

INTRODUCTION TO ITALIAN CONTRACT LAW

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December 1st, 2015

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The sources of Italian Law

Art. 1 Preliminary provisions to the ICC (1942)

- 1) Laws (ordinary law)
- 2) *domestic* regulations (as opposed to European Union-regulations)
- 3) Customs

★ **Constitution of the Italian Republic (1948)**

Italian Civil Code (1942)

- Book I: Persons and the Family
- Book II: Succession
- Book III: Property rights
- Book IV: Obligations
- Book V: Labor
- Book VI: Protection of rights

The place, sources
and scope of contract

- **Civil Code:**

Arts. 1321-1469: general rules;

Arts. 1469-1976: specific contracts.

- **Consumer code** («Codice del Consumo» –
Legislative Decree, 6 September 2005, no. 206)

- **Specific legislation**

Definition of Contract

- **Art. 1321 ICC:** “A contract is the **agreement** of two or more parties to establish, regulate or extinguish a **patrimonial legal relationship** among themselves”
- A contract is an agreement defined as a “**meeting of wills**”

Legal relationships vs Non-legal relationships

The Pill Case

(Bundesgerichtshof, 1986)

- An 18-years-old woman **agreed with** her boyfriend that she would use the pill, but stopped taking it without his “consent” and gave birth to a child.
- Did the Court allow the father to claim for **breach of contract** or to be relieved of the duty to pay alimony for the child?

- **Art. II - 4:101 DCFR:** “A contract is concluded, without any further requirement, if the parties:
 - a) **intend to enter into a binding legal relationship** or bring about some other legal effect; and
 - b) reach a **sufficient** agreement.
- **Art. II - 1:101 DCFR:** (1) “A contract is an agreement which is intended to give rise to a **binding legal relationship** or to have some other **legal effect**. It is a bilateral or multilateral juridical act”.

Legal vs Non-Legal relationships

- In the “Pill Case” the German Supreme Court did not consider her promise legally bound because of a **lack of intention**.
- Policy argument: there would be a violation of one’s personal freedom if one could make binding contracts about having a child or not.

- **Contractual autonomy (Art. 1322 ICC):** “the parties can freely determine the contents of the contract within the limits imposed by law”
- **The binding force of contract (Art. 1372 ICC):** “a contract has the force of law between the parties”
- **Freedom to contract**
- **Freedom of contract and contents of contracts (Art. 1322, sect. 2):** “The parties can also make contracts that are not of the types that are particularly regulated, provided that they are directed to the realization of interests worthy of protection according to the legal order”.

Requirements for the
conclusion of a contract

- What are the **requisites** of contract (**1325 ICC**)?
 - agreement of the parties
 - *causa*
 - object/subject matter
 - form, when prescribed by law under penalty of nullity
- The *absence, unlawfulness or defectiveness* of any of these elements render a contract either **void** or **voidable**.

The formation of contracts

When is a contract concluded?

- **Art. 1326 ICC:** (i) A contract is formed at the moment when he who made the **offer** has knowledge of the **acceptance** of the other party. (v) An acceptance that does not conform to the offer is equivalent to a new offer.
- **Art. 1335 ICC:** An offer, acceptance, their revocation and any other declaration directed to a given person, **are deemed to be known at the moment they reach the address of the person** to whom they are directed, unless he proves that, without his fault, it was impossible for him to have notice of them.
- Under **English Law**, on the contrary, the contract is formed as soon as the acceptance is mailed by the offeree (**mail-box rule**).

Good faith and pre-
contractual liability

- **Art. 1337 ICC:** The parties, in the conduct of **negotiations and the formation** of the contract, shall conduct themselves according to **good faith**.
- **Art. 1338 ICC:** A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter in relying, without fault, on the validity of the contract.

Termination of contract

- **Art. 1372 ICC** (Effect of contract) (1) A contract has the force of law between the parties. **It cannot be dissolved except by mutual consent or for a cause permitted by law.** (2) A contract does not produce effects with respect to third parties except in cases provided by law.

Breach /
non-performance

- **Art. 1453 ICC** (Dissolution for Non-Performance)
(1) In contracts providing for mutual counterperformance, when one of the parties fails to perform his obligations, the other party can choose to demand either performance or dissolution of the contract, saving, in any case, compensation for damages.
- **Art. 1455 ICC** (Importance of non-performance). A contract cannot be dissolved if the non-performance by one of the parties **is of slight importance** with respect to the interest of the other party.

- A minor failure to carry out “exact” performance, i.e. a non-performance of minor importance, exposes the party in breach to liability for damages but will not enable the innocent party to seek dissolution of the contract for non-performance.
- Only where failure to render “exact” performance exceeds the threshold of “*slight importance*” (Art. 1455 CC) will the innocent party be entitled to file an action for dissolution of contract for non-performance.

Contractual liability

- **Art. 1218 ICC** (Liability of debtor): The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.

Penalty clause

Art. 1382 ICC (1) A clause by which it is agreed that in case of non-performance or delay of performance one of the contracting parties is liable for a specified penalty, has the effect of **limiting the compensation to the promised penalty**, unless compensation was agreed on for additional damages. (2) The penalty is due regardless of proof of damage.

Cass. 28 July 1997, n.

7061

Ridiculously low penalty

- Damages awarded by the penalty clause = Euro 55,00
- Damages suffered by the victim of the non-performance = Euro 170.000,00

Cass. 28 July 1997, n. 7061

- The ridiculously low penalty clause has been interpreted by the judge as an exoneration of liability clause.
- There is an elusive intent contrary to the prohibition in Art. 1229 ICC (exoneration of liability clauses).

- **Art. 1229 ICC** (Exoneration of liability clauses) Any agreement which, in advance, **excludes or limits the liability of the debtor for fraud or gross negligence is void.**
- Conclusion: it is for the judge to determine the legal qualification of the contractual provision.