' di mantenere non la prima sillaba bensì la seconda, che è certamente la più identificativa delle due.

法*fa*, infatti, è un morfema polisemantico ricorrente nella lingua ci-

[29] Sulla figura di Feng Guifen si veda: https://www.britannica.com/biography/Feng-Guifen (ultimo accesso 25 marzo 2023).

[30] Zhang Zhidong, non fu l'unico intellettuale a condividere, riprendere ed elaborare il pensiero di Feng Guifen. Fra gli altri esponenti del Movimento di Occidentalizzazione possono ricordarsi, fra gli altri, Xue Funcheng (薛福成, 1838-1894), Zheng Guanying (1842-1922?), Li Hongzhang (李鴻, 1923-1901). Per un approfondimento sul Movimento di Occidentalizzazione, si legga J. Zhou, *Westernization Movement and Early Thought of Modernization in China. Pragmatism and Changes in Society, 1860s-1900*s, Palgrave Macmillan, 2022.

[31] E. Epstein, *op. cit.* Cfr. *Supra,* nota 8, scrive «Study of legal discourse is important because language, cultural values and political ideologies affect how law is expressed and may suggest how it will be applied».

nese (non limitatamente al contesto giuridico) che può rappresentare un'ampia gamma di significati diversi fra loro, passando dal voler dire, tra le altre cose, *calligrafia* 书法, *arti magiche* 法术fino ad arrivare a *regolamento* 法规, *metodo* 方法 e finalmente *legge* 法律[32]; minimo comun denominatore è il collegamento implicito a qualcosa di *appropriato* e *corretto*, nelle *forme*, nei *metodi*, nei *comportamenti*[33]. Infatti, quando 法*fa* si presenta nella forma 'tronca', sarà necessariamente il contesto in cui è collocato a suggerire al lettore il significato con cui lo si è utilizzato.

In ambito giuridico 法 *fa* ricorre molto spesso come troncamento di 法律 *falv*, ovvero *legge di rango ordinario*: si pensi all'epigrafe delle leggi ordinarie della Repubblica Popolare Cinese, come la 中华人民共和国公司**法** *Zhonghua renmin gongheguo gongsifa Legge della Repubblica Popolare Cinese sulle società di capitali* o ancora alla 中华人民共和国合伙企业**法***Zhonghua renmin gongheguo hehuo qiyefa Legge della Repubblica Popolare Cinese sulle società di persone* e così via.

Di esempi ce ne sono centinaia.

In tutti i casi si sceglie di 'rinunciare' al secondo carattere (律*lv*), richiamandosi al significato classico del termine 法 *fa*[34], oggi reso con *legge*.

Essendo, però come si diceva, tendenzialmente il contesto a chiarire il significato di un composto troncato, nel caso di 法 *fa* nel testo del Codice (come nell'articolo 1) esso potrebbe anche rappresentare la compressione di 法典 *fadian* ma non si comprende, allora, il motivo per cui il legislatore nell'epigrafe abbia adottato un diverso criterio di abbreviazione, preferendo in quel caso 典*dian.*

Eppure, mi sembra che alternative a 本法*benfa* potevano essere auspicabile, al fine di evitare ogni tipo di fraintendimento: penso ad esempio a 本法典 (senza operare alcuna compressione) o ancora – ma è meno plausibile – a本典*bendian* il quale composto, benché meno frequente, da una semplice e veloce ricerca sitografica in lingua cinese, non risulta nuovo, almeno non nella lingua informale e non specialistica.

[32] J. H. Herbots, The *Chinese new Civil Code and the law of contract*, in *China-EU Law Journal* 7, 2021, pp. 39-49.

[33] «为了保护民事主体的合法权益，调整民事关系，维护社会和经　济秩序，适应中国特色社会主义发展要求，弘扬社会主义核心价　　值观，根据宪法，制定本法。» La traduzione riportata nel testo è tratta da F. Monti, *op. cit.* Cfr *Supra*, nota 4.

[34] Più precisamente, nel richiamato articolo 1 (così come in altri articoli del Codice) compare un sintagma nominale composto dal dimostrativo 本 *ben* e dal sostantivo 法 *fa*.

Sono propensa a giustificare la scelta linguistica del legislatore cinese sia nell'epigrafe che nel corpo del testo, alla luce di una considerazione piuttosto semplice, ovvero a seguito della valutazione delle conseguenze derivanti dall'effetto *rebound* legato all'adozione del primo Codice civile della Repubblica Popolare Cinese e, con esso, alla raggiunta 'emancipazione' del sistema giuridico del Paese agli occhi cinesi e a quelli del mondo.

Va da sé che la scelta di non utilizzare altrove il termine 典*dian* nel testo, deriva molto semplicemente dalla 'natura' del Codice, il quale è pari ad una qualunque altra legge di rango primario dello Stato.

Ecco allora che tradurre 法 *fa* con 'Codice' è un'operazione a mio giudizio rischiosa e non propriamente corretta per due motivi. Il primo: si opta, da parte del traduttore, per un giudizio di valore del termine usato nella lingua originale, senza alcuna certezza obiettiva che quella contrazione sia riferita a 法典*fadian Codice* ed anzi, statisticamente, con la consapevolezza che la ricorrenza 法*fa* il più delle volte è utilizzata col significato di *legge* e non di *codice*. Il secondo: indirizzando il lettore non sinologo verso il significato di *Codice*, il risultato è un offuscamento del suo reale inquadramento all'interno del sistema gerarchico delle fonti, col risultato della privazione, per il giurista, della possibilità di ragionare sulle interpretazioni e sulle implicazioni giuridiche che potrebbero scaturire dal diverso collocamento di tale atto normativo.

Il fatto che l'appellativo '*codice*' resti limitato alla sola epigrafe va infatti spiegato, ad avviso di chi scrive, proprio dal suo posizionamento nell'ambito del sistema piramidale delle fonti del diritto, che può ricostruirsi leggendo il combinato disposto dell'articolo 5[35] della中华人民共和国宪法 *Zhonghua renmin gongheguo xianfa*, *Costituzione della Repubblica Popolare Cinese* e dell'articolo 2[36] della 中华人民共和国立法法 *Zhonghua renmin gongheguo lifafa*, *Legge della Repubblica Popolare*

[35] Cfr. L'unica traduzione in lingua italiana dell'intera opera codicistica è per opera di Diliberto, O., Dursi, D., Masi, A. (a cura di), traduzione di M. Huang, *Codice civile della Repubblica Popolare Cinese*, Pacini giuridica, 2021, pp. 210 e ss. Non può non segnalarsi, tuttavia, che si tratta di una traduzione attiva (dalla lingua cinese alla lingua italiana, eseguita da un non madrelingua italiano, quindi per sé una lingua straniera).

[36] Termine 'caro' alla 法家*fajia,* la scuola dei Legisti, che ne faceva utilizzo per riferirsi prevalentemente al precetto punitivo.

cinese sulla legislazione, promulgata nel 2000 e da ultimo emendata il 13 marzo 2023.

La Costituzione (宪法) è la fonte primaria, seguita dalle leggi法律 *falv*[37], dai regolamenti amministrativi行政法规 (*xingzheng fagui*), dai regolamenti locali 地方性法规, dai regolamenti delle autonomie 自治条例 *zizhi tiaoli* e dai regolamenti specifici 单行条例 *danxing tiaoli*.

In questo *climax* discendente, il mancato riferimento al Codice ha aperto in dottrina un confronto teso a comprendere quale debba essere il rapporto gerarchico tra le disposizioni del Codice e quelle dettate da ogni altra legge ordinaria che continui a regolare situazioni non 'coperte' dalla trattazione codicistica, come ad esempio nel caso delle vicende del diritto dell'impresa e del diritto commerciale.

Il Codice e prima ancora *i Principi generali* del 2017, infatti, hanno ereditato la maggior parte delle previsioni contenute precedentemente nelle *Disposizioni* del 1986 e, a voler essere critici, paiono risolversi in una mera compilazione di leggi preesistenti, sistematicamente raggruppate ed organizzate secondo la *formula codicistica*, quasi a voler rimarcare quell'intenzione gius-politica del Paese di cui sopra si diceva, che non a voler seguire autenticamente l'esperienza di codificazione dei paesi con tradizione romano-germanica.

Come si dirà meglio poco sotto ma come in parte già accennato, alcune materie ne sono rimaste escluse e restano tuttora regolate da leggi *ad hoc* (mini-codici) di rango ordinario.

Il problema, alla luce di quanto precede, è allora quello di comprendere quale sia la relazione tra le materie rimaste 'isolate' e lo stesso Codice, soprattutto in considerazione delle discordanze, che non mancano.

La mia sensazione è che 'l'aspetto relazionale' fra Codice e leggi 'fondamentali ed ordinarie isolate' resti ancora sormontato da una grande incertezza; tendo a ritenere che si possa garantire quantomeno una parità di posizionamento tra previsioni in esso contenute e quelle delle norme

[37] Si legga l'interessante 'definizione' di 法 *fa* riportata in Angus Charles Graham, *La Ricerca del Tao. Il Dibattito Filosofico nella Cina Classica*, traduzione di Riccardo Fracasso, Neri Pozza, 1999, pag. 376, «尺寸也、绳墨也、规矩也、衡石也、斗斛也、角量也、谓之法。《管子·七法》» [Il piede e il pollice, l'inchiostro e la riga, il compasso e la squadra, le misure di volume e di peso vengono chiamati "standard" [n.d.a. 法 *fa*].

esterne, ma mi sentirei di escludere una netta e scontata prevalenza del primo sulle seconde.

Da dicembre 2017 a settembre 2019 si sono tenute quattro importanti tavole rotonde sulla '*Formulazione di un Codice di Commercio*' della Repubblica Popolare Cinese, presso la *Peking University Law School.* Durante la seconda sessione, il professor Liu Kaixiang (刘凯湘) ha illustrato nel suo *keynote* (incentrato sulle ragioni a sfavore dell'adozione di un codice di commercio cinese) come non si possa escludere la *specialità*[38] delle leggi in materia commerciale e quindi prevederne addirittura la loro prevalenza sulle disposizioni del *Codice* e ciò anche in considerazione di ulteriori riflessioni sulla possibile autonomia ed indipendenza del diritto commerciale da quello civile.

Ecco allora che il 典*dian* Codice, benché unico e solo nell'epigrafe, racchiude in sé un valore di assoluta importanza – direi – più per la sua accezione antropologica che non per quella giuridica, in quanto testimo-

[38] Oggi si tende ad identificare 法 *fa* (法律*falv*) con 'legge'; va tuttavia osservato come in realtà il significato insito in 法 *fa* sia ben più ricco. Sul punto si consulti Cfr. T. W. Lachlan, *The complexity of translating legal terms: understanding Fa (法) and the Chinese concept of law*, in *Melbourne Asia Review*, 6, 2021, qui disponibile https://melbourneasiareview.edu.au/the-complexities-of-translating-legal-terms-understanding-fa-法-and-the-chinese-concept-of-law/ (ultima consultazione 20 marzo 2023). La lingua classica si serviva di un carattere diverso da quello odierno, semplificato, per 法*fa* (ovvero l'omofono 灋) che se scomposto 'racconta' meglio di sé e delle differenze che lo distinguono da *legge*. Nella parte sinistra può trovarsi il radicale delle 'tre gocce d'acqua' (氵, *san dian shui*). La parte destra del carattere, invece, può essere divisa in due sezioni: in quella superiore si ritrova il carattere 廌*zhi* (parte del composto 解廌*xiezhi*) il quale riporta alla mente una creatura mitologica libera, che dimorava accanto ai corsi d'acqua, che a differenza di altri simili della specie era dotata di un unico corno e che era capace di intuire e distinguere il *giusto* (o meglio ciò che fosse *retto* 直, da ciò che rappresentasse una *distorsione della verità*, fino a diventare *menzogna*, 曲 *qu*); in quella inferiore compare il termine 去 *qu*, col significato di *rimuovere*, *lavar via*. Si legga l'interessante contributo di F. Sapio, *Giustizia e mito lungo il filo della storia. La figura del Xiezhi*, qui disponibile https://sinosfere.com/2020/10/25/flora-sapio-giustizia-e-mito-lungo-il-filo-della-storia-la-figura-del-xiezhi/ (ultimo accesso 20 marzo 2023). Il significato insito in 法 *fa* (di cui vi è traccia nella lingua cinese fin dalla Dinastia Han) è definito dallo 说文解字*Shuowen Jiezi* (antico dizionario 'etimologico' del periodo dinastico Han, 202 A.C. - 220 D.C.) in questo modo: «*Fa*: era una punizione, livellata come l'acqua, l'animale 廌*zhi* colpiva coloro che non sono retti, rimuovendoli». Si veda: Vedi qui: https://www.shuowen.org/view/6229 (ultimo accesso in data 20 marzo 2023). Tutto ciò per evidenziare come il concetto di 法 *fa*, fosse storicamente legato più alla sua funzione punitiva, che a quella ordinatoria della società, che invece può essergli oggi attribuita.

nianza di un'evoluzione culturale *tout court* e di una maggiore e diversa tolleranza dello strumento giuridico per normare la società e garantire un vivere stabile ed ordinato.

3. *Il diritto dell'impresa.* Inganni *traduttologici e conseguenze dell'isolamento*

Quanto alla sua *struttura*, il Codice si compone di 1260 articoli suddivisi in sette libri, rispettivamente: *disposizioni generali*; dei *diritti reali*; dei *contratti*; *dei contratti tipici*; dei *diritti della personalità*; del *matrimonio* e della *famiglia*; delle *responsabilità per fatto illecito*.

Non sfuggirà l'assenza di un simil-*Libro V* del Codice civile italiano ('Del lavoro'), che toglie dunque ogni speranza a vedere integrate le disposizioni in materia di impresa; è già stato anticipato, in effetti, come queste rientrino fra le materie 'ghettizzate' dal legislatore.

Ciononostante, pur essendoci di fatto un distanziamento strutturale della disciplina commercialistica da quella del Codice, va anche osservato che all'interno del Libro I è stato previsto un Titolo III '*Sulle persone giuridiche*' dove sono inseriti rispettivamente il Capo I '*Principi generali*' (artt. 57-75), il Capo II sulle '*Persone giuridiche con scopo di lucro*'(artt. 76-86), il Capo III sulle '*Persone giuridiche senza scopo di lucro*' (artt. 87-95) ed infine il Capo IV sulle '*Persone giuridiche speciali*' (artt. 96-101). Vi è poi il Titolo IV '*Sulle organizzazioni prive di personalità giuridica*' (artt. 102-108).

Infine, in seno al Libro IV, nell'alveo dei *contratti tipici*[39] (Libro III, Parte II) troviamo il Titolo XXVII (artt. 967-978), che disciplina il '*Contratto di società*' (traduzione resa da Huang Meiling[40]) e che merita de-

[39] L'articolo 5 della Costituzione della Repubblica Popolare Cinese recita «[…] 一切法律、行政法规和地方性法规都不得同宪法相抵触。 […]» [Tutte le leggi, tutti i regolamenti amministrativi e tutte le leggi e regolamenti locali, non devono essere in contrasto con la Costituzione].

[40] L'articolo 2 legge sulla legislazione della Repubblica Popolare Cinese recita «法律、行政法规、地方性法规、自治条例和单行条例的制定、修改和废止，适用本法。[…]»

[La presente legge si applica nell'ipotesi di promulgazione, di emendamento ed abrogazione di leggi, regolamenti amministrativi, regolamenti locali, regolamenti autonomi e regolamenti specifici […]».

cisamente qualche riflessione, così da sgombrare il campo da possibili fraintendimenti, in considerazione – soprattutto – della spontanea associazione che il giurista italiano sarà portato a fare con l'articolo 2247 del Codice civile italiano. Di nuovo, le mie riflessioni non possono non considerare l'unica traduzione completa in lingua italiana del Codice, ad oggi disponibile.

La traduzione offerta da Huang (cfr. *Supra*, nota 35) vede allora la referenza 合伙合同 *hehuo hetong*, di cui il legislatore cinese si avvale, resa con '*contratto di società*'.

A me sembra però che si tratti, ancora una volta, di un palese esempio di *misleading translation*.

In questo caso, però, a differenza di quanto accade con 典*dian*, di cui è stato ampiamente detto sopra, pare non trattarsi di una scelta discutibile derivante dal giudizio di valore del termine cinese e dal filtro concettuale che il traduttore può aver adoperato nel rendere in lingua italiana la terminologia scelta dal legislatore cinese; semplicemente il traduttore, che certamente conoscerà il diritto dell'impresa italiano, potrebbe aver utilizzato il termine *società* in modo affrettato[41]. Una semplice annotazione sulla scelta traduttologica (evidentemente non sentita necessaria) sarebbe stata sicuramente d'aiuto per sgombrare il campo da possibili fraintendimenti.

Il Titolo sullo 合伙合同 *hehuo hetong,* infatti, non fa affatto riferimento al *contratto di società*, di cui nel nostro articolo 2247 cod. civ., ma al contratto costitutivo delle sole società di persone e dunque non anche all'atto di costituzione delle società di capitali, che – peraltro – non hanno neppure un'origine propriamente contrattuale in Cina.

Ciò, senza considerare che il termine utilizzato nella lingua cinese per identificare 'le società di capitali' è 公司*gongsi* (e non 合伙 *hehuo*).

Con 公司*gongsi* si designano, infatti, le due forme tipizzate di società di capitali ammesse dalla Legge della Repubblica Popolare Cinese sulle società di capitali, ovvero le società a responsabilità limitata 有限责任公司 *youxian zeren gongsi* e le società per azioni 股份有限公司 *gufen youxian gongsi*.

[41] Fanno eccezione le traduzioni in lingua inglese le quali, propriamente, utilizzano come traducente del morfema composto 合伙*hehuo* il termine *partnership* non lasciando dubbi sul tipo di contratto a cui il Titolo XXVII fa riferimento.

La fermezza traduttologica, nel rendere 合伙 *hehuo* con *società*[42], senza specificazione alcuna, è confermata anche *aliunde* nel corpo del Codice, come ad esempio laddove l'articolo 102 offre una definizione di *organizzazioni senza personalità giuridica* (Titolo IV) in cui, al secondo comma, si stabilisce che «[…] Le organizzazioni senza personalità giuridica includono, ma non sono limitate a: le imprese individuali, le società di persone e gli enti di servizi professionali non dotati di personalità giuridica»[43]. Anche in questo caso Huang preferisce avvalersi del 'generico' termine *società*, nonostante l'incongruenza giuridica, stante la portata del Titolo IV.

Dell'*inganno* traduttologico, il lettore si renderà conto, peraltro, solo una volta giunto alla lettura dell'articolo 973, quasi in conclusione dell'intero Titolo, in cui è stabilito che «I soci rispondono solidalmente per le obbligazioni sociali. Il socio che abbia adempiuto alle obbligazioni in misura maggiore, rispetto alla sua quota, ha diritto di regresso nei confronti degli altri soci»[44].

Ciò perché fermandosi alla lettura dell'articolo 967, che apre il Titolo dedicato al *contratto di società di persone* ed offre la definizione di detto contratto, non si noterebbero in realtà grandi differenze con quanto previsto dal nostro 2247 cod. civ.

L'articolo 967 stabilisce, infatti che «Il contratto di società di persone è l'accordo con cui due o più soci decidono di condividere utili e rischi, nell'esercizio di un'attività in comune.»[45].

Ora, l'esempio della discutibile resa traduttologica è servito da volano per allertare lo studioso, che decide di avvicinarsi allo studio del diritto cinese, sia sulla delicata operazione di restituzione autentica in lingua straniera dei vari concetti insiti nel sistema giuridico cinese, sia – ricollegandosi a quanto già anticipato (*supra*, par. 2) – sui problemi di discordanza e coordinamento tra le previsioni codicistiche e le previsioni dettate dai cd. *mini-codici* rimasti al di fuori della trattazione del Codice.

[42] Diliberto, O., Dursi, D., Masi, *op. cit.*, p. 25.

[43] La traduzione è personale. L'articolo 102 in lingua originale è il seguente: «[…] 非法人组织包括个人独资企、合伙企业、不具有法人资格的专业服务构等。»

[44] La traduzione è personale. L'articolo 973 in lingua originale è il seguente: «合伙人对合伙债务承担连带责任。清偿合伙债务超过自己应当承担份额的合伙人，有权向其他合伙人追偿。».

[45] La traduzione è personale. L'articolo 967 in lingua originale è il seguente «合伙合同是两个以上合伙人为了共同的事业目的，订立的共享利益、共担风险的协议。».

Dalla lettura del Titolo XXVII apprendiamo che le società di persone sono costituite sulla base di uno 合同 *hetong*, ovvero di un *contratto*. Questa previsione, però, non è pienamente coordinata con quanto previsto dalla Legge della Repubblica Popolare Cinese sulle società di persone, che all'articolo 4 prescrive «L'accordo di società di persone è concluso con il consenso di tutti i soci, in forma scritta, in conformità con la legge.»[46], in cui il legislatore si avvale di un altro termine per designare il documento costitutivo del vincolo giuridico fra soci, ovvero 协议 *xieyi*.

In sintesi, alla luce del Codice una società di persone originerebbe da uno 合同*hetong*, ovvero un *contratto*, mentre alla luce della Legge sulle società di persone parrebbe sufficiente l'esistenza di uno 协议 *xieyi*, ovvero di un *accordo*, nella fattispecie scritto.

Esorbita dagli intenti del presente contributo ogni riflessione sul concetto di contratto nel diritto cinese, per le quali si rimanda ai lavori della più autorevole dottrina in materia[47].

Basti sapere al lettore che 合同[48]*hetong* e 协议 *xieyi* sono due termini della lingua cinese che possono trarre facilmente in inganno e mandare in *tilt* il giurista occidentale.

Nel Codice, così come prima della sua adozione la 中华人民共和国合同法*Zhonghua renmin gongheguo hetongfa Legge sui contratti della Repubblica Popolare Cinese* (articolo 2), il contratto è designato dal termine 合同*hetong*, definito oggi in seno all'articolo 464 come «[…] l'accordo [n.d.a. 协议 *xieyi*] diretto a costituire, modificare o estinguere un rapporto giuridico tra soggetti di diritto. […]»[49].

Si noterà, nella struttura della definizione, una certa somiglianza con

[46] La traduzione è personale. L'articolo 4 in lingua originale è il seguente «合伙协议依法由全体合伙人协商一致、以书面形式订立。».

[47] Fra gli altri, M. Timoteo, Il contratto in Cina e Giappone nello specchio dei diritti occidentali, Cedam, 2004, ma anche S. Porcelli, Hetong e Contactus. Per una risposta dell'idea di reciprocità nel dialogo tra diritto cinese e diritto romano, Giappichelli, 2020.

[48] 合同*hetong* implica e richiama l'idea di comunione ed uguaglianza (合*he* sta per *accordare*; *unire*; mentre 同 *tong* significa '*uguale*'), quindi comunione di un interesse ed intenzione delle parti di voler agire per la realizzazione di uno scopo comune (così M. Timoteo, *op. cit.,* pag. 255).

[49] La traduzione è personale. La parte dell'articolo 464, richiamata nel testo, è la seguente: «[…] 合同是民事主体之间设立、变更、终 止民事法律律关系的协议。[…]».

il nostro 1321 cc. così come con l'articolo 1101[50] del Code Civil francese, i quali pure definiscono il *contratto* come *accordo*.

Anche nel diritto cinese un contratto 合同*hetong* è dunque definito come *accordo* 协议 *xieyi*, caratterizzato, accanto alla *conventio*, da altri *elementi strutturali* (in stretta aderenza ai modelli di tradizione romanistica).

Ciò che qui interessa, invero, è la differenza ontologica tra协议 *xieyi* e 合同*hetong*[51], fra loro non sinonimi ma in un rapporto *genus-species* per cui tutti gli 合同*hetong*, come tali, saranno sempre anche 协议 *xieyi*, ma non il contrario. Perché uno 协议 *xieyi*, infatti, possa essere considerato 合同*hetong*, e dunque un contratto, potrebbe dover essere reso in una determinata forma o potrebbe dover essere caratterizzato anche da elementi ulteriori, in assenza dei quali non solo resterebbe un mero accordo (协议 *xieyi*) ma gli effetti ad esso ricondotti potrebbero essere più deboli o addirittura assenti[52].

Sarà fondamentale, allora, ai fini della costituzione di una società di persone – prerogativa per altro oggi non più dei soli investitori cinesi ma anche degli investitori esteri –, quale delle due previsioni sarà da considerare preordinata, se quella dettata dal Codice o quella della Legge sulle società di persone.

Importanti sono i segnali che arrivano dalla prassi societaria stante l'assenza, sotto il profilo dell'inquadramento giuridico dei due concetti, di una posizione unanime della dottrina[53] sul punto. Accade molto spesso che nel tentativo di 'colmare' gli estremi di un concetto giuridico riferito al sistema giuridico cinese, sia la pratica a suggerire la risposta o quantomeno a facilitare la comprensione di come un determinato istituto operi e sia regolato.

Per quel che riguarda l'atto costitutivo delle società di persone, ciò

[50] «Le contrat est un accord de volontés entre deux ou plusieurs personnes destiné à créer, modifier, transmettre ou éteindre des obligations».

[51] È stata evidenziala la presenza di una *sineddoche* nella definizione di contratto di cui all'articolo 2 della Legge sui contratti della Repubblica Popolare, oggi assorbita nell'articolo 464 del Codice. Si veda R. Sacco, *Il contratto* in F. Vassalli (diretto da), *Trattato di diritto civile*, UTET, 1975 ma anche P.G. Monateri, *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti*, Giuffrè, 1984.

[52] In questo senso S. Porcelli Hetong e Contractus, *op. cit.* p. 74.

[53] In questo senso 朱虎 [Zhu Hu], 《民法典》合伙合同规范的体系基点 [«Codice Civile» I fondamenti del sistema del contratto di società di persone], in 法学 [Law Science], 465, 8, 2020, 19-36.

che si riscontra è la tendenza delle parti a limitare la regolamentazione del rapporto all'interno della nascente struttura societaria sulla base di accordi sintetici e generali, rimandando a 'contrattazioni parallele e successive' – o, potremmo dire, 'parasociali' – ogni eventuale aspetto che si avverte di dover in qualche maniera formalizzare.

Niente che, personalmente, mi sorprenda se si considera il ruolo che il diritto, anche *inter partes*, ha avuto in Cina e che, per quanto evoluto, non sedimenta tornando, non di rado, a galla.

Peraltro, questa tendenza pare non voler esser abbandonata, stando a quanto può leggersi nella seconda bozza di revisione della Legge sulle società di capitali (non ancora approvata), la quale rimanda ad accordi (协议 *xieyi*, per cui se ne richiede la sottoscrizione) *a latere* della costituzione (che avviene su base statutaria e non contrattuale) la regolamentazione di ogni aspetto riguardante il regime dei diritti e dei doveri dei soci nel corso della *costituzione della società*[54] (ex. articolo 43[55]).

Anche in quel caso sarà indispensabile capire se e quando tali accordi rappresenteranno la fonte di un vincolo giuridico fra le parti e/o delle parti verso i terzi.

Quanto precede è sintomatico di un'importante disarmonia fra Codice e leggi isolate, di cui il campione offerto dal raffronto con la Legge delle società di persone è solo un possibile esempio.

4. *Un codice di commercio della* Repubblica Popolare Cinese*. Quale futuro?*

Allo stato attuale le disciplina del diritto dell'impresa e del diritto commerciale sono estremamente frammentate e regolamentate da *mini-codici* o leggi *ad hoc* (tassativamente tutte 法*fa*), separate ed autonome.

[54] Dal tenore letterale non si comprende se l'articolo 43 si riferisca al solo regime dei diritti e dei doveri dei soci, vigente fintantoché la società non è stata costituita, o se le previsioni accordate circa la distribuzione interna dei diritti e degli obblighi, debbano intendersi estese all'intero corso della vita sociale. Allo stato attuale, per quel che si legge nel testo della seconda bozza di emendamento, si propende per la prima ipotesi.

[55] L'articolo 43 della 中华人民共和国公司法(修订草案)(二次审议稿) [Seconda bozza di revisione della Legge sulle società di capitali della Repubblica Popolare Cinese] recita: «有限责任公司设立时的股东可以签订设立协 议,明确各自在公司设立过程中的权利和义务。».

L'elencazione che segue è assolutamente parziale e quindi deve intendersi come meramente esemplificativa. Fra i principali riferimenti normativi, possono richiamarsi: la 中华人民共和国中小企业促进法, Legge della Repubblica Popolare Cinese per la promozione delle organizzazioni economiche di medie e piccole dimensioni; la 中华人民共和国个人独资企业法, Legge della Repubblica Popolare Cinese sulle imprese individuali; la 中华人民共和国乡镇企业法, Legge della Repubblica Popolare Cinese sulle imprese nelle piccole città e nei villaggi; la 中华人民共和国全民所有制工业企业法, Legge della Repubblica Popolare Cinese sulle imprese industriali di proprietà del popolo; la中华人民共和国合伙企业法Legge della Repubblica Popolare Cinese sulle società di persone; la 中华人民共和国公司法, Legge della Repubblica Popolare Cinese sulle società di capitali, insieme a molte altre.

Anzitutto, mi pare utile partire da alcune brevi riflessioni circa la natura e la tendenza del diritto civile cinese, cercando di inquadrare in quale *trend* di codificazione, fra quelli vissuti da altri Paesi, potrebbe collocarsi un Codice di Commercio della Repubblica Popolare, potendo valere questo come riferimento predittivo del possibile ruolo e del futuro percorso evolutivo della disciplina commerciale.

In questa cornice, non può non considerarsi l'inesistenza, sul piano privatistico, di una distinzione fra *diritto civile* e *diritto commerciale* per la quale, stante la massima secondo cui *la norma speciale prevale su quella generale* (sicuramente recepita dal diritto cinese), le norme che disciplinano gli aspetti in materia del diritto dell'impresa, delle società e che dunque, in generale, disciplinano la materia commercialistica (rimaste al di fuori dell'opera di codificazione) dovrebbero prevalere su quelle *generali*, che tornerebbero ad essere rilevanti solo in via residuale, allorché la disciplina specialistica non preveda alcunché.

Sono consapevole che quella che precede potrebbe essere reputata una lettura fin troppo *tradizionale* di un fenomeno che meriterebbe, invece, una rivisitazione in chiave *moderna*, con maggiore clemenza sul giudizio *specialità* delle norme esterne al codice, a favore piuttosto della loro *unicità* ed *esclusività*.

Tuttavia, nel caso cinese, tenderei a conservare un certo scetticismo, mantenendo valida l'opzione per cui l'isolamento e la *specialità* della materia sono in realtà un fatto voluto, in forza di una necessità momentanea del sistema (soprattutto di quello economico e politico) che non esclude

che le stesse possano divenire oggetto di disciplina giuridica in un secondo momento.

Scorrendo l'indice dei contenuti del Codice, sarà agevole rendersi conto del fatto che, dei diciannove contratti tipici inclusi nel Codice (sulla falsariga, a parte minime eccezioni, di quanto era già previsto nella Legge sui Contratti) tutti, tranne quello di donazione, sono contratti tipicamente commerciali. Abbiamo, infatti, il contratto di *vendita,* di *fornitura e consumo di energia elettrica, acqua e gas*, poi ancora il contratto di *mutuo*, di *fideiussione*, di *locazione*, di *locazione finanziaria*, di *factoring*, accanto a contratti 'nuovi' come quello di *tecnologia*, ecc.

A me sembra che ciò testimoni due aspetti: una certa tendenza alla *commercializzazione* del diritto civile e, contemporaneamente, uno *sconfinamento* della materia commercialistica al di là dei confini del diritto civile.

Per certi versi, parrebbe un segnale verso un percorso di *integrazione* e *ricostruzione* del diritto civile e commerciale che anche il nostro Paese (come Svizzera ed Olanda) ha seguito, tanto che, secondo alcuni, il confine tra diritto commerciale e diritto civile (anche sul piano sostanziale) è divenuto via via sempre più labile.

È pur vero che l'inclinazione a mantenere frammentata la materia commerciale, soprattutto quella riferita alle società di capitali, in aggiunta al fatto che il Paese si appresta a promulgare l'ennesimo progetto di riforma della Legge sulle società di capitali, riconfermando la volontà di mantenere – almeno queste società – al di fuori del Codice, avvicina l'esperienza cinese più a quella Giapponese (per il raggiunto risultato attuale), ovvero a una nazione che benché abbia adottato lo 商法 Shoho – Codice commerciale (nel 1899) mantiene tuttora separata la disciplina delle società di Capitali, riferita alla 新会社法 *Kaisha-Ho*, del 2005, considerata legge *speciale* per la regolamentazione delle *kabushiki-kaisha*, delle *goumei-kaisha*, delle *goushi-kaisha* e delle *goudou-kaisha* (in cui il termine *kaisha*, comune a tutte, designa le 'società di capitali'), rispettivamente le *Stock Company*, *General Partnership Company*, *Limited Partnership Company* e le *Limited Liability Company*.

Il diverso percorso di Cina e Giappone è indubbio, ma mi sento di non *snobbare* affatto l'esperienza di questo secondo Paese, ed anzi reputo opportuno farne un *memento*.

Niente di nuovo per la Cina che si troverebbe infatti ancora una volta a servirsi del *caso giapponese* per abbreviare i tempi di modernizzazione e sistematizzazione della materia del diritto commerciale, se e quando ne avvertisse la necessità. Mi torna in mente un noto proverbio cinese che riassume al meglio questo punto: 老马识途 *Un cavallo vecchio conosce* (n.d.a. meglio) *la strada*, ovvero si dà valore all'esperienza (altrui) per non commettere errori.

Di possibile (e ancor più auspicabile) ispirazione giapponese potrebbe essere l'adozione di un codice commerciale (pur volendo mantenere al di fuori di esso le *companies*) che affianca, nel caso giapponese, ai *principi generali*, la disciplina degli atti e contratti commerciali e una parte dedicata al commercio marittimo. Per la Cina, però, ciò comporterebbe un duplice sforzo: creare ed estrapolare

Creare nuove tassonomie giuridiche, dato che al momento non si rintraccia in alcun dove neppure una rudimentale, unitaria definizione di *impresa*, di *imprenditore*, di *atto di commercio*, di *attività d'impresa*, *ecc.*

Estrapolare perché, come si è detto poco sopra, la propensione alla commercializzazione del Codice ha portato lo stesso ad assorbire, fra i contratti *tipici*, quelli commerciali, che a quel punto troverebbero più giusta collocazione nel Codice di commercio.

Si aggiunge poi, un'ulteriore visione: nonostante sia stato riservato, nel Codice cinese, maggiore spazio alle società di persone, al momento non vi sono cenni che facciano pensare ad un'abrogazione della loro legge *ad hoc*[56].

In materia societaria si ha, dunque, una legge sulle società di persone e una legge sulle società di capitali, il che non mi consente di escludere (neppure) in un futuro prossimo un percorso cinese che possa seguire i passi dell'esperienza – ad esempio – austriaca, che si serve di due *Act* separati per regolare la società di capitali (il Gesetz über Gesellschaften mit beschränkter Haftung, GmbHG, *Limited Liability Companies Act* e l'Aktiengesetz, AktG, *Stock Corporation Act*) ma anche di un codice dell'impresa (Unternehmensgesetzbuch, UGB), in vigore dal 2007.

[56] 张文显 [Zhang Wenxian],*法理学* [Giurisprudenza], Peking University Press, 2007, p. 104.

5. *Considerazioni conclusive*

Sul piano oggettivo, i percorsi potrebbero essere molti, ma si avverte ancora una forte fragilità del sistema, dovuta alla mancanza di lemmi e tassonomie proprie del diritto[57] (a prescindere dal sistema giuridico di ispirazione) che sono alla base di esso e la ragione stessa di comparazione tra linguaggio giuridico ed altri *linguaggi giuridici.*

Sul piano soggettivo la dottrina è fortemente divisa sulla reale *convenienza*, per la Cina, di una codificazione commerciale.

Accanto ai convinti sostenitori di un Codice di commercio, si affiancano, nei tavoli di discussione, *decine* di altre visioni semi-allineate o in totale contrasto fra loro:

- è una pratica in *controtendenza* – una parte della dottrina[58] ritiene che la creazione di Codice di commercio sia ormai una pratica desueta ed in *controtendenza*, vista anche la *promiscuità* normativa fra diritto civile e diritto commerciale, per cui il secondo fungerebbe da *norma speciale* e sarebbe di per sé sufficientemente caratteristico da assicurare una (efficace?) regolamentazione della materia, quandanche senza un apparato codicistico di riferimento (se non quello del Codice civile). La *vis* attrattiva del diritto civile ricondurrebbe a sé, infatti, anche le vicende in materia commerciale, nonostante il legislatore abbia relegato la disciplina ai detti *mini-codici*;
- ciò che necessita è la creazione di *Principi Generali di Diritto Commerciale* (商事通则 *shanglv tongze*[59]) – Alcuni[60] sostenitori della posizione precedente ammettono semmai la formulazione di *Principi Generali di Diritto Commerciale* che possano assorbire la produzione della giurisprudenza (*guiding cases*);
- un'esperienza non del tutto nuova per la Cina – si ricordano infatti alcuni infruttuosi tentativi di 'codificazione commerciale': le 深圳经济

[57] Così N. Irti, *L'età della decodificazione*, Giuffrè, 1999, p. 37.

[58] Cui Wenyu, *Construction of a China's commercial law system, under the deconstructionism of the commercial code*, in *China Legal Science*, 7, 4, pp. 3-24

[59] Alle società di capitali sono dedicati appena dieci articoli, dall'articolo 76 all'articolo 86.

[60] In Giappone per lungo tempo la materia del diritto commerciale (o per meglio dire societaria) è stata disciplinata da un Codice di Commercio (del 1899), da una Legge sulle *Private Limited Liability Companies* (del 1938) e da diversi regolamenti secondari.

特区商事条例 *Shenzhen jingji tequ shangshi tiaoli*, *Regolamento della zona economica speciale di Shenzhen sugli aspetti commerciali*, adottati dalla municipalità di Shenzhen nel giugno 1999 (emendata nel 2004 e successivamente invalidata. Oggi non più in vigore) e le *draft proposals* rispettivamente di Miao Yanbo e Fan Tao[61];

- rappresenterebbe una *limitazione allo sviluppo economico* – si ritiene, invero, che la codificazione possa essere addirittura penalizzante per l'economia cinese, in considerazione della struttura di *governance* nazionale e della sua organizzazione secondo uno schema *centralizzato con caratteristiche di decentralizzazione*, il quale ammette pratiche differenti, tenendo conto dei differenti piani di governo per le diverse aree del Paese. Un codice di commercio dovrebbe tenere conto delle diffuse, variegate e variabili pratiche di *business*, uniformando il sistema e finendo per ridursi ad una cinghia soffocante per economia, operatori del mercato, amministrazioni ed anche corti.

Con la mentalità del giurista sono portata a credere, prima ancora che ad un Codice di Commercio, alla possibile formulazione e all'utile contributo che i *Principi Generali di Diritto Commerciale* (come del resto è stato per il diritto civile) possono offrire in un futuro neppure troppo lontano; con la mentalità del sinologo, sono più incline a trovare metaforicamente una risposta, per ciò che sarà, osservando la scrittura: «ciò che vediamo non è ciò che è […] anche se messo nero su bianco ci racconta la sua storia, il suo percorso, non è ancora diventato «significato», è posto a metà tra l'idea racchiusa nell'attimo della creazione artistica e l'atto materiale di divenire espressione. È questo il punto fondamentale da comprendere. L'ideogramma non è un «significato», ancorché si pos-

Nel corso degli anni il *legal framework* relativo alle società di capitali, con particolare riferimento alle società per azioni, si è profondamente evoluto, fino ad arrivare all'attuale 新会社法 *Kaisha-Ho*, del 2005, entrata in vigore nel 2006. In principio, il Codice di commercio traeva ispirazione dal sistema tedesco, tanto che la prima bozza di 'legge commerciale' venne elaborata da Hernan Roesler, giurista ed economista tedesco (1834-1894). Cfr. N. Nakamura, *The revision of Japanese Company Law and its Modernisation*, in *Waseda bulletin of Cmparative Law*, 24, pp. 1-22.

[61] Cfr. https://www.japaneselawtranslation.go.jp/en/laws/view/4020/en (ultimo accesso 25 marzo 2023).

sa attribuire a una parola un significato univoco decontestualizzandola dal"momento": è un divenire del pensiero»[62].

[62] Contestualmente all'adozione del Codice sono state abrogate tutte le leggi preesistenti nelle materie codificate. Pertanto una simile scelta, se fosse stata nella volontà del legislatore, poteva essere implementata insieme alle altre, con la promulgazione del Codice.

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WHY CORPORATIONS & WHERE ARE THEY HEADING TO? SHAREHOLDERS, STAKEHOLDERS AND SUSTAINABILITY IN EU AND CHINA

1. *Introduction*

Sustainability becomes more important than ever. While the classical manners of companies' operation need to be reformed continuingly to adopt upcoming new changes, one question still remains unanswered. Are companies there for their shareholder, stakeholders or more broadly to attain sustainability for the society in general? Under the current geopolitical dynamics, the EU and China seem to have more common grounds to map their actions on sustainability. Therefore, in this Chapter, we look at the development in the EU and China, in order to explore this question. We first discuss the goal of corporations. Following that, recent legal developments in EU and China on sustainability, directors' duties, as well as due diligence and internal control will be examined respectively.

2. *What is the goal of corporations?*

In all legal systems, the question arises as to what purposes should companies and their directors pursue. In particular, it is debated wheth-

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er directors should only maximise shareholders' profit or also consider other stakeholders' interests. It goes without saying that the larger the number of stakeholders whose interests are to be considered, the bigger also directors' freedom. This question is exclusively focused on company law and directors' fiduciary duties. In other words, even legal systems that indicate shareholder value as the sole corporate purpose may pursue other stakeholders' interests by way of other legal strategies, such as administrative duties or labour law. Nevertheless, the hidden abode of this legal question is a political issue, namely whether maximising shareholder value spontaneously increases the value for the society as a whole, including the company's other stakeholders, such as workers or creditors. In other words: is it desirable to steer companies to pursue non-shareholders interests, such as those of workers, clients or the environment, or is the companies' proper goal just to maximise profits?

In the last decade, a new policy benchmark has emerged in scholarly and political debate, namely that companies' activity should be 'sustainable'. Some projects of the European Union, in particular, pursue the goal of environmental sustainability and the protection of human rights, according to some indications developed by the UN in recent years[1]. This goal is often linked to the purpose of pursuing long-term entrepreneurial and investment strategies. Social and environmental sustainability has entered the policy agenda after the 2008 crisis, which is often considered to be caused by the tendency of listed companies to pursue short-term objectives and focus their attention only on the market value of the shares. A few years ago, the U.S. *Business Roundtable*, which gathers the CEOs of major US companies, issued a surprising statement that promotes the idea that companies should not only aim to maximize the profit for the shareholders but must also take into account the interests of other subjects, also in order to overcome the excessive inequalities produced by capitalism[2]. As can be guessed, these statements have raised

[1] See: United Nations Sustainable Development Goals (SDGS) General Assembly Resolution 70/1: Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, (25 September 2015), www.undocs.org/A / RES / 70/1. See also the Communication from the Commission "The sustainable future of Europe: next steps - European action for sustainability" (SWD (2016) 390 final).

[2] Business Roundtable, Statement on the purposes of a corporation, 2019, https://opportunity.businessroundtable.org/ourcommitment/. The manifesto of the World Eco-

many perplexities and criticisms. One would indeed expect that the U.S. business roundtable would rather support the idea that companies must only pursue shareholder value. Some scholars have been vocal in arguing that the *Business Roundtable*'s claims are unrealistic or opportunistic[3], because protecting the environment or other *stakeholders* is not companies' task, but a state's duty through rules and constraints external to company law[4]. And it is not unreasonable to argue that managers are trying to emancipate themselves from capitalists' patronage[5].

This issue is one of the underlying problems of capitalism, namely the relationship between the private interest of shareholders and the interests of society at large. Instead of discussing the proper purpose of corporations, it seems much more useful to address the main source of their negative impact on other stakeholders and the environment, namely shareholders' limited liability. Shareholders' private assets are protected from companies' creditors and, at the same time, companies' assets can not be seized by shareholders' private creditors. Limited liability, which is an essential factor that facilitates entrepreneurship and investments, also produces the risk of negative externalities. Shareholders, indeed, only risk what they have invested in the company (which might be a high value), hence they have incentives, at least in some circumstances such as in the vicinity of insolvency, to shift businesses' risks onto other stakeholders or the environment at large. Hence a more pragmatic policy question is whether companies should be requested to internalise negative externalities or whether, at least in some circumstances, shareholders might be requested to pay for their companies' damages.

nomic Forum (Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution) is no different in tenor: https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution /

[3] F. Denozza, *Lo scopo della società: dall'organizzazione al mercato*, in *Rivista Orizzonti del Diritto Commerciale*, n. 3, 2019, 622.

[4] L.A. Bebchuk - R. Tallarita, *The Illusory Promise of Stakeholder Governance*, in *Cornell Law Review*, 2020, 91; M. Gatti - C. Ondersma, *Can a broader corporate purpose redress inequality? The stakeholder approach chimera*, in 46 *Journal of Corporate Legal Studies*, 2020, 1.

[5] F. Denozza, *op. cit.*

3. *Sustainability: Sustainability in EU law*

In the European Union, the starting point is the Commission's Action Plan 'Financing Sustainable Growth', dating back to 2018[6]. This program for future actions focuses on financing securities of sustainable companies and declared as its goal to transform the European economy into 'a greener, more resilient and circular system'. The Action Plan moves from the realistic statement that '[e]nvironmental and climate risks are currently not always adequately taken into account by the financial sector.' Additionally, the Action Plan admits that asset managers and institutional investors 'still do not systematically consider sustainability factors and risks in the investment process' and 'do not sufficiently disclose to their clients if and how they consider these sustainability factors in their decision-making'. And yet, the goal of 'sustainability' is meant to be pursued just by increasing transparency about social purposes and the environmental impact of financial investments, so that private investors will be able – if they so wish – to choose to invest in sustainable companies. The implicit assumption is that if retail investors had more information, they would be happy to direct their savings and investments towards socially and environmentally sustainable financial products, yet the validity of this assumption is still controversial.

Regarding company law rules, one of the most significant attempts to consider sustainability goals is the directive on non-financial communications[7]. In a nutshell, larger companies must disclose, among other documents attached to their financial statements, information on results and transactions of non-financial nature about the environment, social and employee issues, compliance with human rights and corruption risks[8].

[6] Action Plan, COM (2018) 97 final. See the taxonomy in Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 concerning the establishment of a framework that favors sustainable investments and amending regulation (EU) 2019/2088. For a summary Bartolacelli 2021.

[7] Directive 2014/95 / EU of the European Parliament and of the Council, of 22 October 2014, amending Directive 2013/34 / EU as regards the disclosure of non-financial information and information on diversity by certain companies and certain large groups. See Kocollari 2018, 65 ff. for a discussion of the tools to measure the social impact of business activity.

[8] On 21 April 2021, the Commission adopted a proposal for the reform of the directive which essentially broadens its objectives and scope to also take into account en-

To be sure, this directive does not seem to make these goals mandatory, it only clarifies that, if a company pursues these objectives, it must give them adequate transparenc[9].

Furthermore, the second directive on shareholders' rights, approved in 2017, aimed at encouraging 'the long-term commitment of shareholders'[10], by increasing transparency about institutional investors' and asset managers' strategies and their time horizon (called 'commitment policies'), and by enlarging shareholders' voting powers on crucial matters such as directors' remuneration or transactions with related parties. This directive, therefore, is based on the hope that an increase in the transparency and powers of shareholders will induce the latter to pursue, both in the exercise of social rights and in the time horizon of their investment, long-term goals and not short-term profit maximization[11].

In 2020 a study was published, drafted by Ernst & Young for the European Commission, with the significant title *Study on directors' duties and sustainable corporate governance*[12]. This report assumes that European companies primarily pursue short-term goals, mostly due to financial market pressure. Consequently, future EU legislation should induce companies to pursue long-term objectives that make them environmentally and socially sustainable, at the expense of short-term profit. To attain this goal, this report suggests harmonising some aspects of company law in order to favour long-term strategies that take into account the interests of *stakeholders* other than shareholders. In particular: directors' remunerations are to be aligned with long-term and sustainability objectives[13], national boards' composition criteria are to be harmonised to in-

vironmental and social sustainability objectives: Directive (EU) 2022/2464 of the European Parliament and the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

[9] S. Bruno, *Dichiarazione "non finanziaria" e obblighi degli amministratori*, in *Riv. soc.*, 2018, 979.

[10] Directive 2017/828 / EU of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36 / EC as regards the encouragement of the long-term commitment of shareholders.

[11] See E. Gliozzi, *Lo short-termismo e la Direttiva n. 828 UE del 2017*, in *Riv. trim. dir. proc. civ.*, 2020, 847 et seq.

[12] See it on the website: https://op.europa.eu/it/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en.

[13] In particular it is suggested to limit the right to resell the shares obtained by direc-

clude subjective criteria that consider long-term sustainability objectives and, eventually, boards of directors should involve external *stakeholders* (i.e. non-shareholders) in the decision-making process. Similar questions are raised by another recent study that addresses the desirability of introducing 'due diligence' duties for the directors of parent companies, to avoid human rights violations throughout the value chain (therefore even if committed from foreign suppliers and subsidiaries)[14]. And, on the basis of this report, the European Parliament recently approved a resolution calling on the Commission to propose a directive on 'due diligence' referring to the violation of human rights, also implying that the directors of the company upstream of the value chain should not pursue profit maximization at any cost[15].

The question underlying the European debate of the moment, however, is not new: it is indeed one of the most debated issues in the whole of company law. It is worthwhile to say a few words on it, at the cost of recapitulating ancient and, perhaps, well-known issues: director's duty.

3. Continued*: Sustainability in Chinese Law*

The development of this area in China has its unique routes. This is partially decided by the nature of economic reforms in China. Additionally, the sustainability issue is tightly linked with the company law reforms. This is the reason why, to understand the sustainability matter under Chinese context, corporate governance reforms need to be looked

tors in *stock option plans* and including measures related to non-financial values and social or environmental objectives to be achieved contained in the agreements on the remuneration of directors.

[14] See it on the website: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

[15] European Parliament resolution of 10 March 2021 with recommendations to the Commission on due diligence and corporate responsibility P9_ TA (2021) 0073 (2020/2129 (INL). In the aftermath, the European Commission adopted a compromise proposal (Brussels, 23.2.2022 COM(2022) 71 final 2022/0051 (COD) Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937). At the moment when this paper is being drafted, the final approval of this proposal by the Council (given the opposition of some Governments, including Italy, France and Germany) is uncertain.

into. Due to the Company Law, which was first enacted in China in 1993, the debate on the shareholders – centric and stakeholder-centric matter has not been carried out as the same scale in the EU. China has quickly moved to encourage corporations to consider their social responsibility. This point of view is supported by the Company Law 2005 revision, under which company shall comply with social and business morality, and bear social responsibilities[16]. During this time, other Chinese laws and regulations addressed this matter as well; for instance, the Food Safety Law, Code of Corporate Governance for Listed Companies, Guiding Opinions of the China Insurance Regulatory Commission on the Fulfilment of Social Responsibilities in the Insurance Industry, etc.

A more recent milestone is the enactment of the Civil Code of China in 2021. It provides the foundation for a more systemic approach to deal with good governance and sustainability issues. It requires a person of the civil law to behave in compliance with the principle of good faith, uphold honesty and honour able commitments[17]. It also states that a person of the civil law shall conduct civil activities in a manner that facilitates conservation of resources and protection of the ecological environment[18]. Civil Code has further clarified the liability for environmental pollution and ecological damage, which are recognised as the "Green Clauses"[19]. This enhances the existing environment protection legal framework in China. Given the increasing concerns on sustainability matter, the proposals for revision of Company Law have emphasized the importance of sustainability and environmental matters, in both first round draft revision in 2021 and the second round draft revision in December 2022. It stipulates that, companies must "fully consider the interests of its employees, consumers, and other stakeholders, as well as social and public interests, such as ecological and environmental protection, and assume social responsibilities"[20]. Furthermore, if further stipulates that, "the state encourages companies to participate in social welfare activities and publish their social responsibility reports"[21].

[16] Company Law of PRC, revised in 2005, Article 5.
[17] Civil Code of PRC, Article 7.
[18] Civil Code of PRC, Article 9.
[19] Civil Code of PRC, Article 1229 to 1235.
[20] Second Draft Revision of Company Law, Article 20.
[21] *Ibid.*

In terms of disclosure requirements, similarly, there are various laws and regulations. For instance, the revised Code of Corporate Governance for Listed Companies stipulates that listing companies shall disclose environmental information and social responsibilities performance information such as poverty alleviation according to the relevant regulatory regime[22]. The Ministry of Ecology and Environment (MEE) issued the Plan for the Reform of the Legal Disclosure System of Enterprise Environmental Information in May 2021, under which a mandatory environmental information disclosure system is to be established by 2025[23]. Following this, in December 2021, the MME Measures for the Administration of Legal Disclosure of Enterprise Environmental Information[24]. It states that enterprises shall be responsible for the disclosure of environmental information and that they shall establish and improve management systems for such disclosure[25]. China's securities regulator, the China Securities Regulatory Commission (CSRC) has enhanced the relevant disclosure regime. For instance, in 2021, the CSRC revised the Guidelines on the Content and Format of Information Disclosure by Companies Offering Securities to the Public No. 2 – Content and Format of Annual Reports[26]. Articles 41 to 43 list the relevant environment and social responsibility contents. In 2022, the CSCS published the revised Work Guidelines for the Investor Relations Management of Listed Companies, which is aimed at enhancing effective communication between listed companies and investor[27]. It states that listed companies shall use multiple channels, platforms and methods to communicate with the investors, including content that relates to the company's environmental, social and governance information[28]. It can be seen from the above discussion, that there is a growing body of regulatory guidance for sustainability and ESG reporting/disclosure. Nonetheless, there is

[22] China Securities Regulatory Commission, [2018] No. 29, Article 95.

[23] Ministry of Ecology and Environment, Huanzonghe [2021] No. 43, Point I.

[24] Ministry of Ecology and Environment, [2021] No. 24, effective date: 8 February 2022.

[25] Article 4.

[26] China Securities Regulatory Commission CSRC, [2021] No. 15, published & effective date: 28 June 2021.

[27] China Securities Regulatory Commission, [2022] No. 29, published date: 11 April 2022, effective date: 15 May 2022.

[28] Article 7.

not a set of unified or centralized rules to deal with the sustainability and ESG disclosure responsibility of the corporations. The disclosure requirements are mixed of voluntary and mandatory disclosure. Due to the existence of various legal documents, it has added the operational and compliance costs for companies. The format and contents required are different, these may potentially lead to the difficulties for the users to compare and evaluate their reports. In the past four decades of economic reform, we have witnessed such limitation in the Chinese legal development. It is not difficult to understand that this may be decided by the fast development and reform nature of Chinese business. Though, a more harmonized and standardized system will be helpful for the development of this legal regime.

Given the aforementioned status quo, this matter in China will lay further responsibilities on the directors, which will be analysed in the next section.

4. *Directors' Duties: Directors' duties in EU*

Directors' duties are still governed by national company law rules, which might significantly diverge from each other regarding the role of other stakeholders.

The model for stakeholder-oriented company law is Germany, where directors of *Aktiengsellschaften* have to balance the interests of shareholders with those of employees and other stakeholders, also because of the codetermination mechanism that grants workers a significant weight in supervisory boards that appoint companies' directors[29]. And yet, it is to be noticed that over the last years, the relevance of other stakeholders has become increasingly significant for directors' duties in other countries. In France, for instance, since 2019 companies can pursue any goal, as long as it is explicitly indicated in the deed of incorporation together with the rules and principles to balance the interests of the various stakeholders[30]. The 2019 reform, in particular, requires directors to take into account the social and environmental impact of their activities, not just

[29] Fleischer 2018.

[30] LOI n. 2019-486, 22 May 2019 "Loi Pacte ".

the interests of the shareholders[31]. It is however not clear what the sanctions are for directors' choices that do not take into account the interests of other stakeholders. In Italy, on the other hand, as a general rule, the purpose of profit is still considered an essential element of companies' articles of association[32]. Since a reform in 2015, however, companies can amend their articles of association by introducing the purpose of balancing the interests of shareholders with that of other stakeholders. These companies, renamed 'benefit companies', are committed to operating in a responsible and transparent manner towards other stakeholders. It is, however, not clear whether other companies are allowed to combine shareholders' profit maximization with other interests[33]. Despite the general rule set forth in the Italian Civil Code, and the relevance of profit, the new edition of the Corporate Governance code of 2020 states that directors should pursue a 'sustainable success', namely the 'creation of long-term value for the benefit of shareholders, taking into account other stakeholders. Company Relevant'[34], which is a formula that briefly echoes the content of *Section* 172 of the UK *Companies Act*.

In this regard, it is interesting to consider UK rules about director duties, as they try to find a balance between the interest of the shareholders and the interests of other *stakeholders*. The first and general duty of directors is to act in good faith in order to '*promote the success of the company for the benefit of its members as a whole'*[35]. However, directors, in pursuing the interests of the shareholders, must also take into account: (a) the probable long-term consequences of their choices; (b) the interests of the workers; (c); relations with customers and suppliers; (d) the impact on local communities or the environment; (e) reputational needs; (f) the duty to treat shareholders fairly. This formulation,

[31] Art. 1833 Code Civil.

[32] Art. 2247 of the Italian Civil Code. See R. Costi, *La responsabilità sociale dell'impresa e il diritto azionario italiano,* in *La responsabilità dell'impresa,* Milano, 2006, 83 et seq.; recent opinions, however, suggest that this article is not stringent: M. Libertini, *Un commento al manifesto sulla responsabilità sociale d'impresa della Business Roundtable*, in *Rivista Orizzonti del Diritto Commerciale*, n. 3, 627 *et seq*.; U. Tombari, *L'organo amministrativo di spa tra "interessi dei soci" e "altri interessi"*, in *Riv. soc*., 2021, 13.

[33] U. Tombari, *L'organo amministrativo di spa tra "interessi dei soci" e "altri interessi"*, in *Riv. Soc*, 2018, 20 et seq.

[34] Corporate Governance Code, January 2020, Article 1, Principle 1.

[35] S. 172, Companies Act 2006.

commonly referred to as 'enlightened shareholder value', has undergone numerous criticisms. First, 'secondary' duties are difficult to punish, considering that local communities or workers, who complain that they have not been adequately considered, have little opportunity to take action against directors, at least by enforcing fiduciary duties based on company law[36]. Moreover, in today's economic reality, financial markets often require short-term investment horizons and it seems difficult that, if faced with the alternative of sacrificing, on the one hand, a possible profit and, on the other hand, employees or the environment, administrators are really free to choose[37].

5. Continued*: Directors' duties in China*

Director's duties are mainly dealt under the Company Law. Under this law, directors of a company shall abide the laws, administrative regulations and the company's articles of association, and they shall be faithful and diligent to the company[38]. Though there is not any further explanation as to the legal meaning of faithful and diligent. Only under the next section, the Company Law listed the prohibited behaviours for a director such as, misappropriating the funds of the company; opening an account in his/her own name or the name of any other individual to deposit the funds of the company; accepting, and keeping in his/her possession, commissions for the transactions between others and the company; disclosing the company's secrets without authorization; etc. [39]

It is not difficult to imagine that this vague situation has led to many confusions in the past few years; in particular, for a civil law country. The duty of loyalty and diligence are the most important duties of directors, while lack of clarity will only increase the operational difficulties for the relevant parties. Based on these, the revised draft of Company Law attempts to improve the aspect of duty of loyalty and diligence of directors.

[36] A. Keay, The Enlightened Shareholder Value Principle and Corporate Governance, Routledge, London-New York, 2013, 137.

[37] L. Talbot, *Critical company law*, Routledge, London - New York, 2016, 142-143.

[38] Standing Committee of the National People's Congress, revised 26 October 2018, Article 147.

[39] Article 148.

It states that directors have a duty of loyalty to the company, and they shall take measures to avoid conflicts between their own interests and the interests of the company, and shall not use their authority to seek improper interests[40]. It further states that, directors have a duty of diligence to the company, and in performing their duties, and they shall exercise reasonable due care in the best interests of the company[41].

Among other further revisions, directors' liabilities for gross negligence is enhanced: if a director causes damage to others in the performance duties, the company shall bear the liability for compensation, directors and senior management shall also be liable for compensation if they are intentional or grossly negligent[42].

As stated in the earlier session of this chapter, this draft revision states that companies must "fully consider the interests of its employees, consumers, and other stakeholders, as well as social and public interests, such as ecological and environmental protection, and assume social responsibilities"[43]. This has evidently shown the new Company Law will further incorporate the stakeholders, employees and environment concerns into consideration, which set up a general direction for the future direction.

However, as the newly added articles to the directors' duties are still limited, and the Article 20 of Company Law revision draft does not give a clear legal position as to whether the directors can put the stakeholders' position higher than the shareholders, the situation remains being vague. This obviously will increase the operation difficulties for directors in the future. Thus, further mandatory requirements shall be set with a clearer approach.

6. *Due diligence and companies' internal procedures: Due diligence and companies' internal procedures in EU*

The most promising strategy to address companies' negative externalities is introducing a duty of 'due diligence' directors regarding com-

[40] Second Draft Revision of Company Law, Article 187.
[41] *Ibid*.
[42] Second Draft Revision of Company Law, Article 190.
[43] Second Draft Revision of Company Law, Article 20.

panies' impact on human rights and the environment. This strategy was set forth first in 2011 in the *Guiding Principles on Business and Human Rights,* drafted by the UN Office of the High Commissioner for Human Rights. In particular, the purpose of 'human rights due diligence' should be to 'identify, prevent, mitigate and account for how [companies] address their adverse human rights impacts' (principle 17). This assessment should cover any negative impact on human rights that the company can cause (or contribute to causing) through its business or that may be related to its activities, products or services. In particular, due diligence procedures must include: (a) an assessment of current and potential impacts on human rights; (b) actions relating to these findings; (c) communicate how these impacts have been addressed. In a similar vein, the Organization for Economic Cooperation and Development (OECD) issued in 2017 *Guidelines for Multinational Enterprises: Responsible Business Conduct Matters*[44]*,* which also included a general human rights due diligence duty and extended such assessment to potential violations throughout the whole value chain, including foreign subsidiaries and suppliers. Extending such an ex ante assessment to behaviours of suppliers is obviously problematic and extremely controversial, as companies might not be able to have a full control of what happens downstream their value-chain.

Turning our attention to EU member states, we can notice that some of them have introduced legislations mandating due diligence duties to their companies. In the Netherland, domestic companies and companies active on the domestic territory should avoid child labour throughout their whole value-chain, that is to say they should also verify that their foreign subsidiary and foreign suppliers comply with this duty[45]. While Dutch law has a narrow focus (only child-labour), France[46] and German[47] legislations try to cover a broader spectrum of any human right violation. According to both French and German legislations*,* large domestic companies should avoid violations of human rights, including environmental damages, throughout their whole value chain, including 'stable suppliers'. Yet, while in the French law any violation of human

[44] https://www.oecd.org/daf/inv/mne/48004323.pdf.
[45] Law 401/2019, of 24 October 2019.
[46] Loi de Vigilance, 2017 (Law n. 2017-399, 27 March 2017).
[47] Lieferkettensorgfaltspflichtengesetz (LkSG), 16.1.2021, BGBl, 2021, I, 2959.

right is included, the German rules only prohibit those violations stemming from a list of international treaties that can not further expanded or implemented by courts.

Against this background, the Legal Affairs Commission of the European Parliament has drafted in 2021 *Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability.* Eventually, the European Commission has drafted a proposal for a Directive on *Corporate Sustainability Due Diligence*[48]. The essential elements of this proposals are the following: (a) the duty of 'due diligence' must be included in 'company policies and a code of conduct' (Article 5); (b) companies should identify their potential negative impacts on human rights and the environment (art. 6); (c) companies should try to prevent and mitigate such negative impacts (art. 7), in particular by including in procurement and supply contracts guarantees of compliance with the code of conduct and by a general right to suspend or terminate such contracts, provided that the applicable law allows such a solution; (d) general duty to terminate negative impacts on human rights and the environment (art. 8). Regarding the notion of human rights, the directive proposal follows the German model, by reference to only rights included in a list of international treaties.

It is understandable that these proposals have raised doubts and harsh criticism. Some scholars consider this proposal unrealistic and unworkable[49]. Other scholars have held it incompatible with the freedom of enterprise and the market order that governs the European Union[50]. In general, neoliberal views on the market move from the assumption that efficient financial markets are already spontaneously pushing towards

[48] Proposal for a Directive of the European Parliament and of the Council, on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022 (COM(2022) 71 final).

[49] V. Knapp, *Sustainable Corporate Governance: A Way Forward?*, in *European Company and Financial Law Review*, 2021, 218 et seq. (which prefers solutions based on transparency and self-regulation codes); G. Ferrarini, M. Siri, S. Zhou, *The EU Sustainable Governance Consultation and the Missing Link to Soft Law*, ECGI Working Paper 576/2021 (who prefer solutions based on national soft law, underlining a spontaneous convergence of the laws of the Member States).

[50] Andersen et al., Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars, Nordic & European Company Law LSN Research Paper Series No. 20-12, 2021.

sustainable investments and that institutional investors are spontaneously oriented towards sustainable and green investments.

And yet, this proposal captures a real problem of globalization, namely that Western companies, in order to maximise revenues, have relocated their production in developing countries with lower standards of employee and environment protection. This proposal shows awareness of this issue and tries to bridge this gap. On the contrary, one could argue that this proposal is too narrow, as due diligence duties do not cover the whole value chain but only 'consolidated business relationships' and, like the German model, is based on a rule-based approach, as it only covers adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex (Part I Section 1) as enshrined in the international conventions listed in the Annex (Part I Section 2). The proposal also tries to address climate change issues. Companies, in particular, should draft a plan 'to ensure that the business model and corporate strategy pursued are compatible with the transition to a sustainable economy and with the limitation of global warming to 1.5 ºC in accordance with the Paris Agreement' (art. 15). Additionally, larger companies should specify whether climate change 'represents a risk to society's activities or a possible impact', and the goals for its reduction. Eventually, directors' remuneration is meant to be linked to the goal of reducing climate impacts, provided that the actions aimed at achieving such goals are somehow 'linked to the contribution of the director to the corporate strategy, to the long-term interests and sustainability of the company'. This provision about climate change overlaps with the proposal for a directive on corporate communication and sustainability[51] which foresees that the directors' report on operations includes 'information necessary for understanding the impact of the company on sustainability issues'[52]. Such pieces of information should comprehend 'the company's plans to ensure that the business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5 ° C in line with the Paris Agreement'. It is probably desirable that the proposals are coordinated in order to strengthen their clarity. Eventually, reactions against director duties are to be addressed. The first

[51] 21.4.2021 COM (2021) 189 final.
[52] New art. 19-bis in Directive 2013/34/EU.

possible reaction is civil liability actions for damages produced by the violation of human rights due diligence (Article 22). Member States, in particular, shall ensure that companies are liable for damages if three circumstances occur: (a) they failed to comply with the obligations laid down in Articles 7 and 8; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures occurred and led to damage; (c) it was reasonably predictable that a certain measure would prevent a damage (reasonable causality). Regarding the crucial issue of establishing the applicable law, the directive proposal follows a minimal, albeit effective, approach, namely to indicate that national provisions about civil liability should be considered overriding mandatory provisions, which trump the applicable law.

The directive proposal also addresses director duties. Such provision is particularly relevant as it is one of the few addressing director fiduciary duties, which normally belong to the lex societatis. In particular, directors' primary duties do not change: they should 'act in the best interest of the company' (art. 25). In doing this, according to the UK model, directors must *take into account* 'the consequences in terms of sustainability, in the short, medium and long term, of the decisions they make', 'including the consequences for human rights, climate change and the environment.' National rules on breach of directors' obligations also apply to the provisions of this article. This article leaves the crucial question unresolved: is this a change of director duties (from shareholder to stakeholders) or does it only indicate that corporate interest indicated at State level (normally shareholder value) is still paramount?

7. Continued*: Due diligence and companies' internal procedures in China*

As stated earlier, China has put great heed on the sustainable development. And various legal, policy, and industrial guidance have been issues to promote ESG disclosure. Nonetheless, it has to be recognised, that these are still fairly new to China. A more systemic scheme needs to be established. In term of sustainable due diligence, there is not a unified law or regulation to address it comprehensively at this stage. Though, there are some major developments in the environmental legal

system and policies aspects. Earlier developments can be reflected by Environmental Protection Law, Law on Environmental Impact Assessment, Administrative Measures for Pollutant Emission Permitting (For Trail Implementation), Air Pollution Prevention and Control Law, Soil Pollution Prevention and Control Law, etc. Recently moves on this aspect have achieved some positive results. Among them, the Law on Environmental Impact Assessment has played an important role on the environment due diligence. Under this law, for each project, the construction entities shall draft the environmental impact appraisal documents, including environmental impacts report, environmental impacts report form, or the environmental impacts registration form[53]. The environmental impacts report shall include an introduction to the construction project; the surrounding environment of the project; an analysis, prediction and appraisal of the environmental impacts that may be caused by the project; the measures for protecting the environment and a technical and economical demonstration; an analysis of the economic benefits and losses of the environmental impacts that may be caused by the project; suggestions for carrying out environmental monitoring; conclusion of assessment of the environmental impacts[54].

More recently, the Administrative Measures for Carbon Emissions Trading (Trial Implementation) have set up to promote the market mechanisms to tackle climate change and promote green and low-carbon development[55]. The MEE also published the Guiding Opinions on Enhanced Control of Ecological and Environmental Pollution Sources for Energy and Emission intensive Construction Projects, in order to curb the "blind development" of high energy-consuming and high-emission projects, and promote green transformation and high-quality development[56]. Among other matters, this document gives emphasis on the scrutiny and approval process of energy and emission intensive construction projects.

[53] Standing Committee of the Ninth National People's Congress, revised 29 December, 2018, Article 16.

[54] Standing Committee of the Ninth National People's Congress, revised 29 December, 2018, Article 17.

[55] Ministry of Ecology and Environment, [2020] No. 19, effective date: 1 February 2021, Article 1.

[56] Ministry of Ecology and Environment, Huanhuanping [2021] No. 45, published date: 30 May 2021.

As mentioned earlier, in December 2021, the MME Measures for the Administration of Legal Disclosure of Enterprise Environmental Information was published[57]. As the businesses to be disclosing the environmental information, an environment due diligence will normally be carried out as well.

Another factor that cannot be ignored is the laws and regulations applied to the state-owned enterprises (SoEs). Given the importance of the SoEs), the supervisors in China have enhanced the regulatory regime on this aspect. The State-owned Assets Supervision and Administration Commission (SASAC) promulgated the Guidelines on Compliance Management of Central Enterprises (Trial) in 2018, to promote the establishment of a comprehensive compliance system in enterprises[58]. In 2022, the SASAC issued the Measures for the Supervision and Management of Energy Conservation and Ecological Environmental Protection of Central Enterprises[59]. This document was developed for the purposes of guiding and supervising central enterprises to fulfil their primary responsibility for energy conservation and ecological and environmental protection, as well as promote the comprehensive and sustainable development[60]. Under this document, it requires the central enterprises to actively implement the concept of green and low-carbon development, incorporate energy conservation and ecological environmental protection doctrines[61]. One particular important matter addressed under this Measures is the due diligence issue, it states that, the central enterprises shall take due diligence on energy conservation and ecological environmental protection as the pre-procedure for M&A and reorganization[62]. This step has set down the rule of conducting environment due diligence for the

[57] Ministry of Ecology and Environment, [2021] No. 24, effective date: 8 February 2022.

[58] G. Fagui, *State-owned Assets Supervision and Administration Commission*, [2018] No. 106, published and effective date: 2 November 2018.

[59] State-owned Assets Supervision and Administration Commission, [2022] No. 41, published date: 29 June 2022, effective date: 1 August 2022.

[60] State-owned Assets Supervision and Administration Commission, [2022] No. 41, Article 1.

[61] State-owned Assets Supervision and Administration Commission, [2022] No. 41, Article 4.

[62] State-owned Assets Supervision and Administration Commission, [2022] No. 41, Article 10.

SoEs. Following this, in the same year, the SASAC further published the Measures for Compliance of Central Enterprises to enhance the compliance regime and to require central enterprises to perform their duties in compliance. In terms of business human rights, various international initiatives including the Guiding Principles on Business and Human Rights have demonstrated their impacts. Some SoEs and export-oriented enterprises have already actively taken steps in order to fulfil their duties. Domestic Chinese corporations pay more attention to this aspect as well. However, they still face the human rights due diligence risks, thus shall be more cautious in operation[63].

The term "business human rights" is not widely used in Chinese legislations. Though, various laws and regulations on labour and employment aspects have echoed some concepts of the business human rights. For instance, the Social Insurance Law requires the employers to contribute to the pension, medical, and other types of insurance for their employees[64]. The Labour Law is a major law to adjust labour and employer relationship in China[65]. For instance, the Article 3 states that, workers shall have equal right to employment and choice of occupation. Article 12 states that workers, regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated. Article 13 states that women shall have the equal rights with men to employment. Article 15 sets out the rule that no employers are allowed to recruit minors under the age of 16. Article 32 states when an employer forces the labour to work by violence, intimidation or illegal restriction of personal freedom, the latter can notify the employer at any time of his cancelation of the labour contract. Further examples of protection of the labours can be found under Constitution Law and Criminal Law.

Some industrial or professional bodies also issued guidelines also address the business human rights. China Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters (CCCMC) is one of them. In 2014, it published the Guidelines for Social Responsibility in Outbound Mining Investment, which calls for Chinese companies "to

[63] X. Wang, C. Yang, *Human Rights Protection in International Supply Chain: Development of rules and Practice*, Social Science Forum, 2022, n. 3, 110.

[64] Standing Committee of the Ninth National People's Congress, revised 29 December, 2018, Article 10, 23.

[65] Standing Committee of the Ninth National People's Congress, revised 29 December, 2018.

observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project" and "to strengthen the responsibility throughout the extractive industries value chain". In 2015, the CCCMC published the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, to provide guidance to Chinese companies "are extracting and/or are using mineral resources and their related products and are engaged at any point in the supply chain of minerals to identify, prevent and mitigate their risks of contributing to conflict, serious human rights abuses and risks of serious misconduct, as well as to observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project".

As can be seen from the above analysis, although China has not adopted a similar approach to EU, to enact a unified law or regulation to regulate the sustainability due diligence, there are many provisions, regulations, and industrial guidance in this aspect. This, similar with the author's point made earlier, is due to a very fast economic development. Nonetheless, these provisions indeed presented a complex compliance challenge to the Chinses companies. Therefore, Chinese companies shall set up effective compliance management system, to meet the regulatory requirements, and enhance the internal control and risk assessments. Under this circumstance, the directors have to be more proactive when dealing with the ESG due diligence. Failure to do so, liabilities for companies' directors or directly responsible people may occur. There could be administrative, civil, and criminal sanctions. For instance, under the Prevention and Control of Environment Pollution Caused by Solid Wastes, it has listed detailed punishments for the breaches[66]. It is beyond this paper's scope to examine all the punishments, we can only present some examples. If a person engages in collecting, storing, utilizing or disposing of hazardous waste without a permit, (along with other punishments) the legal representative, principal responsible person, directly responsible person in charge and other responsible personnel shall be fined between RMB 100,000 and RMB 1,000,000[67]. When failure to take

[66] Standing Committee of the National People's Congress, published date: 29 April 2020, effective date: 1 September 2020, Chapter 8.

[67] Standing Committee of the National People's Congress, published date: 29 April 2020, Article 114.

preventive measures, resulting in the dispersion, loss, leakage of hazardous waste or other serious consequences, the Public Security Organs can detain the legal representative, principal responsible person, directly responsible person in charge, and other responsible personnel for not less than 10 days but no more than 15 days; if the circumstances are less serious, they shall be detained for not less than 5 days but no more than 10 days[68]. Therefore, although Chinese law did not specify the answer to the debate of the shareholder-centric vs. stakeholder-centric company law, in practice, it illustrates the importance of the stakeholders and sustainability matters. In terms of the current limitation resulted from a fragmented legal framework in this area, the external factors may provide some useful grounds and venues for Chinese companies to practice. For instance, the new EU regime aforementioned, will bring some challenges to the Chinese companies to meet their requirements. This is because some Chinese corporations will be under the jurisdiction directly, while more others will be affected due to supply chain operations. And this will require companies to "carry out sustainable development reform from the inside out, incorporate sustainable development into their strategic development, business model, operation management, risk control, supply chain, etc., and put forward higher requirements for ESG information disclosure and management"[69]. Therefore, to gain some valuable experiences and subsequently being able to share the best practice back through these practices.

8. *Conclusions*

Based on our observation, it can clearly be seen that the EU and China adopted different approaches to deal with the matter relating to the goal of companies. Having said that, although the routes are different, the emphasis on stakeholders and sustainable developments is the similar.

[68] Standing Committee of the National People's Congress, published date: 29 April 2020, Article 120.

[69] Deloitte, *CSRD is coming, are Chinese Companies Ready for it?*, 2 December 2022, https://www2.deloitte.com/cn/zh/pages/risk/articles/csrd.html, accessed: 6 May 2023.

In most Member States of the European Union, directors should primarily focus their activities towards the goal of pursuing shareholders' wealth (which does not mean necessary maximising shares' value). At the same time, it is to be acknowledged that some jurisdictions (such as in Germany) have adopted a multi-stakeholder approach and that there is a general tendency, at least in policy documents of the EU (but less in legal reality) to consider companies' impact on other stakeholders.

It seems that China has already moved to give shareholders and sustainability important positions, without many academic or practical debates. China carries on its common pathway to deal with fast development, i.e., to provide a working solution. This is of course determined by its transitional and reforming nature. Though one issue to be addressed is that the current Chinese laws, regulations, and guidance are fragmented. Therefore, it increases the operational difficulties for the companies to meet these requirements, and add the compliance costs, which will affect the efficiency of development. Overall, as to our research question, it may not be necessary to distinguish to the benefits of whom the companies operate in China: China believes and upholds the value of Community of Common Destiny for Mankind; namely, a community with a shared future for mankind.

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THE CREATION AND DISTRIBUTION OF ARTWORK IN DIGITAL MARKET

Introduction

The platform economy is the tendency for commerce to move increasingly towards digital platform business models. Platforms are underlying computer systems that can host services allowing consumers, entrepreneurs, businesses and the general public to connect, share resources or sell products. Blockchain technology can support immutable and trustless transactions in a distributed and disintermediated way among various users. The trustless environments that blockchains have created enable peer-to-peer (P2P) sending and receiving transactions, smart contract agreements, and more. On the blockchain platform, tokenisation is used to transform ownerships and rights of particular assets into a digital form.

Tokenisation in blockchain opens up multiple new possibilities for businesses and individuals. Non-fungible tokens (NFTs) are widely adopted by the token owner in the form of a record and hash codes that show ownership of the unique token associated with a particular digital asset. Transactions are executed on smart contracts, sequences of computer codes that automatically execute pre-established instructions. Each block has a set amount of storage capacity, and once it is

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filled, it is 'chained' to the previously filled block. Most NFTs exist on the Ethereum blockchain, with permanent digital records of all cryptocurrency transactions. Blockchain technologies and platforms inspired the creation of 'crypto art', that is, to tokenise artwork digitally and trade the tokens on the platform. Crypto art is disruptive to the traditional market of artwork in many ways. First, it solves the chronic problem of the piracy of artworks. NFTs enable authors to have exclusive control of their works stored in unique blocks with a private key, thus re-creating 'digital scarcity' of the works. The transaction of NFTed artwork occurs within a more decentralised power structure (Storey 2022). Second, NFTs make fine art investment more accessible and democratic. On the one hand, it enables a smaller investment of a fraction of an artwork. On the other hand, artwork can also be directly accessible from mobile phones and laptops without requiring storage space or the use of special equipment, which thus allows trade to be conducted more seamlessly (Hashtag Investing 2022, Hamilton 2022). Third, it enables direct transactions between the rightsholder and consumer without involving middlemen such as curators, galleries and art dealers (Drobitko 2022). Lastly, transactions of NFTed artwork increase liquidity and allow for higher transparency of data. Blockchain transactions are often completed in milliseconds, reducing the waiting time when selling NFTed artwork and allowing artists to be paid more quickly, thus increasing liquidity (Storey 2022). Not only are NFTs generally sold and traded in full public view (Storey 2022), but each transaction can also be traced and followed, as each NFT and its blockchain entries contain proof of current and past ownership, and all transactions involved (Storey 2022). While NFTs look promising in many respects in trading artworks on digital platforms, legal risks must be addressed in order to capture the benefits of NFTs fully. When buying an art piece, one does not purchase its copyright, which would have to be transferred separately. According to international copyright law, to own a piece of artwork does not necessarily entail the subsequent right to display the work in a public place and collect copyright royalties paid for the use of the work. The right to display and receive royalties remains with the author or the rightsholder.

In this chapter, we explore the legal nature of NFTed artwork. When purchasing an NFTed artwork, what rights and interests does the purchaser acquire? Is holding an NFTed work equivalent to holding a phys-

ical copy? The objectives of this chapter are, first, to contextualise the discussion against the background of the trade of artworks in a blockchain environment; second, to examine the most recent legislation and court decisions concerning NFTs and cryptocurrency; finally, to conduct a comparative study between the common law and civil law systems of their concept of assets and property in relation to NFTs.

We undertake a comparative approach to facilitate the understanding of how different jurisdictions view the legal nature of NFTs. We look at the Anglo-American countries, then turn to Europe and China as civil law jurisdictions. Traditionally, the two legal systems view property rights differently. A comparative study offers insight into whether the convergence of law applies to legal issues of global relevance in a digital environment. Furthermore, this chapter conducts a case study of the most recent court decisions concerning property and intellectual property issues. As the legislation could lag behind the speedy advancement of technologies, court decisions offer a more timely reflection of the judiciary's attitude to NFTs.

This chapter proceeds as follows. The first section introduces blockchain and NFTs as an application of blockchain technologies, particularly the tokenisation of artwork. The second section examines how artworks are traded in the mortar-and-brick era and the digital era. The third and fourth sections scrutinise the common law and civil law approaches towards NFTs and the NFTed artwork. The last section offers a comparative analysis of the different approaches and provides concluding remarks.

1. *Blockchain and the tokenisation of artwork - The blockchains: private, public and consortium chain*

Blockchains have been developed into three types: private chain, public chain and consortium chain. Private chains operate under the control of certain individuals or organisations. This is done by setting up a permissioned network, restricting the individuals allowed to participate in the network and transactions (Jayachandran 2017). As participants must obtain an invitation to join the network, private chains can filter out illegal activities within a chain (Iredale 2021). Yet as there are fewer nodes

within the chain, the entire chain may become more easily compromised, posing a potential security risk (Brown 2022). Having a unique hash is vital for maintaining security throughout the different blocks because there are concerns about hackers tampering with the blocks and changing the hashes. In contrast to a private chain, public chains, such as Bitcoin and Ethereum, are openly accessible to all who can access the internet (Jayachandran 2017), who can also see the ledger and participate in the consensus process (Iredale 2021). This design enables participants in a public chain to have equal rights and boosts transparency (Iredale 2021). Yet it also comes with drawbacks. For instance, a high amount of computational power is necessary for a public chain to function, to maintain the distributed ledger at a large scale (Jayachandran 2017). It takes a relatively long time to verify each transaction compared to other chains.

A consortium chain is a permissioned ledger where information can only be shared among a small group of organisations (Crypto News 2021). It is formed by combining various private blockchains belonging to different groups, where each group forms a node on the chain as a stakeholder. While each group manages its own blockchain, the data within it can be accessed, shared and distributed among the other organisations in the consortium (Bybit Learn 2022). A consortium chain is created among organisations to facilitate cooperation among these groups (Banerjee 2022). As a result, consortium chains offer benefits such as efficiency in decision-making (Bybit Learn 2022). However, there are also challenges. For example, a unified framework of industry standards for consortium blockchains (Banerjee 2022) urgently needs to be developed.

1.1. Continued*: The tokens: fungible and non-fungible*

An NFT is a piece of digital artefact that represents the ownership of real-world assets. The influential NFT marketplaces in 2022 are OpenSea, Rarible, NBA Top Shot, Binance and Nifty Gateway, with most of them utilising cryptocurrencies as their payment method (Rodeck 2022). Whilst NFTs operate as a type of cryptocurrency (Fairfield 2021), it is vital to distinguish Bitcoin's and NFT's different natures. Bitcoins are interchangeable and indistinguishable, making them fungible tokens (Nakamoto 2019), while NFT is non-fungible because the associated data

has a unique "hash value", a "unique and reproducible alphanumeric value from a specific data set" (Tipotsch 2021) derived from the artwork. There are different types of tokens. For example, using the ERC 20 Protocol, parties may create fungible tokens; using ERC 721 Protocol, they may create non-fungible tokens; using ERC 1238 Protocol, they may create non-transferable tokens (titles or badges).

There are three ways to create and issue tokens. The first method is through an Initial Coin Offering (ICO). This is a method of raising capital for new ventures (Delivorias 2021). The tokens can be exchanged for future products and services or confer a right to a share in future profits on holders (Knowledge at Wharton 2019). The tokens are then launched, and the business can use the proceeds to launch new products and services (CFI 2022). The second method is mining, where groups or individuals compete to solve complex mathematical problems (Trading Education 2021). The first one who solves the equation and validates the accuracy of a transaction in a block wins a reward (Trading Education 2021). Upon mining, tokens can be minted, that is, published on the blockchain and made available for purchase (Craig 2021). This can be done on platforms such as OpenSea, which allows one to mint tokens on the Ethereum blockchain by setting up a crypto wallet, creating a collection and uploading work (OpenSea Learn 2022). The third method to create tokens is through tokenisation by linking or embedding the economic value and the rights derived from the asset to digital tokens created on the blockchain (OECD 2020). The tokenised asset can then be listed and sold on NFT marketplaces. In this chapter, we mainly focus on the third tokenisation method for discussing NFTed artworks.

2. *The trading of artworks*

In the past, artworks were traded by transferring the physical object or licensing the use of the work without the transfer of ownership. Collective copyright licensing is managed by collective societies in Europe and China while in common law jurisdictions, by corporations specialising in collective copyright management. A common problem of collective copyright management is the high agency cost. Moreover, tracing and tracking the author of orphan works is less efficient due to the need

for more technology. The intermediary, that is, the collective society, is confined by its structural and technological limits and cannot assist the rightsholder in fully capturing the value of artworks.

In the digital era, various data management tools help improve the efficiency of collective management. However, the agency cost and source-tracing problems still exist, although to a lesser extent. With the onslaught of blockchain and NFTs, it is time to revisit the agent-based transaction model. Do artists need an intermediary to manage their copyright if they can manage their own copyrighted works with secured NFTs and supporting platforms?

Although blockchain technologies seem to offer an ideally distributed and democratic digital world without intermediaries involving transaction costs (Drobitko 2022), in the new reality of business, NFTed artwork trading platforms emerge as new intermediaries. In China, the platforms can be divided into three categories. The first type comprises platforms that offer blockchain technology. Examples in China include Zhixin Chain, a platform based on Hyperledger technology, which is employed to execute smart contracts, digitise company chops and delineate ownership of intellectual property. Beyond China, Hyperledger Fabric, hosted by the Linux Foundation, offers enterprise-grade blockchain technology for leaders in finance, banking and supply chains.

The second type is the platforms that support the trade of NFTed work. These may include platforms that facilitate the collection and resale of NFTed work, such as Netease Chain, a public chain which allows trade in a large variety of NFTed work, such as animation, music and 3-D models. Similarly, some provide the space for users to sell their NFTed products, for instance, the Two-Mirror Museum (双镜博物), a public chain that sells NFTed products related to culture, such as a digital collectible featuring the Palace Museum's only existing set of wedding garments belonging to a Qing dynasty empress. Such platforms can also be found outside China, for instance, Nifty Gateway, which cooperates with musicians and artists to create limited edition NFTs that are exclusively available on their platform.

The third type relates to those platforms that issue NFTed work. An example of such a platform is BlueFocus, a multinational company specialising in marketing and brand management services in media and design. Another example is CrowdCreate, whose services include assis-

tance in crypto community management and crypto token marketing. The increasingly involved artificial intelligence in creating artwork brings another dimension to the legal compliance for the trading of artworks. Unlike traditional artworks like painting, photography and music, which are protected by copyright, AI-created art is less concerned with copyright. AI-created art is also called generative art. Many NFT projects, such as CryptoPunks, Bored Ape Yacht Club, World of Women, Azuki, Chromie Squiggles, Clone X, and Moonbirds, involve generative art in the creation process. Generative art is generated wholly or in part by the algorithm and not in direct control of the programmer, who is an artist or commissioned by a customer. The programmer creates a programme consisting of one or more algorithms that randomly generate an artwork based on randomised parameter selections or by one or more inputs that are driven or operated to suggest a direction for the artwork. In more complex projects, artificial intelligence is programmed to make decisions during the entire process of creating an artwork (Dornis 2021). Different from the purchase of traditional artworks, the purchase of generative artwork is obtained upon the creation of the art, which coincides with the act of minting. The purchase of the NFTed AI-created artwork takes place by creating and minting the artwork.

However, NFTs are not the artwork, nor does it become the artwork. The NFT records the existence and ownership of the artwork onto the blockchain, and because no two NFTs are the same, and no two blockchain registrations can be the same, the tokenised asset linked to the NFT also can be considered unique and non-fungible. Each NFT contains metadata that describes the corresponding assets in order to prove the physical object's authenticity or rarity. The NFT represents the physical object in code that is written into the blockchain that contains various information. This information frequently contains the name of the creator of the NFT, a URL linking to a representation of the underlying work of the NFT, the date it was minted, and any contractual terms that follow the NFT after it is sold. While the separate URL embedded in the NFT contains a link to a copy of the underlying work, it is not itself a copy of that work. Thus, an NFT is not a reproduction of content; it is merely a token that authenticates the source of the content. For this reason, NFTs themselves are not "copies" and thus not subject to copyright infringement. The metadata does not contain any recognisable content

of the underlying work, nor does it describe its contents. Similarly, the metadata does not add, transform, or recast any underlying work.

Nevertheless, NFT establishes an exclusive ownership relationship with the underlying artwork. The hash is stored on a blockchain with an associated time stamp. Consequently, NFT keeps track of hash sales, so it is possible to trace the hand steps of the hash to the creator. This mechanism provides proof of authenticity and, simultaneously, ownership of the work. The transfer of an NFT connected to a work of art transfers the digital ownership of the authentic copy of the work; however, the purposes that can be pursued with this tool are different, so it is necessary to identify the crypto activity, the specific utility that the NFT is intended to create from time to time.

Authors can create and sell NFTs representing their works. In practice, the NFT digital art market recognises the owner of a "legitimate" NFTed work as the "owner" of the work, even though NFTs do not convey copyright ownership of the work (Frye 2021). NFT owners encourage others to use their work because popularity increases the value of the work. Increasing the author's impact creates more value than controlling the use of the work. If the profit from selling NFTs alone is large enough to motivate authors, copyright is no longer necessary as a legal monopoly to reward authors. The value of art has always come from the reputation of the author and the scarcity of the work through "authenticity".

3. *Legal status of NFT: the common law approaches*

The premise of this property syllogism is that "a particular type of right (such as a chose in action, an intellectual property right or a beneficial interest under a trust) is the same type of right as a right to a tangible asset and must therefore be protected in the same way." (McFarlane and Douglas 2022, page 162). With this background in mind, it is perhaps unsurprising that crypto assets have been more readily accommodated within common law systems' vague notions of property than those of civilian systems. The courts in England and Wales (English and Welsh cases), Singapore (Singaporean cases), and New Zealand (Ruscoe v Cryptopia Ltd (in Liq) [2020]) have acknowledged bitcoins and other crypto assets as property within the common law. Property in the

case law to date refers more to assets than things (Low and Hara 2022). This was also the advice of the LawTech Delivery Panel's UK Jurisdiction Taskforce in its Legal Statement on Cryptoassets and Smart Contracts. The key question is how crypto assets as property would fit within the common law's classificatory scheme for property. Unlike the civilian classification between movables and immovables, the common law classifies property into real and personal, with the former comprising mostly land. Personality is, in turn, classified into either choses in possession or choses in action.

3.1. Continued*: The UK*

The point on whether cryptocurrency could be a form of property was more fully developed in AA v Persons Unknown [2019] ("AA"). Bryan J noted that the immediate difficulty was that "English law traditionally views property as being of only two kinds, choses in possession and choses in action" (AA at [55], citing Colonial Bank v Whinney [1885] ("Colonial Bank")). Bitcoins, and other cryptocurrencies, did not fall neatly into either category and thus could not be classified as a form of property (AA at [56] and [58]). Bryan J, however, considered that it was "fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action" (AA at [58]). In doing so, he cited extensively from the legal statement on crypto assets and smart contracts published by the UK Jurisdiction Task Force (the "Legal Statement"). The Task Force thus took the view that Colonial Bank was not to be treated as limiting the scope of what kinds of things could be property in law. Rather, it showed the ability of the common law to stretch "traditional definitions and concepts to adapt to new business practices" (Legal Statement at [77]). The Legal Statement, therefore, formed the basis for Bryan J's conclusion that while a crypto asset might not be a thing in action based on a narrow definition of that term, it could still be considered property (AA at [59]). He made a finding that crypto assets such as Bitcoin were property, given that they met the four criteria set out in National Provincial Bank Ltd v Ainsworth [1965] ("Ainsworth") at 1248 – namely that it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

The UK's High Court recently ruled that NFTs are property, and thus victims of NFT theft can now have their stolen assets frozen through court injunctions. The decision comes after months of repeated NFT thefts, as savvy hackers have exploited loopholes and poor security literacy to seize high-profile NFTs. In an earlier case involving NFTs (Osbourne v Persons Unknown [2022]), the court also found a claimant has a good arguable case that misappropriated crypto assets are held on a constructive trust is therefore clear that the courts are open to constructive trust claims as regards crypto assets. However, Ms Osbourne did not go so far as to seek, as Mr D'Aloia has, to ask the courts to consider a claim in which – in addition to the alleged fraudsters – the exchanges are also said to hold the crypto assets on constructive trust. In D'Aloia case, therefore, appears to be the first in which the Court has found that there is a good arguable case for this claim against the exchanges themselves. D'Aloia case allows victims to obtain court injunctions against individuals whose crypto wallet has been identified as carrying a stolen NFT and to the NFT platform on which the stolen asset is being sold.

This ruling demonstrates that the English courts are open to entertaining constructive trust claims concerning crypto assets, not only against the fraudsters themselves but also against third-party exchanges. The possibility of such a claim has been lent further support by the Law Commission's analysis in their Consultation Paper on Digital Assets, published on 28 July 2022 (see paragraph 19.51). This would give victims of crypto-asset fraud a means of direct action against exchanges for breach of trust should they fail to comply with their duties as constructive trustees, having been notified that they are in the possession of fraudulently misappropriated crypto assets.

3.2. *Singapore*

In an earlier case of CLM v CLN [2022] SGHC 46 ("CLM"), Lee Seiu Kin J dealt with the question of whether stolen cryptocurrency assets, specifically Bitcoin and Ethereum, could be the subject of a proprietary injunction. Having considered the cases and the analysis in Ruscoe v Cryptopia Ltd (in liq) [2020] ("Ruscoe"), the judge was of the view (at [46]) that the claimant, in that case, was able to prove an ar-

guable case that the stolen cryptocurrency assets were capable of giving rise to proprietary rights, which could be protected via a proprietary injunction.

In Janesh s/o Rajkumar v Unknown Person [2022], the court noted that although NFTs have been characterised as certificates of ownership "powered by smart contracts and protected by blockchain technology" (Aksoy and Üner 2021, page 1115), NFTs represent an "ownership of a digital certificate of authenticity of commonly available digital art" (Low and Hara 2022). Nevertheless, the court disagrees with the 'NFT is certificate' approach. The court points out that NFTs are not just mere information but rather data encoded in a certain manner and securely stored on the blockchain ledger. (Janesh s/o Rajkumar v Unknown Person [2022], paragraph 58) Rather, NFTs provide instructions to the computer under a system whereby the "owner" of the NFT has exclusive control over its transfer from his wallet to any other wallet.

Lee Seiu Kin J adopted the Ainsworth test and upheld the following findings. First, an NFT with its unique metadata is definable (Janesh s/o Rajkumar, [44]). NFTs are not just mere information, but rather, data encoded in a certain manner and securely stored on the blockchain ledger (Janesh s/o Rajkumar, [58]) 'It provides instructions to the computer under a system whereby the "owner" of the NFT has exclusive control over its transfer from his wallet to any other wallet.' (Janesh s/o Rajkumar, [58]) Second, per the second requirement that the "asset must have an owner being capable of being recognised as such by third parties" (CLM, [45(b)], citing Ruscoe at [109]) the presumptive NFT owner would be whoever controls the wallet which is linked to the NFT an NFT with its private keys would be an asset, with an owner being capable of being recognised as such by third parties. The third requirement is that "that the right must be capable of assumption by third parties, which in turn involves two aspects: that third parties must respect the rights of the owner in that asset, and that the asset must be potentially desirable" The 'nature of the blockchain technology gives the owner the exclusive ability to transfer the NFT to another party, which underscores the "right" of the owner.' Lastly, an NFT has a relevant degree of permanence and stability as money in bank accounts which, nowadays, exist mainly in the form of ledger entries and not cold hard cash.

In summary, Singapore's first court decision on NFTs rejects the ana-

logy between a title deed and a certificate of property. The court applies the Ainsworth criteria and upholds NFTs as property.

4. *Legal status of NFT: the civil law approaches - The theoretical and legislative discussion*

Scholars pointed out that digital tokens may be considered "digital assets". The same approach is taken by the Gesetz über Token und VT-Dienstleister of Liechtenstein, which regulates tokens as assets (Vermögen, art. 4) (Teruel 2021). In fact, it has been stated that "all-European-legal systems of the member states regard not only corporeal thing as the objects of real rights but also incorporeal assets, such as patrimonial rights" (Von Bar and Drobnig 2004). However, some legal systems take a narrower approach concerning the scope of the property, which is limited to "corporeal things", as is the case under both German and Swiss law (e.g. §§90 Bürgerliches Gesetzbuch30 -BGB- or §641 Swiss Civil Code 31). This means that tokens could not be regarded as the object of property in these legal systems, e.g. in Germany, tokens have been defined as "eine faktische Vermögensposition", meaning 'a factual situation' (Lehman and Krysa 2019). Other EU legal systems have either incorporated a broader definition of the concept of a "thing" to include "patrimonial or valuable rights" (e.g. arts. 334.10 CC; §§292, 298 and 299 Allgemeines bürgerliches Gesetzbuch, ABGB35) or a broader definition of the concept of an "asset" (art. 3.1 Burgerlijk Wetboek -BW-), which makes regulating tokens as an object of ownership more accessible. For example, in Spain, the judgment of the Supreme Court 20/06/201937 denied the recognition of bitcoin as a legal tender (money) but considered it an "incorporeal asset". In Italy, tokens have been regarded as "digital assets" under the provisions of art. 810 Italian Civil Code ("Sono beni le cose che possono formare oggetto di diritti"); and art. 65 French Loi n. 486 categorises tokens as "incorporeal assets" (bien incorporel).

From an EU perspective, the Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets (MiCA) 24 September 2020 aims to enhance legal certainty to crypto-assets while encouraging innovation and protecting consumers. However, this proposal does not cover the legal nature, the legal effects and the admissibili-

ty of using asset-backed tokens to transfer property rights. Tokens issued in blocks of fewer than 150 tokens are excluded from the Regulation. So, the Regulation does not cover small issuances, which are typically the case in the tokenisation of real-world assets. The European Union Court of Justice has ruled that cryptocurrencies fall into legal goods exempt from VAT (EUCG, sez. V, 22 October 2015, case -214/2016).

China's first Civil Code, which became effective in 2021, includes provisions peripherally relevant to virtual assets. In Book I General Provisions, Article 114 provides that civil subjects enjoy property rights (rights in rem), which are the exclusive rights to directly dominate a particular thing, including ownership, usufructuary rights, and security interests. Article 116 is a Numerus Clausus that limits the types and contents of property rights exclusively by law. Article 127 provides that the Civil Code shall recognise the existing legal provisions for virtual property.

4.1. Continued*: European cases*

Italian Supreme Court indicated that an equivalent function approach could be taken to allow the court to treat NFTs similarly to cryptocurrency with similar qualities. It held that the legal qualities of bitcoins depend on the purpose of the usage of the currency and the utility they produce. If a virtual currency is used for speculative purposes, it will be considered a financial product (security token). The Court identifies the requirements to qualify the securities offered (in the specific case LWF Coin) as financial instruments. The test includes the purpose of the use of capital, the expectation of return, and the risk directly linked to the use of capital. (Court of Cassation, Penal Section, 30 November 2021, n. 44337 and 22 November 2022, n. 44378).

The Court of Rome, IP Chamber (Docket No. 32072/2022) enjoined Blockeras s.r.l. from any production, marketing, promotion and offering for sale, directly and/or indirectly, in any way and form, of the NFTs and digital contents and ordered the defendant to withdraw from the market and remove from every website the NFTs and the digital contents associated or products in general covered by the injunction (Rome, 19 July 2022). The dispute concerned trademark infringement and unfair competition practice, consisting of the unauthorised use of words or figurative marks through the production, marketing and online promotion of

digital playing cards with images that reproduced footballers' NFTs. The distinctive signs in question show the image of former player Christian (Bobo) Vieri wearing the Juventus shirt and the team's name. The Court did not express an opinion about the legal nature of NFT but stated that the circumstance that Bobo Vieri played for Juventus and that he granted permission to the use of his image through the creation of cards reproducing the player with the different shirts of the teams in which he played does not, therefore, exclude the need to request authorisation for using the registered trademarks owned by the teams whose shirts and names are reproduced. The decision indicated that the court viewed the infringement of IP by NFTs as equivalent to an infringement made through physical reproduction. Therefore, we can deduce that the court considers NFT as equivalent to (intellectual) property.

At the European level, the Court of Rome is the first to order an injunction to the creation and marketing of NFTs infringing registered trademarks. It also ordered the NFTs to be removed from the trading website. The decision represents a reference point at a global level at a time when strong attention is paid, by all operators in the sector, to the legal aspects of this new digital tool. It goes from who defines NFT as "a digital not interchangeable good, such as a photograph, a song or a video, whose property has been authenticated and stored in a database called blockchain and which can be collected, sold and exchanged on various online platforms" (Trevisi et al. 2022) to those who consider them as "unique digital certificates, registered in a blockchain, used as a means to register the ownership of an object, as a digital artwork or a collectible object" (EUIPO 2022). The decision represents an implicit accreditation of the interpretation – already adopted by the main national and international offices, including EUIPO, for which Class 9 is the one for registered trademarks used to distinguish certain types of "digital goods". The Italian Court reiterates the provision of art. 97 of the Copyright Law, relating to the permitted uses of the right to the image of a person, does not extend to the use of trademarks possibly represented in the same image. The same consideration, however, also introduces the probably most important concept of the decision, which confirms the fact that the creation of NFTs – which are "goods intended for commercial sale" – requires specific authorisation from the proprietor of the trade mark, of which it, therefore, constitutes a separate infringement and distinct from

the infringement constituted by the use of the trademark in the digital images associated with the NFT.

This confirms the preference for a legal definition of NFT that undertakes a dichotomy between the certificate and the content (Janesh s/o Rajkumar v Unknown Person [2022] SGHC 264). Above all, it explains the ratio of the same precautionary order, which is not by chance kept well distinguished between NFTs and the corresponding digital content, inhibits the "production, marketing, promotion and offer for sale, direct and/or indirect, in any way and form" of, on the one hand "of the NFT (non-fungible token)" and, on the other hand, of any other "digital content or product generally bearing the photograph, even modified, and/or the Juventus trademarks, as well as the use of said trademarks in any form and manner". This judgement echoes the US court decision involving Maison Hermes against the artist Mason Rothschild and Nike in relevant goods traded in StockX, a second-hand market.

In the latter case, in particular, this dichotomy of NFT / digital content cannot be ignored. The judge will have to decide whether the creation of an NFT generates an intrinsic value rather than a mere digital certificate of ownership of the associated property, which, hypothetically, the person who mints and uploads the NFTed work is the legitimate owner of the work. We can deduce that even if someone possesses a good legitimately, it can be unlawful for the legitimate owner to produce NFTs of the good protected by IP rights. Since the judgments are still at a first summary level, we can only speculate on this issue.

The Commercial Law Court of Barcelona (Visual Entidad De Gestion De Artistas Plasticos/ Punto Fa, S.L. [2022] AJM B 1900/2022 – ECLI:ES: JMB: 2022:1900, Juzgado de lo Mercantil nº 09 de Barcelona) delivered one of the first judgments dealing with the relationship between intellectual property and NFT. The decision involves the fast fashion brand Mango and the Spanish collective society for artists VEGAP (Visual Entidad de Gestión de Artistas Plásticos). In March 2022, Mango exhibited a series of artworks created by Farkas, an artist, in a virtual museum on the Decentraland, a Web 3.0 site. Mango legitimately owns the original copy of the works. The collection was designed to reinterpret rather than directly reproduce the artworks, which are under copyright protection. VEGAP sued Mango for copyright infringement, arguing that the minting and displaying of the artworks infringed copyri-

ght, Mango argued that the NFTs were just a list on OpenSea and did not represent any proprietary rights per se. The Court ordered tokens to be de-listed and further pointed out that the withdrawal of a work does not amount to destroying tokens since tokens can be used during the process. For this reason, the Court orders the claimant to provide a cryptocurrency wallet, with a deposit of EUR 1,000 that will be used to maintain legal custody of the NFTs and orders OpenSea to transfer custody of those tokens to be deposited to the applicant's portfolio.

The first aspect of the dispute is the extent of Mango's rights as owner of the physical artwork. The ruling states that VEGAP transferred the right to display physical works publicly, but nothing else. The Court assumes that the right to display does not give the right to digitise the work, display and sell it as NFT. The second question that the Court will have to examine is whether adapting a work in this way infringes copyright. Styles and ideas are not protected, only the expression of the idea is protected. If the Court decides that these designs are indeed in violation of relevant IP rights, the question is whether the minting NFT of a work without authorisation is unlawful in itself and whether the display and sale of such an NFT is a communication o the work to the public. It can be argued that an NFT may include a link to a copy of the work but not the work itself. The connection could not even be permanent and may be interrupted. In addition, the actual connection to work is not always easy to reach. If the link is to an IPFS file, it is not accessible unless a specialised browser like Brave, which can read IPFS links, is used. From this perspective, it is difficult to admit that "the act of minting" is protected as an exclusive right of the author.

4.2. *Chinese cases*

In the first NFT court decision in China (Qice Technology Ltd v A Technology Ltd), the Hangzhou Internet Court, an intermediate-level court, holds an NFT-trading platform liable for copyright infringement for an NFTed unauthorised reproduction of an artwork uploaded by its user. The court discussed similar issues regarding the nature of NFTs. It holds that the metadata exclusively and uniquely represents a copy of an artwork. It is identifiable by third parties and maintains the scarcity of the work in a digital form. Therefore, an NFTed work is a 'digital com-

modity', and NFTed copies of the work are digital assets. The trade of an NFTed work is essentially a transfer of ownership of the copy being tokenised and uploaded (page 18). Acquiring such an NFTed work entails obtaining the property rights and interests in that copy. It entails no license to use such digital assets nor a license or a transfer of the intellectual property rights of the underlying artwork (unless the sales agreement provides otherwise). In the further analysis of copyright infringement, the court distinguishes NFTed work from a physical object. It holds that the distribution right does not apply in this case because it only concerns the distribution of physical objects. The legitimate creator of an NFT should not be the person who possesses a copy of the underlying work but the person who owns the copyright or obtains a due license for the underlying work. Hence, it holds that the uploading of the NFTed work infringed on the right to disseminate work by information networks.

However, as the court is only a district-level court, it remains to be seen whether its ruling will be widely followed or is likely to be challenged in subsequent cases by other courts in China. In any case, as the authorities have not yet enacted any formal NFT laws or regulations, the court's insights in the judgment are meaningful, and NFT players in China should carefully consider the implications of the ruling.

5 *Conclusions*

The value of art has always come from the reputation of the author and the scarcity of the work through 'authenticity'. NFTs offer artists the opportunity to secure incomes with tracing and tracking functions and embedded smart contracts while encouraging the dissemination of artwork that cannot be reproduced without authorisation. If the profit from selling NFTs is large enough to motivate authors, copyright as a legal monopoly is no longer necessary to generate rewards. Recognising NFTs as property encourages artists to be open to the market, which helps create cultural prosperity and increase social welfare.

The NFT is more than a recording of digital work. Minting an NFTed work is to record the work on the blockchain through an identification code. The creation of the digital tokenised work (i.e. registered block-

chain with hash code) involves the acquisition of ownership by the registration holder. NFTed artwork might evoke the question of exclusive possession and control of the work, including property and intellectual property such as copyright. The right to tokenise a work protected by copyright belongs to the owner of the copyright or those who have the authorisation of the owner; beyond this hypothesis, this right belongs to the owner of NFTed work. Consequently, it is necessary to distinguish NFTs from NFTed artwork. The NFT is a mechanism for forming the ownership of a right of use and disposition of digital work in the hands of the person who registers the NFTs.

Although the judiciary from different jurisdictions has been willing to extend the protection for brick-and-mortar property to NFTed artworks, NFTs are at the risk of misrepresenting or even infringing IP rights in a work minted into NFTs. Possessing an NFT does not necessarily confer any legal right over the digital or physical object the NFT refers to. Several proposals have been advanced to overcome this limitation to the concept of NFT. Some try to strike a balance between the legal and the technical dimension, incorporating aspects of copyright law into the metadata of the NFT or in accompanying documentation; others propose to incorporate the actual work into the underlying smart contract. While many commentators are critical at this point (Ryan 2021), others, like Fairfield, see the potential of NFTs as forms of 'unique digital property', re-establishing personal property rights that have been lost to user agreements and other instruments of uneven bargaining power (Fairfield 2021).

In the UK, the Task Force took the view that Colonial Bank was not to be treated as limiting the scope of what kinds of things could be property in law. Instead, it showed the ability of the common law to stretch "traditional definitions and concepts to adapt to new business practices". National Provincial Bank Ltd v Ainsworth [1965] has established a four-factored test for the property as something "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability". In Singapore, the court rejected the analogy between a title deed for real property and NFTs as a certificate for digital assets. Rather, it adopted the Ainsworth criteria and upheld NFTs as property.

In Europe, although some jurisdictions traditionally take a narrow ap-

proach concerning the scope of the property, which is limited to "corporeal things", many others are more open to including incorporeal assets, such as patrimonial rights, into real rights. The court decisions discussed in section 4 demonstrate that cryptocurrency and NFTs are considered digital assets (Calzolaio 2020). The Italian and Spanish Courts noted that NFTs, on the one hand, bear a certifying function and, on the other hand, link to specific content. China's first Civil Code explicitly recognises virtual property as an object protectable by law. In the first NFT-concerned case, the court distinguishes the NFTed work from a physical object and holds that an NFTed work is a 'digital commodity', and NFTed copies of the work are digital assets. It adopts a test similar to the Ainsworth test that evaluates whether the data is unique and securely linked to a work and is identifiable by third parties. It is consensus that while the right of the owner to mint and tokenise a work is to be fully protected, it cannot be overlooked that this right must be exercised in compliance with the principle of economic solidarity and fair competition. The comparison between the legal systems implies an increasing level of convergence of law towards a harmonised concept of digital assets in a world built on blockchain and tokens. In comparing the common law and civil law systems, convergence of law is emerging in the digital world. The legal systems have advanced closer towards a concept of property with many shared features. First, the data must be stored securely on the blockchain ledger. The nature of blockchain technology gives the owner the exclusive ability to transfer the NFT to another party, which underscores the "right" of the owner. Second, the data should be capable of being recognised by third parties. Third, the data has intrinsic value that is respected and potentially desirable by third parties. Lastly, an NFT has a relevant degree of permanence and stability as money in bank accounts which, nowadays, exist mainly in the form of ledger entries and not cold hard cash. Property is moving from a static concept to a concept of act and activity. At the same time, ownership is the link between the owner and the worthy interest to be realised and guaranteed.

NFTed artworks are considered incorporeal assets that confer quasi-property rights and interests. The legal principle of numerus clausus is an instrument for legal certainty. However, reality goes beyond the dogmas of the legal tradition. The jurist must take an evolutionary leap forward to adapt the mechanisms and techniques of law to emerging digital

technologies that change the societal ecosystem. The concept of property per se and the rights deriving from the property need a recalibration that shifts from focusing on exclusive control to the use of the thing. Attention must be paid to the consideration that the "thing" becomes a juridical good as a reference point and content of legal situations if it has a socially appreciable utility and finds in the orderly system an evaluation in terms of merit (Perlingieri 1990). The artificial exclusivity – created by the relationship between the account/portfolio and the hash via NFT – that represents the copy of the underlying value – evokes the proprietary logic even if its dynamics undermine any theoretical definition for the benefit of the valuation of the interests involved.

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THE ITALIAN LAW CONCERNING LISTED COMPANIES. A SUMMARY

Sommario: 1. The sources of law. – 2. Listing and delisting. – 3. Structure and aims of the law. – 4. The disclosure obligations. – 5. The shareholders' meeting. – 6. Board of directors and control bodies. – 7. Right of withdrawal and takeover bid. – 8. The dividend increase. – 9. The assets shares. – 10. The vote increase.

1. *The sources of law*

The Italian legal system allows for different types of companies to be listed, including limited partnerships by shares and cooperatives. Since almost all listed companies are currently joint-stock companies, only this type of enterprise will be considered here. The purpose of this paper is to give a brief analysis of the most significant features of law regarding this issue.

With respect to law in force, listed companies are subjected to three different sources of law, namely:

(i) law concerning any joint-stock company;

(ii) law concerning companies that appeal to the risk capital market (a category that includes, in addition to listed companies, companies with particularly extensive shareholding structure). There are currently 19 rules concerning these companies in the Italian Civil Code.

(iii) law concerning only listed companies. There are currently only 8 articles of the Civil Code that contain such rules, while most of the rules are located outside the Civil Code. In particular, the need for a specific law concerning listed companies was addressed by law no. 216/1974, which, among other things, gave rise to Consob, an independent administrative authority that is concerned with protecting those who invest in the Italian securities market, also promoting efficiency and transparency of that market[1]. The pivotal law

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[1] As S. Amorosino recalls in *Funzioni e poteri della Consob "nouvelle"*, Banca, borsa

in the field of listed companies is "Consolidated Law on Finance" (T.U.I.F.), established by Legislative Decree no. 58 in 1998. This law applies only to Italian companies with shares listed in Italian regulated markets in Italy or other EU regulated markets and therefore not to foreign companies. However, additional rules not included in T.U.I.F. are also very important: above all those in the amendments to the T.U.I.F. (in particular the regulation concerning the discipline of issuers, adopted by CONSOB under resolution no. 11971 of 14 May 1999), and the regulations issued by Borsa Italiana s.p.a.[2], which manages the Italian regulated markets: each regulated market has its own regulation. It should be noted that regulations of Borsa Italiana s.p.a. must be approved by Consob, which is, among other things, called upon to supervise rules of the markets, to ensure that they guarantee transparency and investor protection[3].

Finally let us consider the so-called codes of conduct, especially the Corporate Governance Code of listed companies[4]. Each listed company is free to choose whether to follow[5] this Code or not, but if it chooses not to, it must explain its motivation according to the "comply or explain" principle.

2. *Listing and delisting*

Borsa Italiana s.p.a., as a market regulator, has, among other things, the task of arranging for the admission, exclusion, and suspension of listing of shares.

e titoli di credito, 2008, 139, at the beginning, Consob was substantially dependent on the Ministry of the Treasury and becomes a properly independent authority only after the issue of the T.U.I.F.

[2] Company born from the privatization of the stock markets in 1998: see S. Baiona, *I confini tra regolazione pubblica e privata nel sistema bancario e finanziario italiano*, Giurisprudenza italiana, 2010, 1466.

[3] As S. Baiona points out in *op. cit.*, 1460, the relevant interests involved in this sector has justified the maintenance of rigorous and insightful public control over the system of regulated markets.

[4] The current version of the Code entered into force on January 31, 2020; the first edition of the same is from 1999 (see P. Marchetti, *Il nuovo Codice di Autodisciplina delle società quotate*, Rivista delle società, 2020, 268). The code must be placed, like any other self-regulatory code, within the soft law category: see, in this regard, S. Baiona, *op. cit.*, 1463.

[5] Even only partially: see, on this point, S. Baiona, *op. cit.*, 1467.

Listing takes place following a complex procedure; at the end of which Borsa Italiana s.p.a. decides whether to accept the application for admission submitted by a company, notifying markets and Consob. The procedure starts with submission to Borsa Italiana s.p.a. for admission to listing, which is also forwarded to Consob. Subsequently, the documents produced by the issuer are vetted and then, if approved within two months of submission, the provision for admission to listing by Borsa Italiana s.p.a. is issued. Also, in this case, decision taken by Borsa Italiana s.p.a. – whether positive or negative – is simultaneously communicated to the company and Consob and, in any case, made public. This provision is valid for six months and is subject to the filing of Information Prospectus with Consob, which is the official document soliciting public savings with the purpose of providing all information regarding both company and proposal submitted to the market, and it must be published once approved by Consob.

Finally, the listing process ends with the executive phase, in which the company's shares are effectively traded in the regulated market.

Subsequently, the listed company can also leave the regulated market. Actually, pursuant to art. 133, T.U.I.F., Italian companies with shares listed in Italian regulated markets, subject to resolution of the extraordinary shareholders' meeting, may request the exclusion from trading of their own shares if they are admitted to another regulated market in Italy or another EU country, provided that equivalent protection for investors is guaranteed[6].

Furthermore, as mentioned above, it is also possible that the listed company that was admitted is excluded from the regulated market[7]. Actually, Borsa Italiana s.p.a. may suspend the listing of a financial instrument in the event it has not been traded for a prolonged time or if it is not possible to maintain a regular market for that instrument due to

[6] As underlined by A. Pomelli in Delisting *di società quotata tra interesse dell'azionista di controllo e tutela degli azionisti di minoranza*, Rivista delle società, 2009, 418, if another Italian or European Union market offers equivalent guarantees, the protection deriving from the right of withdrawal becomes superfluous and unjustifiably burdensome for the company.

[7] On this point see F. Vella - V. Corrente, *La quotazione nei mercati e la negoziazione sui sistemi*, in *Il Testo Unico Finanziario*, directed by M. Cera and G. Presti, Bologna, 2020, tome 2, 1079 ff.

particular circumstances. After 18 months of suspension without reasons underlying it having ceased, the listing of shares can be interrupted. Borsa Italiana s.p.a can also suspend or exclude equity securities from trading if issuers stop complying with market rules. All these decisions are also communicated to Consob which, for its part, may stop both the admission to listing and the exclusion from trading; on the other hand, it can as well suspend or end trading shares[8].

3. *Structure and aims of the law*

The law of listed companies is influenced by the high diffusion of company shares, although as far as Italy is concerned, very rarely can we speak of real public companies.

In any case, the fact that listed companies usually have a particularly extensive shareholding structure requires simpler procedures, given that compliance with those envisaged for ordinary joint-stock companies would be excessively burdensome and too complex. Therefore one of the most distinctive features of law regarding this issue is represented by mandatory dematerialization of shares[9], which are therefore not issued in paper form. Ownership of shares is actually proved by accounting records kept by intermediaries (such as banks), which exercise property rights in the name and on behalf of shareholders, while administrative rights are usually exercised by the same shareholders, but by certifications issued by an intermediary; according to art. 83-*novies*, T.U.I.F. however, an intermediary may also exercise, in the name and on behalf of shareholders, associated administrative rights coming from their shares if a shareholder has given him a relevant mandate. As for the rest, in a nutshell, it can be said that the law of listed companies refers to 4 distinct

[8] Under art. 24, paragraph 6-*bis*, l. 262/2005, Consob, the members of its bodies as well as its employees are liable for the damage caused by acts carried out with willful misconduct or gross negligence; for some reflections on this provision, see S. Amorosino, *op. cit.*, 161-162.

[9] For a historical reconstruction of the evolution of the law concerning dematerialization, see I. Kutufà, *Indici di legittimazione e tecniche azionarie: nuove soluzioni per vecchi problemi tra cartolarità e dematerializzazione*, Banca, borsa e titoli di credito, 2013, 660 ss.

and yet related thematic areas: that of information, that of the structure and working of corporate bodies; that of protection of shareholders and that of financial structure.

The principal aim of this law is to protect the investment; this is essential both because the Italian Constitution wants savings to be protected (see Article 47), and because doing so helps to finance listed companies. Of course, protection of investment must start before the investment is made, and law concerning information is fundamental in this regard. Moreover, protection does not end when the investment has been made, but becomes the protection of shareholders, manifesting itself both in some powers given to shareholders and in the strengthening of those control bodies, which are aimed at overcoming the problem of so-called "rational apathy".

Investment in the securities market is also protected by imposing a specific financial structure on companies in order to make them more solid and to avoid, as far as possible, frauds against savers.

4. *The disclosure obligations*

Starting from the issue of information, it must be said that listed companies have to comply with disclosure obligations towards markets and towards Consob. Information required can be divided into:

a) periodic information relating to ordinary operations. It includes the annual financial report, which includes, in addition to draft financial statements and any consolidated financial statements, the management report. This report contains, among other things, a specific section, called "Report on corporate governance and ownership structure", which reports detailed information regarding, among other things:
   - structure of share capital with the indication of categories of shares issued and, for each category, of related rights and obligations as well as the percentage of share capital it represents;
   - any restrictions on the transfer of shares such as for example, limits on share ownership or the need to obtain approval of companies in order to become a shareholder; • major holdings, according to art. 120, T.U.I.F.;

- any restrictions on voting rights (for example, restrictions on voting rights to a specific percentage or a specific number of votes);
- shareholder agreemets, communicated to the company according to art. 122, T.U.I.F.;
- agreements between the company and its directors.

b) continuous information concerning news that must be communicated to the market if it can influence the price of shares: this is the so-called "inside information". It is possible to delay public disclosure of such information only if it is necessary in order not to prejudice the interests of the company and if delay cannot mislead the market about essential events.

c) extraordinary/episodic information, relating to extraordinary transactions, such as mergers, spin-offs, acquisitions, etc. In these cases, company is obliged to prepare documents with specific information. Often even during these transactions, inside information is created and it must be compliant with the rules referred to in point *b*) above. It should also be remembered that under art. 115, T.U.I.F. Consob, in order to monitor the correctness of information spread to the market, may request from listed companies, those who control them, members of their corporate bodies and statutory auditors further information and documents as well as carry out inspections to check corporate documents. In any case, listed companies make the requested information public, ensuring quick access to it throughout the European Union, including through its filing with Borsa Italiana s.p.a. and Consob. The latter may also communicate to the market that people obliged to communicate information have not fulfilled their obligations and may, among other things, suspend trading of shares involved if it suspects that there has been a violation of the provisions concerning the matter. Disclosure obligations relating to shareholders' agreements directly concerning the exercise of the right to vote but also consultation agreements, agreements setting limits on the transfer of shares, agreements providing for the purchase of shares and agreements having as their object or effect the exercise, jointly or otherwise, of a dominant influence on such companies, and the agreements regarding takeover bids deserve separate consideration. Law on the matter is in article 122, T.U.I.F., and the fundamental points of the same are the following:

such agreements, in any form stipulated, must, within 5 days of stipulation[10]:

a) be communicated to Consob;
b) be published in daily press;
c) be filed at the Companies Register;
d) be communicated to the company.

In the event of non-fulfillment of these obligations, these agreements are void, and the right to vote cannot be exercised[11].

Finally, disclosure obligations resulting from the purchase of a significant shareholding should be remembered, which are aimed at making known who are most important shareholders of a listed company, so to favor market information and, indirectly, contestability of control. In other words, the legislator has deemed it essential that the market be made known who is in control of a company, and this means that those who have more than three per cent of the capital in a listed company must notify both the company and Consob. Furthermore, if a share equal to or greater than 10 per cent, 20 per cent, and 25 per cent of capital is purchased, the shareholder is obliged to declare which objectives he intends to pursue in the following six months. Also, in these cases, voting right inherent in listed shares for which the aforementioned communications have been omitted, cannot be exercised, and this entails contestability of resolution passed with the decisive vote of shares for which exercise of the right to vote was not allowed, and in this case, the power of appeal also rests with Consob.

5. *The shareholders' meeting*

As regards the examination of corporate bodies of listed companies, it is appropriate to start with shareholders' meetings, given that it appears to be the most different body compared to the counterpart of a

[10] Term to be considered peremptory according to M. Filippelli, *La trasparenza dei patti parasociali nelle società per azioni*, Rivista delle società, 2019, 468.

[11] As M. Filippelli points out in *op. cit.*, 454, actually the Italian law concerning this matter is an exception, in an international scenario in which solicitations towards an increase in the transparency of shareholder agreements, which also emerge with increasing frequency in the doctrinal debate, have so far been supported, on the legislative level, mostly marginally and indirectly.

non-listed company; in particular, rules of the T.U.I.F. that concern it aimed at increasing pre-meeting and shareholders' meeting information and simplifying exercise of the voting right and – even before – speaking in a meeting, in an attempt to counter the widespread phenomenon of abstention. As regards the first matter, one has above all to consider art. 125-*bis*, T.U.I.F, which specifies what the content of the convocation notice must be, arranging for the publication of the same on the company's website. The management must also make a report on each matter on the agenda (see Article 125-*ter*, T.U.I.F.) available to the public on the corporate website. It should also be noted that the company's website is also a fundamental tool for conveying post-meeting information, given that minutes of shareholders' meeting must be also published there. The aim of countering the drive not to attend shareholders' meetings is instead pursued through many provisions, which are added to those centered on the dematerialization of shares that we have already spoken about. Among these rules, the one that authorizes the exercise of the right to vote through electronic means should be mentioned (Article 127, T.U.I.F.); but it is also important that according to art. 135-*undecies*, T.U.I.F., the company is obliged to make available to shareholders, and at no cost to them, a person available to represent them in meetings. The most significant provision in this regard, however, is the one that introduces a new system of entitlement to attend shareholders' meetings, which makes it possible to disregard the sale of shares after a certain date (so-called "record date"). Art. 83-*sexies*, paragraph 2, T.U.I.F. in fact provides that from the seventh day before the meeting, the transfer of shares becomes irrelevant, meaning that even if the transfer has taken place, it is still possible to participate in a meeting and exercise the right to vote. This provision has a double effect: it allows shareholders to attend shareholders' meetings and nevertheless to be able to sell their shares at any time and it facilitates trades on market[12]. Undeniably, this

[12] On this point also see S. Balzola, *"Record date" e rappresentanza assembleare nelle società quotate: armonie e disarmonie (anche alla luce del D.lgs. 18 giugno 2012 n. 91)*, Banca, borsa e titoli di credito, 2013, 756, which highlights that the benefits as far governance coming from the record date system are manifested in the form of greater protection of the economic-financial interest of shareholders, who can attend meetings without having to passively suffer the fluctuation of the stock market prices which are determined in the proximity of the meetings.

way a significant anomaly can occur, such as when those who are no longer shareholders attend the meeting and even vote as the sale of their shares took place after the record date but before the meeting (so-called "empty voting")[13]. Lastly, with regard to shareholders' meetings, one has to underline rules that allow individual shareholders to ask questions on items on agenda even before the meeting (Article 127-*ter*, T.U.I.F.) and to a minority consisting of at least 1/40 of share capital to include other items on the agenda introduced by directors (art. 126-*bis*, T.U.I.F.): that is, two provisions that are also to be included among those aimed at increasing protection of investors/shareholders.

6. *Board of directors and control bodies*

As regards the board of directors, the provisions relating to the integrity and independence requirements should first of all be recalled. In other words, directors must meet integrity requirements for members of the supervisory body, otherwise they will lose their position; in addition, the board must necessarily include at least one independent director (2 if the board has more than 7 members).

According to art. 147-ter, T.U.I.F., a company's by-laws must provide that members of the board of directors are elected on the basis of lists of candidates and must therefore also determine the minimum share of capital necessary for the presentation of a list. At least one of the members of the board must also be chosen from the minority list, "minority" meaning the set of shareholders who are not part of those who hold control of the company. The relevant law is also aimed at establishing gender balance; in fact, it is necessary to ensure that at least one-third of directors belong to the less represented gender (Article 147-*ter*, paragraph 1-*ter*, T.U.I.F.)[14]. Lastly, it should be noted that the board of directors

[13] As I. Kutufà points out in *op. cit.*, 674, today it is allowed to vote for those who no longer have any interest in the outcome or effects of the resolution that they concur to take. As S. Balzola also points out in *op. cit.*, 760, the sale of the shares after the record date makes people entitled to vote indifferent to the outcome of the vote.

[14] For some concerns about the possibility that the implementation of gender equality has a positive impact on entrepreneurial activity, see F. Cuccu, *Il diritto diseguale delle quote di genere e la "performance" dell'impresa*, Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente, 2018, 109 ff.

of a listed company is almost always divided into committees, mostly composed of independent directors and having consultative and propositional functions, which are set up to ensure correct and transparent management and reduce business risk as far as possible. Some of these committees (such as the Risk Control Committee, the Remuneration Committee, and the Nomination Committee) are also expressly recommended by the aforementioned Corporate Governance Code.

Relatively to the supervisory body, it should first of all be noted that law provides that there are not fewer than 3 effective members of this board (so-called auditors) and not fewer than 2 of alternate members (Article 148, paragraph 1, T.U.I.F); on the other hand, no limits have been envisaged on the maximum size of this board. Moreover, as regards the board of auditors, the election must take place by list vote (Article 148, paragraph 2, T.U.I.F.), and also in this case gender balance is envisaged (Article 148, paragraph 1-bis, T.U.I.F.) in a similar way to the one described when speaking of directors. Finally, it should be emphasized that at least one auditor must be chosen by the minority[15] and that the president of the board of auditors must be chosen from members elected by the latter.

It should also be underlined that legal audit of listed companies cannot be entrusted to the board of auditors but must necessarily be carried out by an auditing company, which among other things is required to express an opinion on financial statements. The opinion expressed does not bind the shareholders' meeting, which is free to approve even a financial statement that has got a negative opinion or is deemed not to be judged. If a resolution approving the financial statements with a positive judgment is taken, only shareholders representing at least 5% of share capital will be entitled to challenge it (Article 157, paragraph 1, T.U.I.F.).

7. *Right of withdrawal and takeover bid*

As already written, there are many provisions of T.U.I.F. that implement protection of shareholders (especially minority shareholders); here

[15] See, on this point, S. Ambrosini, *Nomina del collegio sindacale nelle società quotate: il c.d. sindaco di minoranza*, Rivista delle società, 1999, 103 ss., which rightly highlights how the auditor chosen by the minority – like those chosen by the majority – must not protect the interest of those who elected him, but the common interest of all the shareholders.

it is also possible to focus only on those concerning the withdrawal right, that is the right to disinvest under fair conditions.

In this regard, art. 2437-*quinquies* of the Civil Code must be recalled, which gives the right to withdraw to shareholders who have not approved the resolution[16] that provides for the exclusion of the company from listing. Furthermore, shareholders' right to withdrawal is protected mainly through provisions concerning takeover bids. In this sense, the first rule to be considered is according to art. 106, T.U.I.F., which, regarding the purchase of shares of listed companies, provides that anyone holding a stake above the thirty percent threshold is obliged to launch a takeover bid for all the shares traded on the market. A fundamental feature of law concerning mandatory takeover bids is the determination of the offer price, which must not be lower than the highest price paid in the previous twelve months. The board of directors of the issuer is then obliged to issue a press release, containing all useful data for evaluation of the bid.

The second interesting provision is represented by art. 108, TUIF, which provides that the bidder who holds, after a takeover bid, a stake equal to at least ninety-five percent of the capital must purchase the remaining shares from whoever requests it (so-called "right to sell out"). Finally, art. 111, T.U.I.F., according to which the bidder who holds, after a takeover bid, a share of at least ninety-five percent of the share capital of a listed Italian company has the right to purchase the remaining shares[17].

8. *The dividend increase*

As regards the financial structure of listed companies, the first rules on which it is appropriate to focus are those relating to the increase of the dividend, that is, the rules that allow bylaws to provide that each

[16] Passed by the extraordinary meeting: see A. Pomelli, *op. cit.*, 419-420.

[17] See, on this point, A. Pomelli, *op. cit.*, 451, who highlights that in principle the controlling shareholder is induced to purchase all the shares that are not his property and thus cause the consequent delisting of the company due to the loss of the free float required by the regulation of the market when he's interested to take all the cash flow produced by the company, and to reduce the costs associated with listing on a regulated market.

share held by the same shareholder for not less than one year give the shareholder an increase of no more than 10% of the dividend given by the other shares.

This benefit is not transferable: if the share is sold, it is lost; and this means, among other things, that if the one who sells the share has been the owner of the share for six months, the buyer cannot add the six months following its purchase, in order to complete the year which is necessary to have the right to the increase[18].

However, the aforementioned increase cannot be given:

a) to shares which during the vesting period of the benefit exceeded 0.5% of share capital: if a shareholder owns a shareholding that exceeds this threshold, the increase can only be granted within the threshold;
b) to shares that have been owned by whoever has exercised (even temporarily or jointly with other shareholders) a "dominant or significant influence" over the company[19];
c) to shares that have even been temporarily included in a shareholders' agreement provided for by art. 122 T.U.F. and concerning more than thirty percent of the shares (and this regardless of whether the agreement allows exercising a dominant or significant influence on the company). Provisions just mentioned have received significant criticism, based on the assumption that the duration of the equity investment is not important for the capital market and that it is, therefore, wrong to introduce provisions that reward it. Furthermore, it was stated that the increased dividend, as it constitutes a hindrance to the trade of the shares, hinders the more efficient allocation of the same and therefore is an obstacle to the good governance of the company. In other words, the fact that the increased dividend reduces the contestability of a company has been stigmatized: it would therefore decrease the efficiency of the market control and therefore weaken

[18] Actually, as U. Tombari also recalls in *"Maggiorazione del dividendo" e "maggiorazione del voto": verso uno "statuto normativo" per l'investitore di medio-lungo termine?*, Banca borsa e titoli di credito, 2016, 310, any interruption of the holding of shares causes a zeroing of the calculation of the time required for the accrual of the equity advantage.

[19] See, on this point, U. Tombari, *op. cit.*, 311, who underlines that only an effective exercise of power deriving from control can prevent the granting of the patrimonial advantage, as potentiality alone is not sufficient for this purpose.

one of the main tools for containing agency costs. In addition to this, it was reported that rewarding and encouraging stability (but not activism) of shareholders creates discrimination among shareholders, which is often penalizing, especially for institutional investors.

9. *The asset shares*

A higher dividend can also be paid to asset shares, which have been introduced by law n. 216/1974 that allowed issuing shares without voting rights, but in the face of greater financial rights compared to ordinary shares. Today, this kind of shares is governed by articles 145-147, T.U.I.F., which provides, among other things, that the aforementioned greater rights are determined by the company itself, which must indicate them in its bylaw[20]. In other words, T.U.I.F. does not establish the rights given by asset shares but instead entrusts bylaws of the companies with the task of determining the content of the rights. Also, in this case, an increase in the distribution of profits is usually provided – to a fixed or variable extent – and/or a priority in the aforementioned distribution with respect to the other kinds of shares.

However, asset shares can also be privileged through a bylaw's provision that postpones them in the losses in the event of winding-up or during the life of the company or that favors them in the reimbursement of the share capital over the other kinds of share categories in the event of the winding up of the company. The strengthening of ownership rights is countered by fewer administrative rights: in fact, they do not attribute only the right to vote during general meetings – be it ordinary or extraordinary – but not even the right to attend such meetings.

Asset shares have been created to push private savers, who usually have little interest in administrative rights, to buy shares of listed companies and they can be issued both in the event of an increase in the share capital and in the event of the conversion of ordinary shares.

Their introduction was aimed at increasing the financing of listed companies, trying to attract investment in venture capital from those

[20] See, on this point, A. Sacco Ginevri, *Le azioni di risparmio (quarant'anni dopo)*, Il Nuovo Diritto delle Società, 2015, 27.

more interested in the return on the business rather than in its management[21]; however, it has been then understood that the average shareholder does not like the very low – if not zero – power that can be exercised through these shares and that's why their diffusion has been extremely limited; that is, asset shares have not met with the hoped-for success among investors and indeed in recent years their number has progressively reduced. Asset shares cannot represent more than 50% of the share capital, and this is in order to limit the power of ordinary shareholders who could otherwise control the company even if they own a modest amount of capital.

The owners of these shares meet in a special meeting to protect their rights. The functioning and responsibilities of this meeting are governed by art. 146, T.U.I.F., which provides that the same:

(a) appoints and revokes the common representative of the holders of assets shares, who among other things has the power to challenge the resolutions of the general meeting;

(b) approves the resolutions of the ordinary shareholders' meeting that prejudice the rights of assets shares. It is still debated today what is meant by "prejudice" to the rights of assets shares; however, according to the prevailing interpretation, approval of the meeting of asset shares' holders is required if resolutions of the general meeting of the company have been adopted which worsen the rights due to asset shares or which in any case worsen the ratio between these rights and the rights given by the other shares.

10. *The vote increase*

Listed companies, on the other hand, cannot issue shares with multiple votes, which may also be issued by unlisted companies. In other words, the latter may issue shares which are entitled to a number of votes greater than one (but not more than three).

However, companies that issued these shares before the listing can keep them: actually, the second paragraph of art. 127-*sexies*, T.U.I.F. provides that "*shares with multiple votes issued before being listed on a*

[21] See A. Sacco Ginevri, *op. cit.*, 23.

regulated market retain their rights"; moreover, these companies, in the event of a capital increase may issue more shares with multiple votes in order to "*maintain unchanged the ratio between the various categories of shares*". Clearly, these rules are aimed at encouraging listing on regulated markets[22].

Listed companies that have issued shares with multiple votes cannot, however, take advantage of the possibility provided for by art. 127-*quinquies*, T.U.I.F, i.e., the use of the vote increase. The vote increase has been introduced into Italian law in 2014, and it allows only listed companies to give an increased voting right, in principle corresponding to two votes to each share held for at least 24 months. Therefore, we are faced with "loyalty shares", or rather a "bonus" to loyal shareholders who continuously hold their shares for a prolonged time: once 24 months have elapsed, he will be automatically awarded a maximum of two votes per share held.

This provision has been introduced also to give greater emphasis to long-term investors so as to discourage short-term investments which contributed, among other things, to causing the financial crisis of the last decade.

Shares with increased voting rights were therefore considered capable of stimulating long-term equity investments[23] (in order to favor the stability of the management of the company), and therefore shareholders not inclined to the so-called short-termism[24] and equipped (also thanks to the increased vote) with a more effective monitoring power[25], and this is also for the indirect purpose of reducing the volatility of share prices and therefore favoring a more efficient formation of prices. In short, we are talking about law supported by the same philosophy underlying the introduction of dividend increase mentioned above. As it is known, long-

[22] As underlined also by G. Guizzi, *La maggiorazione del diritto di voto nelle società quotate: qualche riflessione sistematica*, Il Corriere giuridico, 2015, 154-155.

[23] Doubtful about the possibility of actually achieving this goal G. Guizzi, *op. cit.*, 157.

[24] As recalled by U. Tombari in *op. cit.*, 304, the financial crises of the last decade have highlighted the need to replace or otherwise limit the so-called short-termism, enhancing the medium-long term investment perspective.

[25] But see U. Tombari, *op. cit.*, 305-306, who does not believe that art. 127-*quinquies*, T.U.I.F can intensify the monitoring activity.

term investors are important because they induce directors not to make purely financial and short-term management choices.

It must be considered that the law entrusts company with the task of establishing the specific content of the increased voting right, so that it is therefore possible to customize this right, for example by providing that to have the increased vote it is necessary to own the share for more than 24 months or providing for the loss of the increase if certain events occur; especially, a vote greater than one but less than two could also be attributed, and therefore a vote equal to one decimal figure, such as 1.5 for example.

It is also necessary to clarify that shares with increased voting rights do not constitute a special category of shares, precisely because they lose the right of increased voting if they are transferred; actually, the third paragraph of art. 127-*quinquies*, T.U.I.F. states that "*the sale of the share even for free … involves the loss of the increased vote*". In other words, the increase in the right to vote is connected not to the share itself, but to the shareholder[26] (and therefore it is up to all shareholders who have done what was necessary to "deserve" it, and not to the owners of certain shares). The choice of allowing increased voting has also been contested[27], as it can reduce share trades by leading to not giving up in order to benefit from the increase. Furthermore, it must be considered that if there are shareholders who can keep their shares in order to have dividend increase, there are other shareholders – who in theory could intervene more actively in company's decisions, for example institutional investors – who must always be ready to divest: it follows, therefore, that the shareholder who is always ready to trade, even if he actively participates in the life of the company, is a shareholder penalized by the provisions just described. Currently, however, most of the companies that have introduced the increased voting rights operate in industrial sectors and usually have a controlling shareholder who controlled the company even before taking advantage of the increased voting rights.

[26] See, on this point, G. Guizzi, *op. cit.*, 157.

[27] But see the favorable opinion about it of G. Guizzi, *op. cit.*, 155.

SEZIONE II.

L'ECONOMIA

Mattia Tassinari*, Francesca Spigarelli°, Gianluca Sampaolo§

POLITICA INDUSTRIALE E PRIORITÀ SETTORIALI IN CINA. UN'ANALISI DELLA PRESENZA STRATEGICA DEL GOVERNO IN INDUSTRIE CHIAVE**

Sommario: 1. Introduzione. – 2. Politica industriale e priorità settoriali in Cina. – 3. Metodologia. – 4. Risultati e discussione. – 5. Considerazioni conclusive.

1. Introduzione

L'esperienza di sviluppo industriale della Cina può senza dubbio essere considerata sorprendente, specialmente se la si osserva dalla prospettiva avanzata dalla teoria economica *mainstream*. Tipicamente, infatti, la dinamica di sviluppo economico è descritta come trainata in modo preponderante dalla concorrenza di mercato, ritenuta in grado di generare per gli operatori economici quegli incentivi all'efficienza e all'innovazione che alimentano il progresso tecnologico e le capacità produttive. In questa prospettiva il ruolo delle politiche pubbliche è di fatto confinato ad alcuni ambiti di intervento ben delimitati (i cosiddetti casi di *fallimento del mercato*). Ben diversa è invece l'indicazione che si trae osservando l'esperienza storica di sviluppo economico di molte economie asiatiche e, in particolare, della Cina. Fin dalla fine degli anni Settanta, il governo cinese ha sempre mantenuto un ruolo attivo nel promuovere la competitività e l'innovazione della struttura produttiva nazionale. Nonostante la progressiva transizione a un'economia di mercato, si può sostenere che ancora oggi prevalga un "capitalismo con caratteristiche cinesi", nel qua-

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le il governo continua a giocare un ruolo strategico fondamentale nel regolare il difficile equilibrio tra apertura alla concorrenza internazionale e necessità di proteggere e promuovere la struttura industriale nazionale[1].

Nel contesto cinese gli interventi pubblici in campo economico e, in particolare, le azioni di *politica industriale*[2], assumono un ruolo determinante nell'orientare le trasformazioni della struttura produttiva, affinché risponda a obiettivi ed esigenze di interesse nazionale, tra cui, ad esempio, il miglioramento della competitività, l'accelerazione della crescita, l'indipendenza industriale ed economica, la promozione delle esportazioni e la sostituzione delle importazioni, l'innovazione e l'avanzamento tecnologico, il contrasto al declino industriale o a crisi e recessioni. Nella maggior parte dei casi questi obiettivi sono promossi attraverso politiche industriali *selettive* (o verticali), che identificano particolari imprese, settori e territori come prioritari al fine di promuovere lo sviluppo di capacità tecnologiche e produttive in segmenti chiave dell'economia[3]. In questa prospettiva i processi di sviluppo e cambiamento promossi dalla politica industriale possono essere valutati anche andando oltre le tradizionali variabili di crescita e performance economica, lasciando spazio a

[1] F. Spigarelli, J.R. McIntyre (cur.), *The New Chinese Dream. Palgrave Studies of Internationalization in Emerging Markets*, Palgrave Macmillan, Cham, 2021

[2] Come spiegato in M. Cimoli, G. Dosi, J.E. Stiglitz, *Industrial Policy and Development. The Political Economy of Capabilities Accumulation*, Oxford: Oxford University Press, 2009, p. 1-2, "la politica industriale comprende politiche che incidono sul sostegno di vario tipo all'industria nascente, ma anche politiche commerciali, politiche per scienza e tecnologia, appalti pubblici, politiche che incidono sugli investimenti diretti esteri, diritti di proprietà intellettuale e allocazione delle risorse finanziarie. Le politiche industriali, in questo senso ampio, accompagnano processi di ingegneria istituzionale che modellano la natura stessa degli attori economici, i meccanismi di mercato e le regole in base alle quali operano, e i confini tra ciò che è governato dalle transazioni di mercato e ciò che non lo è" (nostra traduzione).

[3] E. Barbieri, M.R. Di Tommaso, M. Tassinari, *Politiche industriali selettive e settori strategici. Lo scenario e le scelte di Pechino*, in *L'Industria. Review of Industrial Economics and Policy*, 2015, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *Selective Industrial Policies in China: Investigating the Choice of Pillar Industries,* in *International Journal of Emerging Market*, 2019, 264 ss.; L. Compagnucci, M. Tassinari, F. Spigarelli, M.R. Di Tommaso, *Exploring the rise of cultural industries in China: selective industrial policies and economic performances towards a knowledge-intensive economy,* in *Economia della cultura,* Bologna, 2020, 23 ss., il Mulino; L. Ping, L. Curran, F. Spigarelli, E. Barbieri, *One country, many industries: Heterogeneity of Chinese OFDI motivations at meso level*, in *China Economic Review,* Amsterdam, 2021, 1 ss.

considerazioni legate, ad esempio, alla distribuzione della ricchezza tra persone o territori, all'accesso a beni meritori, o alla sostenibilità sociale o ambientale[4].

In questo contesto, in cui l'azione politica dello Stato è strumento di orientamento e sostegno dell'attività economica nazionale, continua ad avere particolare rilevanza la presenza strategica, in industrie chiave, di imprese di proprietà statale (*state-owned enterprises*). Circa 170.000 imprese di Stato operano oggi in Cina, producendo tra il 23 e il 28 percento del PIL cinese[5]. La maggior parte di queste imprese sono attualmente operatori di mercato a proprietà mista (pubblico-privato). Si consideri, comunque, che le sole 98 imprese di proprietà statale sotto il controllo diretto del governo centrale hanno realizzato nel 2022 un profitto netto di 1.900 miliardi di yuan (circa 280,7 miliardi di dollari), che comparato al valore dell'anno precedente registra un aumento del 8,3 percento su base annua[6]. Valori certamente significativi di quanto le imprese pubbliche cinesi continuino oggi a giocare un ruolo importante nel sostenere l'economia in diversi settori chiave. La persistenza del controllo statale consente infatti a queste imprese, di garantire la stabilità finanziaria, di evitare acquisizioni ostili, e di attuare scelte strategiche di politica industriale.

Questo contributo vuole ripercorre sinteticamente gli elementi fondamentali della politica industriale cinese e proporre, in particolare, un'analisi sulla presenza delle imprese di proprietà statale nelle diverse industrie nazionali, come elemento di controllo, promozione e supporto di settori ritenuti prioritari per lo sviluppo economico. Le domande di ricerca alla base dell'indagine empirica proposta sono: quali sono le industrie cinesi caratterizzate da una maggiore presenza pubblica, valutata in particolare in termini di presenza di imprese di proprietà statale? Come

[4] M.R. Di Tommaso, L. Rubini, E. Barbieri, M. Tassinari, *Economia e politica industriale. Organizzazione della produzione, innovazione e politiche di interesse pubblico*, Bologna, 2021, il Mulino; F. Spigarelli, J.R. McIntyre, *op. cit.*

[5] K.J. Lin, X. Lu, J. Zhang, Y. Zheng, *State-owned enterprises in China: A review of 40 years of research and practice*, in *China J. Account*, 2020, 31 ss.; C. Zhang, *How Much Do State-Owned Enterprises Contribute to China's GDP and Employment?*, in *World Bank*, 2019.

[6] S. Yimin, L. Guoping, D. Yi, *China Central SOEs' Profit Growth Outpaces GDP, Caixin Global,* 2023. https://www.caixinglobal.com/2023-01-18/china-central-soes-profit-growth-outpaces-gdp-101990634.html.

si è modificata nel tempo l'intensità della presenza pubblica nelle diverse industrie cinesi? L'analisi empirica è condotta attraverso la costruzione di un indicatore composto – l'indice di Intensità di Presenza Pubblica (IPP) – utile a classificare le industrie manifatturiere sulla base dell'intensità della presenza di imprese di Stato. L'indice è applicato all'analisi di 37 settori manifatturieri dell'economia cinese per il periodo 2004-2018. I risultati dell'analisi evidenziano le industrie cinesi in cui la presenza del governo assume ancora oggi una rilevanza strategica.

2. *Politica industriale e priorità settoriali in Cina*

Il processo di sviluppo economico che ha condotto la Cina a diventare oggi uno degli attori industriali più importanti sulla scena internazionale è iniziato alla fine degli anni Settanta, quando Deng Xiaoping intraprese una serie di riforme volte a promuovere il commercio estero e gli investimenti (attraverso la politica della *Porta Aperta*). In questo graduale processo di apertura economica internazionale, il governo cinese ha comunque sempre continuato a guidare e orientare lo sviluppo industriale della Cina attraverso il controllo statale di settori chiave, la creazione di nuovi *campioni nazionali* e l'impegno a promuovere obiettivi sociali e distributivi[7]. Ad esempio, quando il commercio e gli investimenti sono stati liberalizzati, sono state imposte specifiche condizioni agli investitori stranieri e sono stati privilegiati gli investimenti in specifici settori[8].

Anche in tempi più recenti, il governo continua a esercitare un'influenza decisiva. Il piano di politica industriale *Made in China 2025*, lanciato nel 2015, persegue l'ambizione della Cina di diventare economicamente e tecnologicamente autosufficiente. L'adozione di questa prospettiva è stata recentemente rafforzata anche dalla guerra commerciale e tecnologica avviata dal Presidente Trump contro la Cina e, ancora, dalla pandemia e dalle tensioni geopolitiche internazionali. Questi eventi han-

[7] M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, in *World Politics,* 2005, 296 ss.

[8] M.R. Di Tommaso, L. Rubini, E. Barbieri, *Southern China: Industry, Development and Industrial Policy*, London and New York, Routledge, 2013; F. Spigarelli, *Politica industriale e cambiamenti strutturali: la via cinese alla crescita*, in *L'Industria*, 2018, 511 ss.

no di fatto ridotto il commercio internazionale inducendo la Cina a fare ulteriormente affidamento sul mercato interno per sostenere la crescita economica del Paese[9]. È in questo contesto internazionale che è stata lanciata la strategia della *doppia circolazione*, come la politica economica al centro del 14° Piano Quinquennale (2021-2025). Questa strategia mira, da un lato, a rendere l'economia nazionale autosufficiente dal resto del mondo in termini di risorse naturali e tecnologia e, dall'altro lato, a stimolare la domanda esterna di prodotti cinesi, in particolare attraverso la *Belt and Road Initiative* (BRI)[10].

In questo contesto, le politiche cinesi volte a sostenere lo sviluppo industriale hanno spesso adottato un approccio selettivo, volto in particolare a supportare e promuovere specifici settori o industrie ritenuti prioritari per lo sviluppo economico cinese. Ciò è visibile sia nella definizione degli obiettivi politici sia negli strumenti utilizzati per promuovere la crescita industriale[11]. Gli obiettivi politici a lungo termine sono definiti nell'ambito dei Piani Quinquennali, cioè i documenti programmatici attraverso cui i governi cinesi hanno sostanzialmente formalizzato per decenni la propria visione sullo sviluppo economico del Paese. Anche se oggi sono volti a fornire delle linee guida, più che a definire obiettivi vincolanti, i Piani Quinquennali forniscono comunque sempre indicazioni precise sui settori economici da considerare come "pilastri" o "chiave" per lo sviluppo economico. Ad esempio, tra i settori considerati spesso prioritari ritroviamo il settore dei trasporti, i prodotti petrolchimici, l'industria metallurgica, i materiali da costruzione e la produzione di apparecchiature elettroniche. L'identificazione di tali industrie è spesso ac-

[9] G. Sampaolo, M.R. Di Tommaso, O. Liakh, *Structural Changes and Policies in China: From the New Dream to COVID-19 Era*, in F. Spigarelli, J.R. McIntyre, (cur.) *The New Chinese Dream. Palgrave Studies of Internationalization in Emerging Markets*, Palgrave Macmillan, Cham, 2021; G. Sampaolo, F. Spigarelli, M. Tassinari, *La politica industriale della Cina: tendenze in corso e prospettive future*, in *Rivista di Politica Economica*, 2022, 213 ss.

[10] F. Spigarelli, *op. cit.* 511 ss.; F. Spigarelli, L. Ping, *The New Silk Road to Europe: Retrospect and Prospect of the Belt and Road Initiative 5 Years from Inception (working paper)*, in *Forum The European House - Ambrosetti*, 2018; G. Sampaolo, F. Spigarelli, M. Tassinari, *op. cit.,* 213 ss.

[11] E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.*, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *op. cit.,* 264 ss.

compagnata da indicazioni sulle azioni da intraprendere al fine di migliorare qualitativamente e quantitativamente le performance industriali[12].

Le linee guida dei piani quinquennali sono attuate attraverso diversi strumenti di politica. Tra questi, ricopre una posizione di rilievo la definizione di *Zone Economiche Speciali*, cioè di aree delimitate entro cui la Cina ha di fatto "sperimentato" le riforme legate alla transizione a un'economia di mercato per poi, in caso di risultati soddisfacenti, estendere tali riforme ad altre parti del Paese. Le zone economiche speciali si differenziano sostanzialmente per lo scopo perseguito e per le specifiche industrie che vengono promosse al loro interno[13]. Oltre alle zone economiche speciali, sono state implementate altre politiche per promuovere la crescita industriale in specifici settori, tra cui, la realizzazione di distretti industriali specializzati, l'utilizzo della domanda pubblica, l'implementazione di mega-progetti e la gestione delle imprese a proprietà statale[14].

Con particolare riferimento alle imprese statali, vale la pena notare che nel 1978 rappresentavano quasi l'80% delle imprese nazionali, mentre il restante 22% erano imprese "collettive". In una seconda fase, le imprese statali sono state riformate e "privatizzate". Nel 2013, le imprese statali rappresentavano solo il 45% di tutta la produzione industriale cinese[15]. Tuttavia, è stato mantenuto da parte dello Stato il controllo della maggioranza delle azioni delle imprese operanti in settori considerati "strategici", tra cui, ad esempio, l'industria aerospaziale[16], l'industria automobilistica e i settori legati all'energia[17]. Le imprese a proprietà statale rimangono oggi uno strumento cruciale di controllo e indirizzo

[12] E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.*, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *op. cit.,* 264 ss.

[13] D. Yao, J. Whalley, *An evaluation of the impact of the China (Changhai) Pilot Free Trade Zone (SPFTZ) (working paper),* in *National Bureau of Economic Research*, 2015; E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.,* 264 ss.

[14] M. Bellandi, M.R. Di Tommaso, *The case of specialized towns in Guangdong, China,* in *European Planning Studies*, 2005, 707 ss.; L. Rubini, E. Barbieri, *Percorsi Evolutivi nel sostegno alle imprese in Cina. Un'analisi sulle imprese leader e riflessioni sulla politica industriale*, in *L'Industria, Rivista di economia e politica industriale*, 2013, 397 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.*, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *op. cit.,* 264 ss.

[15] K.J. Lin, X. Lu, J. Zhang, Y. Zheng, *op. cit.,* 31 ss.; C. Zhang, *op. cit.*; M.R. Di Tommaso, L. Rubini, E. Barbieri, M. Tassinari, *op. cit.*

[16] ChinaEdge Database, https://thechinaproject.com/industry/aerospace/;

[17] L. Rubini, E. Barbieri, *op. cit.*, 397 ss.

dell'economia cinese[18]. Questo promuove di fatto un sistema economico nazionale in cui le industrie considerate "strategiche" sono limitatamente esposte alla pressione competitiva internazionale e caratterizzate da poche grandi imprese prevalentemente di proprietà statale[19]. Le prossime pagine affrontano con maggiore dettaglio questo tema, analizzando in particolare l'intensità della presenza pubblica nelle diverse industrie manifatturiere cinesi.

3. *Metodologia*

Come anticipato nell'introduzione a questo lavoro, le domande di ricerca alla base dell'indagine empirica condotta nelle prossime pagine sono: quali sono le industrie cinesi caratterizzate da una più alta intensità di presenza di imprese di proprietà statale? Come si è modificata nel tempo l'intensità della presenza pubblica nelle diverse industrie cinesi? In questa sezione presentiamo la metodologia di analisi empirica adottata per rispondere a questi quesiti. In particolare si propone la costruzione di un indicatore composto – l'indice di Intensità di Presenza Pubblica (IPP) – utile a classificare le industrie manifatturiere sulla base dell'intensità della presenza di imprese di Stato.

Gli indicatori compositi (o indici) sono generalmente utilizzati per descrivere fenomeni complessi, che sono difficili da misurare attraverso il ricorso ad una singola variabile[20]. Per valutare il livello di intensità della presenza pubblica nei settori economici, applichiamo la nozione di indicatore composito per combinare un insieme di K=5 variabili riferite a J=37 settori, ottenendo una classifica dei settori dell'economia cinese, da quello a più alta intensità a quello a con minore intensità della presenza pubblica.

[18] K.J. Lin, X. Lu, J. Zhang, Y. Zheng, *op. cit.,* 31 ss.; C. Zhang, *op. cit.*

[19] E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.*, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *op. cit.,* 264 ss.

[20] Si veda, ad esempio, OECD, *Handbook on Constructing Composite Indicators*, Paris, 2008; P.M. Fayers, D.J. Hand, *Causal variables, composite indicators and measurement scales: an example from quality of life*, in *Journal of the Royal Statistical Society: Series A*, 2002, vol. 165, 2, 233 ss.

La procedura per il calcolo di indicatori compositi si basa su due fasi principali:

1. normalizzazione delle variabili
2. ponderazione e aggregazione

Nella prima fase della procedura (prima di eseguire la fase di aggregazione delle variabili), le variabili vengono normalizzate in quanto possono avere scale e dispersioni diverse. Ognuna delle variabili originarie viene normalizzata nell'intervallo (0,1) in modo che all'industria con più alta intensità sia assegnato un valore trasformato tendente a 1, mentre all'industria con minore intensità sia assegnato un valore trasformato tendente a 0. Per tutte le altre industrie il valore trasformato è un numero compreso tra 0 e 1. Formalmente, indicando con X_{jk} il valore della *k*-esima variabile per l'industria *j*, la funzione di normalizzazione della k-esima variabile è:

$$\beta(X_{jk}) = \frac{X_{jk} - \min_j(X_{jk}, j = 1,\ldots,J) + 1/J}{\max_j(X_{jk}, j = 1,\ldots,J) - \min_j(X_{jk}, j = 1,\ldots,J) + 2/J},$$

che corrisponde alla trasformazione lineare nell'intervallo min-max. Si noti che per evitare che $\beta(X_{jk})$ sia uguale a 0 o 1, che potrebbe causare incoerenze computazionali in fase di aggregazione, vengono aggiunti i fattori di correzione 1/J e 2/J rispettivamente al numeratore e al denominatore.

Nella seconda fase della procedura, i dati normalizzati vengono pesati e aggregati applicando un'opportuna funzione combinante per ottenere l'indice di Intensità di Presenza Pubblica (IPP) per l'industria *j* (*j*=1,…, *J*). Questa fase comprende la scelta dei pesi da assegnare a ciascuna variabile, per incorporarne i diversi gradi di importanza nell'indicatore composto, e la decisione in merito alla funzione di combinazione da adottare. Per quanto riguarda la scelta dei pesi, si è deciso di attribuire lo stesso peso a ciascuna variabile. Per quanto riguarda la funzione di aggregazione, i dati normalizzati sono stati pesati e aggregati per ottenere l'indice IPP per l'industria *j* (*j*=1,…, *J*) secondo la seguente funzione additiva:

$$IPP_j = \sum_{k=1}^{K} \beta(X_{jk}) w_k,$$

dove w_k indica il peso assegnato alla *k*-esima variabile con $\sum_{k=1}^{K} w_k = 1$.

Maggiore è il valore dell'indicatore composito, maggiore è il livello di intensità della presenza statale nei settori economici. Il valore dell'indice IPP viene quindi trasformato nel rango corrispondente per ciascun settore. In questo modo, i risultati della nostra analisi empirica (Tabella 1) sono presentati in modo tale che il rango 1 rappresenta il settore con l'indice IPP più alto in termini di intensità di presenza pubblica, mentre il rango 37 identifica il settore con l'indice IPP più basso.

I valori delle 5 variabili utilizzate nella costruzione dell'indice IPP, riferiti ai 37 settori manifatturieri dell'economia cinese, sono stati raccolti ed elaborati per il periodo 2004-2018. La fonte dei dati è il *National Bureau of Statistics of China*. Le variabili utilizzate colgono diversi aspetti dimensionali della presenza di imprese di proprietà statale nelle diverse industrie e sono le seguenti:

i. *Numero di imprese*: si riferisce al numero (unità) di Imprese di Stato presenti nel settore industriale.
ii. *Attività totali*: si riferiscono a tutte le risorse che sono possedute o controllate dalle imprese statali del settore. In base a una classificazione per grado di liquidità, le attività totali comprendono attività correnti e attività non correnti. Le attività correnti possono essere classificate in capitale monetario, attività finanziarie commerciali, effetti attivi, conti attivi, pagamenti anticipati, altri crediti e rimanenze. Le attività non correnti possono essere suddivise in partecipazioni immobilizzate, immobilizzazioni, attività immateriali e altre attività non correnti. I dati relativi a questo indicatore sono ricavabili dai dati di fine anno relativi al totale attivo dello Stato Patrimoniale.
iii. *Entrate aziendali*: si riferiscono alle entrate totali annue realizzate delle imprese statali del settore e sono ricavabili dalla voce "ricavi d'impresa" del Conto Economico.
iv. *Profitti totali*: si riferiscono ai risultati delle operazioni aziendali conseguiti dalle imprese statati del settore in un determinato anno, intesi come differenza tra ricavi e costi, ricavabili dal Conto Economico delle imprese.
v. *Dipendenti medi annui*: si riferisce al numero medio di persone impegnate nelle attività produttive e operative delle imprese statali del settore in un determinato anno.

4. *Risultati e discussione*

I principali risultati dell'applicazione dell'indice IPP sono esposti nella Tabella 1. La tabella mostra le classifiche basate sull'indice IPP per i diversi anni considerati, dove il rango 1 rappresenta il settore con il valore più alto in termini di intensità di presenza pubblica e il rango 37 identifica il settore con il valore più basso. Suddividendo le classifiche in tre potenziali categorie, corrispondenti a intensità di presenza pubblica *alta*, *media*, e *bassa*, è possibile evidenziare i gruppi di industrie caratterizzati da un simile livello di intensità di presenza pubblica.

Tra i settori caratterizzati da *alta* intensità di presenza pubblica ritroviamo, ad esempio, i settori legati all'energia (*Produzione e distribuzione di energia elettrica e termica*; *Estrazione e lavaggio del carbone*; *Lavorazione del petrolio, del combustibile nucleare e cokeria*; *Estrazione di petrolio e gas naturale*), il settore della *Fabbricazione di mezzi di trasporto*, i settori legati all'industria pesante e alla chimica (*Fusione e stampaggio di metalli ferrosi*; *Fabbricazione di materie prime chimiche e prodotti chimici*; *Fabbricazione di prodotti minerali non metallici*; *Fusione e stampaggio di metalli non ferrosi*) e la *Produzione di apparecchiature elettroniche*. Questi settori sono da lungo tempo considerati *prioritari* dal governo cinese, come mostrato anche dalle analisi di lungo periodo dei Piani quinquennali[21], e tale rilevanza si riflette in una alta intensità di presenza pubblica nel tempo. Osservando in particolare la Figura 1, che rappresenta le tendenze dal 2004 al 2018 dei settori ad alta intensità di presenza pubblica, si nota che durante i 15 anni osservati queste industrie hanno sostanzialmente mantenuto (salvo alcune eccezioni) una posizione stabile, ai primi posti delle classifiche dell'indice IPP. Questo segnala che nonostante i processi di liberalizzazione economica in corso negli ultimi decenni, il governo cinese non ha rinunciato a mantenere il proprio controllo su industrie considerate chiave per lo sviluppo economico del Paese.

L'analisi qui condotta mostra comunque anche che alcuni settori erano in passato caratterizzati da una alta presenza pubblica, mentre oggi questa si è affievolita. È il caso, ad esempio della *Fabbricazione di macchine per uso generale*, della *Fabbricazione di macchinari per usi speciali*,

[21] E. Barbieri, M.R. Di Tommaso, M. Tassinari, *op. cit.*, 403 ss.; E. Barbieri, M.R. Di Tommaso, M. Tassinari, M. Marozzi, *op. cit.,* 264 ss.

e della *Fabbricazione di tessuti*, che oggi rientrano tra i settori a media e bassa intensità di presenza pubblica.

Tabella 1. Classifica delle industrie cinesi sulla base dell'indice GPI – 2004-2018 (Fonte: autori)

	Industrie	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
ALTA	Produzione e distribuzione di energia elettrica e termica	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
	Fabbricazione di mezzi di trasporto	2	3	4	2	3	2	2	3	2	2	2	2	2	2	2
	Estrazione e lavaggio del carbone	4	2	2	3	2	3	3	2	3	4	4	3	3	3	3
	Fusione e stampaggio di metalli ferrosi	3	5	5	5	5	5	5	5	5	5	5	5	5	4	4
	Fabbricazione di materie prime chimiche e prodotti chimici	5	6	6	6	6	6	6	6	6	6	6	4	4	5	5
	Lavorazione del petrolio, del combustibile nucleare e cokeria	9	9	8	7	11	7	7	7	7	7	8	6	6	6	6
	Fabbricazione di prodotti minerali non metallici	7	8	9	11	9	10	10	9	9	8	7	8	8	9	7
	Estrazione di petrolio e gas naturale	6	4	3	4	4	4	4	4	4	3	3	10	18	14	8
	Fusione e stampaggio di metalli non ferrosi	15	13	12	9	10	11	8	8	8	10	9	7	9	8	9
	Produzione di apparecchiature elettroniche	11	12	13	12	12	13	12	12	12	11	11	9	7	7	10
	Produzione di tabacco	16	17	17	14	15	12	13	13	10	9	10	11	10	10	11
	Produzione e distribuzione di acqua	13	11	10	13	13	14	14	15	16	16	15	15	13	12	12
MEDIA	Produzione di bevande	19	20	20	19	19	18	18	17	15	15	17	18	16	16	13
	Fabbricazione di macchine e apparecchiature elettriche	18	16	14	15	14	15	15	14	14	14	13	14	11	11	14

MEDIA	Fabbricazione di macchine per uso generale	8	7	7	8	7	8	9	11	13	12	12	12	12	13	15
	Fabbricazione di macchinari per usi speciali	10	10	11	10	8	9	11	10	11	13	14	13	14	15	16
	Fabbricazione di medicinali	17	18	18	18	17	16	17	16	18	18	18	16	15	17	17
	Produzione e distribuzione di gas	28	27	27	26	26	26	27	24	21	20	19	20	19	18	18
	Trasformazione di alimenti da prodotti agricoli	14	15	16	16	16	17	16	18	17	17	16	17	17	19	19
	Fabbricazione di prodotti in metallo	24	22	22	21	20	19	19	20	19	19	20	19	20	20	20
	Estrazione e lavorazione di minerali di metalli non ferrosi	25	25	24	20	23	23	20	19	20	21	21	21	21	21	21
	Produzione di alimenti	21	23	23	24	24	25	24	26	24	24	23	22	22	22	22
	Estrazione e lavorazione di minerali metallici ferrosi	32	32	30	28	27	28	25	21	22	22	22	23	24	24	23
	Fabbricazione di prodotti in gomma e plastica	22	21	21	23	21	21	21	22	23	23	24	24	23	23	24
BASSA	Stampa, riproduzione di supporti di registrazione	20	19	19	22	22	22	23	27	25	25	25	25	27	26	25
	Fabbricazione di tessuti	12	14	15	17	18	20	22	23	27	27	27	26	26	27	26
	Fabbricazione di strumenti di misura e macchine	26	26	25	25	25	24	26	25	26	26	26	27	25	25	27
	Fabbricazione di fibre chimiche	29	29	29	30	31	31	32	32	33	34	33	32	31	30	28
	Produzione di abbigliamento, calzature e berretti in tessuto	30	30	32	31	30	30	30	31	30	30	30	30	30	29	29
	Estrazione e lavorazione di minerali non metallici	27	28	28	29	29	29	29	28	28	28	28	28	28	28	30
	Fabbricazione di carta e prodotti di carta	23	24	26	27	28	27	28	29	29	29	29	29	29	31	31
	Fabbricazione di articoli per la cultura, l'educazione e lo sport	36	35	35	34	35	35	36	36	34	32	32	33	33	33	32

BASSA	Lavorazione del legname e produzione di prodotti in legno	31	31	31	32	32	32	33	33	31	33	34	34	34	34	33
	Riciclaggio e smaltimento dei rifiuti	37	37	37	37	34	34	35	34	35	35	35	36	35	35	34
	Fabbricazione di mobili	35	34	34	35	36	36	34	35	37	37	36	37	37	36	35
	Lavorazione di pelle, pelliccie, piume e prodotti affini	34	36	36	36	37	37	37	37	36	36	37	35	36	37	36
	Fabbricazione di opere d'arte e altri manufatti	33	33	33	33	33	33	31	30	32	31	31	31	32	32	37

Figura 1. Tendenze dal 2004 al 2018 dei settori ad alta intensità di presenza del governo secondo l'indice GPI (Fonte: autori).

5. *Considerazioni conclusive*

Nonostante la progressiva transizione verso un'economia di mercato, la Cina continua a essere ancora oggi un Paese caratterizzato da una forte presenza pubblica in campo economico e industriale. Il percorso di sviluppo economico cinese è stato molto spesso supportato, promosso e orientato da politiche industriali in grado di favorire il cambiamento della struttura produttiva nazionale, rispondendo alle necessità di miglioramento delle capacità tecnologiche e produttive in segmenti chiave dell'economia. In un tale scenario, questo breve contributo è stato dedicato all'analisi della presenza di imprese di proprietà statale nell'economia cinese (*state-owned enterprises*), come strumento di politica industriale volto a supportare e promuovere particolari settori manifatturieri. L'analisi condotta ha messo in evidenza come le imprese statali continuino in Cina ad essere ancora oggi un attore importante nelle dinamiche di settori ritenuti prioritari dal governo, come i settori legati all'energia, la fabbricazione di mezzi di trasporto, l'industria pesante e della chimica e la produzione di apparecchiature elettroniche.

In un contesto globale in rapida evoluzione, segnato da importanti trasformazioni nelle relazioni politiche ed economiche internazionali, il ruolo che il governo cinese è ancora chiamato a giocare non è certamente marginale. Soprattutto attraverso l'impegno in quei settori al centro delle questioni geopolitiche attuali, come energia e microelettronica, il governo continua a dover garantire la crescita economica, mantenere il consenso nazionale, far fronte agli shock esterni, mitigare la volatilità dei mercati globali, e governare il cambiamento strutturale. Sapranno la politica industriale e la *vision* della classe dirigente cinesi essere all'altezza delle molte sfide – geopolitiche, economiche, ambientali e sociali – che il nostro presente ci impone?

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PERFORMANCE AND CHARACTERISTICS OF THE SINO-FOREIGN JOINT VENTURES

Abstract. This article outlines a brief and non-exhaustive review of the existing literature (mostly related to the field of international management and business studies) specifically addressing the case of the Sino-foreing Joint Ventures. Three distinct aspects are at the core of our analysis. First, we report the evidence available in regard to the long-term orientation of international joint ventures' (IJVs) strategies in modern China, discussing their plausible implications and causes. Second, we document a few relevant stylized facts about the relationship between foreign ownership and IJV performance in China. Third and last, we describe the ownership evolution trajectories followed by Chinese IJVs after legal restrictions on the requested equity participation by local partners have been lifted. Conditional on the selected trajectory, we then report and discuss the empirical patterns emerged so far in regard to their post-conversion performance.

JEL codes: F23, K22, M20, P27, P48.

Keywords: International Joint Ventures, China, Ownership Structures, Firm Performance, Strategic Orientation.

1. Introduction

When the Chinese Government began the reform process following the so-called Cultural Revolution, in the late '60s, one of the most deli-

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cate steps of the process was represented by the gradual opening-up of the internal market to Western investors. A completely new policy was introduced, granting openness to foreign direct investments (FDIs) on the Chinese soil, based on the recognition of the attraction of inward FDIs as a key strategic driver of economic growth for the country. In this regard, the establishment of equity joint ventures was seen as the first and main vehicles to stimulate foreign investments in China. Indeed, it was perceived as a sort of middle ground option, able to combine the need of a more open internal market with the one of avoiding a sudden dramatic change that could have exposed the fragile domestic economy to possible predatory behavior by part of Western actors. In particular, the presence of a local partner as a pre-condition to the accession to the Chinese market was intended as a safeguard, specifically aimed to mitigate this risk.

The original equity joint venture law was promulgated in 1979. Despite the initial enthusiasm, for many years inward FDI flows directed to China remained at relatively low levels, mainly by reason of the vagueness of this law and the lack of a complementary domestic legal framework (Campbell Potter, 1993). At the end of the 80s, a series of implementing regulations and amendments were finally approved and brought into force, along with the Foreign Cooperative Joint Ventures (the "Contractual Joint Venture Law"), promulgated in 1988. All this finally led to a massive boost in the amount of foreign investment flowing to China, with a true proliferation in the overall number of Sino-foreign joint ventures established through direct equity participation by Western investors and local partners. In parallel, an academic literature has flourished, specifically focused on the case of international joint ventures (IJVs) based in China. As a matter of fact, this has created the premise to consider mainland China as the most natural environment, or case study, for the analysis of this specific type of firms, their performance and evolution over time. It is worth stressing that this literature has mainly developed within the field of international business and management studies, whereas research in economics seems to have largely neglected the issue. In the present literature review, we consider three main aspects – that appear to us as of particular interest –, among those investigated and highlighted by the scientific studies available in regard to Sino-foreign joint ventures. In Section 2 we first discuss the topic of

cultural distance between Chinese and foreign partners and we revise a number of contributions in the literature specifically addressing how such distance affects the type of strategies commonly adopted by IJVs operating in China. In Section 3 we slightly change the focus of our analysis, describing the most relevant empirical facts about the correlation observed between IVJs' performance (in terms of productivity and profitability) and the relative level of ownership control exerted by foreign versus local investors. Finally, in Section 4 we discuss the rationale and implications of the changes incurred in the proportion between foreign and domestic capital in Sino-foreign joint ventures, since the relief (post China's accession to WTO, in 2001) of the legal restrictions requesting the presence of local partners in the venture. Section 5 concludes.

2. *Strategic Orientation of IJVs in China - Long term orientation in Chinese culture*

As it is well known, the globalization process has contributed to substantially smooth out differences among countries in their institutional frameworks, levels of income *per capita* and production technologies, leading to a gradual convergence that has also interested relevant aspects of the cultural traits in each nation. Differences in national culture –particularly applied to workplace situations and the business environment – have indeed largely diminished between the West and the East of the world, spurred by material prosperity, that has considerably and rapidly increased over the last twenty years, in particular in the Far East regions. Many authors have investigated the process of cultural convergence between among countries, showing that local institutions, however, still have the potential to limit the rate of convergence (see Pothukuchi et al., 2002); and many studies have specifically focused on the case of China, in light of the large cultural differences existing between this country and the Western world nations. Tihanyi, Griffith and Russell (2005), for instance, have pointed out a relevant cultural distance as one of the main obstacles for westerners when doing business with China, besides legal and institutional barriers. Significant inter-country differences have been detected also by a large number of attitudinal surveys conducted within

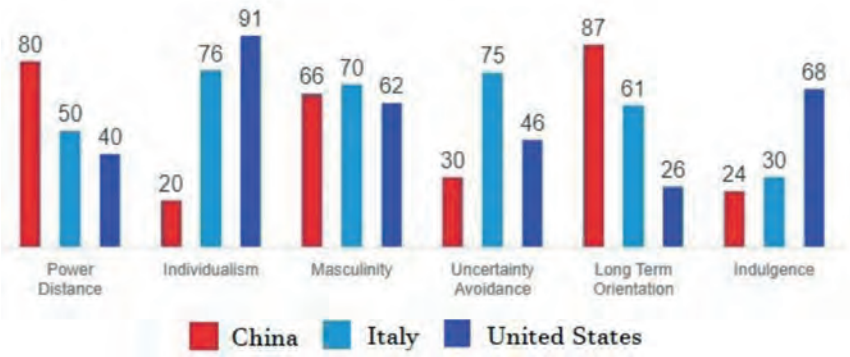
the literature of cross-cultural psychology, particularly the one looking at different national characteristics[1].

Against this background, one of the most interesting aspects highlighted by the extant literature of international business studies has to do with the impact that the Confucian doctrine still exerts on a large fraction of the population of Chinese managers and entrepreneurs. While modern Chinese work values have been brought substantially closer to those observed in the European and North American society, the new managerial class seems not to have forsaken yet its ancestral set of Confucian values (Ralston et al. 1999). The most prominent reflection of this aspect is certainly represented by the different strategic orientation of Chinese firms with respect to their European or American counterparts. More in detail, the sway of the Confucian heritage appears to mainly take the form of a strong long-term orientation (LTO), which Hofstede and Bond (1988) define as "the extent to which a national culture programmes its members to accept delayed gratification of their material, social and emotional needs". Hofstede (2007) provides an interesting attempt to get a quantification of this facet, through a comparison between countries along six different dimensions, as measured by means of composite indices. Figure 1 reports such comparison, using Italy and the U.S. as a benchmark for the values observed in the case of China. A first dimension is the so-called "power distance", which expresses the attitude of a given national culture towards inequalities amongst people, as measured by the extent to which less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally". According to Hofstede's calculations, China is one of the countries where inequalities are more accepted, as the comparison with Italy and the U.S. clearly reveals. A second relevant dimension along which China considerably differentiates from the Western world is represented by "individualism", qualifying as a collectivist society in which "people belong to 'in groups' that take care of them in exchange for loyalty", hence at odds

[1] An interesting and comprehensive analysis of the culture's impact on firm organizational choices and the management practices that may leverage cultural diversity can be found in Adler (2002). We instead refer to Hill (1995) and North (1990) for a discussion on the role of national cultures as a sort of informal institutions able to shape and condition formal institutions.

with western societies in which individuals are more inclined to "look after themselves and their direct family only". Other relevant differences between China and the two benchmark countries can be observed in regard to "uncertainty avoidance" (i.e., people's tendency to feel threatened by unknown future contingencies and situations, and their propensity to create *ad-hoc* institutions to mitigate the risk) and "indulgence" (i.e., people's perception that their actions are not much restrained by social norms, implying that the gratification of their desires is a legitimate goal). Figure 1 shows that Chinese individuals are much more comfortable with uncertainty and hence adaptable, especially than Italians; and overall less prone to indulge themselves than U.S. citizens, in particular.

Figure 1: The Hofstede Insights Culture Compass: China vs. Italy vs. U.S



Source: https://www.hofstede-insights.com/country-comparison/

The quantification of the LTO is the one we are mostly interested in. In its essence, this dimension captures how every society is able to "adapt traditions easily to changed conditions", and display "a strong propensity to save and invest, thriftiness, and perseverance in achieving results". The high score of China in this dimension suggests a very pragmatic culture in this country, which contrasts with the more pronounced focus observed in the U.S. on short-term goals and results.

A few alternative time-oriented constructs have been proposed in the literature, which all however support the conjecture of a different strategic orientation of Chinese firms *vis-à-vis* their European and North American counterparts, as a result of the significant cultural distance between these two areas. One example is the distinction, introduced by

Hall (1959), between *monochronic* and *polychronic* societies. The first are used to address tasks in a sequential way (i.e., one at a time), which is the approach that seems to prevail in the Western world, based on a careful planning and scheduling of all activities. The latter, instead, put more emphasis on human interactions and are overall less concerned with outcomes, which allows to accomplish many tasks at once, in a more holistic fashion. Another example comes from Trompenaars and Hampden-Turner (1997), with their distinction among past, present and future-oriented societies, based on the extent to which a collectivity promotes and rewards planning and all other actions that can be regarded as future-looking. As pointed out by Harris and Carr (2008), the time-orientation of each society has clear repercussions over the time-frames within which the members of this society intend to achieve their goals, particularly on their workplace and economic activity.

The strong long-termism in Asian societies creates the premise for a very interesting analysis, carried out by Buck, Liu and Ott (2010), in which Sino-foreign joint ventures are used as a suitable laboratory for shedding light on how cultural differences among Eastern and Western societies help explain differences in the level of time commitment of firms' strategy. The proposed empirical investigation exploits the variation observed in the proportion between Chinese and foreign managers seated in the board of a sample of IJVs active in China; and relates this variation with the observed level of long-term orientation of a set of firm strategy pursued by each venture. The documented evidence suggests that a more pronounced presence of Chinese managers is associated with a higher propensity towards long-term commitment, thereby lending support to the conjecture that national culture in China is still largely pervaded by a Confucian view that tends to favor high levels of LTO. The paper is described in detail in the following subsection, in which we also discuss the most relevant results from the empirical analysis and its main innovation with respect to the extant related literature.

3. *Cultural drivers of the time commitment of IJVs' strategies*

The key insight behind the analysis of Buck, Liu and Ott (2010) is the association of different nationalities of the joint venture partners with

different degrees of long-term orientation of the management, which – in turn– determines a different propensity of the IJV towards internal functional strategies that may qualify as future-oriented. Table 1 below characterizes these strategies in three different areas. In the context of the human-resource strategies, a firm with higher orientation towards the short-term generally prefers the adoption of a hire-and-fire policy, whereas a company more in line towards the long run generally opts for the use of permanent and long-term job contracts.

Table 1: Firm strategies as categorized by type of time commitment (short- vs. long-term).

	Short-term strategies	Long-term strategies
Human resource strategies	Hire-and-fire	Permanent contracts
		Long-term contracts
	Out-sourcing	Pension provision
	Piece-rates, short-term bonus	Profit-sharing, employee shares and options
Investment strategies	High current stocks of materials, products and financial assets (e.g. bank cash) as a % of sales	High investment in fixed assets as a % of sales
	Finance through short-term borrowing	Finance through equity issue
	Low levels of R&D spending/sales	High levels of R&D spending/sales
	Mergers and acquisitions	Organic firm growth
R&D strategies	R&D at home country HQ	Local R&D in China

Source: Buck, Liu and Ott (2010).

Similarly, in the case of R&D, short-term determinism may lead to prefer performing R&D activities in the home country of the foreign parent/headquarter, rather than investing financial resources and equipping laboratories and plants to perform local R&D directly in China. Finally, in terms of investment strategies, low levels of LTO are expected to result in a series of strategic decisions ranging from recurrent use of outsourcing (rather than in-house production) to finance through short-term borrowing (instead of equity issuance); and even high current stocks of materials, products and bank cash, with low investment in fixed assets. The empirical study proposed by Buck, Liu and Ott (2010) goes further in depth with respect to the simple distinction between Chinese and non-Chinese partners. Building on the approach originally proposed by Javidan and House (2002), the authors indeed consider four 'clusters' of national culture, i.e., four different geographical areas in regard to the origin – and hence the relevant cultural attitudes – of the investors participating in each venture.

More specifically, the latter are categorized, alternatively, as (i) investors from mainland China, who are expected to be subject to the in-

fluence of both home country's culture and institutions; (ii) investors from other Chinese communities (e.g. Taiwan or Hong-Kong), who are expected to be influenced by Chinese culture but not by Chinese institutions (i.e., those characterizing the PRC); (iii) investors from other Asian countries, such as Japan or South Korea, who should display relatively high levels of LTO, even though lower than Chinese investors, by reasons of the historically more limited diffusion of the Confucian doctrine in their countries; (iv) investors from the West – mainly the U.S. and the European countries – who are supposed to display low levels of LTO, in light of the completely different cultural traits that characterize these countries compared to the Asian ones.

A set of four testable hypothesis is then put forward, namely

H1. The higher the degree of management control by mainland Chinese investors, the higher the propensity of Chinese IJVs to adopt various long-term (human resource management, investment and R&D) strategies, as a result of the influence of the specific Chinese national culture and institutions.

H2. The adoption of various long-term strategies within Chinese IJVs is expected to increase with degree of management control exerted by investors of Chinese culture, albeit resident outside the PRC (i.e., investors from Hong-Kong or Taiwan).

H3. The presence of various long-term strategies within Chinese IJVs should be positively associated with the degree of management control exerted by foreign investors from other Asian countries such as South Korea or Japan, rather than foreign investors from Western world countries, typically characterized by a national culture of low LTO.

H4. The higher the overall degree of management control by foreign investors from the U.S. or Europe, the lower the propensity of Chinese IJVs to engage in long-term strategies.

To test these hypotheses, Buck, Liu and Ott (2010) conduct a postal questionnaire survey of Sino-foreign joint ventures located in three cities, namely Beijing, Tianjin and Qingdao, selected among others because of the high concentration in these regions of IJVs operating in high-technology industries. An overall number of 2053 IJVs (representing the 56% of the IJV population in the three cities above) were contacted, although

only 316 valid questionnaires were finally collected, corresponding to a response rate of 15%.

Table 2 reports the evidence documented by Buck, Liu and Ott (2010) from their survey data, in regard to the IJVs' human resource management strategies. In their empirical investigation, all hypotheses H1-H4 above are tested by measuring the degree of management control by different national clusters of investors based on the number of senior managers of each IJV, categorized by nationality[2]. The incidence of long-term strategies, in the context of human resource management, is evaluated with respect to three aspects, i.e., the presence of job tenure, long-term contracts and pension provision. The results suggest a positive association between the number of the local senior managers from PRC and the time commitment of the IJV's strategies. This evidence is particularly strong when looking at pension provision and lends support to the hypothesis stated as H1, albeit the proposed analysis does not help clarify whether the main driver is related to national culture or institutions.

The table also shows that a larger number of senior managers from Hong Kong and Taiwan – hence sharing a Chinese culture of high levels of LTO, but distanced from PRC institutions – is also associated with a higher propensity towards long-terminism by the IJV, in line with the hypothesis stated as H2. Similar evidence is detected in regard to the presence of Japanese and Korean investors, even though the association is characterized by lower statistical significance. The hypothesis labeled as H3 is therefore weakly supported. Finally, the number of senior managers from the U.S. and European countries appears to be negatively correlated with the adoption of long-term strategies in the context of human resources management, which provides empirical support to the last hypothesis, namely H4. The larger the number of investors and senior managers from Western world countries, the less the IJV is inclined to provide secure employee tenure, use long-term contracts and grant pensions to its workers.

While the testable hypothesis H1-H4 finds overall large support in Table 2, i.e., in the context of IJVs' human resources management strategies, a less clear picture emerges from Table 3, in which Buck, Liu

[2] In the resulting sample, each Sino-foreign joint venture has – on average – 5 senior Chinese managers and 3 senior foreign managers (of different nationalities).

Table 2: Time commitment of IJVs' human resources management strategies and number of Chinese/foreign senior managers.

Independent variables	Dependent variable: employees' tenure Ordered probit			Dependent variable: % of employees' contracts for 3 years Ordered probit			Dependent variable: employees' pension Ordered probit		
Number of foreign senior managers	−.057 (.014)***	.018 (.020)	.039 (.046)	−.024 (.012)**	.011 (.022)	.019 (.012)	−.045 (.014)***	.009 (.021)	.001
Number of Chinese senior managers	.012 (.007)*	.005 (.007)	.001 (.007)	.002 (.008)	.021 (.024)	.007 (.023)	.022 (.006)***	.020 (.008)**	.011 .022 .020
US-European and Chinese IJV	−.289 (.145)**			−.379 (.145)**			−.329 (.154)		
Japan-Korean and Chinese IJV		.237 (.151)†			.015 (.166)			.068 (.197)	
HK-Taiwan and Chinese IJV			.337 (.155)**			.288 (.143)**			.507 (.148)***
Control variables									
Age	.120 (.008)***	.157 (.013)***	.159 (.013)***	.109 (.013)***	.106 (.012)***	.108 .013	.019 (.012)	.019 (.012)	.018 (.013)
Size	.204 (.033)***	.137 (.036)***	.156 (.035)***	.029 (.035)	.001 (.033)	−.033 (.049)	.246 (.039)***	.197 (.038)***	.234 (.039)*
Tianjin	−.111 (.135)	−.281 (.141)†	−.304 (.140)†	−.246 (.149)	−.201 (.148)	−.247 (.150)	.016 (.154)	−.027 (.153)	.032 (.159)
Qing Dao	.188 (.178)	.177 (.180)	.210 (.178)	−.067 (.183)	−.017 (.183)	−.036 (.181)	−.098 (.183)	−.082 (.184)	−.097 (.185)
Industry dummy	Included	Included	Included	Included	Included	Included	Included	Included	Included
Observations	316	316	316	316	316	316	316	316	316

*** Significant at the 1% levels.
** Significant at the 0.1% levels.
† Significant at the 10% levels.

Source: Buck, Liu and Ott (2010).

and Ott (2010) report their result in regard to the association between the level of time commitment of IJV's investment strategies and the relative presence of Chinese versus foreign senior managers in the venture. Long-term investment in fixed assets in Chinese IJVs appears to be higher, when the larger the number of Chinese senior managers, both from mainland China or belonging to the overseas Chinese communities (i.e., from Taiwan or Hong-Kong). In turn, the number of senior managers from other Asian countries (specifically, Japan and South Korea) and Western countries does not display any significant correlation with the type of investment policy conducted by the IJV. In brief, the results seems to validate hypothesis H1 and H2, but not H3 and H4. Similar conclusions can be drawn by looking at the results reported in Table 4, in which the degree of management control by Chinese and foreign investors in Sino-foreign joint ventures is used as a possible predictor for the ventures' R&D strategies. A larger number of Chinese senior managers seems to be associated with the adoption of long-term strategy, and similar evidence can be obtained when considering overseas Chinese investors. Again, there is no evidence of a statistically significant correlation between the adoption of long-term strategy by the IJV and the number of other Asian senior managers. Analogously, no significant correlation is detected when looking at the number of senior managers from the U.S. and the European countries.

Summing up, the results of the analysis by Buck, Liu and Ott (2010) suggest that modern Chinese culture is still influenced by a long terminism as a result of the heritage of the Confucian creed, which results in

Table 3: Time commitment of IJVs' investment strategies and number of Chinese/ foreign senior managers.

Independent variables	Dependent variable: annual average value of investment in fixed assets as a % of sales Tobit model			Dependent variable: average value of (long term) equity shares as a % of total capital Tobit model		
Number of foreign senior managers	−.002 (.014)	.011 (.019)	.008 (.012)	.008 (.006)	.004 (.007)	.007 (.005)
Number of Chinese senior managers	.039 (.007)***	.039 (.007)***	.037 (.007)***	.017 (.006)***	.017 (.006)***	.016 (.005)***
US-European and Chinese IJV	.051 (.142)			−.006 (.009)		
Japan-Korean and Chinese IJV		−.097 (.147)			−.002 (.009)	
HK-Taiwan and Chinese IJV			.216 (.134)**			−.018 (.067)
Control variables						
Age	−.017 (.011)	−.017 (.011)	−.017 (.011)	−.006 (.006)	−.005 (.006)	−.006 (.007)
Size	.243 (.034)***	.242 (.036)***	.237 (.035)***	.003 (.019)	.006 (.019)	.001 (.019)
Tianjin	1.049 (.138)**	1.061 (.139)**	1.038 (.138)**	−.326 (.074)***	−.323 (.075)***	−.324 (.075)***
Qing Dao	.293 (.177)	.303 (.178)	.281 (.176)	.431 (.082)*	.425 (.083)†	.429 (.082)†
Industry dummy	Included	Included	Included	Included	Included	Included
Observations	316	316	316	316	316	316

* Significant at the 5% levels.
** Significant at the 1% levels.
*** Significant at the 0.1% levels.
† Significant at the 10% levels.

Source: Buck, Liu and Ott (2010).

Table 4: Time commitment of IJVs' strategies in terms of R&D and number of Chinese/foreign senior managers.

Independent variables	Dependent variable: R&D spending/sales Ordered probit			Dependent variable: % of JV's R&D contributed by parent companies Ordered probit		
Number of foreign senior managers	.007 (.016)	.014 (.011)	.016 (.011)	.002 (.013)	.0104 (.0118)	.011 (.053)
Number of Chinese senior managers	.033 (.007)***	.030 (.007)***	.029 (.007)***	.035 (.007)***	.034 (.008)***	.035 (.007)***
US-European and Chinese IJV	.061 (.140)			−.006 (.019)		
Japan-Korean and Chinese IJV		−.149 (.130)			.040 (.134)	
HK-Taiwan and Chinese IJV			.216 (.129)**			.001 (.003)
Control variables						
Age	−.008 (.011)	−.008 (.011)	−.009 (.011)	−.012 (.011)	−.012 (.012)	−.012 (.011)
Size	.199 (.033)	.206 (.035)***	.194 (.034)***	.195 (.038)***	.178 (.036)***	.186 (.034)***
Tianjin	−.108 (.133)†	−.099 (.134)†	−.124 (.133)**	−.572 (.138)**	−.581 (.138)**	−.579 (.139)**
Qing Dao	−.414 (.174)	−.398 (.175)	−.436 (.173)	−.435 (.175)	−.452 (.177)	−.435 (.175)
Industry dummy	Included	Included	Included	Included	Included	Included
Observations	316	316	316	316	316	316

** Significant at the 1% levels.
*** Significant at the 0.1% levels.
† Significant at the 10% levels.

Source: Buck, Liu and Ott (2010).

a higher propensity of Sino-foreign joint ventures' strategies, the more relevant the presence of senior managers of Chinese (or however Asian) origin and culture, compared to European or North American ones. This evidence is particularly strong when looking at the human resource management strategy of modern IJVs in China, but much more nuanced when considering other types of functional internal strategies, such as the ones concerning investments in fixed assets or R&D decisions. As explicitly pointed out by the authors, the explanation has to be sought in the type of social and inter-personal implications of a certain strategic decision in a given functional area of the IJV. Firms choices concerning,

for instance, pension provisions and length of job contracts have indeed a "direct impact on employees and reflect how employees are treated in IJVs". In other words, they directly involve the relational sphere of social interactions between managers, employers and employees, which is more directly and heavily influenced by national cultural traits. In turn, decisions on investment in fixed assets and R&D spending are basically inanimate, which significantly reduces the role for cultural influence.

4. *Foreign ownership and performance of Chinese IJVs*

If the degree of management control exerted by local versus foreign partners proves to affect time orientation of IJVs strategies, it should be no surprise that it also has direct implications on the observed performances of each joint venture. As a matter of fact, there is a huge bulk of empirical literature specifically addressing this point, i.e., showing how the level of foreign ownership in each IJV is associated with various firm-level performance indicators, either in terms of firm productivity or profitability. Shedding light on this (potentially positive) correlation is indeed key to clarifying to what extent foreign direct investment (FDI) can be regard as an engine of economic growth. While the common sense suggests that attracting FDI inflows is a priority to fuel economic growth especially in developing countries, the evidence available in regard to the channels through which this effect typically unravels is far from being conclusive and leaves the door open to speculation and conjectures over both the existence and relevance of knowledge spillovers and/or technological upgrading. As pointed out by Greenaway, Guariglia and Yu (2014), inward FDIs can sustain economic growth only on the condition that firms that are totally or even partially foreign-owned are more productive than domestic counterparts.

This fact is documented in a series of empirical studies, including Dimelis and Louri (2002), who detect a productivity advantage for foreign-owned enterprises in Greece; and Chhibber and Majumdar (1999), who provide similar evidence for the case of Indian firms. However, results from other papers are much less clear-cut, e.g. Aitken and Harrison (1999) find a positive effect of foreign equity participation on the performance of Venezuelan manufacturing plants, yet limited to small-scale

plants only. Mixed results are also obtained from the analysis of data referring to the same country. For instance, looking at the Indonesian manufacturing sector, Takii (2004) documents that wholly foreign-owned enterprises have superior performances than any other type of firm, whereas Blomstrom and Sjoholm (1999) confine themselves to report that foreign-owned firms are more productive than domestic enterprises, yet whether the former are majority or minority owned by foreigners does not really make any difference.

One of the most interesting studies in this literature is precisely the one carried out in the aforementioned paper by Greenaway, Guariglia and Yu (2014). Their analysis builds on the premise that previous studies typically distinguish between foreign-owned and domestic firms based on a sort of *a priori* criterion; and therefore confine themselves to a simple comparison of various performance indicators across the two groups of firms, without taking into account the variation in the level of ownership control in the IJVs exerted by foreign investors (that is, what actually differentiates IJVs from wholly foreign owned enterprises). The most

Table 5: Descriptive statistics of the Chinese firm sample in Greenaway, Guariglia and Yu (2014).

	Foreigncap = 0% (1)	0% < Foreigncap < 50% (2)	50% ≤ Foreigncap < 100% (3)	Foreigncap = 100% (4)
ROA	0.037	0.056	0.060	0.046
ROS	0.025	0.042	0.047	0.032
PROD	0.058	0.112	0.185	0.091
TFP	0.027	0.033	0.037	0.028
Size	6.58	6.74	6.83	6.31
Leverage	0.616	0.595	0.512	0.505
Collateral	0.398	0.337	0.355	0.360
Expdum	36.69	70.40	71.10	85.96
Foreigncap	0	27.00	71.06	100
Statecap	26.16	10.49	7.04	0
Privatecap	62.27	51.23	16.90	0
Observations	55,817	9584	7884	18,291

Notes: Foreigncap represents the fraction of the firm's capital paid in by foreign investors. ROA represents the firm's returns to assets and is given by its net income over its total assets. ROS represents the firm's returns to sales and is given by its net income over its total sales. PROD represents labor productivity, i.e. the ratio of the firm's net income to its number of employees. TFP is total factor productivity calculated using the Levinsohn and Petrin (2003) method. Size is the logarithm of the firm's total assets. Leverage is given by the sum of the firm's current and non-current liabilities to its total assets. Collateral is given by the ratio of the firm's fixed tangible assets to its total assets. Expdum is a dummy equal to 1 if the firm exports, and 0 otherwise. Statecap represents the fraction of the firm's capital paid in by the state. Privatecap represents the fraction of the firm's capital paid in by individual investors and legal entities.

Source: Greenaway, Guariglia and Yu (2014).

striking result of the analysis of Greenaway, Guariglia and Yu (2014) is that the relationship between foreign ownership and firm performances is fundamentally characterized by an inverse U-shape.

More specifically, firm-level performances are found to initially rise with the level of foreign ownership up to attain a peak, corresponding to a level of equity participation equal to 60%, after which a gradual deterioration occurs. This evidence is obtained from an unbalanced panel of 21,582 Chinese unlisted firms, using data over the period 2000-2005, taken from two distinct databases. Annual accounting reports – including balance sheet and profit/loss information for each firm – come from the ORIANA database (Bureau Van Dijk). In turn, ownership data are retrieved from the National Bureau of Statistics of China, which provides information on fraction of paid-in-capital contributed each year by different types of investors, namely

i. the state;
ii. legal entities;
iii. Chinese private investors (i.e., individuals);
iv. Chinese collective investors;
v. foreign investors from Hong-Kong, Macao and Taiwan;
vi. foreign investors from other countries.

This allows the authors to measure foreign ownership as the share of a firm's capital paid in by all foreign investors. More specifically, four groups of Chinese enterprises are defined based on the share of equity owned by foreign investors each year, and precisely:

– domestic firms with no foreign participation, accounting for 60.95% of total population of unlisted firms in their sample;
– sino-foreign joint ventures with a minority stake of foreign capital, i.e., an equity participation lower than 50% (corresponding to 10.47% of the total available observations);
– sino-foreign joint ventures with a majority stake (larger than 50% but lower than 100%) of foreign capital (8.61% of our sample);
– wholly foreign-owned firms (19.07% of the total sample).

Table 5 reports a few summary statistics about the resulting sample of firms used by the authors. Four firm-level performance indicators are shown. Two specifically aim at measuring firm profitability, in terms of

return on assets (ROA), measured by the ratio of the firm's net income to total assets; and *return on sales* (ROS), measured by ratio of the firm's net income to its total sales. The other two indicators capture firm profitability, alternatively defined in terms of *labor productivity* (PROD) – as proxied by the firm's net income per employee – or *total factor productivity* (TFP), following the Levinsohn and Petrin (2003) method.

All performance indicators monotonically increase with the level of foreign ownership, except when moving from IJVs with a majority stake of foreign capital to wholly foreign-owned enterprises. Interestingly, an analogous pattern can be observed in regard to firm size as measured by (log) total assets, whereas export activity is the only variable that is characterized by strict monotonicity, as the proportion of firms participating in the export market within each group increases also when moving from the group of IJVs with foreign equity participation above 50% to the one of wholly foreign-owned enterprises.

The inverse U-shape relationship between foreign ownership and firm performances that emerges from simple summary statistics in Table 5 finds a strong confirmation in the results of a set of regressions conducted by Greenaway, Guariglia and Yu (2014) and reported in Table 6. Every estimated equation adopts a different indicator of firm performance as a dependent variable, which is specified in the corresponding column. The authors employ a first-difference approach based on the generalized method of moments (GMM) estimator in the spirit of Arellano and Bond (1991), instrumenting the various explanatory variables by taking two or even more lags. Firm-specific, time-invariant effects are controlled for.

We see from Table 6 that the estimated coefficient on 'Minority foreign' is positive and statistically significant irrespective of the performance indicator used as dependent variable, whereas the one associated with 'Majority foreign' is also positive and typically larger, but significant only when looking at ROS and TFP as dependent variables. The estimated coefficient on 'All foreign' never happens to be statistically significant. Taken together, the results overall suggest IJVs perform better than both purely domestic firms and wholly foreign-owned enterprises, which resonates well with the findings from previous studies (e.g. Abraham, Konings and Sloottmaekers, 2010; or Yusuf, Nabeshima and Perkins, 2006) according to which both foreign-owned firms and IJVs have supe-

rior performances than pure domestic firms, although the latter holds an greater advantage[3]. Such evidence is also corroborated by further robustness checks (not reported here), which even more clearly show that there exists a level of foreign ownership (approximately estimated at around 60%) beyond which corporate performance starts to decline.

Financial leverage (defined as firm's liabilities over total assets) in turn declines monotonically with foreign ownership, at odds with collateral (proxied by firm's tangible fixed assets over total assets), which remains pretty constant across foreign ownership levels.

The non-monotonicity that characterizes the relationship between foreign ownership and firm performance in IJVs makes perfect sense if one thinks of a very basic argument, that is, both domestic and foreign partners may bring attributes which turn out to be essential for the success of the venture. On the one hand, quoting Greenaway, Guariglia and Yu (2014), "foreign investors bring capital, modern technologies (Girma, Gong, and Görg 2008), better corporate governance, as well as managerial and international networking skills". On the other hand, domestic investors may dispose of a specific (and oftentimes tacit) knowledge of the local Chinese markets, including the institutional, regulatory and bureaucratic environment and the workers' attitudes towards incentives; and may have political connections with local governments (*guanxi*), which might be key for the firms to attain the desired performance levels (Hsieh and Klenow, 2009).

5. *Ownership trajectories of IJVs in China, post deregulation - A theory of ownership rearrangements*

The last topic covered in this brief literature review has to do with the change in the operating mode that an international joint venture may decide to undertake post entry in a certain market, and the performance implications of this decision.

[3] The most surprising result in Table 6 is the negative effect of 'Expdum' on labor productivity (PROD), which clashes against the well consolidated fact in international trade literature (e.g. Ahn, Khandelwal and Wei, 2011; or Antras and Yeaple, 2014) that firms sort according to productivity in their entry decision in the export market, with only more productive firms self-selecting as exporters.

Table 6: GMM estimation of the effects of foreign ownership control on IJVs' performance indicators

	ROA (1)	ROS (2)	PROD (3)	TFP (4)	ROA (5)	ROS (6)	PROD (7)	TFP (8)
Lagged dep. variable	0.386 (21.81)***	0.376 (25.26)***	0.430 (11.26)***	0.197 (4.36)***	0.389 (21.77)***	0.379 (23.54)***	0.421 (11.17)***	0.198 (4.72)***
Minority foreign	0.018 (1.94)*	0.023 (2.91)***	0.045 (2.01)**	0.008 (1.93)*				
Majority foreign	0.017 (0.81)	0.037 (2.10)**	0.060 (1.16)	0.018 (1.93)*				
All foreign	−0.012 (0.43)	0.011 (0.51)	−0.017 (0.27)	0.015 (1.32)				
JV					0.079 (2.93)***	0.090 (3.89)***	0.203 (3.16)***	0.216 (2.05)**
WFO					0.070 (1.82)*	0.080 (2.43)**	0.157 (1.80)*	0.246 (1.72)*
Size	0.001 (0.43)	0.012 (3.30)***	0.033 (3.09)***	−0.009 (3.23)***	−0.0002 (0.04)	0.008 (2.16)**	0.032 (3.05)***	−0.009 (3.89)***
Leverage	−0.032 (2.74)***	−0.040 (3.81)***	0.024 (0.93)	−0.007 (1.29)	−0.036 (2.96)***	−0.041 (3.85)***	0.015 (0.57)	−0.006 (1.11)
Collateral	−0.042 (3.25)***	−0.004 (0.31)	−0.022 (0.69)	−0.013 (2.11)**	−0.047 (3.60)***	0.005 (0.39)	−0.026 (0.78)	−0.019 (3.22)***
Expdum	−0.007 (1.19)	−0.018 (3.19)**	−0.030 (1.90)*	0.005 (1.80)*	0.001 (0.17)	−0.012 (1.87)*	−0.010 (0.58)	0.007 (2.47)**
*m*1	−26.59	28.74	−13.89	−10.41	−26.76	−28.83	−14.12	−11.25
*m*2	0.65	−0.09	1.26	1.25	1.27	0.55	1.46	1.43
Observations	47,149	47,149	47,149	33,749	47,763	47,763	47,763	34,133

Notes: Minority foreign is a dummy equal to 1 if the share of the firm's total capital owned by foreign investors is positive but lower than 50%, and 0 otherwise. Majority foreign is a dummy equal to 1 if the same share is greater than or equal to 50% but lower than 100%, and 0 otherwise. All foreign is a dummy variable equal to 1 if the share of the firm's total capital owned by foreign investors is equal to 100%, and 0 otherwise. JV is a dummy variable equal to 1 if the firm is registered as an equity joint-venture or as a contractual joint-venture, and 0 otherwise. WFO is a dummy variable equal to 1 if the firm is registered as wholly foreign owned, and 0 otherwise. All specifications were estimated using a GMM first-difference estimator. The figures reported in parentheses are asymptotic *t*-statistics. Time dummies and time dummies interacted with industry dummies were included in all specifications. Standard errors and test statistics are asymptotically robust to heteroskedasticity. The instrument set includes two or more lags of all explanatory variables, time dummies, and time dummies interacted with industry dummies. *m*1 (*m*2) is a test for (first-) second-order serial correlation in the first-differenced residuals, asymptotically distributed as $N(0, 1)$ under the null of no serial correlation. Columns 4 and 8 contain fewer observations than other columns because TFP is only available from 2001 onwards. Also see Notes to Table 1.

*Indicates significance at the 10% level.
**Indicates significance at the 5% level.
***Indicates significance at the 1% level.

Source: Greenaway, Guariglia and Yu (2014).

Again, China provides a very suitable environment for the investigation of this matter. Indeed, the initial policy established by the Central Government of the PRC (requesting foreign investors to form joint ventures as a pre-condition for accessing the internal market) was significantly relaxed with the deregulation process that followed China's accession to the World Trade Organization (WTO) in 2001. Many of the IJVs established along the 90's were acquired by either foreign or local partners, thereby converting into, respectively, wholly foreign-owned en-

terprises or pure domestic firms. As reported by Puck, Holtbrugge and Mohr (2009), a non-negligible fraction of the population of Sino-foreign joint ventures were even liquidated.

To analyze the ownership realignment prompted by government deregulation, one needs to clarify first the *motives* according to which owners may want to reconsider their equity participation in the ventures, in the aftermath of a legal, regulatory or institutional changes (such as in the case of China) or at any other point in time, post entry in the market. This point requires a formal theoretical conceptualization, which materializes in the choice of a specific approach to firm organization, to better grasp the motives for the different conversion choices available to firms. One option could be, for instance, relying on the popular *transactions cost theory* (Williamson, 1971, 1975, 1985), according to which firm organizational choices – ranging from scale and scope of internal production, to formation of hierarchies or alliances – are primarily intended to maximize the economic efficiency of the various firm's operations. The theory therefore explains how governance structures can be designed in such a way to reduce a series of anticipated transaction costs related to the characteristic activity of the firm itself, or its management, or even the enforcement of contracts and the accomplishment of certain transactions. As pointed out by Puck, Holtbrugge and Mohr (2009) and Hennart (2009) among others, the transactions cost approach can plausibly rationalize the conversion of a IJV to a wholly foreign owned enterprise, assuming that the latter was in principle the optimal entry mode at the initial time of entry in the Chinese market, yet the option was not available at that time, because of the restriction imposed by the local government about the necessary presence of a local partner. In the aftermath of deregulation, the firm can finally switch from a sub-optimal mode (i.e., the joint venture originally forced by the Government) to the actual first best (i.e., the wholly-owned company). Nonetheless, the transactions cost theory falls short in addressing a local partner's acquisition of the entire venture, as far as entry in form of IJV is hard to characterize as a sub-optimal choice of the local partner(s), in the lack of any specific legal impediment to the establishment of a pure domestic firm (Chang, 2019).

The alternative approach, known as the *property rights theory* (Grossman and Hart, 1986; Hart and Moore, 1990), looks much better suited in this regard. The theory builds on contract incompleteness and

the provision of individual incentives to avoid opportunistic behavior in presence of unverifiable or non-contractible investments specific to a certain economic relationship or transaction. In brief, this approach suggests that firm organizational choices must be designed, *ex-ante*, in such way that *ex-post* bargaining leads to desired outcome, through a system of proper incentives for the party that must undertake the relevant effort.

In the specific application to case of Chinese IJVs, taking this route entails assuming that regulations in place before China's accession to WTO were substantially introducing a distortion of ownership arrangements, that it was possible to correct only after the reform process allowing wholly foreign-owned firms to operate in the Chinese market. It is not particularly relevant whether the joint venture structure was already sub-optimal at the time of its formation, due to inappropriate property rights allocation, or become sub-optimal later on, as one of the parties reaps an advantage over the counterpart (e.g. the foreign partner gains more expertise of the local market through learning-by-doing, thereby reducing the need to resort to a local partner). In this perspective, what really counts, is which partner in the joint venture has "a better chance of improving performance by increasing ex-ante investment enough to compensate for the bought-out partner's loss of incentive" (Chang, 2019). The identification of the party holding this advantage is key to predict which partner has incentive to take full control of the venture in the event of subsequent ownership re-alignments, according to intrinsic efficiency.

It is based on this premise that Chang (2019) proposes an interesting analysis of the ownership trajectories followed by the Sino-foreign joint ventures between 1998 and 2009. The following subsection details the study, which offers an insightful comparison of the conversion decisions and post-conversion performance of IJVs, conducted through the lens of the property rights theory.

6. *Post-conversion performances of IJVs*

The analysis of Chang (2019) takes its cue from the recognition that the relative contribution of each partner in the IJV (according to whi-

ch the ownership structure should be designed) depends on both the characteristics of the industry in terms of intangible assets intensity and those of the local market in which the venture is operating. One the one hand, foreign investors have typically an advantage over the local partner in regard to managerial skills, capital endowment, technology, brand and/or other intangible assets, whereas the local partner can boast a superior knowledge of the local market and the institutional environment. Building on these insights, it is quite natural to expect that in industries in which intangible assets (i.e., technology or brand) play a more crucial role, it is the foreign partner to be able to contribute more to the success of the venture, provided that his/her incentives are well aligned. In turn, in markets characterized by high institutional barriers (in which in-depth local knowledge and investment in social and political capital is required), it is the local partner to be crucial for the attainment of the goals of the IJV. Accordingly, it is the local partner the most natural candidate to take full control in case of ownership rearrangements intended to raise the economic efficiency. Two sets of testable predictions can therefore be put forward, in form of

H1. The likelihood of conversion from IJV to wholly foreign-owned entity tends to be

– higher in industries that are more intensive in intangible assets;
– higher in provinces with higher institutional barriers.

H2. The likelihood of conversion from IJV to local wholly owned entity tends to be

– higher in industries that are less intensive in intangible assets;
– higher in provinces with lower institutional barriers.

There are clear and direct performance implications of ownership rearrangements, provided that changes in the ownership structures are indeed expected to provide an optimal incentive structure to the firm. Provided that changes in the ownership levels and operational mode of each venture are meant to better align the incentives of the party which contributes more to the success of the enterprise, the following conjectures are expected to be verified.

H3. Converted foreign wholly-owned entities should display greater performance improvement

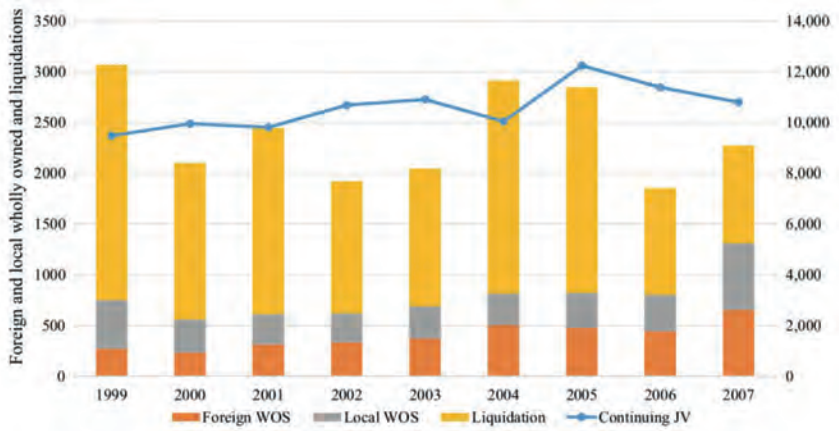
– in industries that are more intensive in intangible assets;
– in provinces with higher institutional barriers.

H4. Converted local wholly-owned firms should display greater performance improvement
– higher in industries that are less intensive in intangible assets;
– higher with lower institutional barriers.

To test the empirical predictions above, Chang (2019) exploits financial information for both local and foreign invested firms in China from the Annual Industrial Survey Database (1998-2009) released by the Chinese National Bureau of Statistics (NBS). The selected sample covers all firms with sale revenues exceeding 5 million RMB on a yearly basis, with the obvious exclusion of (*i*) the IJVs already converted into wholly-owned foreign subsidiary before 1998; and (*ii*) all firms operating in industries in which, even after 2002, a joint venture requirement remained in place or any form of legal ceilings on foreign ownership was however introduced.

From 1998 to 2007, Chang (2019) reports that that overall number of IJVs operating in the Chinese market ranged from 12,057 to 15,068, depending on the year.. Among them, between 237 and 656 were converted into wholly foreign-owned firms, and between 299 and 655 into pure domestic enterprises. The number of liquidated entities amounts between 962 and 2313. Figure 2 portrays the distribution of converted, continuing and liquidated joint ventures, in each year.

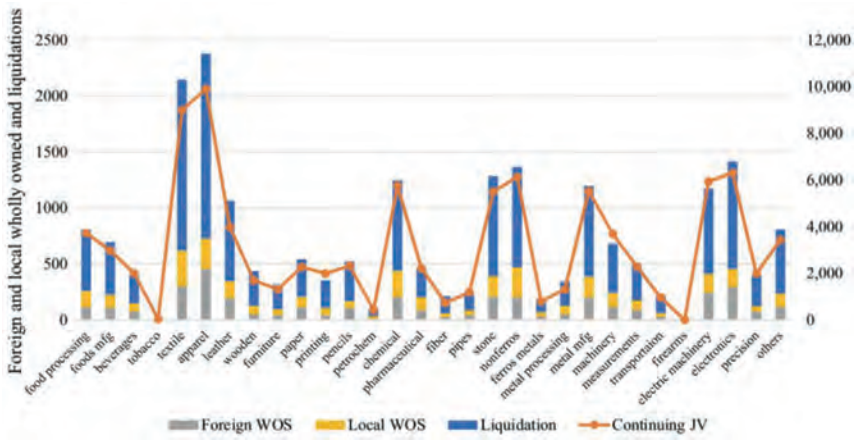
Figure 2: Summary statistics on the number of continuing IJVs, converted foreign and local wholly owned firms, and liquidations, by year.



Source: Chang (2019).

In turn, Figures 3 and 4 report their overall distribution by 2-digit SIC industry and by region, respectively. We note from the figures that while the distribution of the Chinese IJVs largely differ by industry and region, the proportion between the registered episodes of conversion and liquidation is rather constant proportional, implying that IJV termination is neither related to specific industries or nor provinces. The hypotheses labeled as H1-H4 are tested by means of a set of multinomial logit regressions, in which operating return on assets (ROA) is used as a measure of firm profitability, to gauge the specific financial performance of each IJV. More specifically, ROA is calculated as the ratio between firm's operating income and total assets. A difference-in-differences approach is pursued, considering changes in the level of explanatory variables from year $t-1$ through year $t+2$, thereby removing all possible time-invariant effects. The regression model includes several other predictors of IJV liquidation and/or conversion by both foreign and local partners, in addition to industry and year fixed effects.

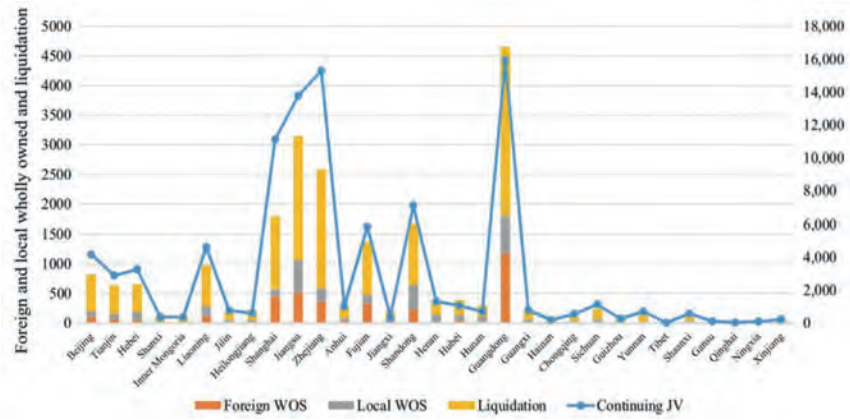
Figure 3: Summary statistics on the number of continuing IJVs, converted foreign and local wholly owned firms, and liquidations, by industry.



Source: Chang (2019).

We see from Table 7 the results of the regressions testing, specifically, hypotheses H1 ad H2. There are four conversion decisions available at every point time, namely conversion of the IJV into either a foreign

Figure 4: Summary statistics on the number of continuing IJVs, converted foreign and local wholly owned firms, and liquidations, by region.



Source: Chang (2019).

or local wholly-owned firm, liquidation, or simple continuation (with no major ownership changes) of the venture. The estimated coefficients quantify the marginal effects for converted or liquidated IJVs, compared to benchmark case represented by continuing IJVs. One of the most interesting results is relative to the explanatory variable 'Provincial institutional barriers', which reflects the marketization index compiled by the National Economic Research Institute (NERI) from 1998 to 2007[4]. Higher values of this variable turns out to significantly reduce the likelihood of conversion of the IJV to a wholly foreign-owned firm, and significantly increase the likelihood of a conversion to a pure domestic firm. This provides support for point *a* of both hypothesis H1 and H2. At the opposite, point *b* of both hypothesis does not find support in the results shown in the table, insofar as the industry-specific explanatory variable capturing 'Intangible asset intensity' (measured as intangible over total assets) does not seem to be significantly related to any of the

[4] This index captures the evolution of marketization in every province of PRC in regard to five crucial indicators quantified through survey data, namely the relationship between the government and the market, the development of the non-state sector, the degree of development of the both the product and factor market, and the quality of the legal framework.

possible IJV conversion decisions, but simply reduces the likelihood of liquidation.

A few other facts stemming from the estimates reported in Table 7 are the following.

- firm profitability (operating ROA) reduces the likelihood of both IJV liquidation and conversion to a wholly foreign-owned entity (even more so, the lower the value of the explanatory variable 'foreign share', i.e., the percentage ownership held by foreign partners)[5];
- firm size (as measured by the log of total assets) reduces the likelihood of both types of conversion, whereas firm age (years since the establishment of the venture) is negatively related to acquisition by foreign partners, while it is positively related to acquisition by local partners;
- financial leverage (debt over total assets) increases the likelihood of both types of conversion, as well as the likelihood of liquidation;
- export orientation (foreign sales over total revenues) does not affect the likelihood of acquisition by foreign partners but reduces the one of both acquisition by local partners and liquidation;
- capital intensity (fixed over total assets) plays in favor of both types of IJV conversion but also increases the likelihood of liquidation;
- the share of ownership held by foreign investors variable has a significant and positive effect on the likelihood of acquisition by foreign partner, while it exerts a negative effect on the one of acquisition by local partners, yet provided that the latter hold a minority stake (otherwise, it seems to play in favor of liquidation).

Finally, there are a couple of interesting results from Table 7 which has to do with the type of local or foreign partner in the IJV. When local partners are represented by *conventional firms* (i.e., state-owned enterprises or collectives, i.e., non-private entities), acquisition by foreign partners is more likely, if a majority stake is held already. Liquidation and/or acquisition by the local (conventional) partner are instead the most

[5] In other words, more profitable IJVs are more expensive for foreign partners to acquire, which makes more likely that the firm will continue as it is, i.e., without major changes in its equity composition. Note that firm profitability tends to increase the likelihood of conversion to a local wholly-owned entity, especially when Chinese partners take a majority position.

likely outcomes when foreign investors hold a minority position in the venture. In turns, if the foreign partner comes from an overseas Chinese community (i.e., Hong Kong, Macau, and Taiwan – HMT in the table), IJVs are more likely to be liquidated or converted than in case foreign investors are from other countries in the world, unless their participation in the venture is confined to a minority position.

The empirical analysis performed by Chang (2019) to specifically test hypotheses H3 and H4 (relative to post-conversion performances of Chinese IJVs) is much more sophisticated, as a simple comparison among the performances of the various groups of joint ventures (i.e., continuing IJVs, liquidated IJVs, wholly foreign-owned and local-owned converted IJVs) can be largely misleading. Every conversion choice is indeed the result of a profit maximizing choice taken by both foreign and local parents in situations of uncertainty, which requires to "incorporate endogenous operation mode change choice when evaluating post-conversion performance". This can be done by means of a multiple treatment effects model, that we do not detail in this simple literature review. We therefore refer the reader to the original paper by Chang (2019) for a detailed discussion of the strategy adopted, and the (difference-in-differences) results obtained in regard to firm performances post ownership realignments. We here confine ourselves to simply

Table 7: Multinomial logit model for IJVs' operation mode decisions.

Explanatory variables ($t-1$)	(1) All JVs			(2) Foreign minority-local majority JVs			(3) Foreign majority-local minority JVs		
	Foreign WOS	Local WOS	Liquidation	Foreign WOS	Local WOS	Liquidation	Foreign WOS	Local WOS	Liquidation
Operating ROA	−0.003†	0.005**	−0.031**	0.003	0.006**	−0.033**	−0.006*	0.002	−0.028**
	(0.192)	(0.186)	(0.140)	(0.305)	(0.223)	(0.182)	(0.248)	(0.347)	(0.226)
Joint venture size	−0.061**	−0.168**	−0.397**	−0.067**	−0.122**	−0.353**	−0.075**	−0.250**	−0.469**
	(0.014)	(0.015)	(0.009)	(0.024)	(0.018)	(0.012)	(0.017)	(0.030)	(0.016)
Age	−0.022**	0.043**	0.019**	−0.023**	0.038**	0.016**	−0.019**	0.057**	0.025**
	(0.004)	(0.002)	(0.002)	(0.007)	(0.003)	(0.002)	(0.005)	(0.005)	(0.003)
Leverage	0.002**	0.007**	0.004**	0.002*	0.007**	0.003**	0.003**	0.007**	0.005**
	(0.001)	(0.001)	(0.000)	(0.001)	(0.001)	(0.000)	(0.001)	(0.001)	(0.001)
Export ratio	0.000	−0.008**	−0.006**	0.001	−0.008**	−0.006**	0.000	−0.009**	−0.006**
	(0.000)	(0.001)	(0.000)	(0.001)	(0.001)	(0.000)	(0.001)	(0.001)	(0.000)
Intangible asset intensity	−0.004	−0.002	−0.010**	−0.009	0.002	−0.007*	−0.005	−0.007	−0.015**
	(0.004)	(0.004)	(0.002)	(0.007)	(0.003)	(0.003)	(0.005)	(0.009)	(0.004)
Fixed asset intensity	0.002*	0.008**	0.002**	0.003	0.007**	0.002**	0.002†	0.009**	0.003**
	(0.001)	(0.001)	(0.001)	(0.002)	(0.001)	(0.001)	(0.001)	(0.002)	(0.001)
Conventional local partner	0.089*	0.060	0.100**	−0.036	0.136**	0.140**	0.104*	−0.144*	−0.007
	(0.038)	(0.039)	(0.021)	(0.074)	(0.047)	(0.026)	(0.046)	(0.073)	(0.035)
HMT foreign partner	0.153**	0.090*	0.128**	0.195**	0.031	0.102**	0.157**	0.229**	0.180**
	(0.036)	(0.037)	(0.020)	(0.060)	(0.043)	(0.024)	(0.046)	(0.073)	(0.035)
Foreign share	1.075**	−0.711**	0.023	3.095**	0.276	0.396**	2.713**	−0.689*	−0.235†
	(0.083)	(0.100)	(0.051)	(0.308)	(0.229)	(0.134)	(0.170)	(0.281)	(0.131)
Industry intangible asset intensity	0.008	−0.004	−0.028	0.141	−0.027	−0.015	0.034	0.104	−0.038
	(0.076)	(0.075)	(0.045)	(0.132)	(0.096)	(0.058)	(0.092)	(0.119)	(0.074)
Provincial institutional barriers	−0.142**	0.175**	0.025**	−0.209**	0.183**	0.020*	−0.091**	0.145**	0.026†
	(0.016)	(0.013)	(0.008)	(0.026)	(0.016)	(0.010)	(0.021)	(0.027)	(0.015)
Industry fixed effects		Yes			Yes			Yes	
Year fixed effects		Yes			Yes			Yes	
Observations		116,178			69,462			41,356	
Chi-sq (d.f.)		8825 (141)			4406 (141)			5921 (129)	

Continuation of joint ventures is the base option. Robust standard errors, clustered at joint ventures, are in parentheses.
**$p < 0.01$, *$p < 0.05$, †$p = 0.1$

Source: Chang (2019).

sketch the proposed methodology and hint the most relevant patterns emerged from the analysis.

Chang (2019) defines the *average treatment effect on the treated* firms as "differences in performance improvement between the control group (continuing IJVs) and each treatment group (foreign or local wholly owned subsidiaries)". To test the hypotheses labeled as H3 and H4, the sample is divided into (*i*) high versus low intangible asset intensive industries; and (*ii*) high versus low institutional barriers provinces. The average treatment effect on the treated (ATTs) are then compared between the two sub-groups, leading to a sort of triple difference ('difference-in-difference-in-differences') method. The underlying results are shown in Table 8.

Table 8: Difference-in-differences estimation of the post conversion performances of Chinese IJVs.

	IPW treatment model (*t*)		RA outcome model (ΔOROA *t* − 1; *t*)			RA outcome model (ΔOROA *t* − 1; *t* + 1)			RA outcome model (ΔOROA *t* − 1; *t* + 2)		
Explanatory variables (*t* − 1)	(1) Foreign WOS	(2) Local WOS	(3) Continuing JV	(4) Foreign WOS	(5) Local WOS	(6) Continuing JV	(7) Foreign WOS	(8) Local WOS	(9) Continuing JV	(10) Foreign WOS	(11) Local WOS
Operating ROA	− 0.006*	0.006*	− 0.357**	− 0.500**	− 0.522**	− 0.475**	− 0.634**	− 0.465**	− 0.557**	− 0.687**	− 0.644**
	(0.003)	(0.003)	(0.009)	(0.039)	(0.072)	(0.010)	(0.041)	(0.122)	(0.011)	(0.050)	(0.095)
Joint venture size	− 0.041*	− 0.165**	− 0.158**	0.060	− 0.464†	− 0.239**	− 0.044	− 0.988*	− 0.283**	− 0.384†	− 0.513
	(0.017)	(0.022)	(0.045)	(0.174)	(0.267)	(0.051)	(0.197)	(0.456)	(0.058)	(0.224)	(0.404)
Age	− 0.025**	0.052**	− 0.050**	− 0.119*	− 0.177*	− 0.059**	− 0.098	− 0.154	− 0.052**	− 0.233**	− 0.095
	(0.005)	(0.003)	(0.011)	(0.059)	(0.077)	(0.013)	(0.061)	(0.110)	(0.013)	(0.068)	(0.094)
Leverage	0.003**	0.007**	0.002	0.002	0.007	0.005†	0.006	0.050*	0.007*	0.015	0.068**
	(0.001)	(0.001)	(0.003)	(0.009)	(0.020)	(0.003)	(0.010)	(0.022)	(0.004)	(0.012)	(0.021)
Export ratio	0.002**	− 0.008**	− 0.001	− 0.000	0.003	− 0.002	0.011	0.006	− 0.006**	0.008	− 0.004
	(0.001)	(0.001)	(0.001)	(0.006)	(0.013)	(0.002)	(0.007)	(0.019)	(0.002)	(0.008)	(0.017)
Intangible asset intensity	0.000	0.004	− 0.028**	− 0.118**	− 0.036	− 0.026*	− 0.077†	− 0.112	− 0.034**	− 0.089†	− 0.033
	(0.005)	(0.006)	(0.010)	(0.039)	(0.078)	(0.011)	(0.046)	(0.096)	(0.013)	(0.053)	(0.083)
Fixed asset intensity	0.003*	0.009**	0.000	− 0.015	0.027	0.009**	− 0.010	0.024	0.005	0.003	0.075*
	(0.001)	(0.001)	(0.003)	(0.013)	(0.022)	(0.003)	(0.014)	(0.032)	(0.004)	(0.016)	(0.030)
Conventional local partner	0.182**	0.026	− 0.428**	− 1.411**	0.856	− 0.643**	− 1.311**	0.176	− 0.774**	− 1.939**	− 2.179*
	(0.047)	(0.055)	(0.111)	(0.451)	(1.137)	(0.124)	(0.470)	(1.711)	(0.143)	(0.605)	(1.083)
HMT foreign partner	0.165**	0.132**	− 0.491**	− 0.280	0.807	− 0.484**	− 0.068	− 1.241	− 0.434**	0.123	− 1.294
	(0.044)	(0.051)	(0.096)	(0.448)	(0.843)	(0.113)	(0.490)	(1.446)	(0.129)	(0.591)	(1.040)
Foreign share	3.375**	− 1.002**	0.327	0.169	0.884	0.426	− 1.924†	1.095	0.810*	− 0.953	1.467
	(0.104)	(0.140)	(0.248)	(1.084)	(1.991)	(0.270)	(1.170)	(3.004)	(0.318)	(1.451)	(2.547)
Industry intangible asset intensity	0.040	0.031	0.100	0.247	− 2.129	− 0.032	− 1.232	− 4.302*	− 0.090	− 0.878	− 4.080*
	(0.089)	(0.099)	(0.202)	(0.913)	(1.727)	(0.248)	(1.001)	(2.049)	(0.270)	(1.321)	(1.832)
Provincial institutional barriers	− 0.121**	0.176**	0.219**	0.610**	0.262	0.391**	0.421†	0.044	0.476**	0.625*	0.458
	(0.020)	(0.018)	(0.043)	(0.228)	(0.354)	(0.052)	(0.221)	(0.593)	(0.059)	(0.280)	(0.434)
Industry fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year fixed effects	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Average treatment effects on the treated (ATT)											
Foreign WOS-Cont. JV (ΔOROA from *t* − 1)			0.163			0.394			0.867**		
			(0.222)			(0.248)			(0.293)		
Local WOS-Cont. JV (ΔOROA from *t* − 1)			0.721			1.597*			1.437*		
			(0.532)			(0.758)			(0.622)		
Continuing JVs (ΔOROA from *t* − 1)			0.451**			0.476**			0.426**		
			(0.086)			(0.112)			(0.130)		

Robust standard errors in parentheses. **$p < 0.01$, *$p < 0.05$, †$p < 0.1$. $N = 75{,}250$

Source: Chang (2019).

The estimated coefficient on the explanatory variable capturing the level of institutional barriers in each province is significantly negative for the likelihood of acquisition by foreign partners and significantly positive

for the likelihood of acquisition by local partners, which confirm that hypotheses H1 and H2 finds some support in the data. This is however mitigated by the lack of evidence of any relevant association between industry-level intangible asset intensity and IJV conversion decisions. The performance change of IJVs converted into wholly foreign-owned entities is higher than the observed for continuing IJVs, even more so when industries are intangible assets intensive and in provinces with low institutional barriers, which is in line with hypothesis H3. However, evidence regarding H4 is mixed, as converted local wholly-owned enterprises outperform continuing IJVs in industries characterized by low levels of intangible asset intensity, except in provinces with higher levels of institutional barriers. Overall, the documented results provide some support to the conjectures derived from the property rights theory, despite the limitation of the analysis carried out by Chang (2019), primarily induced by the lack of information on the specific characteristics of the parent companies of the Chinese IJVs, which might play a major role in determining ownership realignments.

7. *Conclusion*

The brief and largely partial review of the extant empirical literature on Chinese IJVs outlined here has however spotlighted a few interesting stylized facts. First, cultural distance is persistent even in the age of globalization, and senior managers/investors from China or other Eastern Asian counties still largely differentiate from their Western counterparts, particularly in terms of the time orientation of their business strategies. Higher or lower proportion of senior managers from China or Chinese communities abroad *vis-à-vis* European or North American managers in Sino-foreign joint ventures indeed appears to result in a different level of time commitment in regard to a series of internal functional IJV strategies, in particular those concerning human resource management. As heritage of their national culture, pervaded by the Confucian doctrine, investors and managers from mainland China (or even Taiwan and Hong Kong) tend to increase the firm propensity towards long-terminism.

Second, the ownership structure of Chinese IJVs, and in particular the proportion between foreign and local capital, appears to be a fun-

damental driver of IJV performances, both in terms of firm profitability and productivity. The empirical evidence available on this relationship indeed suggests that some degrees of local ownership might be desirable to ensure optimal performance, based on the argument that the presence of a local partner may be functional to the foreign investment to smooth the access to the Chinese market, and take advantage of specific knowledge of the local legal and regulatory framework and/or exploit the embeddedness in the local relational network. The optimal ownership structure has been estimated to require a level of ownership not exceed 60% of overall equity. Third and last, empirical studies have provided evidence that the property rights theory can be particularly insightful to study how the ownership structure of Chinese IJVs have evolved over time, in the age of deregulation. The ownership trajectories followed by these firms (e.g. conversion to either foreign or local wholly-owned companies) has been proved to depend – at least, to some extent – on the both the characteristics of the industries in terms of capital and intangible assets intensity, and those of the local institutional environment at province-level. The direction of the ownership rearrangements that followed the removal of the original restrictions on the established of wholly foreign-owned enterprises in China has clear implications for the subsequent performances of the converted IJVs; and also in this case, the property rights theory can prove to deliver very useful way of interpreting the observed post-conversion performances.

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STRATEGIC PARTNER SELECTION: THE CASE OF CINA

Abstract: This essay provides an overview of the extant literature on the main drivers of partner selection in International Joint Ventures (IJVs), with a specific focus on the case of SinoForeign Joint Ventures. The institutional environment of the hosting country and the individual characteristics are the key determinants for a local partner to be selected and for the success of the IJV. Comparative studies within China and across countries evidence how individual characteristics and informal institutions are relatively more important than formal institutions to explain partner selection. In particular, the network position and role of the Chinese partner are essential for the latter to be selected and for the international alliances to be successful and long-lasting. The literature review points to the need for a solid theoretical background to analyze the economic incentives of the local and foreign partners in network building, with the former embedded in the local network and the latter interested in network building to secure goal achievement. Network building presents a typical problem associated with asymmetric information (adverse selection and moral hazard) and has a non-contractible nature, leading to a *hold-up* problem. These features make developing such theoretical background a very challenging direction for research in economics.

JEL codes: F23, K22, M20, P27, P48.
Keywords: International Joint Ventures, China, Partner Selection

Introduction

Undertaking an entrepreneurial activity in a foreign state requires making some fundamental decisions. In particular, selecting a strategic

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partner is vital for a profitable overseas operation when laying the foundations of an International Joint Venture (IJV) with a local partner based in a foreign state. This issue is particularly salient for firms seeking to operate in transition economies. As suggested by Reuer (1999), for strategic alliances to generate profits, it is needed to "… select the right partners, develop a suitable alliance design, adapt the relationship as needed and manage the endgame appropriately". Finally, after selecting the partner, it is essential to understand how to incentivize him or her, so as to achieve business goals and maintain a lasting and profitable IJV.

This problem is particularly severe when the destination market has institutional and social characteristics such as language, cultural and legal barriers that render access very complicated so that the formation of a proper International Joint Venture (IJV) emerges as the most suitable strategic option (Roy and Oliver, 2009). In this context, the case of China is of most interest for three main reasons. First of all, China has been experiencing a gradual change in institutional characteristics, creating an evolving and prosperous environment that has allowed scholars to assess the impact of institutions on partner selection Similarly, nowadays, China is the most notable example of a booming economy, with a gradually evolving scenario in terms of international openness in the last decades. Finally, China presents a peculiar framework regarding social norms, values, and rules surrounding economic behavior and strategic choices. This essay aims at reviewing the extant literature in business and economics discussing partner selection and economic incentives in China. The remainder of this essay will be as follows. First, Section 2 is devoted to the identification of the most critical determinants for the creation of international alliances, starting from the pioneering work by Nielsen (2003) and then focusing on the institutional characteristics of the host country, i.e., and Roy and Oliver (2009) in Subsection 2.1, as well as giving essential insights on the role of the network characteristics of the local partner, i.e., Meschi and Wassmer (2013) in Subsection 2.2. Subsequently, Section 3 will discuss the case of China more in detail, understanding which are the most critical determinants for being selected or for selecting a local Chinese partner. In particular, we focus on evidence from venture capitalists in China presented by Shi et al. (2014), Gu and Lu (2014), and Liang and Mei (2018), showing which individual characteristics (reputation and network position) and

institutional conditions render an alliance with Chinese partners more fruitful and long-lasting. Within this section, Subsection 3.1 will provide a between-country (Russia vs. China) comparative study (Hitt et al., 2004) as well as a within-county comparative study (Ahlstrom et al., 2014), which further highlight how networking results to be relatively more important than formal institutions for the selection of a strategic partner in mainland China. Finally, subsection 3.2 will be devoted to Shi et al. (2012), and Kim and Kim (2018), which give evidence on the relationship between individual characteristics of a local partner and institutional environment. The article takes advantage of regional Chinese data. Building on these contributions, Section 4 concludes and presents some open questions from the economic viewpoint. In particular, we will discuss the informational problems of an international investor and the economic tools of incentive provision to overcome these problems.

2. *Key determinants of international alliance creation*

Understanding the drivers of international strategic alliance formation has animated the empirical research in business studies of the last two decades. An essential and pioneering study is provided by Nielsen (2003), who use data from a web survey of Danish firms involved in IJV to investigate the drivers of alliance formation between firms from different countries. Although specific to Danish firms, this article gives a reasonably general starting point for the subsequent studies, both for the relatively large sample analyzed and the number of insights delivered. The author identifies four main drivers affecting selection criteria[1] and measures their relative importance using exploratory factor analysis. Among them, two hypotheses are significant for the scope of this essay.[2]

[1] The author identifies twelve criteria: (1) trust between top management teams, (2) relatedness of partner business, (3) partner reputation, (4) partner financial status, (5) partner firm size, (6) degree of favorable experience with a partner, (7) access to marketing/distribution systems, (8) partner international experience (9) experience in technology application, (10) potential for new technology development,(11) access to technology/knowledge and (12) partner ability to negotiate with local government.

[2] The author also studies the governance form of the alliance and the importance of strategic motives for alliance formation.

The first is that prior international alliance experience favors the selection of a partner with high potential and learning. The idea is that a firm with poor experience from prior international alliances would tend to favor a partner with international experience and a favorable reputation, while a more experienced firm can engage in more risky relationships. According to Nielsen (2003), Danish data give only moderate support to this hypothesis, concluding that prior experience significantly affects the likelihood of selecting a partner with technological expertise and local operational and production knowledge. The second is that the nationality of the foreign partner affects selection criteria because national cultural differences lead to potential negative effects, such as alliance conflicts, misunderstandings, and poor performance. The data provide much stronger support to this hypothesis, showing significant differences in all selection criteria according to the geographic region of the partner. When partnering with Western European companies, relational and reputation components are more important, while the partnership with US companies makes task-related criteria more salient. Looking at relationships with Asian firms, access to local cultural knowledge is the most important selection criterion.

Therefore, the institutional environment in which the local firm operates and its role in the local network prove to be the critical determinants in its selection as an IJV partner. In what follows, we give brief and non-exhaustive overview of these aspects. For exposition purposes, we present the impact of the institutional environment and individual characteristics of a local partner separately.

3. *Institutional environment and partner selection*

The background of any economic activity is the institutional and social environment in which an economic agent operates. As pointed out by Roy and Oliver (2009), institutions represent the collective wisdom of rules and norms of conduct associated with laws and governance mechanisms of markets. In this sense, they constrain the firm's ability to take action, reducing viable strategic decisions. Understanding the institutional environment and the role of the specific firm within a social network is thus crucial for enhancing the opportunity for success of any econom-

ic activity. Moreover, given that this set of strategic options viable to a firm depends on these factors, the latter become essential drivers for a multinational enterprise to select the correct local firms as partners in an IJV. This aspect is even more relevant when the cultural, institutional economic difference across partners are prominent. An example is when a foreign multinational enterprise comes from a developed country, and the hosting country is an emerging economy. In this case, the most important difference is that foreign firms markedly hinge upon regulations, contractual arrangements, and market-based management, while emerging economies, with China being the archetypal example, rely more on social networks and reciprocal exchanges. As we will highlight, a general conclusion of papers studying partner selection is that, for a successful IJV, partner characteristics and institutional environment are substitutes. Namely, a more developed institutional environment makes the selection of a local partner a less critical issue for a foreign investor, reducing asymmetric information.

This essay focuses on cases where foreign firms face underdeveloped institutional regimes and institutional differences bite when entering a new market. More in detail, local partners offer valuable access to local connections with the labor market and the government, distribution channels, awareness of local regulations, and government relations. The correct selection of a local partner reduces the natural information asymmetry faced when entering a new market, giving preferential access to the resources needed to develop a fruitful business. Accordingly, the identification and correct partner selection are pivotal for the IJV's success. Moreover, building an international alliance network is a competitive advantage when providing access to know-how and resources.

The article builds on a conceptual model in which the hosting-country legal environment (the rule of law, corruption control) affects partnering concerns such as coordination costs and the ability to capture a fair share of the rents from the IJV in which the MNE is engaged (appropriation), ultimately determining selection criteria, usually based on tasks or the partner. The specific aim of Roy and Oliver (2009) is to empirically identify the extent to which a host country's legal environment affects IJV partner selection criteria. Roy and Oliver (2009) point out that rule of law is important because self-interested firms respond not only to the incentives and penalties outlined in legislation but also to

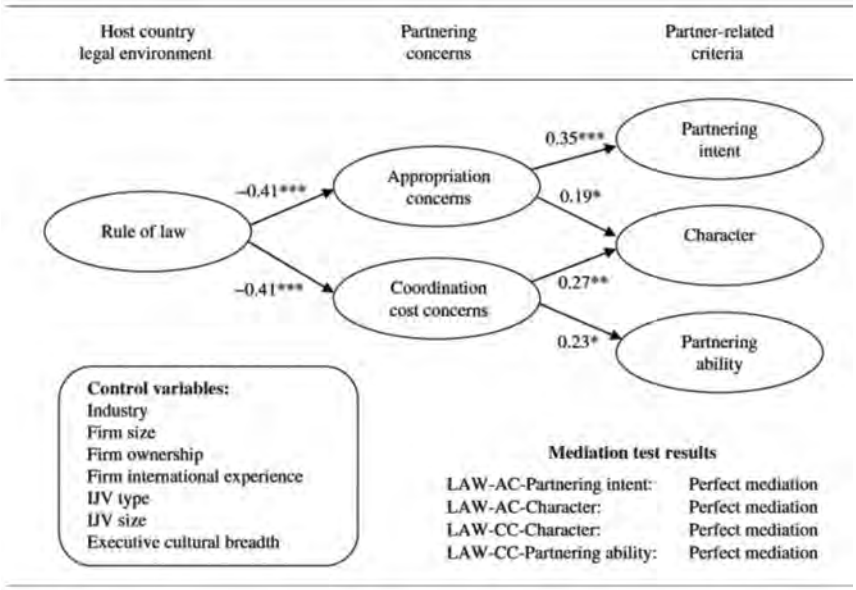
the real-world gaps provided by ambiguous statutes and manipulable regulatory agencies.

The empirical study consists of a maximum likelihood estimation on data from a survey among MNE executives at the MNEs who were responsible for establishing an IJV for their firm. The sample included 600 qualified MNEs and the key informants came from membership lists of the Asia-Pacific Foundation of Canada, Canada-China Business Council, and Toronto Stock Exchange. In their study, the dependent variable is the scores on six factors related to the partner-related criteria, which are:

1. Character, to be intended as their reputation, transparency, and trustworthiness
2. Political ties, measured by connections to government or non-government organizations as well as the possession of regulatory permits, licenses, or patents
3. Market power, measured as firm size, market share, and financial capabilities
4. Control of factors of production, intended as managers and laborers skills as well as access to raw materials, technology, and input products
5. Partnering intent, to be intended as common goals, commitment, and engagement)
6. Partnering ability, measured by the success and duration of past collaborations

Regarding the legal environment, only certain aspects are significant for the concerns of the foreign MNE regarding partner selection. Specifically, while the rule of law is fundamental (accounting for around 50%) for concerns related to appropriation and coordination, which have a powerful impact on partner-related selection criteria, such as intent, ability, and individual characteristics, the control of corruption does not have any significant impact. Moreover, concerns of coordination and appropriation do not affect task-related criteria, such as (2), (3), and (4). In conclusion, a statistically significant effect is found from the rule of law to individual characteristics, with the mediation of appropriation and coordination concerns. A significant contribution is that factors coming from the institutional environment, the firm, and the intra-partner level are all combined to influence IJV partner selection, suggesting that it is difficult to disentangle the effect of each different level.

*Figure 1: Structural model (and coefficients) of the study's empirical findings. Significance level: *p<0.05; **p< 0.01; ***p< 0.001. (Source: Figure 3 in Roy and Oliver 2009)*



4. *Partner individual characteristics and partner selection*

As mentioned earlier, a partner's characteristics are critical and combine with institutional factors to determine the likelihood of participating in an international alliance. An intermediate layer between these two extreme levels is the network structure to which the partner belongs. In this regard, many scholars (e.g., Gulati, 1995, among others) have pointed out how *network embeddedness* and *network density* are important characteristics of such international alliances. Network embeddedness refers to the firms' relations within the type of inter-firm network to which a given firm belongs, while network density refers to the number of links across firms over all possible links, meaning that a network is denser when many firms are connected and sparser when only a few links exist. For our discussion, network embeddedness is maximal when the foreign firm and the local firm belong to the same alliance network.

Moving on to more individual characteristics, it is important to clarify

that specific locations in the network are more important than others. The literature identifies two main dimensions. The first is centrality, which refers to the partner firm being in a central location. The second one is the attribute of "broker firm", referring to a specific role in the network, irrespective of the number of connections. In detail, structural holes exist in any inter-firm network and represents critical positions for inputs or information that facilitate interaction between different subnetworks. A broker firm occupies this position, thus holding a pivotal role as it controls some essential input or holds information for partnership functioning.

With these elements in mind, Meschi and Wassmer (2013) aimed to understand the termination and failures of IJV from European firms emphasizing the role of network embeddedness of local partners. Their conceptual model builds on the idea that network embeddedness increases the likelihood of an IJV to survive, as track records and the network's cumulative experience in a specific country allow to select local partners that are a good match effectively. Centrality would have a similar positive effect due to the perception of collaboration and internal and external visibility that being central in a network brings. Similarly, being a broker firm should have a positive impact due to the key position in terms of

Cox regression results.[a]

Variables	Model 1	Model 2	Model 3	Model 4
Network embeddedness		0.070 (0.264)		
Network density			−1.496 (0.274)***	
Degree centrality				−1.301 (0.416)**
Betweenness centrality				0.189 (1.045)
IJV contract amount[b]	0.164 (0.139)	0.151 (0.132)	0.189 (0.127)	0.196 (0.132)
Number of partners	−0.206 (0.216)	−0.215 (0.215)	−0.258 (0.214)	−0.261 (0.215)
IJV stake	−1.267 (0.799)†	−1.268 (0.797)†	−1.680 (0.937)†	−1.688 (0.945)†
Country experience[b]	−0.472 (0.337)†	−0.507 (0.384)	−0.713 (0.568)	−0.667 (0.603)
Cultural distance	0.033 (0.095)	0.031 (0.095)	0.055 (0.125)	0.051 (0.125)
GDP growth[c]	−0.010 (0.033)	−0.010 (0.033)	−0.012 (0.043)	−0.012 (0.043)
Country dummies	Yes	Yes	Yes	Yes
Industry dummies	Yes	Yes	Yes	Yes
Log pseudo-likelihood	−571.251	−571.201	−261.764	−261.972
Wald chi-square	35.56***	36.71***	34.65***	38.24***
n (IJV exits/failures)	349 (106)	349 (106)	184 (55)	184 (55)
IJV-year observations	3564	3564	2003	2003

[a] Numbers in parentheses are robust standard errors that correct for the clustering of sample firm effects. Positive (negative) coefficient estimates indicate greater (lower) likelihood of IJV failure.
[b] Logarithmic transformation.
[c] Time-variant variable.
† $p < 0.1$.
* $p < 0.05$.
** $p < 0.01$.
*** $p < 0.001$

Figure 2: Model 1: control variables only. Model 2: impact of Network Embeddedness of the focal European firms on the Likelihood of IJV Failure. Model 3: linear effect of Network Density on the Likelihood of IJV Failure. Model 4: impact of centrality – betweenness and degree – on the Likelihood of IJV Failure. (Source: Figure 3 in Meschi and Wassmer (2013))

unicity and access to input and information. Regarding network density, the impact would be ambiguous. On the one hand, a denser network improves information flows and creates repeated interaction, common values, and norms. On the other hand, this comes at the risk of becoming an organizational filter for innovative ideas, eventually hurting IJV performance and thus increasing the likelihood of failure.

Using data on the period 1995-97 on 349 IJVs formed by 132 European firms in various emerging economies, they tested this conceptual model and found that denser networks lead to more performing IJVs characterized by a lower likelihood of failure. Also, they show that not all types of network centrality are necessary for IJV success. Indeed, while *degree centrality* (number of links) – reduces the likelihood of failure and is statistically significant, *betweenness centrality* (the presence of a firm on the shortest paths linking all network members) has a positive but not significant impact.

4.1. *Chinese partners*

The previous section showed how institutional reasons and network-related characteristics represent the most critical drivers for partner selection. We have presented articles that were not explicitly linked to the Chinese case, but highlighting characteristics that make this case particularly interesting. Indeed, China has been an evolving institutional and economic environment in the last decades, offering a valuable natural laboratory to study the role of institutions. Moreover, informal institutions in China are vital in developing a business, and the network component heavily characterizes them. Additionally, China also presents a wide variety of regional differences, providing further opportunities to explore the determinants of partner selection and the relationship among institutions, networks, and individuals.

Before delving into the discussion about network characteristics, it is worth noting that the literature has also spotlighted more general elements such as reputation, inertia, and uncertainty. The focus of Gu and Lu (2014) is indeed the role of intangible resources (reputation) in a firm's alliance formation, proposing a theoretical approach with empirical validation on data from leading research institutes in China, with coverage of the entire range of firms in China's Venture Capital industry. They demon-

strate an inverted U-shaped relationship between a firm's reputation and its likelihood of forming alliances. The intuition is that a firm's reputation creates a positive perception of its ability to create value while decreasing its need to form alliances, as a reputable firm can easily proceed alone. As a result, there exists a threshold or reputation above which the absence of need is more important than the positive perception. Results vary across two dimensions: (1) between foreign and domestic firms; and (2) across different levels of institutional development. In particular, the threshold is lower when the institutional environment is more developed, and for foreign firms: despite their foreignness seems an issue a first sight, comparative advantages arise from their ability to operate globally.

A different perspective is presented in the paper by Liang and Mei (2019), which aims to understand how selection routines and uncertainty of the entire market movement shape firms' preferences when selecting new partners. They use a fine-grained sample of 511 open-end funds started by 61 fund management firms in China. They look at how inertia in the past affected selection decisions. A first result is that inertia hampers the extent to which firms explore new partner selection. This effect tends to be stronger for domestic firms – more interested in preserving relationship-specific assets, social attachments, or personal relations – compared to international firms – more interested in economic outcomes. Market uncertainty leads firms to explore to find new opportunities to deal with the uncertainty (*exploration effect*). However, it may inhibit exploration to avoid risky choices (*risk aversion effect*). The paper shows that short-term uncertainty inclines managers to make choices aimed at avoiding loss in the short term. In case of long-term uncertainty, managers face lower pressures for underperformance, and the exploration effect dominates. When considering network characteristics, a significant contribution is the one proposed by Shi et al. (2014), who assesses the network advantages for a local firm to be in an IJV. Data from WIND Data Services on electronics includes 191 domestic alliances in the period 2001-2005 (inclusive) and 73 IJV formation events, with data on 69 foreign partners (most world-level MNEs) and 84 local firms (China's top software developer UFIDA and outsourcing providers Neusoft and ChinaSoft, among others). As expected, the probability of being selected as a local partner depends on its centrality (due to the visibility it entails) and on being a broker firm (due to its inimitability). Centrality

is more significant than brokerage, suggesting that visibility is vital in attracting foreign partners.

More importantly, as can be observed in the table above, foreign firms' local market experience and perceived capabilities help moderate the strength of these relationships, as these firms can better understand local partner traits reducing information asymmetries. Moreover, more experienced firms tend select broker firms. The intuition is that brokerage becomes more important when the main objective of the foreign firm is not just access to the network itself, but also unique business opportunities and access to local information.

	Network centrality				Brokerage			
	Simple slope	Standard error	*t*-test	Intercept	Simple slope	Standard error	*t*-test	Intercept
Foreign firm's local market experience								
High	1.863	0.382	4.88***	−12.801**	1.285	0.448	2.87**	−12.614***
Mean	1.298	0.291	4.46***	−11.338***	0.362	0.511	0.71	−10.937***
Low	0.702	0.301	2.33*	−10.425***	−0.667	0.685	−0.97	−9.919***
Fortune 500 membership								
High (member)	1.434	0.347	4.13***	−11.453***	0.801	0.463	1.73†	−10.962***
Mean	1.171	0.286	4.09***	−11.275***	0.327	0.556	0.59	−10.857***
Low (not a member)	0.764	0.283	2.70**	−12.436***	−0.103	0.686	−0.15	−12.016***

Note: †p<0.10, *p<0.05, **p<0.01, ***p<0.001

Figure 3: Results of standard errors and t-tests for simple slopes of two-way interactions including network position traits and second predictors. (Source: Shi et al. (2014)).

5. *Between-country and within-country comparative studies*

As mentioned earlier, China offers a rich example to study partner selection due to the specific and evolving institutional background surrounding economic activities. In this regard, comparative studies provide a deeper understanding of the role of institutions in between-country and within-country comparisons.

As for between-country comparisons, Hitt et al. (2004) focus on the differences between China and Russia, highlighting how each institutional environment maps into partner selection criteria. This study is very enlightening in understanding the role of the institutional environment since the transition to a market economy required a major institutional change, and the two transition approaches (sudden in Russia and more gradual in China) have yielded divergent institutional arrangements. The incremental institutional change experienced by China entails the main-

tenance of some rules associated with a gradual transformation of others. Hence, managers focused on acquiring resources and capabilities to help them to compete in the long term. Moreover, the Chinese government encouraged local firms to seek alliance partners with advanced technology to improve their technological capabilities, overcome innovation and product development gaps, and improve their competitiveness in global markets. They conducted an empirical analysis based on a survey of executives from companies involved in international relationships, identifying 14 selection criteria.

As one can observe in the table below, they show that Chinese firms placed more emphasis than Russian firms on the long-term abilities of partners, such as technological and managerial capabilities, intangible assets, reputation, and prior alliance experience.

	Russia		PRC		
	COEFF	SE	COEFF	SE	*z* (Difference Tests)[b]
Fixed Effects (Controls)					
Intercept	2.34**	0.46	3.60**	0.16	
Industry 1 (natural resources)	0.97*	0.46	−0.22*	0.10	
Industry 2 (service)	0.91*	0.46	—	—	
Industry 3 (manufacturing)	0.78	0.48	−0.35**	0.11	
Nat. log of no. of employees	0.11**	0.03	0.02	0.03	
Total number of alliances	−0.01*	0.004	0.007*	0.002	
Random Effects (Partner Characteristics)					
Financial assets	0.32**	0.04	0.31**	0.02	−0.20
Complementary capabilities	0.21**	0.03	0.15**	0.02	−1.56*
Unique competencies	0.11**	0.02	0.17**	0.02	2.03*
Industry attractiveness	0.10**	0.02	0.19**	0.03	2.23*
Cost of alternatives	0.02	0.02	0.08**	0.02	1.95*
Market knowledge/access	0.19**	0.03	0.14**	0.02	−1.15
Intangible assets	0.11**	0.02	0.17**	0.02	2.00*
Managerial capabilities	0.07*	0.02	0.22**	0.02	5.80**
Capability for quality	0.14**	0.03	0.10**	0.02	−1.06
Willingness to share expertise	0.09**	0.02	0.12**	0.02	0.91
Partner ability to acquire skills	−0.02	0.02	−0.01	0.02	0.32
Previous alliance experience	−0.03	0.02	0.09**	0.02	4.14**
Special skills to learn from partner	0.09*	0.02	0.12**	0.02	0.98
Technical capabilities	0.06**	0.02	0.14**	0.03	2.08*

Note. *The top portion of the table shows fixed effects (i.e., effects not varying within the respondent); the bottom portion shows random effects (i.e., effects that vary within the respondent). COEFF = Coefficient; SE = Standard Error.
[b]One-tailed tests.

Figure 4: Dependent variable: Executives rated each of the 30 potential partners described in the cases on a seven-point Likert-type scale on (1) the attractiveness of the firm as an alliance partner and (2) the probability of recommending an alliance with the firm (Source: Hitt et al. 2004).

Regarding within-country studies, Ahlstrom et al. (2014) explore the effects of formal and informal institutions on strategic alliance partner preferences in Mainland China, Taiwan, and Hong Kong, highlighting similarities and differences. Hong Kong, a British colony for 150 years,

was a capitalist system from economic, legal, and social viewpoints. It has mainly been self-governed and historically characterized by a notable presence of MNEs, which have significantly influenced, the commercial law and the whole institutional environment.

Firm effects	(A) Hong Kong		(B) Mainland china (PRC)		(C) Taiwan	
	Estmt.	SE.	Estmt.	SE.	Estmt.	SE
Std. dev. (Intercept)	0.46	0.08	0.005	0.07	0.50	0.07
Std. dev. (Industry 1)	0.47	0.51	0.29	0.13	0.001	0.001
Std. dev. (Industry 2)	0.001	0.001	–	–	–	–
Std. dev. (Industry 3)	0.23	0.20	0.07	0.71	0.49	0.18
Std. dev. (Inverse Mills Ratio)	−0.01	0.02	0.84	0.71	0.01	1.52

Partner characteristics	(A) Hong Kong		(B) Mainland china (PRC)		(C) Taiwan		(D) HK vs. PRC Difference Tests[b]		(E) HK vs. Taiwan		(F) PRC vs. Taiwan	
	Coef.	SE	Coef.	SE	Coef.	SE	Coef.	LR Test	Coef.	LR Test	Coef.	LR Test
Intercept	−2.11***	0.31	−2.61***	0.30	−2.75***	0.32	–	–	–	–	–	–
Financial Assets	0.16***	0.03	0.31***	0.02	0.27***	0.03	−0.11**	–	−0.08*	–	0.03	–
Complementary capabilities	0.19***	0.03	0.15***	0.02	0.23***	0.03	−0.05	–	−0.10***	–	−0.05*	ns
Unique competencies	0.16***	0.03	0.20***	0.03	0.17***	0.02	−0.01	–	−0.03	–	−0.02	–
Industry attractiveness	0.22***	0.03	0.20***	0.03	0.17***	0.03	0.05	–	0.06	–	0.003	–
Cost of alternatives	0.07**	0.03	0.08***	0.03	0.09***	0.03	−0.03	–	−0.005	–	0.03	–
Market knowledge/access	0.10***	0.03	0.14***	0.03	0.13***	0.03	−0.02	–	−0.02	–	−0.01	–
Intangible assets	0.10***	0.03	0.17***	0.03	0.14***	0.03	−0.14***	–	−0.10***	–	0.04	–
Managerial capabilities	0.13***	0.02	0.22***	0.02	0.20***	0.02	−0.11***	–	−0.09***	ns	0.02	–
Capability for quality	0.21***	0.03	0.11***	0.02	0.11***	0.03	0.08**	–	0.06*	*	−0.02	–
Willingness to share expertise	0.15***	0.03	0.13***	0.03	0.18***	0.03	0.08**	–	0.03	–	−0.05	–
Partner ability to acquire skills	0.05*	0.03	−0.004	0.03	0.14***	0.03	0.05	–	−0.07*	ns	−0.12***	**
Previous alliance experience	0.13***	0.02	0.10***	0.02	0.09***	0.02	0.05*	ns	0.001	–	−0.05*	ns
Special skills to learn from partner	0.20***	0.03	0.13***	0.02	0.15***	0.02	0.02	–	0.02	–	0.003	–
Technical capabilities	0.04	0.03	0.14***	0.03	0.13***	0.03	−0.10**	–	−0.12***	*	−0.03	–
Log Restricted Likelihood	−3277.08		−3198.24		−3070.77							
Chi- square	649.99***		1014.72***		978.82***							

* $p < 0.10$.
** $p < 0.05$.
*** $p < 0.01$.
**** $p < 0.001$.
[a] The top portion of the table shows firm effects (not varying within the respondent); the bottom portion shows effects that vary within the respondent. Coef. = coefficient; SE = standard error; Estmt. = estimate; LR Test = Likelihood Ratio test.
[b] Positive test statistics favor Hong Kong in tests vs. Mainland China and Taiwan, and Mainland China in tests vs. Taiwan. Coefficients reported for interactions between country dummy and corresponding Partner Characteristic. Likelihood Ratio test summaries provided for statistically significant interaction coefficients.

Figure 5: Mixed models and Difference tests. Taiwan, Mainland China and Hong Kong. (Source: Ahlstrom et al. (2014)).

Despite being considered by Mainland China as one of its provinces, Taiwan is self-governing with its own governance, judiciary, and legal enforcement system. Due to its Japanese heritage, the formal institutions of this country have many similarities with Western economies, particularly in laws and business practices. Mainland China's economic reforms started in 1978 and gradually created a legal-commercial infrastructure to guide commerce and protect property rights.

Table 3 in Ahlstrom et al. 2014 (Figure 5) shows that compared to Hong Kong firms, Mainland Chinese and Taiwanese firms emphasized the managerial and financial capabilities of partners, intangible assets, and special skills, leading to a meaningful conclusion on the role of formal and informal institutions. The former are stronger and have more

influence in Hong Kong, whereas the latter had influences on the alliance partner selection preferences in China and Taiwan. The reason is the presence of a weaker legal infrastructure so that networking, reciprocal giftgiving, and trust-building have become fundamental parts of economic transactions and may be more important in those societies than in Hong Kong.

	Partners with a high degree of centrality (centrally positioned firms)	*Partners with a high level of structural holes (broker firms)*
Panel A: Cross-country research		
In developed economies	Preferred (✓)	
In emerging economies		Preferred (✓)
Panel B: Within-country research		
In regions with a high degree of marketization within a country	Preferred (✓)	
In regions with a low degree of marketization within a country		Preferred (✓)

Figure 6: The institution-based preferences for IJV partners. (Source: Shi et al. (2012)).

6. *Formal vs informal institutions*

We have concluded so far that the selection of IJV partners is heavily based on informal institutions in the case of China. Analyzing detailed data across Chinese sub-national regions, characterized by a substantial degree of heterogeneity in terms of institutional landscape, allowed obtaining more profound insights into the relationship between formal and informal institutions Shi et al. (2012) studied how the host country's institutional environment interacts with the role of a local firm's network position as a selection criterion, revealing significant differences across Chinese regions.

Their empirical analysis estimates the likelihood of domestic firms being selected as IJV partners by foreign entrants controlling for the firm's characteristics according to economic, organizational, and institutional factors. The study relies on data on electronics and information technology industries in China, primarily characterized by FDI. They emphasized the role of *marketization*, i.e., the degree of development

of market-based mechanisms and other institutions aimed at achieving more efficient market functioning.

Table 6 summarizes their results. The institutional environment's degree of development impacts the type of firm (central vs. broker firm) that is more likely to be selected as an IJV partner. Specifically, centrally positioned firms are more likely to be selected by foreign entrants as IJV partners in regions characterized by a high degree of marketization. In contrast, broker firms that bridge structural holes are more likely to be selected by foreign entrants as IJV partners in regions characterized by low marketization.

A different approach is followed by Kim and Kim (2018), who investigate the impact of local partners' network attributes on the survival of high-tech IJVs, also examining at the strength of this impact in different subnational institutional environments. They analyze a sample of 125 IJV dyadic pairs of US multinational enterprises (MNEs) operating in high-tech industries and their local partners in China. Besides degree centrality and brokerage, the authors also consider the "network status", that is the firm's positional ranking within its interfirm networks.

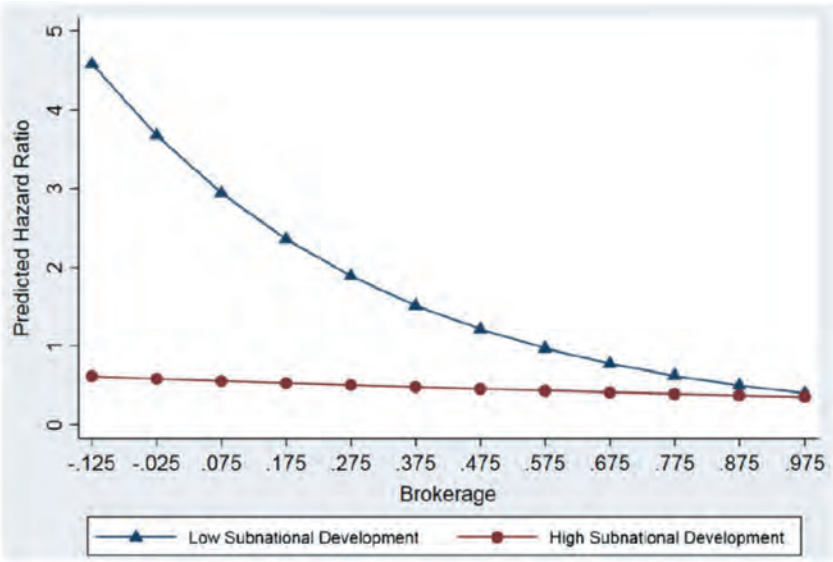


Figure 7: Brokerage and sub-national development. (Source: Figure 1 in Kim and Kim (2018)).

The main conclusion is that greater institutional development negatively moderates all three relationships between local partners' network characteristics and the IJV survival rate. Therefore, this relationship becomes less important in more developed regions.

In Figure 7, we report the example of brokerage, suggesting that high subnational development essentially eliminates any relationship between the level of the strategic position of a local firm in a structural hole and the probability of survival of the venture. In line with the general conclusion of all articles, they show that partner characteristics and institutional environment seem to be substitutes. To put it differently, while operating in countries characterized by underdeveloped formal institutions require IJV to rely heavily on uninformed institutions massively, the opposite is true for developed environments. Indeed, when the host country's legal, economic, and social framework is more favorable for securing market based operations, network characteristics are less important for selecting a local partner.

7. *Concluding remarks*

This brief essay has highlighted the role of network characteristics of a local Chinese partner as a key driver to secure the achievement of business goals and, more generally, the success of their ventures. This presents significant food for thought for the economics discipline. While the economic literature has explored the role of network effects in various economic environment,[3] the *relational dimension* of firms, entrepreneurs, and managers have been neglected for a very long time due to objective difficulties in framing and formalizing the economic analysis. Beyond the articles presented in Sections 2 and 3, the relational nature of buyer-supplier linkages in global value chains and their formation, duration and distinctive features have been analyzed by several authors (see Gereffi et al., 2005, Macchiavello and Morjaria, 2015, Monarch and Schmidt-Eisenlohr, 2016, among others). Hence, an interesting avenue

[3] Examples are technology adoption and innovation diffusion (from Saloner and Shepard, 1995 and Choi and Thum, 1998 up to Beaman et al., 2021) consumer search (e.g., Campbell, 2013) and job seekers (e.g., Galeotti and Merlino, 2014).

for future research is to develop a robust theoretical framework to analyze the incentives of partners (both Chinese and foreign investors) and the resulting conditions for profitable business opportunities within a network of direct and indirect personal contacts a network of direct and indirect personal contacts.

In this regard, social and interpersonal interactions are *not contractible* (Dur and Sol, 2010). Moreover, bring about a substantial degree of uncertainty, potentially giving rise to a common principal/agent problem whenever the relational dimension of economic activity is entrusted or somewhat delegated to a local partner. Indeed, in an IJV, the foreign partner is often unfamiliar with the environment in which the IJV operates, while the local partner is part of the local relational network. When this is the case, the relational dimension of the activity of the local partner – as well as the underlying outcomes – reasonably falls well outside the boundaries of the contractible component of the relationship established between parties, also due to information asymmetries.

In other words, this essay has highlighted that the IJV performance depends on the ability of a foreign company to select a local partner able to build a network, i.e., social ties that are strong, long-lasting, reliable, and functional to the objectives of the IJV. However, this selection is a challenging task. A foreign entrepreneur has generally limited knowledge of the local relational network – which justifies the decision to rely on a local partner – and may dispose of poor information about the local firm position in the network and its ability to build longlasting relationships. The information that the foreign firm can gather on these dimensions is, by definition, partial and possibly biased, as a local partner has a clear incentive to misreport its position in the local relational network and its ability in network building. All these elements constitute private information and give rise to potential problems of adverse selection – due to the impossibility of observing the partner's ability – and moral hazard – due to the impossibility of observing the partner's behavior.

Two aspects further exacerbate this problem. First, interpersonal connections are qualitatively different, and whenever the IJV needs to improve this quality, the cost of this *network-building* activity would fall upon the local partner. Observational evidence suggests that, in complex social networks, some agents are connected between them via solid links (sustained by mutual trust and reputation, consolidated based on repeat-

ed interactions). In contrast, others links are weaker, as mutual exchange and knowledge remain superficial.[4] Second, the inherent non-contractibility of a relational dimension leads to a standard *hold-up* inefficiency, given that the network building needed for a fruitful IJV requires relationshipspecific investments that are not (or not fully) contractible. In particular, investigating the commitment problem that emerges in a relational network, where the latter is supposed to develop contacts and make them stronger – at private expense and starting from its personal connections on site – to achieve a given economic objective. A fundamental trade-off hinges on the choice of the local partner, who has to privately bear the cost to build the best possible network for the IJV (common) interest.

According to the property rights theory, the associated distortions can be mitigated, if not corrected, by using ownership and organizational decisions as a tool for incentive provision (Grossman and Hart, 1986; Hart and Moore, 1990). In this perspective, a principal can prevent the opportunistic behavior of the agent (in a case in point, the local partner) by designing an optimal sharing rule for the joint surplus from the relationship so that the economic incentives of the two parties can align. Studying the optimal sharing rule in this context and analyzing the tools to overcome all the informational issues in IJV performances represent a promising research path.

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Beaman, L., Ben Yishay, A., Magruder, J., and Mobarak, A. M. (2021), *Can network theory based targeting increase technology adoption?,* in *American Economic Review*, 111(6), pp. 1918-43.

[4] A famous study presented in Dunbar (1992) shows that cognitive resources limit information-processing capacity, which, in turn, "limits the number of relationships that an individual can monitor simultaneously". Hence, there exists an upper bound on the number of individuals with whom stable and tight interpersonal relationships can be maintained over time ("strong" links), with the others falling into the status of "weak".

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