

MARCH 2026

*Derivative contracts: with decisions nos. 2262 and 2358 of 2026, the Supreme Court endorses a substantive approach to the validity of interest rate swaps*

○ Dispute Resolution

## *The context: Post-Cattolica Ruling uncertainties in case law*

With regard to derivative contracts, and in particular to *interest rate swaps* <sup>(1)</sup>, the well-known "*Cattolica Ruling*" (**Joint Chambers of the Italian Supreme Court, decision no. 8770/2020**) identified three elements that must be agreed upon between the intermediary and the investor for the contract to be deemed having a "rational risk" ("*alea*") and thus to be valid, namely:

- (i) The criteria for calculating the **mark-to-market (or MTM)** value, or replacement cost (or rather, the method of estimating it), *i.e.*, the cost at which a party may terminate the contract prematurely or at which a third party, on the valuation date, would be willing to take over the derivative, thus becoming - in practice - the current market value of the swap;
- (ii) The **probabilistic scenarios**; and
- (iii) The so-called **implicit** or **hidden costs**.

However, the breadth and, in some respects, the vagueness of these indications have led to considerable uncertainty in the recent case law: in compliance with this decision, several judges have adopted a **strictly formalistic approach**, declaring **derivative contracts null and void solely on the basis that the contractual text did not expressly refer to the three aforementioned elements, irrespective of the derivative's structure**, its economic rationale, or the sophistication of the contracting parties.

An emblematic example is provided by decision of **the Milan Court of Appeal (no. 3382/2021)** which - while expressly acknowledging the uncertainty surrounding the very meaning of "*probabilistic scenarios*" - nonetheless declared the contract null and void exclusively on the grounds that the text of the contract lacked "*any data that could be traced back to the notion of a 'probabilistic scenario'*".

With **decisions nos. 2262 and 2358 of 3 and 4 February 2026**, the First Civil Section of the Supreme Court appears to have intervened on the issue, offering a clarification - **not a reversal** - of the principles set out by the Cattolica Ruling.

## *From formalism to substance*

The first logical step set out by the commented decisions concerns the proper **dogmatic classification** of the requirements identified by the Cattolica Ruling.

The Supreme Court first clears up a widespread misunderstanding: mark-to-market and probabilistic scenarios do not pertain to the economic reason underlying the contract ("*causa*") or the determinacy of its subject matter ("*oggetto*"). Rather, they are relevant to the assessment of the contract's reason to exist ("*meritevolezza*") pursuant to Article 1322, paragraph 2, of the Italian Civil Code. Therefore, an IRS contract, the text of which contains the essential elements - notional amount, dates, reference parameters, interest rate measurement - possesses a sufficiently specific or at least determinable subject matter and could not be declared null and void solely

<sup>(1)</sup> As observed by the Supreme Court in the Cattolica Ruling, within *the genus* of swaps, the most widespread type is the so-called interest rate swap (otherwise known as IRS, especially in its most widespread or basic form, the so-called plain vanilla), *i.e.* a swap contract for future monetary obligations which, in essence, translates "*into the obligation of one party to pay the other party the amount d (where d is the sum corresponding to capital 1 for interest rate W) in exchange for the other party's commitment to pay the first party the amount y (where y is the sum corresponding to capital 1 for interest rate Z)*".

on the grounds that there are no explicit references to mark-to-market or probabilistic scenarios <sup>(2)</sup>.

The second point of interest is the **unified and functional** interpretation of the information requirements of the contract.

**Mark-to-market and probability scenarios are not autonomous and cumulative elements, but components of a single assessment:** the latter serve to give "substantive content" to the former, as they illustrate the historical data (average return and volatility) used in calculating the market value of derivative contracts.

In light of the above, the Supreme Court (in both decisions) focuses in particular on the definition of "probabilistic scenarios" and excludes that these can be understood as projections of future interest rate trends. Probabilistic scenarios should be understood as *"the set of information relating to historical data (mainly yield, average and volatility) used to determine the mark-to-market"* (i.e., essentially, the documentation of the historical and methodological parameters underlying the pricing).

## *The principle of proportionality and the relevance of pre-contractual information*

Of particular practical interest is the Court's implicit introduction of a sort of **proportionality criterion**: the **degree of detail** required in disclosing the risk of the contract depends on **the complexity of the transaction in question**.

Specifically:

- (i) On the one hand, the Court considers that for so-called "plain vanilla" IRS contracts for hedging purposes <sup>(3)</sup>, whose fair value can be determined using the *discounted cash flow method* <sup>(4)</sup>, **it is not essential to include detailed information in the contract text**, provided that the calculation criteria can be inferred from the structure of the transaction;
- (ii) On the other hand, for **complex derivatives**, **the level of disclosure should be more detailed**, although even in such cases the Court warns against excessive detail, which would be *"hypertrophic and ultimately counterproductive"* <sup>(5)</sup>.

The Court thereby seems to suggest a **possible distinction between "speculative" IRS contracts and "hedging" IRS contracts** with respect to the analytical nature and degree of detail required in explaining the risk involved in the contract: when the transaction is not particularly complex (such as "hedging" IRS), it is not necessary for the mark-to-market and its calculation formula to be set out in a highly analytical manner. Their specific

<sup>(2)</sup> As clarified by the Court in decision no. 2358 of 4 February 2026, namely: *"With regard to the requirement of certainty/determinability of the subject matter [...] it disregards the rationality of the risk and must be commensurate with the objective structure of the contract, in relation to the mutual obligations assumed by the contracting parties: **the invalidity of an IRS contract due to the indeterminacy of the subject matter can only arise when one or more elements necessary for identifying the content of the mutual performances are missing, but not when (other) elements aimed at allowing the parties a more accurate understanding of the risk assumed are missing**. In other words, if the IRS contract contains an indication of the essential elements [...] (notional amount, dates, interest rate), the subject matter of the contract is therefore determined or determinable [...]"*.

<sup>(3)</sup> Therefore, in the words of the ruling: *"a derivative that provides for the pure and simple exchange of cash flows at a fixed rate and a variable rate respectively"* (see, decision no. 2262, of 3 February 2026).

<sup>(4)</sup> This is a particularly widespread methodology that is accessible to market operators.

<sup>(5)</sup> To quote a passage from decision no. 2262 of 3 February 2026: *"In other words, since **what is important is the verification of merit**, it must be considered that, for this purpose, **it is sufficient to indicate those elements that are indispensable for the purpose**, without the need to specify a series of parameters that are so complex and detailed as to be excessive and ultimately counterproductive [...]"*.

determination may, in principle, be inferred from the *"architecture of the actual transaction"*.

Finally, decision no. 2358/2026 provides for an additional element that amplifies its potential practical scope: the information necessary to understand the risk of the contract **does not necessarily have to be included in the text of the contract**. In doing so, the Supreme Court acknowledges that awareness of the risk may also result from the pre-contractual information provided by the intermediary or from the public availability of the market data used to calculate the mark-to-market value. This clarification significantly enhances the legal relevance of the negotiation phase and its documentary record. The analytical focus thus shifts from a purely textual examination of the contract to a broader assessment of the investor's actual knowledge and informational context at the time of execution.

## *What are the consequences for operators?*

Should the interpretative approach articulated in these two decisions consolidate in future case law, the practical implications could be substantial.

In **pending litigation**, the rulings appear to furnish intermediaries with robust defensive arguments, particularly where they were to be able to demonstrate that the investor was adequately informed through pre-contractual disclosure or through access to publicly available data.

More broadly, the Court's reasoning conveys a clear directive to lower courts: judicial scrutiny should prioritize the **substantive economic reality of the transaction** over a merely formalistic examination of the contractual wording

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