

Comparative Private Law

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Monday, October 27, 2014

The concept of “contract”

A contract is a “*convention par laquelle les deux parties réciproquement, ou seulement l’une des deux, promettent et s’engagent envers l’autre à lui donner quelque chose, ou à faire ou à ne pas faire quelque chose*” (Pothier, *Traité des obligations*, 1761).

An agreement by which two parties, or only one, promise and undertake to give something to the other, or to do or not to do something.

Art. 1101 Code Civil

A contract is an agreement by which one or several persons bind themselves, towards one or several other to transfer, to do or not to do something.



Art. 1321 Civil Code (CC) - Definition

A contract is the agreement between two or more parties to constitute, regulate or extinguish a legal relationship having economic content.



Any agreement between two or more parties to constitute ... **is** a contract.

⇒ *Is marriage a contract?*

Under **Italian law** a **gift** is also a contract



Under **Anglo-American Law** a contract must include **consideration** (a payment, financial or otherwise)

Some contracts do not depend upon exchange
(**enforceable** unilateral gratuitous promise)

Art. 1322 CC - *Contractual autonomy*

Parties are free to **determine the content** of the contract within the limits imposed by law...

Parties are also free to make contracts that are **not of the types particularly** regulated, provided they are directed to the realization of interests deserving of protection according to the legal order.

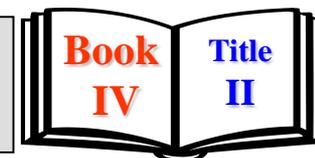
Everyone is the best judge of his own interests

⇒ *What is the concept underlying the concept of contract?*

Art. 1323 CC - *Laws of contract*

All contracts are subject to **general regulations of contracts** even if they are not of the **type** specifically provided for by law.

Contracts in general



Example: Assuming that – before Parliament passed any statutory provision ruling the **leasing** – a dispute arose with reference to the form requirements applicable to a proxy, or to one of the parties to the **leasing** challenging the validity of the contract due to alleged duress, or seeking its dissolution following the non-fulfilment by the other party ... **Book IV, Title II** applies. ⇒ Similarly, with reference to **factoring, merchandising ...**

Art. 1107, paragraph 1, *Code Civil*

Contracts, whether they have a specific denomination or not, are subject to general rules, which are the subject matter of this Title.



Art. 1324 CC - *Regulations applicable to one-sided actions*

Unless otherwise provided for by law, contract regulations are observed, insofar as they are compatible, for one-sided actions between living persons having an economic content.



In Germany:

Rechtsgeschäft (Legal transaction) ⇒ A declaration of will is fundamental

(will, marriage, recognition of illegitimate child, power of attorney, promise to the public ... etc.)



§§ 104 ff BGB «Legal transaction»

In France:

Contracts and conventional obligations in general (Art. 1101 – 1369-11 *Code civil*)

In Italy:

The concept of contract (two-sided declaration of will, having economic content)



Law of contract is applicable to one-sided actions ... having economic content



Contracts in general

“Dei contratti in generale”

In Common Law (England + USA):

Contracts for mutual counterperformance



In the Uniform Commercial Code: **contract = sale**



Contracts for value/for mutual performance



Gratuitous contracts

Contract



**Contrat
Contratto
Vertrag**

**Some contracts do not depend upon exchange
(enforceable unilateral gratuitous promise)**

→ **When** does a contractual obligation arise?

Consensual contracts



Real contracts
gift, *gratuitous* loan, etc.

The contractual obligation arises, as a rule, at the moment of the **agreement**



→ **What** effects does a contract produce?

Contracts transferring ownership or property interests



Contracts that only originate obligations

Requirements of a contract

Art. 1108 Code civil 

Four requisites are essential for the validity of an agreement:

- the consent of the party who binds himself;
- his capacity to contract;
- a definite object which forms the subject matter of the undertaking;
- a lawful cause in the obligation.

Art. 1325 CC - Requirements 

The requirements for a contract are:

- 1.) agreement between parties (**accordo**);
- 2.) **causa**; ⇒ **socio-economic function**
- 3.) subject matter (**oggetto**);
- 4.) form (**forma**), when prescribed by law, under penalty of nullity.

Agreement

Offer is sent on **25.2**

Offer reaches the other party on **28.2**

Acceptance is sent on **2.3**

~~Offer is withdrawn on **3.3** *~~

~~Withdrawal of offer reaches offeree on **4.3** ✧ ✧~~

Acceptance received on **5.3**

~~Withdrawal of offer reaches offeree on **6.3** ✧~~

~~Offer is withdrawn on **7.3** **~~

The **offeror**, arriving home, **receives notice** of the acceptance on **8.3**

Mail-box rule (*Common law*)



Principle of reception (*Germany*)



Principle of cognition (*Italy*)



⇒ *Is there a contract?*

Art. 1326, paragraph 1, CC - Entering into the contract

The contract is entered into at the moment when the offeror receives notice of acceptance by the other party.

Principle of cognition

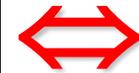
Restrictive interpretation

Art. 1335 CC - *Presumption of notice*

The offer, the acceptance and his revocation ... are considered to be known by the receiver at the moment when they reach the receiver's address, unless the receiver proves his impossibility of his knowledge through no fault of his own.

Principle of **cognition** \cong principle of **reception**

According to English law acceptance takes place when the **letter of acceptance** is **posted** to the **offeree** (*Adams v. Lindsell* - **1818**).



The **offeree** should not be prejudiced once he has dispatched his acceptance and he should be able to **rely** on the efficacy of his acceptance.

The rule is based:

Posting



Delivery

The postal rule is subject to some limitations:

1. It must have been **reasonable** for the **offeree** to use the post (it is reasonable to use the post where the parties live at a distance from each other).
2. The **offeror** can avoid the operation of the rule by stating that the acceptance **will only be effective when it actually reaches him**.
3. The rule has not been adopted in many other cases where the parties are **not** dealing face to face: it is confined to **non-instantaneous forms of communication**; for instance, it is **not** applied to **telexes** and **e-mails (digital signature)**.

An offer can be **withdrawn** by the **offeror** at any time before it has been accepted.



To be effective the **withdrawal** must be drawn to the attention of the **offeree** and, for this purpose, the **postal rule** – **obviously** - does **not apply**, so that the **revocation only takes effect** when it actually reaches the other party.

Knowledge by the **offeree** of the **withdrawal of the offer**



Posting of the **acceptance** by the **offeree**



Art. 1328, § 1, CC - Revocation of offer and of acceptance

The offer can be revoked up until the time when the contract is entered into.



Art. 1328, § 1, CC - Revocation of offer and of acceptance

The acceptance can be revoked up until the time when the **offeror** has knowledge of the acceptance.

Art. 1329 CC - Irrevocable offer

If the offering party undertakes to keep the offer fixed for a certain time, revocation has no effect.

Advantage of the English solution:

Preventing speculation at the **offeree's** and/or at the **offeror's** expense

The **offeree** should not be prejudiced once he has dispatched his acceptance and he should be able to **rely** on the efficacy of his acceptance.

Advantage of the Italian solution:

The **offeror** is **not** bound ... without knowing to be bound!

⇒ *What happens if the **offeree** posts his acceptance and then sends a rejection by a quicker method so that the rejection reaches the **offeror** before the acceptance?*

A logical application of the general rule leads to the result that the contract was entered into when the letter of acceptance was **posted** and so the subsequent communication is not a **revocation** of the offer but a **breach of contract**, which may be accepted or rejected by the **offeror**.



To hold that the contract was not concluded when the **letter of acceptance** was **posted** allows the **offeree to speculate at the offeror's expense** by sending a revocation by a faster means where the contract turns out to be a bad one for him.

Art. 1328, § 1, CC - *Revocation of offer and of acceptance*

The offer can be revoked up until the time when the contract is entered into.



⇒ Does the consent of a contracting party have to be expressed **explicitly**?

Example: *Bill:* “I have to go to the copy shop to get the book Principles of Private Law.”

Paul: “You can have mine for € 5, if you like. I don’t need it.”

Bill: “Great, then I won’t need to go to the copy shop.”

⇒ Has the contract been entered into?

Acceptance can be made **by words** or **by conduct**.



Unless the law states otherwise (eg: in the case of guarantee [**fideiussione**]), **consent** (or, more broadly, a declaration of will) is valid even though **tacit**.



⇒ Is it necessary to have agreement on **all** points of the contract?

The “**mirror image**” rule of contractual formation is applied.

According to this rule, the court must be able to find in the documents which passed between the parties a clear and unequivocal offer which is matched or “**mirrored**” by an equally clear and unequivocal acceptance.



A purported acceptance which does not accept all the terms of the original offer is **not** in fact a **true acceptance** at all but is a **counter-offer** which “kills-off” the original offer and amounts to a **new offer** which can in turn be accepted by the other party.

Art. 1326, paragraph 5, CC - Entering into the contract

An acceptance which does not match all the terms of the offer amounts to a **new offer**.



Principles of European Contract Law (PECL- Lando Commission)



Article 2:101: *Conditions for the Conclusion of a Contract*

- (1) A contract is concluded if:
- (a) the parties intend to be legally bound, and
 - (b) they reach a **sufficient agreement** without any further requirement.

Article 2:103: **Sufficient Agreement**

- (1) There is sufficient agreement if the terms:
- (a) have been sufficiently defined by the parties so that the contract can be enforced, or
 - (b) can be determined under these Principles.

Art. 2 Swiss Code of Obligations

Where the parties have agreed on all the **essential terms**, it is presumed that the contract will be binding notwithstanding any reservation on **secondary terms**.

In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction.



⇒ *What happens if a contracting party prescribes a **specific method of performance**?*

When the **offeror** prescribes a **specific method of acceptance**, the general rule is that the **offeror** is **not** bound unless the terms of his offer are complied with.



Art. 1326, paragraph 4, CC – *Formation of contract*

When the **offeror** requires a specific form of acceptance, the acceptance is ineffective if given in a different form.

