

LIUC eBook

# Lectures on Italian Private Law

Alessio Reali



LIUC Università  
Cattaneo







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LIUC Università Cattaneo

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C.so Matteotti, 22 - 21053 Castellanza (VA)  
Data di pubblicazione: Novembre 2021  
ISBN 978-88-908806-9-8

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## **Foreword**

This book is a collection of lectures on Italian private law taught to university students attending first academic year in English.

Accordingly, even if it is going to deal with technical subject matters, the language will be sometimes colloquial, like the one used in class, so to try and catch the attention of the reader while moving her through the various legal instruments under analysis, their provisions, and their explanatory cases; the last two ones quite often employed herein too.

Moreover, as the lectures are for both Italian students attending university courses in English in general and Erasmus/foreign students attending university courses in Italy, all above-mentioned provisions will be reported in Italian and English language, even to try and allow readers to understand the technical Italian private-law concept of the case in a more prompt and immediate way.

Then, as private laws are also currently quite different from State to State, and a major distinction arises, in terms of private comparative law, between so-called civil law systems (like the Italian one, under the circumstances) and so-called common law systems (like the English one, above all), the label used to define some instruments shall consider even said distinction. Therefore, all along the book, the wording of a few instruments will be maintained in Italian language, whenever the author retains that a translation can mystify the actual legal meaning behind the legal instrument of the case; whereas, when it is possible, it will be even translated in compliance with the reasoning of the English private law – marked by its traditional distinction between (internal) common law and equity – so to let an English (or anyway a common-law) reader to catch up the exact meaning of the legal concept of the case, even from her own perspective too. Therefore, in pursuit of this policy, footnotes will also try and allow to fulfil this purpose, if it is the case.

Obviously, as law is also about interpretation, the approach will necessarily follow the sentiment of the author, jointly with his own experience, and hence limitations, in dealing with foreign private laws too. Any possible suggestion offered by third parties shall be appreciated by the author, so to improve language and scheme of the handbook, in view of possible new editions, duly updated even in compliance with continuous evolution of laws in general.



## 1 Lecture 1: on law and legal system.

SUMMARY: 1.1 Brief introduction to the concept of law. – 1.2 On Italian public and private law. – 1.3 The concepts of right, *ius*, organized community, legal system and State. – 1.4 On orders, *norme giuridiche*, positive and natural law, and *precepto* and *facti species* of a *norma giuridica*.

### 1.1 Brief introduction to the concept of law.

What is law? What does law stand for?

Law provides order.

How? Throughout rules that a specific class of people (to be identified from time to time, on a practical basis) decides to adopt (putting persons in charge of drafting them) so to organize their coexistence and their activities as individuals.

Please note that even in war we do need law.

Laws of war were and still are (both at personal and State level) a set of rules which governs behaviour of parties during conflicts. They consist of rules that limit and run so-called “means and practices of war”, *id est* weapons allowed and procedures for their use. Warriors who break the laws of war lose every kind of protection afforded by them (see e.g., the case of the atomic bomb).

Now, please remember that law in general and private law in particular are practical sciences.

The subject matter of this course is private law; but what is private law?

### 1.2 On Italian public and private law.

The Italian legal system is divided into two major areas of law: **public law** and **private law**.

**Public law deals with:**

a) first and foremost, **the organization of the Italian State, its territorial public bodies** (namely, *Regioni*, *Province* and *Comuni*) and other public bodies.

All of them are legal entities whose **purpose is to fulfil collective interests**. They have a **power of supremacy**; they are subject to permanent controls and to the direction of the State or other public bodies;

b) secondly,

– **the relationships between these entities, when they do concern the exercise of their public functions**; and

– **the relationships between public entities and private persons, when such relationships disclose the supremacy of the public entity of the case over the private person of the case** (*exempli gratia*: the relationship between the tax authority and the tax-payer

of the case; the punitive claim that the State is allowed to perform against everyone who commits a crime; regulations on building activities on land).

Therefore:

- constitutional law;
- administrative law;
- tax law;
- criminal law;
- criminal procedural law;

are all public laws.

**On the contrary, private law deals with the regulation of mutual relationships between private individuals, on a personal basis, on a familiar basis and on a patrimonial basis** (it deals *exempli gratia* with obligations, contracts, liability for torts, ownership and other rights over things, commercial relationships, succession on personal legal positions).

**But private law also governs the organization and activity of the so-called *persone giuridiche*** (legal persons, such as companies or corporations, associations, foundations, and other private-law entities).

Now, please note that relationships between State/public entities and private persons are not always relationships which involve legal supremacy.

Outcome: the rules of private law are to be applied when a relationship of supremacy is not involved.

An example: a public entity that creates an unjustified harm to a private individual, through the activity of one of its legal representatives, outside the exercise of its powers, must pay damages pursuant to article 2043 ICC and ff. ones.

Moreover, public entities sometimes move themselves inside private law.

One example above all: the acquisition of a piece of land performed by a public entity can take place:

a) by an act of expropriation, if public interests are involved (see article 42, paragraph 2, of the Italian Constitution), against payment of a so-called *indennizzo* (an amount of money to be paid for compensation); or

b) through a sale-purchase contract (a contract which is governed by the Civil Code).

The same rule applies if the contract is completed between two public entities.

Again, the exercise of a productive activity by the State or a public entity can be executed personally by the public entity of the case, or by a company whose shareholder is the public authority itself. This company is still governed by the rules of private law.

Accordingly, the distinction between application of public law rather than private law:

- does not depend, per se, on the quality of the persons involved in the legal relationship of the case or the interests under way; but,
- it depends on the type of legal relationship that is actually involved between the parties of the case, meaning, based on equality rather than supremacy.

Please also note that:

- many rules of public law tend to coordinate public and private interests and to mitigate them when they are in conflict. So, individuals can sometimes perform claims before the administrative courts (the courts in charge of dealing with public law); and
- on the contrary, certain private-law activities (such as, for example, those performed by major companies) acquire such dimensions that they do necessarily involve public interests, and the public entities – as mentioned – can play productive economic activities similar to those undertaken by individuals.

All the above has contributed to a slight modification of the core characteristics of private law.

In the nineteenth century, private law was the mere statute of private individuals. Instead, today private law can be said to be, more properly, a system of law that adopts certain technical tools and particular principles (such as equality; autonomy; competition; prohibition of self-protection; *et cetera*).

### 1.3 The concepts of right, *ius*, organized community, legal system and State.

Please note that, when we talk about law, we can talk about it moving from an objective point of view or from a subjective point of view.

These different points of view involve the difference, in English language, between the term law and the term right (both labelled, in Italian language, under the word *diritto*).

#### **The etymology of the word *diritto*.**

First and foremost, please remember that each science has its own language, and therefore legal sciences have their own languages too.

**Ius** is the Latin word that identifies, more than others, the concept of *diritto*, and most probably it comes from the word **iussum** (from *iubeo* = to command).

**Iussum** means *what has been ordered/commanded*. Hence the words *just*, *justice*, *jurisprudence*, *jurist*, *jurisdiction*, *juridical*.

In the neo-Latin language, the concept of law was also expressed by the word **directum**. See nowadays, in French: *droit*; in Italian: *diritto*; in Spanish: *derecho*; in German: *Recht*.

Having said that, there is a Latin motto which explains the role of law:

**Ubi societas, ibi ius** = Where there is a society, there is law.

Question: does the concept of society necessarily entail the involvement of human beings? More precisely, does the nature provides for other societies besides the human one?

Answer: see the case of apes and monkeys above all.

Moving on, as far as human beings are concerned, men/women are social beings. They seek help and cooperation from their fellow creatures.

More generally, a human being tends to:

- search for cooperation (which helps the achievement of the desired results and speed up the satisfaction of individual needs);
- create organizations, namely, structured organizations, on a collective form.

The outcome of these activities is the creation of a so-called **organized community** (or organized group).

Please note that an example of organized micro-community in the Italian private law is the **association** (included amongst the legal entities in Book I of the Italian Civil Code, labelled *Delle persone e della famiglia*). Please note also that associations are also mentioned in the Italian Constitution (see article 18, on the freedom of association).

The concept of organized community, to be a relevant one, on a legal basis, it must involve:

- 1) a non-casual coordination between its members. More precisely, a coordination governed by rules of conduct (meant to manage the behaviour of each member of the group);
- 2) rules that they must be established and applied in a structured way (not on a temporary basis), throughout persons appointed to establish them; and
- 3) rules of conduct that they must also be actually observed (here we talk about a **principle of effectiveness**, even if this does not mean that all rules have to find an identical and a constant application, as this principle is a so-called closing clause of the system).

A system of rules of this type creates, as a whole, a so-called **legal system**.

Function of legal systems: to create order inside the social reality of the case.

The concept of legal system is therefore related to the concept of law to be seen from an *objective* point of view.

Please note that legal systems are always subject to evolution.

Please also note that the above-mentioned organized communities can be of different types.

Examples: political parties, cultural organizations, associations, foundations, companies/partnerships, unions, churches, *et cetera*.

The **political society** is the paramount organized community.

The function of the political society: not to satisfy personal interests of its members, but to create the necessary conditions for the achievement of those interests, in an orderly and peaceful manner.

Basic objectives of a political society:

- to avoid the use of force among its members (no *vim vi repellere licet*), also through threat of fines;
- to strengthen the defence of the community against external dangers (of various kinds: military, environmental, sanitary ones, *et cetera*);
- to promote development and welfare of the community.

These are institutional tasks of a political society, but there are also other possible tasks. Namely, there has been an expansion of public duties, in modern societies. Since the industrial revolution, there has been a greater access to goods available for consumption, and therefore there has been:

- more culture available for the masses;
- a greater demand for a guarantee to a full development of the individuals (see article 3 of the Italian Constitution, on the right to equality), and to a free and dignified existence for everyone (see article 36 of the Italian Constitution, on the right to work);
- a request for stability of work, a decent affordable housing, a proper education, an actual health-protection, a greater care for the environment, *et cetera*.

Briefly, economic development means more action by the public authorities aimed at regulating all the economic initiatives of the case (see article 42, paragraph 2, of the Italian Constitution, on ownership).

The shapes of the political societies have been quite different, during history (examples: the nomadic tribes, the imperial polis, the feudal system, the signorias, *et cetera*, and then, **the State**).

A State is a community of individuals spread on a territory that is supposed to be sovereign on its soil (*superiorem non recognoscit*) and it is organized under a specific legal system.

The concept of State, as we currently know it, was essentially created under the Peace of Westphalia (1648).

Please note that nowadays there are also supranational political societies. Please see, above all, the European Union.

As for our legal system, please see, as far as the creation of supranational political societies is concerned, articles 10 and 11 of the Italian Constitution.

### **Article 10, paragraph 1, Italian Constitution:**

*“[1]. L’ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute”.*

“[I]. The Italian legal system complies with generally-recognized provisions of international law”.

#### **Article 11 Italian Constitution:**

“[I]. *L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di responsabilità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo*”.

“[I]. Italy repudiates war as an instrument of offense to freedom of other peoples and as a means of resolution of international disputes; it allows, on equal terms with other States, to the limitations of liability due to set up an order that ensures peace and justice amongst Nations; it promotes and favours international organizations aimed at this purpose”.

#### **1.4 On orders, *norme giuridiche*, positive and natural law, and *precetto* and *facti species* of a *norma giuridica*.**

##### **The orders.**

An order is an act of command.

What can be the subject matter of an order? It can be:

- a general rule (an example: the legal rules or so-called *norme giuridiche*);
- the regulation of a single (legal) fact (an example: the judgment of a judge).

##### **On the rules of law/*norme giuridiche*.**

A legal rule or rule of law (or *norma giuridica*) is a general rule, which is relevant in the field of law, of an organized legal community.

The fundamental characteristics of legal rules: they are authoritative. They bind all members of the community, because they found their source in an act or a regulatory phenomenon suitable to be qualified as a source of law.

Please note that, when we talk about rules, we must distinguish between legal rules and moral rules.

Please also note that there are rules which are both legal rules and moral rules, in our legal system. See article 147 of the Italian Civil Code (herein below, the “*ICC*”).

## ARTICOLO 147 CC

### Doveri verso i figli (nel matrimonio)

“[I]. Il matrimonio impone ad ambedue i coniugi l’obbligo di mantenere, istruire, educare e assistere moralmente i figli, nel rispetto delle loro capacità, inclinazioni naturali e aspirazioni, secondo quanto previsto dall’articolo 315-bis”.

## ARTICLE 147 ICC

### Duties towards children (in marriage)

“[I]. Marriage imposes on both spouses the obligation to maintain, instruct, educate and **morally** assist children, in accordance with their abilities, natural inclinations and aspirations, under what is provided for in article 315-bis”.

See also article 575 of the Italian Criminal Code: “It is forbidden to cause the death of a man”.

Moral rules are **absolute** and **autonomous**: they find their validity in their content; human beings share their values and comply with them.

Vice versa, legal rules are **heteronomous**: they find their binding force in the fact that they are acts endowed with authority and issued by some members of the organization of a certain community (which constitute a **source of law**).

Rules of law are also told to be relative ones (because, if we think of them from a the legal-system point of view, a rule of law it’s a rule of law in one legal system but it’s not necessarily a rule of law in another legal system).

### **On text and *precetto* of the rules of law.**

We when talk about rules of law in Italian law, we also speak about the concept of ***precetto*** of a every rule of law. It goes along with the concept of **text** of the same legal rules.

Anyway, please note that the text of a rule of law must be distinguished from its ***precetto***. The latter is its meaning, that comes out from the interpretation of the text of the rule of law of the case.

Thus, the two terms would coincide one with the other, if a single interpretation of the rules of law was available in the legal system of the case. But this is not the case.

The activity of interpretation (of legal rules too) is always a personal one, and therefore, as far as the rules of law are concerned, it has to be governed by the law itself (see above all articles 12 and 14 of the so-called “*Disposizioni sulla legge in generale*”, detailed herein below).

### **On the term “law”.**

We have talked about law. At this point we must also briefly distinguish between the two concepts of **rule of law** and **law** per se.

In fact, the word law is used to define:

- in a broad way, a legal act, written and equipped with force of law (under article 134 of the Italian Constitution and article 2 of *Disposizioni sulla legge in generale*) issued by the competent bodies (under article 70 and ff. ones of the Italian Constitution) which contains legal rules;
- strictly speaking, a specific legal act, hierarchically superior to regulations, contracts, *et cetera*.

### **On positive law and natural law.**

When we talk about law we must also distinguish between **positive law** and **natural law**.

Positive law comes from the Latin statement *ius in civitate positum*. Ergo, **positive law is the law in force**.

**Natural law** is the source of all various positive laws; it is a criterion for the evaluation of a legal systems; it is a set of eternal and universal principles; a law sometimes linked to religious concepts, or otherwise based on human reason or the nature of things (*de rerum natura*).

In brief, it represents the human aspiration to link a certain positive law to an objective purpose in order to delete the risk of arbitrariness inherent in the possibility of elevating to the rank of legal rule any content approved by those who are in charge, under the circumstances (*quod principi placuit legis habet vigorem*).

It represents a sort of warning for every legislator.

### **On the characteristics of the rules of law and the concept of *facti species*.**

Legal rules/rules of law are **general** and **abstract**.

Again, when we talk about law, and more specifically about the rules of law, we also talk about **norms** (*norme*) or **provisions** (*disposizioni*).

A **norm/provision** is a prescriptive statement which is displayed throughout the formulation of a **hypothesis of fact** (*facti species*) customarily with a specific **legal consequence** attached to it. An example:

## ARTICOLO 1453 CC

### Risolubilità del contratto per inadempimento

“[I]. Nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno.

[II]. La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione.

[III]. Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione”.

## ARTICLE 1453 ICC

### Termination of contract due to non-performance

“[I]. In case of contracts providing for mutual counter-performance, when one of the contracting parties does not perform her own obligations, the other party may at her choice demand (specific) performance or termination of the contract of the case, without prejudice, in any case, to payment of damages.

[II]. Termination can also be demanded when a claim has been raised to obtain performance, but performance can no longer be demanded when termination has been requested.

[III]. The breaching party can no longer perform her own obligations from the date of a claim for termination”.

Please note that **generality and abstractness are an expression**, from the objective-law point of view, of the general principle of equality.

The above-mentioned provision:

– **is equipped with a hypothetical structure** (it makes reference to a possible event and declares a legal consequence linked with it); and

– **it is meant to predict the future** (it has a general and abstract character adaptable to the specific circumstances of the case).

The purpose of the legal rules is to render judgments/decisions predictable.

**The *facti species*** = part of the norm that describes the event subject to regulation.

Here, there is a general distinction among:

a) a **simple *facti species***. See e.g., article 456 ICC.

## ARTICOLO 456 CC

### Apertura della successione

“[I]. La successione si apre al momento della morte, nel luogo dell’ultimo domicilio del defunto”.

## ARTICLE 456 ICC

### Opening of the succession

“[I]. Succession opens up at the time of death, in the place of the last domicile of the deceased”.

- b) a **complex facti species** (a sum up of two or more legal facts/acts). See *exempli gratia*:
- in order to sell the assets of a minor, the authorization of a court and the assistance of his/her parents acting as legal representative are both due;
  - for a marriage to be governed by the Italian civil code, the consent of both spouses and a declaration of the keeper of the civil-law registrar are both still due.

and

- c) a **progressive facti species**. *Exempli gratia*, a contract subject to a condition precedent, meaning a future and uncertain event upon the occurrence of which the legal effects of the contract of the case take place.

### On the remedies provided for by the law.

We saw that a legal rule is a **precetto** to which **remedies** are connected. Here there are some examples of remedies:

- incarceration and fine, available especially in criminal law (please note that there is a general fear for fines, and this fear involves a greater compliance with this kind of law);
- a direct coercive reaction (*exempli gratia*: if there is housebreaking, here comes intervention from the law enforcement);
- specific performance: used to achieve a certain result (such as foreclosure), or to delete an illegal situation (like the demolition of an abusive building), or in order to achieve a purpose equivalent to the one that the right of the case was meant to achieve (see article 2932 ICC).

## ARTICOLO 2932 CC

### Esecuzione specifica dell'obbligo di concludere un contratto

“[I]. *Se colui che è obbligato a concludere un contratto non adempie l'obbligazione, l'altra parte, qualora sia possibile e non sia escluso dal titolo, può ottenere una sentenza che produca gli effetti del contratto non concluso.*

[II]. *Se si tratta di contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata o la costituzione o il trasferimento di un altro diritto, la domanda non può essere accolta, se la parte che l'ha proposta non esegue la sua prestazione o non ne fa offerta nei modi di legge, a meno che la prestazione non sia ancora esigibile”.*

## ARTICLE 2932 ICC

### Specific performance of the obligation to complete a contract

“[I]. If the one who is obliged to complete a contract does not fulfil his own obligation, then the other party, if it is possible and is not excluded from the title, can obtain a judgment that produces the effects of the contract not completed.

[II]. *In case of contracts for transfer of ownership of a specific thing or establishment or transfer of another right, the claim cannot be granted, if the party who advanced it does not carry out her own performance or does not offer to do so in accordance with the formalities prescribed by the law, unless such performance cannot yet be demanded”.*

Please note, on the distinction between the remedies available in civil law and in criminal law, LM LoPucki, *The Death of Liability*, 106 (1996) *The Yale Law Journal* 1, p. 3:

*“Law is a system for controlling human behavior. In contemporary society, governments enforce law by essentially two mechanisms: incarceration and liability. These roughly correspond to the two spheres of the legal system: the criminal and the civil. In the criminal sphere, the wrongdoer is threatened with imprisonment; in the civil sphere, the wrongdoer is threatened with deprivation of wealth. Liability is crucial because it is one of only two principal means by which government enforce law”.*

Sometimes rules of law involve benefits subject to specified conditions. See *exempli gratia* art. 1322 ICC on so-called **contratti atipici** (atypical contracts): they are valid ones, only if they achieve interests worthy of protection according to the legal system. Otherwise, they are invalid.

**ARTICOLO 1322 CC**  
**Autonomia contrattuale**

*“[I]. Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge.*

*[II]. Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico”.*

**ARTICLE 1322 ICC**  
**Contractual autonomy**

*“[I]. The parties can freely determine the content of the contract within the limits imposed by the law.*

*[II]. The parties can also complete contracts that do not belong to the types having a particular discipline, as long as they are aimed at achieving interests worthy of protection according to the legal system”.*

Please note that not every provision implies a remedy or a sanction. See e.g., 315-bis, last paragraph, ICC, on respect due by children towards their parents.

**ARTICOLO 315-bis CC**  
**Diritti e doveri del figlio**

*“[I]. Il figlio ha diritto di essere mantenuto, educato, istruito e assistito moralmente dai genitori, nel rispetto delle sue capacità, delle sue inclinazioni naturali e delle sue aspirazioni.*

*[II]. Il figlio ha diritto di crescere in famiglia e di mantenere rapporti significativi con i parenti.*

*[III]. Il figlio minore che abbia compiuto gli anni dodici, e anche di età inferiore ove capace di discernimento, ha diritto di essere ascoltato in tutte le questioni e le procedure che lo riguardano.*

*[IV]. Il figlio deve rispettare i genitori e deve contribuire, in relazione alle proprie capacità, alle proprie sostanze e al proprio reddito, al mantenimento della famiglia finché convive con essa”.*

**ARTICLE 315-bis ICC**  
**Rights and duties of the child**

*“[I]. The child has the right to be supported, educated, instructed and morally assisted by the parents, in compliance with his own abilities, his natural inclinations and his aspirations.*

*[II]. The child has the right to grow up in the family and to maintain meaningful relationships with his relatives.*

*[III]. The minor child who has reached the age of twelve, and also younger, if capable of discernment, has the right to be heard in all matters and procedures that concern him.*

*[IV]. The child must respect his parents and must contribute, in relation to his own abilities, possessions and income, to the maintenance of the family as long as he lives with it”.*

However, these are still legal rules because they are part of the legal system.

Please note that the use of force is residual in a legal system: obedience is, in fact, the basic rule. Obedience to legal rules comes from:

- general acceptance of the rules themselves (because they are deemed to be useful);
- habit;
- moral suasion;
- need for authority.

Conclusion: a legal system cannot be understood as a complex of remedies or sanctions (this kind of vision would be too simplistic).



## 2 Lecture 2: sources of the Italian law, judicial activity, and interpretation of laws.

SUMMARY: 2.1 The sources of the Italian law. – 2.2 Introduction to the Italian Constitution. – 2.3 Introduction to the ordinary laws of the State. – 2.4 On regional laws. – 2.5 On regulations. – 2.6 On customs. – 2.7 On judicial activity and construction of Italian laws. – 2.8 The distinction between mandatory and dispositive rules of law.

### 2.1 The sources of the Italian law.

Sources of the Italian law are the following ones:

- 1) Constitution;
- 2) ordinary laws of the State;
- 3) regional laws;
- 4) regulations;
- 5) customs.

Then, there are the so-called *extra-ordinem* sources, like, above all, community law (please see the Treaty of the European Union), according to which EU directives and EU regulations (where the latter ones are directly applicable in the individual laws of the Member States) come into play.

This kind of law does involve limitation of the principle of State sovereignty over its territory (see above article 11 of the Italian Constitution).

Please note that in 1942 Italian Civil Code, the *Provisions on the law in general* or so-called *Preleggi* state, at article 1, a different list of the sources of law.

#### ARTICOLO 1 PRELEGGI

##### Indicazione delle fonti

“[I]. Sono fonti del diritto:

- 1) *le leggi*;
- 2) *i regolamenti*;
- 3) *le norme corporative*;
- 4) *gli usi*”.

#### ARTICLE 1 PRELEGGI

##### Indication of the sources

“[I]. They are sources of law:

- 1) *laws*;
- 2) *regulations*;

- 3) *corporate provisions*;
- 4) *customs*".

The difference from the actual sources of the Italian law currently in force and the ones mentioned in art. 1 *Preleggi* is due to the fact that we must take into account:

- 1) the corporate order abolition (performed by Italian d. Lgs. lt. 23/11/1944, n. 369);
- 2) the subsequent advent of the Constitution of the Italian Republic dated January, 1, 1948.

As per above, there is a hierarchical order amongst the above-mentioned sources of law.

The basic rules of the hierarchy are the following ones:

- every ordinary law must respect the Constitution;
- regional laws must be enacted within the limits of the fundamental principles established by the laws of the State (see article 117 of the Italian Constitution);
- regulations are valid when they are not against the law (namely, not being *contra legem*, under article 4 of the *Preleggi*);
- customs on subject matters governed by laws and regulations, are relevant when they are called in by laws or regulations (see article 8 of the *Preleggi*).

## **2.2 Introduction to the Italian Constitution.**

The Constitution is the fundamental law of the Italian legal system.

Its content/subject matter are:

- the fundamental principles of the legal system;
- the rules of organization of the State;
- the rights and duties of citizens and social groups;
- the citizens-State legal relationships;
- the relationships amongst citizens (see article 30, on the rights/duties of parents to their children; article 36, on the right to work; articles 18 and 19, on freedom of religion; articles 42 and 47, on ownership; *et cetera*).

Therefore, the constitution also contains the fundamental rules of private law.

## **2.3 Introduction to the ordinary laws of the State.**

They are invalid if they are against the Constitution. See the procedure for invalidation mentioned in article 134 of the Constitution.

### **ARTICOLO 134 COST**

“[I]. *La Corte costituzionale giudica:*

- *sulle controversie relative alla legittimità costituzionale delle leggi e degli atti, aventi forza di legge, dello Stato e delle Regioni;*
- *sui conflitti di attribuzione tra i poteri dello Stato e su quelli tra lo Stato e le Regioni, e tra le Regioni;*
- *sulle accuse promosse contro il Presidente della Repubblica a norma della Costituzione”.*

### **ARTICLE 134 IT CONST**

“[I]. The Constitutional Court judges:

- on disputes relating to the constitutional legitimacy of laws and acts, having the force of law, of the State and of the Regions;
- *on the conflicts of attribution among the powers of the State and those between State and Regions, and among Regions;*
- *on the accusations brought against the President of the Republic under the Constitution”.*

Please note that the ways to enact ordinary laws are subject matter of the constitutional laws.

### **ARTICOLO 2 PRELEGGI**

#### **Leggi**

“[I]. *La formazione delle leggi e l’emanazione degli atti del Governo aventi forza di legge sono disciplinate da leggi di carattere costituzionale”.*

### **ARTICLE 2 PRELEGGI**

#### **Laws**

“[I]. Formation of laws and enactment of acts of Government having force of law are run by laws of constitutional nature”.

Now, please note that for the purposes of private law, laws *stricto sensu*, converted law decrees, legislative decrees, and the Civil Code and so-called *leggi collegate* are all treated as equal ordinary laws.

## **On enactment and repeal of laws.**

### **ARTICOLO 15 PRELEGGI**

#### **Abrogazione delle leggi**

“[I]. *Le leggi non sono abrogate che da leggi posteriori per dichiarazione espressa del legislatore, o per incompatibilità tra le nuove disposizioni e le precedenti o perché la nuova legge regola l'intera materia già regolata dalla legge anteriore*”.

### **ARTICLE 15 PRELEGGI**

#### **Repeal of laws**

“[I]. Laws can only be repealed by later laws, by express declaration of the legislator, or by incompatibility between the new provisions and the previous ones, or because the new law governs the entire subject matter already governed in the previous law”.

Examples of cases of introduction and repeal of legal rules in the Civil Code: 1) the rules of law on contracts for consumers: first there were just articles 1341 and 1342 ICC; then articles 1469-*bis* ICC and ff. ones came into force; then articles 1469 ICC and ff. ones were repealed and the Consumer Code dated 2005 came into play; 2) the 1975 family-law reform; 3) the 2003 company-law reform.

Please also note the progressive autonomy of the special legislations. Nowadays the rules of certain areas of private law can be found outside the Civil Code. Examples: 1) the compulsory insurance-policy on civil-law liability for the circulation of vehicles; 2) the rules of law on divorce; 3) the financial law (see Legislative Decree n. 58/1998); 4) the banking law (see Legislative Decree n. 385/1993), *et cetera*.

## **2.4 On regional laws.**

Please see on the topic artt. 116 and 117 of the Italian Constitution.

Briefly, under article 116 of the Italian Constitution a distinction is drawn between the so-called special Regions (*Regioni a statuto speciale*) and the ordinary ones (*Regioni a statuto ordinario*).

### **ARTICOLO 116 COST**

“[I]. *Il Friuli-Venezia Giulia, la Sardegna, la Sicilia, il Trentino-Alto Adige/Südtirol e la Valle d'Aosta/Vallée d'Aoste dispongono di forme e condizioni particolari di autonomia, secondo i rispettivi statuti speciali adottati con legge costituzionale.*”

[II]. *La Regione Trentino-Alto Adige/Südtirol è costituita dalle Province autonome di Trento e di Bolzano.*

[III]. *Ulteriori forme e condizioni particolari di autonomia, concernenti le materie di cui al terzo comma dell'articolo 117 e le materie indicate dal secondo comma del medesimo articolo alle lettere l), limitatamente all'organizzazione della giustizia di pace, n) e s), possono essere attribuite ad altre Regioni, con legge dello Stato, su iniziativa della Regione interessata, sentiti gli enti locali, nel rispetto dei principi di cui all'articolo 119. La legge è approvata dalle Camere a maggioranza assoluta dei componenti, sulla base di intesa fra lo Stato e la Regione interessata”.*

### ARTICLE 116 IT CONST

“[I]. Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste are granted particular forms and conditions of autonomy, according to their special statutes adopted with constitutional law.

[II]. *Trentino-Alto Adige/Südtirol Region is made up of the autonomous provinces of Trento and Bolzano.*

[III]. Further forms and particular conditions of autonomy, concerning the matters referred to in the third paragraph of article 117 and the matters mentioned in the second paragraph of the same article in letters l), limited to the organization of justice of the peace, n) and s ), can be granted to other Regions, by state law, on the initiative of the Region concerned, after consulting the local authorities, in compliance with the principles referred to in article 119. The law is approved by the Chambers by an absolute majority of their members, on the basis of a mutual understanding between the State and the Region concerned”.

Then, under article 117 of the Italian Constitution (as amended in 2001) a distinction is drawn amongst: a) exclusive legislative power of the State; b) concurring power of State and Regions; and c) exclusive legislative power of each Region, to be determined by default rule.

### ARTICOLO 117 COST

“[I]. *La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall’ordinamento comunitario e dagli obblighi internazionali.*

[III]. *Lo Stato ha legislazione esclusiva nelle seguenti materie: a) politica estera e rapporti internazionali dello Stato; rapporti dello Stato con l’Unione europea; diritto di asilo e condizione giuridica dei cittadini di Stati non appartenenti all’Unione europea; b)*

*immigrazione; c) rapporti tra la Repubblica e le confessioni religiose; d) difesa e Forze armate; sicurezza dello Stato; armi, munizioni ed esplosivi; e) moneta, tutela del risparmio e mercati finanziari; tutela della concorrenza; sistema valutario; sistema tributario e contabile dello Stato; armonizzazione dei bilanci pubblici; perequazione delle risorse finanziarie; f) organi dello Stato e relative leggi elettorali; referendum statali; elezione del Parlamento europeo; g) ordinamento e organizzazione amministrativa dello Stato e degli enti pubblici nazionali; h) ordine pubblico e sicurezza, ad esclusione della polizia amministrativa locale; i) cittadinanza, stato civile e anagrafi; l) giurisdizione e norme processuali; ordinamento civile e penale; giustizia amministrativa; m) determinazione dei livelli essenziali delle prestazioni concernenti i diritti civili e sociali che devono essere garantiti su tutto il territorio nazionale; n) norme generali sull'istruzione; o) previdenza sociale; p) legislazione elettorale, organi di governo e funzioni fondamentali di Comuni, Province e Città metropolitane; q) dogane, protezione dei confini nazionali e profilassi internazionale; r) pesi, misure e determinazione del tempo; coordinamento informativo statistico e informatico dei dati dell'amministrazione statale, regionale e locale; opere dell'ingegno; s) tutela dell'ambiente, dell'ecosistema e dei beni culturali.*

*[III]. Sono materie di legislazione concorrente quelle relative a: rapporti internazionali e con l'Unione europea delle Regioni; commercio con l'estero; tutela e sicurezza del lavoro; istruzione, salva l'autonomia delle istituzioni scolastiche e con esclusione della istruzione e della formazione professionale; professioni; ricerca scientifica e tecnologica e sostegno all'innovazione per i settori produttivi; tutela della salute; alimentazione; ordinamento sportivo; protezione civile; governo del territorio; porti e aeroporti civili; grandi reti di trasporto e di navigazione; ordinamento della comunicazione; produzione, trasporto e distribuzione nazionale dell'energia; previdenza complementare e integrativa; coordinamento della finanza pubblica e del sistema tributario; valorizzazione dei beni culturali e ambientali e promozione e organizzazione di attività culturali; casse di risparmio, casse rurali, aziende di credito a carattere regionale; enti di credito fondiario e agrario a carattere regionale. Nelle materie di legislazione concorrente spetta alle Regioni la potestà legislativa, salvo che per la determinazione dei principi fondamentali, riservata alla legislazione dello Stato.*

*[IV]. Spetta alle Regioni la potestà legislativa in riferimento ad ogni materia non espressamente riservata alla legislazione dello Stato.*

*[V]. Le Regioni e le Province autonome di Trento e di Bolzano, nelle materie di loro competenza, partecipano alle decisioni dirette alla formazione degli atti normativi comunitari e provvedono all'attuazione e all'esecuzione degli accordi internazionali e degli atti dell'Unione*

europea, nel rispetto delle norme di procedura stabilite da legge dello Stato, che disciplina le modalità di esercizio del potere sostitutivo in caso di inadempienza.

[VI]. La potestà regolamentare spetta allo Stato nelle materie di legislazione esclusiva, salva delega alle Regioni. La potestà regolamentare spetta alle Regioni in ogni altra materia. I Comuni, le Province e le Città metropolitane hanno potestà regolamentare in ordine alla disciplina dell'organizzazione e dello svolgimento delle funzioni loro attribuite.

[VII]. Le leggi regionali rimuovono ogni ostacolo che impedisce la piena parità degli uomini e delle donne nella vita sociale, culturale ed economica e promuovono la parità di accesso tra donne e uomini alle cariche elettive.

[VIII]. La legge regionale ratifica le intese della Regione con altre Regioni per il migliore esercizio delle proprie funzioni, anche con individuazione di organi comuni.

[IX]. Nelle materie di sua competenza la Regione può concludere accordi con Stati e intese con enti territoriali interni ad altro Stato, nei casi e con le forme disciplinati da leggi dello Stato”.

#### ARTICLE 117 IT CONST

“[I]. Legislative power is exercised by State and Regions in compliance with the Constitution, as well as under the constraints deriving from the legal system of the European Union and other international obligations.

[II]. The State has exclusive legislation in the following subject matters: a) foreign policy and international relations of the State; relations of the State with the European Union; right of asylum and legal status of citizens of countries not belonging to the European Union; b) immigration; c) relations between the Republic and religious confessions; d) defence and armed forces; State security; weapons, ammunition and explosives; e) money, savings protection and financial markets; competition protection; currency system; tax and accounting system of the State; harmonization of public budgets; equalization of financial resources; f) State bodies and related electoral laws; State referendums; election of the European Parliament; g) system and administrative organization of the State and of national public bodies; h) public order and security, with the exception of the local administrative police; i) citizenship, marital status and registry offices; l) jurisdiction and procedural rules; civil and criminal law; administrative justice; m) determination of the essential levels of benefits concerning civil and social rights that must be guaranteed throughout the national territory; n) general rules on education; o) social security; p) electoral legislation, governing bodies and fundamental functions of municipalities, provinces and metropolitan cities; q) customs, protection of national borders and international prophylaxis; r) weights, measures and determination of time; statistical and

IT information coordination of the data of the State, regional and local administration; intellectual works; s) protection of the environment, ecosystem and cultural heritage.

[III]. Concurrent legislation matters are those relating to: international relations and relations with the European Union of the Regions; foreign trade; job protection and safety; education, without prejudice to the autonomy of educational institutions and with the exclusion of education and vocational training; professions; scientific and technological research and support for innovation for the productive sectors; health protection; power supply; sports regulations; civil protection; government of the territory; civil ports and airports; large transport and navigation networks; ordering of communication; national energy production, transport and distribution; complementary and supplementary pension; coordination of public finance and tax system; enhancement of cultural and environmental heritage and promotion and organization of cultural activities; savings banks, rural banks, regional credit companies; regional land and agricultural credit institutions. In matters of concurrent legislation, the legislative power is vested in the Regions, except for the determination of the fundamental principles, which is reserved for the legislation of the State.

[IV]. The Regions have legislative power on any subject matter not expressly reserved to the legislation of the State.

[V]. The Regions and the Autonomous Provinces of Trento and Bolzano, in the matters of their competence, participate in the decisions aimed at the formation of legislative acts of the European Union and ensure the implementation and execution of international agreements and European Union acts, in compliance with the rules of procedure established by the law of the State, which governs the methods of exercising the substitute power in the event of non-compliance.

[VI]. Regulatory power belongs to the State in matters of exclusive legislation, unless delegated to the Regions. Regulatory power belongs to the Regions in all other matters. Municipalities, Provinces and Metropolitan Cities have regulatory power regarding the organization and performance of the functions attributed to them.

[VII]. Regional laws remove all obstacles that prevent full equality of men and women in social, cultural and economic life and promote equal access between women and men to elected offices.

[VIII]. The regional law ratifies the agreements of the Region with other Regions for the better exercise of its functions, also with the identification of common bodies.

[IX]. In matters within its competence, the Region may conclude agreements with States and agreements with territorial entities within another State, in the cases and with the forms governed by the laws of the State”.

## 2.5 On regulations.

They are generally distinguished by subject-matter and the competent authority in charge of enacting them.

### ARTICOLO 3 PRELEGGI

#### Regolamenti

*“[I]. Il potere regolamentare del Governo è disciplinato da leggi di carattere costituzionale.*

*[II]. Il potere regolamentare di altre autorità è esercitato nei limiti delle rispettive competenze, in conformità delle leggi particolari”.*

### ARTICLE 3 PRELEGGI

#### Regulations

*“[I]. The regulatory power of the Government is governed by constitutional laws.*

*[II]. The regulatory power of other authorities is exercised within the limits of their respective competences, in compliance with particular laws”.*

In private law, they are due to be mentioned the so-called regulations for execution of State and regional laws. They complete and specify the law of the case. An example: the so-called *legge cambiaria*, dated 1933, and the so-called *atto di protesto*: the amendments to the ways of execution of a *protesto* were introduced both by law and regulation.

### ARTICOLO 4 PRELEGGI

#### Limiti della disciplina regolamentare

*“[I]. I regolamenti non possono contenere norme contrarie alle disposizioni delle leggi.*

*[II]. I regolamenti emanati a norma del secondo comma dell’articolo 3 non possono nemmeno dettare norme contrarie a quelle dei regolamenti emanati dal Governo”.*

### ARTICLE 4 PRELEGGI

#### Limits of the regulatory discipline

*“[I]. Regulations cannot contain rules against provisions of law.*

*[II]. Regulations issued pursuant to the second paragraph of article 3 cannot also dictate rules contrary to those of the regulations issued by the Government”.*

## 2.6 On customs.

They are developed by way of a constant practice of the interested parties of the case.

Legally-relevant customs are those referred to by laws and regulations.

### ARTICOLO 8 PRELEGGI

#### Usi

*“[I]. Nelle materie regolate dalle leggi e dai regolamenti gli usi hanno efficacia solo in quanto sono da essi richiamati”.*

### ARTICLE 8 PRELEGGI

#### Customs

*“[I]. In matters governed by laws and regulations, customs are effective only in so far as they are referred to by them”.*

Examples of customs available in the Civil Code: the one mentioned in article 892 ICC, on distances among trees.

### ARTICOLO 892 CC

#### Distanze per gli alberi

*“[I]. Chi vuol piantare alberi presso il confine deve osservare le distanze stabilite dai regolamenti e, in mancanza, dagli usi locali. Se gli uni e gli altri non dispongono, devono essere osservate le seguenti distanze dal confine: [omissis]”.*

### ARTICLE 892 ICC

#### Distance amongst trees

*“[I]. Those who want to plant trees near the border must observe the distances established by the regulations and, if they miss, by **local customs**. If both of them do not provide for rules, then the following distances from the border must be observed: [omitted]”.*

See also in article 1326, paragraph 2, ICC, on matter of contractual proposals:

## ARTICOLO 1326 CC

### Conclusione del contratto

“[I]. Il contratto è concluso nel momento in cui chi ha fatto la proposta ha conoscenza dell'accettazione dell'altra parte.

[II]. L'accettazione deve giungere al proponente nel termine da lui stabilito o in quello ordinariamente necessario secondo la natura dell'affare o secondo gli usi”.

## ARTICLE 1326 ICC

### Completion of contract

“[I]. A contract is completed when the proposer is aware of the acceptance of the other party.

[II]. Acceptance must reach the proposer within the time limit established by him or as ordinarily necessary according to the nature of the deal or according to customs”.

Other customs: see article 1340 ICC, on the so-called *clausole d'uso*; article 1374 ICC, on integration of contracts; article 1733 ICC, on the fees due to agents.

Please note that customs can become law. An example is even the case of the so-called (international) *lex mercatoria*.

Customs' requirements needed to become law:

- **an objective element:** there must be a uniform and constant practice, held by most of the interested parties in a specific area of legal relationships. Time per se is not decisive;
- **a subjective element:** there must be, among the members, the idea of their binding effects. If it is missing, then there is only a custom *de facto*, but not a legal one, namely a source of law.

Other examples of customs: maritime ones; agricultural ones; commercial ones.

On the difference between customs and law: **the law cannot be cancelled/deleted by non-habit (*desuetudine*) but only by formal repeal, under the above-mentioned article 15 of the *Preleggi*.**

Please note that official books are available at the competent chambers of commerce, in order to check out, e.g., commercial customs. Accordingly, these customs are in force unless differently proved (there is a so-called presumption *iuris tantum* in force).

## ARTICOLO 9 PRELEGGI

### Raccolte di usi

“[I]. *Gli usi pubblicati nelle raccolte ufficiali degli enti e degli organi a ciò autorizzati si presumono esistenti fino a prova contraria*”.

## ARTICLE 9 PRELEGGI

### Books on customs

“[I]. *Customs registered in official books of entities and bodies allowed to do so are presumed to exist until proven otherwise*”.

### 2.7 On judicial activity and construction of Italian laws.

We said that the subject matter of an order is:

- a) a general rule (see the legal rules); or
- b) a single/concrete fact (see the judgment of a judge).

#### The judicial activity.

In our legal system, it consists in the concretization of the rules of law (meaning **adaptation of the case under examination to the rules of law**).

Please note that the subject matter of the rules of law are individual behaviours, which falls within the *facti species* provided for by the legal rule of the case (which is general and abstract), that can be legal, illegal, lawful, unlawful, *et cetera*.

Accordingly, we speak about **compliance of the judgment with the legal rule**.

The legal reasoning of the judges follows the technique of a **sylogism**:

- **fact = minor premise;**
- **provision/norm = major premise;**
- **judgment = conclusion.**

Accordingly, the issues related are the following ones:

- to ascertain the fact;
- to identify the proper rule of law to be applied, under the principle *jura novit curia*;
- to interpret the law.

#### On interpretation/construction of the law.

This is a general problem, meaning it concerns not only what is drafted in an imperfect way (see e.g., the text of article 2645-ter ICC), but also what is apparently well formulated (see e.g.,

the concept of “*family*” or “*needs of the family needs*” referred to in article 170 ICC, on the so-called *fondo patrimoniale*).

**Every term and statement must be interpreted**, to understand if, in addition to the things that they regularly govern, they can also rule other things.

There are always areas of dim light (*penombra*); meanings of words must always be contextualized; they are not “universal”.

General provisions on the interpretation of the law are artt. 12 and 14 of the *Preleggi*.

## ARTICOLO 12 PRELEGGI

### Interpretazione della legge

“[I]. *Nell’applicare la legge non si può ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole secondo la connessione di esse, e dalla intenzione del legislatore.*

[II]. *Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principi generali dell’ordinamento giuridico dello Stato”.*

## ARTICLE 12 PRELEGGI

### Interpretation of the law

“[I]. In applying the law, no other meaning can be given to it other than the one made clear by the proper meaning of the words, in accordance with their connection, and by the intention of the legislator.

[II]. If a dispute cannot be decided by a specific provision, then provisions governing similar cases or analogous subject matters must be taken into account; if the case is still a doubtful one, then it has to be decided in accordance with the general principles of the legal system of the State”.

Here, first and foremost, a **literal interpretation** is called in by the provision. Then, the norm speaks of the **intention of the legislator**; and finally, in the second paragraph, it makes reference to **analogy** and distinguishes between the so-called *analogia legis* (where it speaks of *similar cases* and *analogous subject matters*) and the so-called *analogia iuris* (*the general principles of the legal system*).

The intention of the legislator involves the analysis of the so-called *lavori preparatori*, and the legislator is perceived here as the personification of the rationality, that the interpreter of the case takes on as a benchmark. The preferred interpretation is the one that fulfils the purposes of

the law of the case, and it is consistent with the rest of the legal system. The purpose of the law must be identified; and here we must look again at the above-mentioned preparatory works.

Please note that the activity of interpretation changes when the rules of law change, when new provisions are enacted, and when society evolves (see the case of article 1322 ICC on the above-mentioned “*interests worthy of protection*”, and accordingly see the case of the leasing contract).

Please also note that the importance of the preparatory works decreases as long as time goes by.

### **On analogical interpretation.**

Let’s see an example of analogic procedure on “similar cases” or “analogous subject matters”.

See the following provisions:

- article 1768 ICC, on the duty of custody of the *depositario* (see paragraph 2, on the free-of-charge deposit);
- articles 789 ICC and 798 ICC on gift/donation (which is an *atto a titolo gratuito*) and the donor’s liability;
- article 1710 ICC, on the agency/*mandato* free-of-charge;
- article 1812 ICC on *comodato* (which is essentially a free-of-charge contract, under article 1803 ICC);
- article 1821, paragraph 2, ICC, on free-interests loan.

We can say, after a comparative examination of all these rules of law, that, when we are dealing with legal acts/legal transactions free-of-charge, then the liability of the parties involved is minor than the one involved when the legal act or the legal transaction of the case is an act performed, or a transaction completed, for a consideration.

When we perform analogic interpretation, we must look at the **rationale** of the provision of the case (or its own *ratio*). An example: please find the *rationale* of article 2744 ICC.

## **ARTICOLO 2744 CC**

### **Divieto del patto commissorio**

“[I]. È nullo il patto col quale si conviene che, in mancanza del pagamento del credito nel termine fissato, la proprietà della cosa ipotecata o data in pegno passi al creditore. Il patto è nullo anche se posteriore alla costituzione dell’ipoteca o del pegno”.

## ARTICLE 2744 ICC

### Prohibition of foreclosure agreements (*pactum commissorium*)

“[I]. Any covenant according to which its parties agree that, in case of failure of payment of the credit of the case within the time limit agreed on by them, ownership of the mortgaged or pledged property is transferred to the creditor of the case, it is a void agreement. The agreement is void even when it is completed after creation of the mortgage or the pledge of the case”.

Then, article 12 *Preleggi* speaks about the so-called “*general principles of the legal system*”. What are they? They are principles coming out from the fundamental laws of the legal system, like constitutional/general norms (see article 3 of the Italian Constitution, on equality among citizens; the natural rights of the family; the principle of liability due to actions; protection of good faith; *et cetera*).

Again, on the interpretation of the laws, please also see art. 14 *Preleggi*.

## ARTICOLO 14 PRELEGGI

### Applicazione delle leggi penali ed eccezionali

“[I]. Le leggi penali e quelle che fanno eccezione a regole generali o ad altre leggi non si applicano oltre i casi e i tempi in esse considerati”.

## ARTICLE 14 PRELEGGI

### Application of criminal and exceptional laws

“[I]. Criminal laws and those laws that are exceptional to general rules or to other laws do not apply outside the cases and times considered therein”.

#### **On exceptionality of a law.**

Please see the relationship among article 2046 ICC and article 2047, par. 2, ICC; the latter is an exception to the former. But they are also an exception to article 2043 ICC, which is, in its turn, an exception to the principle of freedom of action.

However, here the evaluation of exceptionality is not a logical/formal one, but a legal/political one (e.g., laws in time of war are exceptional to laws in time of peace).

#### **On interpretation of so-called *general clauses*.**

Sometimes the law dictates just mere/general directives and no more, which it is up to the jurisprudence to develop and specify.

Examples of general clauses:

- the concept of *giusta causa*/just reason and justified motive;
- the interests worthy of protection (see article 1322 ICC);
- the “*unfair damage*” mentioned in article 2043 ICC;
- the concept of good faith (see articles 1337, 1366, 1375, 1460, par. 2, ICC);
- the concept of *buon costume*/good custom (see article 1343 ICC);
- the diligence of a good family man (see article 382, par 1, ICC, and article 1176 ICC).

Here, it is up to the judge to carry out an activity of integration and proper identification of the rule of law to be applied under the circumstances of the case; but this does not mean that there is discretion per se by the judge.

### **On equity/*aequitas*.**

Equity/fairness is opposed to “rigidity” of the rules of law; it discloses the ideal of justice appropriate to the circumstances of the case

The word equity comes from the Latin word *aequitas*.

Please note that equity/fairness means something quite different, in our legal system (which is a so-called *civil-law* legal system), from the term Equity as used in so-called *common-law* legal systems (we speak, in comparative law, of *common-law* systems *versus/against* *civil-law* systems).

Examples of equity in the Italian Civil Code:

- article 1349 ICC, on subject matter of contracts;
- article 1374 ICC, on integration of contracts;
- articles 2045 ICC and 2047 ICC, on matter of compensation for damages arising from unlawful acts.

Other times the meaning of equity is a smaller and more specific one. Examples:

- article 1371 ICC, on interpretation of contracts;
- articles 1447 ICC on *rescissione*, and 1450 ICC, on termination of contracts for breach;
- article 1467, par. 3, ICC, on termination of contract for “*eccessiva onerosità sopravvenuta*” (supervening excessive onerousness);
- article 1733 ICC;
- articles 1751 and 1755, par. 2, ICC, on fees due to agents and brokers and on indemnity for termination of the relationship.

Finally, in different situations equity is also useful to authorize judges to determine, by approximation, a certain value in the absence of a rigorous proof (see article 1226 ICC, on damages).

### **On integration of the law by the court.**

In civil-law systems, judgments/decisions of the courts are singular. They are effective against the parties before court. They are not universal, meaning they don't bind, as a rule of law, everybody else.

Please also note that, accordingly, in our legal system there are no constraints, for every judge, to necessarily abide by what has previously decided in a precedent similar case (there is **no stare decisis**).

Still, a previous judgment can be a persuasive one, if it is well motivated.

Hence:

- we can have stable case-laws, which allow predictability of judicial solutions; and
- to know the law, in our legal system, it also means to know the so-called **case law**.

### **On the historical evolution of the interpretation of the law.**

During the 17<sup>th</sup> and 18<sup>th</sup> centuries the dogma “*in claris non fit interpretatio*” and the interpretation of the case not “**decided by the law**” were the two policies of interpretation of the law running by, on the various States (*id est*, there was the law of the doctors and the courts; the *judge was a law maker*).

Consequence: there was distribution of production of laws between sovereigns and higher courts.

Then, the French Revolution came into play: the judge became the “*mouth of the law*” and no more (see Montesquieu - Robespierre); it is an effect of the separation of powers (enshrined in our Constitution too).

Then, however, the 1804 French *Code civil* required that the judge had to decide also the case not foreseen by the law (there is a restitution of the interpretative power to the courts, albeit with reference to the single case).

On the topic, see also article 1 of the Swiss Civil Code (dated 1907):

“(Application of the law)

<sup>1</sup> *The law applies to all juridical questions to which the letter or the meaning of one of its provisions may refer.*

<sup>2</sup> *In cases not provided for by the law, the judge decides according to custom and, failing this, according to the rule that he would adopt as legislator.*

<sup>3</sup> *He abides by the most authoritative doctrine and jurisprudence”.*

## **2.8 The distinction between mandatory and dispositive rules of law.**

**Mandatory rules** are rules of law that they cannot be derogated by the parties.

**Dispositive rules** are rules of law that they can be derogated by the parties (see *exempli gratia*, article 1402, par.1, ICC, on *electio amici*; article 1411, par. 2, ICC on the contract on behalf of third parties; article 1457 ICC, on the breach of contract).

Dispositive rules provide for a criterion of discipline in the event that the will of the parties is not disclosed (see e.g., article 1815 ICC, on the loan agreement; if nothing has been said, then the loan is a loan with interests).

They are supplementary rules, aimed at covering gaps (see e.g., article 1193, par. 2 ICC; article 1182, par. 1, ICC; article 1183 ICC).

The rules of public law are generally binding rules; the rules of private law are generally dispositive rules. However, please note that the following equations must not be applied:

- public law is a set of mandatory rules of law;
- private law is a set of dispositive rules of law.

In fact, there are dispositive public-law provisions (see e.g., article 806 of the Italian Procedural Civil Code) and mandatory private-law provisions (see e.g., the above-mentioned art. 2744 ICC; articles 1343 ICC and 1418 ICC on *illiceità della causa* and on *nullità del contratto*).

Finally, sometimes, the binding nature of a norm can be seen *ictu oculi*: see e.g., article 147 ICC; article 1350 ICC; article 1229, par. 2, ICC.

### 3 Lecture 3: general concepts of the Italian private law.

SUMMARY: 3.1 The prohibition of self-defence (*divieto di autotutela*) in Italian private law. – 3.2 The subjective right. – 3.3 On subjective right and authority. – 3.4 On private autonomy. – 3.5 On private-law relationships. – 3.6 On absolute rights and relative rights. – 3.7 On personality rights and patrimonial rights. – 3.8 The (legal) expectation (*aspettativa*). – 3.9 The authoritative right (*diritto potestativo*). – 3.10 The burden (or *onus*). – 3.11 On simple legal relationships versus complex legal relationships. – 3.12 On legal facts and legal acts.

#### 3.1 The prohibition of self-defence (*divieto di autotutela*) in Italian private law.

Targets of legal rules are order, peaceful coexistence, and growth of the community.

Legal rules state what we are entitled to (under the circumstances of the case), and they also provide the correct procedure to enforce rights, and more generally, law.

Accordingly, legal rules must provide for sanctions/fines, and they must prohibit self-defence.

The prohibition of self-defence (meaning justice performed directly by the alleged damaged party) is a general one: it is obviously related to violent acts, but not only to them. It applies also to every act that, in order to fulfil someone's own claim (like a right), infringes legal positions of other persons. An example: an unpaid creditor cannot take away an asset from his debtor to sell it and satisfy himself with the proceeds of sale; basically, not even the so-called *diritto di ritenzione* (right of retention) is allowed.

Sometimes the prohibition of certain types of covenants/agreements is also an expression of the prohibition of self-defence. See art. 2744 ICC.

#### ARTICOLO 2744 CC

##### Divieto del patto commissorio

*“[I]. È nullo il patto col quale si conviene che, in mancanza del pagamento del credito nel termine fissato, la proprietà della cosa ipotecata o data in pegno passi al creditore. Il patto è nullo anche se posteriore alla costituzione dell'ipoteca o del pegno”.*

#### ARTICLE 2744 ICC

##### Prohibition of foreclosure agreements (*pactum commissorium*)

*“[I]. Any covenant according to which its parties agree that, in case of failure of payment of the credit of the case within the time limit agreed on by them, ownership of the mortgaged or pledged property is transferred to the creditor of the case, it is a void agreement. The agreement is void even when it is completed after creation of the mortgage or the pledge of the case”.*

Again, a debatable right of way (which is a minor *right in rem* governed by article 1027 ICC and ff. ones) cannot be prevented *de facto*, all the sudden, through an installation of tools which are meant to prevent the passage. Actually, the law covers, first and foremost, the person that is exercising the alleged right (see article 1368 ICC on *azione di reintegrazione nel possesso*) and then, if it is due (*id est*, once everything has been ascertained), the holder of the right.

Namely, possessory protection precedes ownership protection (and/or protection of other rights), in order to avoid the activity known under the Latin motto *vim vi repellere licet*.

These are all ways used by the legal system to discourage self-defence.

Exceptions:

a) generally speaking, the use of the force is allowed to defend ourselves against aggressive acts (but please note the proportion due between an offense and defence under article 52 of the Italian Criminal Code and article 2044 ICC).

#### **ARTICOLO 2044 CC**

##### **Legittima difesa**

“[I]. *Non è responsabile chi cagiona il danno per legittima difesa di sé o di altri*”.

#### **ARTICLE 2044 ICC**

##### **Legitimate defence**

“[I]. *A person who causes harm in self-defence or in the exercise of legitimate defence of others is not a liable one*”.

b) the right of retention. See article 2756 ICC.

#### **ARTICOLO 2756 CC**

##### **Crediti per prestazioni e spese di conservazione e miglioramento**

“[I]. *I crediti per le prestazioni e le spese relative alla conservazione o al miglioramento di beni mobili hanno privilegio sui beni stessi, purché questi si trovino ancora presso chi ha fatto le prestazioni o le spese.*

[II]. *Il privilegio ha effetto anche in pregiudizio dei terzi che hanno diritti sulla cosa, qualora chi ha fatto le prestazioni o le spese sia stato in buona fede.*

[III]. *Il creditore può ritenere la cosa soggetta al privilegio finché non è soddisfatto del suo credito e può anche venderla secondo le norme stabilite per la vendita del pegno*”.

## ARTICLE 2756 ICC

### Credits for services and expenses for conservation and improvement

*“[I]. Claims for services and expenses related to conservation or improvement of movable properties have a privilege over such properties, provided that the latter are still in the hands of the person who has performed the service or paid the expense.*

*[II]. The privilege has also effect against third parties who have rights over the thing, if the person who performed the service or paid the expense was in good faith.*

*[III]. The creditor can hold the thing subject to privilege until his claim is satisfied, and he can also sell such property according to the rules established for sale of a pledged property”.*

The above-mentioned provision is applicable, *exempli gratia*, in case of a mechanic who claims payment for the work performed to repair a car.

Another exception to the rule is also granted under pledge (a *right in rem* of guarantee).

## ARTICOLO 2794 CC

### Restituzione della cosa

*“[I]. Colui che ha costituito il pegno non può esigerne la restituzione, se non sono stati interamente pagati il capitale e gli interessi e non sono state rimborsate le spese relative al debito e al pegno.*

*[II]. Se il pegno è stato costituito dal debitore e questi ha verso lo stesso creditore un altro debito sorto dopo la costituzione del pegno e scaduto prima che sia pagato il debito anteriore, il creditore ha soltanto il diritto di ritenzione a garanzia del nuovo credito”.*

## ARTICLE 2794 ICC

### Restitution of the thing

*“[I]. The person who has created a pledge cannot demand restitution of the pledged property, if principal and interest have not been fully paid, and expenses related to debt and pledge have not been reimbursed too.*

*[II]. If the pledge of the case was created by the debtor, and the debtor himself has another debt pending against the same creditor that arose after creation of the pledge and expired before payment of the previous debt, then the creditor of the case has just a right of retention, so to be guaranteed for the payment of the new credit”.*

### 3.2 The subjective right.

A set of pretences, claims, powers and immunities create a subjective legal position.

The utmost personal legal position available in private law is the so-called *diritto soggettivo* (subjective right).

Fundamental characteristic of every subjective right is the freedom of exercise by its holder.

There is an area of power where he can move in whatsoever way he likes, at his full discretion.

The related problem is to frame the areas of power of the various holders of subjective rights. Accordingly, an evaluation of the relevance of the conflicting interests of the case, along with the social importance of said interests themselves, is due, sometimes.

Examples:

1) as for the rights of an individual owner of a land, see the rules of law on distances (article 873 ICC and ff. ones) and the urban-planning restrictions on the right to build up;

2) the right to confidentiality against the right to information.

Sometimes the evaluation is already performed by the legislator, sometimes it is not. As for latter case, please see article 844 ICC on so-called *immissioni*.

#### ARTICOLO 844 CC

##### **Immissioni**

*“[I]. Il proprietario di un fondo non può impedire le immissioni di fumo o di calore, le esalazioni, i rumori, gli scuotimenti e simili propagazioni derivanti dal fondo del vicino, se non superano la normale tollerabilità, avuto anche riguardo alla condizione dei luoghi.*

*[II]. Nell'applicare questa norma l'autorità giudiziaria deve contemperare le esigenze della produzione con le ragioni della proprietà. Può tener conto della priorità di un determinato uso”.*

#### ARTICLE 844 ICC

##### **Immissioni**

*“[I]. The owner of a land cannot prevent the introduction in his land of smoke or heat, fumes, noises, vibrations and similar propagations coming out from the neighbour's land, if they do not exceed normal tolerability, also having regard to the condition of the sites.*

*[II]. In applying this rule, the judicial authority must reconcile the needs of production with the reasons of the ownership. It can take into account the priority of a particular use”.*

### 3.3 On subjective right and authority.

Subjective rights mean attribution of a sphere of autonomy in which the holder of the case can move in a regime of pure will.

This legal situation is perceived particularly when an **authority** (a *potestà*) is involved.

**Authority/potestà** is a power given to someone not to protect his/her own interests, but to exercise a function, aimed at protecting rights of others or higher interests. The utmost figure of this kind is a discretionary authority.

An example: parental authority to look after minors.

As per above, acts of control and remedies are available in case of abuse. Please see article 330 ICC (there are limits to subjective rights; *ergo* there are limits to authorities too).

#### ARTICOLO 330 CC

##### Decadenza dalla responsabilità genitoriale sui figli

*“[I]. Il giudice può pronunciare la decadenza dalla responsabilità genitoriale quando il genitore viola o trascura i doveri ad essa inerenti o abusa dei relativi poteri con grave pregiudizio del figlio.*

*[II]. In tale caso, per gravi motivi, il giudice può ordinare l’allontanamento del figlio dalla residenza familiare ovvero l’allontanamento del genitore o convivente che maltratta o abusa del minore”.*

#### ARTICLE 330 ICC

##### Forfeiture of parental authority over children

*“[I]. A judge can pronounce forfeiture of parental authority when the parent of the case breaches or neglects the duties inherent in it or abuses of relative powers with serious prejudice to the child.*

*[II]. In this case, for serious reasons, the judge can order removal of the child from the family residence or removal of the parent or the cohabitant who mistreats or abuses the minor”.*

### 3.4 On private autonomy.

It’s the power of a single person to govern legal relationships as he/she pleases.

It is performed by way of legal transactions (*negozi giuridici*), that are dispositive statements/declarations according to which the legal system grants legal effects that comply with the intent of the declaring party. We shall also see that, when it comes to legal transactions,

the law equals determining behaviours of the party of the case to the above-mentioned declarations.

Examples of legal transactions:

- contract;
- will;
- marriage.

All of them are all legal transactions (different ones, meaning that, under the circumstances, they are either bilateral or unilateral or multilateral legal transactions).

Now, please note that a person who perform a legal transaction (and acts within the regime of private autonomy) must be able to dispose of his/her legal sphere.

Accordingly, private autonomy requires capacity to act.

Please also note that **capacity to act** must be distinguished from legal capacity.

**Capacity to act:** it is someone's capacity to dispose of his/her rights and to take on commitments throughout displays of will (capable of producing legal effects).

**Legal capacity:** it is someone's capacity to be subject to rights and obligations.

On the acquisition of the legal capacity and the capacity to act, please see art. 1 ICC and art. 2 ICC.

## ARTICOLO 1 CC

### Capacità giuridica

*“[I]. La capacità giuridica si acquista dal momento della nascita.*

*[II]. I diritti che la legge riconosce a favore del concepito sono subordinati all'evento della nascita”.*

## ARTICLE 1 ICC

### Legal capacity

*“[I]. Legal capacity is acquired from the time of birth.*

*[II]. The rights that the law recognizes in favour of a conceived child are subject to the event of birth”.*

## ARTICOLO 2 CC

### Maggiore età. Capacità di agire

*“[I]. La maggiore età è fissata al compimento del diciottesimo anno. Con la maggiore età si acquista la capacità di compiere tutti gli atti per i quali non sia stabilita una età diversa.*

*[II]. Sono salve le leggi speciali che stabiliscono un'età inferiore in materia di capacità a prestare il proprio lavoro. In tal caso il minore è abilitato all'esercizio dei diritti e delle azioni che dipendono dal contratto di lavoro”.*

## ARTICLE 2 ICC

### Age of majority. Capacity to act

*“[I]. The age of majority is set up at the age of eighteen. With the age of majority, everyone acquires capacity to perform all acts for which a different age is not prescribed.*

*[II]. Special laws that establish a lower age on matter of capacity to perform working activities are unaffected. In this case, the minor is entitled to exercise the rights and claims that depend on the contract of employment”.*

Then, private autonomy requires freedom. Accordingly, it is protected from threats or deceptive acts (intervention of third parties that undermine it): see e.g., article 1439 ICC on the contract subject to avoidance for fraud.

## ARTICOLO 1439 CC

### Dolo

*“[I]. Il dolo è causa di annullamento del contratto quando i raggiri usati da uno dei contraenti sono stati tali che, senza di essi, l'altra parte non avrebbe contrattato.*

*[II]. Quando i raggiri sono stati usati da un terzo, il contratto è annullabile se essi erano noti al contraente che ne ha tratto vantaggio”.*

## ARTICLE 1439 ICC

### Fraud

*“[I]. Fraud causes avoidance of a contract when deceptions used by one of the contracting parties were such that the other party would have not negotiated without them.*

*[II]. When deceptions have been used by a third party, then the contract of the case is a voidable one if the contracting party was aware and has taken advantage of them”.*

As per above, anyway, private autonomy must have boundaries. Accordingly, here there the general boundaries to private autonomy:

1) **the sphere of others**. Therefore, consent of the other party/parties is due, to enter into a contract (see article 1321 ICC). A unilateral legal transaction is allowed just when someone perform dispositive acts on his own behalf (see *exempli gratia* the will; the renunciation of

inheritance under article 519 ICC). The so-called *gestione degli affari altrui* requires a specific appointment, and even the useful management of the business of another party does not bind the interested party, except in the exceptional case that the person whose business is managed is not in a position to do it herself (see article 2028 ICC);

2) **ethics**. Examples: in non-patrimonial areas of private law, private autonomy can be performed only by way of a few legal transactions provided for by the law (e.g., we cannot decline our position as parents or son/daughter; there is full freedom of marriage, but there is no freedom in establishing in an autonomous way its legal discipline). In the field of property rights, on the contrary, contracts against morality/*buon costume* are not allowed (see article 1343 ICC jointly with article 1418 ICC: the contract is void);

3) **other limits are provided for defence of public interests**: see, *exempli gratia*, the prohibition on agreements amongst entrepreneurs (agreements reached to cancel mutual competition amongst their parties, with prejudice for the market);

4) **limits to private autonomy are also set up for the protection of the contractual equality between the parties**: see e.g., the rules on information.

Please note that the concept of private autonomy is a flexible one. An example of flexibility: the informational form. Here, please note today's importance of formalism: formalism as a limit to private autonomy; the various *rationales* of formalism (see article 1350 ICC; article 1351 ICC; the so-called informative form).

### **On conflicts between exigencies (which are an expressions of private autonomy).**

An example: *static exigency* against *dynamic exigency*. Please note, e.g., the case of the *depositario* who sells the movable asset subject to deposit (*protection of the third party vs. protection of the depositor*). See article 1153 ICC.

## **ARTICOLO 1153 CC**

### **Effetti dell'acquisto del possesso**

“[I]. *Colui al quale sono alienati beni mobili da parte di chi non ne è proprietario, ne acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà.*

[II]. *La proprietà si acquista libera da diritti altrui sulla cosa, se questi non risultano dal titolo e vi è la buona fede dell'acquirente.*

[III]. *Nello stesso modo si acquistano i diritti di usufrutto, di uso e di pegno”.*

## ARTICLE 1153 ICC

### Effects/consequences of an acquisition of possession

“[I]. Anyone to whom a movable property is alienated/transferred by someone who is not its own owner, acquires ownership through possession, provided that he is in good faith at the time of delivery and a suitable title for the transfer of ownership is available.

[II]. Ownership is acquired free from the rights of other persons over the thing, if they cannot be perceived from the title and the acquirer/transferee is in good faith.

[III]. Rights of usufruct, right of use and pledge are acquired/transferred in the same way”.

### 3.5 On private-law relationships.

#### On obligation and claim, and *facoltà* and lack of claim.

Each order/command involves a duty: *exempli gratia*, a duty to act (such as to execute a payment or to take on custody over something) or a duty not to act or to abstain (not to build on a land; not to defame).

Now, duties are imposed to fulfil certain interests. If the interests of the case can be linked to a specific person, who can demand fulfilment of the duty, then the counterparty has a claim.

*Exempli gratia*: the duty of the debtor = the claim of the creditor.

The relationship between duties and claims is a constant one, in private law.

A duty related to a claim is also called an **obligation**.

## ARTICOLO 1173 CC

### Fonti delle obbligazioni

“[I]. Le obbligazioni derivano da contratto, da fatto illecito, o da ogni altro atto o fatto idoneo a produrle in conformità dell’ordinamento giuridico”.

## ARTICLE 1173 ICC

### Sources of obligations

“[I]. Obligations arise from contracts, from unlawful acts, of from any other act or fact able to produce them in accordance with the legal system”.

Obligation and claim as related concepts: an obligation of A corresponds to a claim of B and vice versa.

Reverse side of the coin: if A has no obligations against B, then B has no claims against A, and if we take a specific behaviour as a subject matter of the case, then A has the *facoltà* not to

undertake that behaviour. Here we say that A's *facoltà* mirrors B's **lack of claim**. An example: the owner of a car has the *facoltà* to use it or not, and to demolish it too.

In common language, we are used to say that the owner has the right to use or not the car, and to exclude others from using it, but the exclusion of strangers from the use of the car is a claim, because it involves the behaviour of the others; that of using the car is, instead, a *facoltà*, by virtue of which the owner can satisfy himself.

Rather often, the exercise of a *facoltà* is accompanied by the claim that everyone else refrain himself/herself from preventing or disturbing its exercise. Not always, however: the hunter, for example, can take possession of the wild game (he has the *facoltà* to take it), but he cannot forbid others to do the same by preceding him (he has no claim).

Often *facoltà* are protected against certain types of interference but not others. An example: the freedom of an entrepreneur to enter into a business with a specific customer is not protected against those who want to take away the customer by offering better conditions; however, it is protected from unfair competition.

Accordingly, the concepts of claim, obligation, *facoltà*, lack of claim are relative ones.

An example: A binds himself with B not to compete with him. A has a (non-compete) obligation against B; but A has the power to compete with all the others, therefore only B has a claim; the others have a lack of claim on the subject matter.

### **On power and state of awe (*soggezione*).**

Sometimes the law entitles persons to carry out dispositive acts (of rights, such as legal transactions) and therefore to change/amend their own legal positions or the legal position of other persons (examples: the renunciation to a right: it is a dispositive act of the right of the case according to which the right holder of the case renounce to his/her right; the power of representation gives to the powerholder the possibility of undertaking commitments in the name and on behalf of others).

Here, technically speaking, we have a **power**.

If there is someone who has to comply with the consequences of this power, he is in a **state of awe (*soggezione*)**.

An example: the mortgagee (*creditore ipotecario*) can (he has the power to) sell off the property of the defaulting debtor at a legally governed auction in order to satisfy himself with the proceeds of sale; the debtor must undergo the sale and therefore he is in a state of awe.

Counterparts of power and state of awe: **lack of power** and **immunity** (e.g., the immunity of the consular staff; the immunity of the debtor, as for the assets not subject to foreclosure under article 514 ICC).

### General outcome of the above-mentioned distinctions.

All legal personal positions (particularly subjective rights), apparently simple ones, are intertwined with the legal positions of others in a complex way.

*Ergo*, legal reality is made up of complex aggregates of simple legal relationships.

An example: ownership, which is the right to full enjoy and dispose of the thing of the case (see article 832 ICC), implies:

- claims (to exclude others from using the thing);
- *facoltà* (to use or not use the thing or modify it);
- powers (to sell it, gift it, abandon it, *et cetera*);
- immunity (not to be subject to expropriation, except in case of public interests involved under article 42 of the Italian Constitution; not to be subject to alienation by third parties without an *ad-hoc* legal authorization: see agency/*mandato/rappresentanza*).

All these legal positions of the owner are described, in the language of the ordinary life, as the right of the owner to exclude, to use, to sell, not to be expropriated, *et cetera*.

Often the difference is not a relevant one, from a legal point of view, but sometimes it is quite relevant. An example: the case of the voluntary legal representative who *falls outside the terms* of the so-called *procura*, or proxy, or power of attorney or representation (the so-called *falsus procurator*: he may still have the **power** to sell, e.g., a real property of the alleged *rappresentato*, but he cannot sell it at that particular price).

### ARTICOLO 1398 CC

#### Rappresentanza senza potere

“[I]. *Colui che ha contrattato come rappresentante senza averne i poteri o eccedendo i limiti delle facoltà conferitegli, è responsabile del danno che il terzo contraente ha sofferto per avere confidato senza sua colpa nella validità del contratto*”.

### ARTICLE 1398 ICC

#### Representation without power

“[I]. *Anyone who has contracted as a representative without having the powers or exceeding the boundaries of the facoltà conferred on him is liable for the damage that the third party has suffered for having, without fault, relied on the validity of the contract*”.

The subjective right is, as above-mentioned, the maximum legal position available to an individual; it is a set of claims, *facoltà*, immunities and powers granted to the individual of the case in order to satisfy his own interests, according to his own free appreciation.

Accordingly, also the importance of will of the party comes out, when we are in the field of subjective rights.

The will of the party of the case is often underestimated (even a person who has no capacity to act due to minor age or because is subject to the *status* of *interdizione* is entitled to subjective rights).

Anyway, the value of the will of the party, comes out, in all its fullness, *exempli gratia*, in the case of the vices of consent (see article 1427 ICC and ff. ones).

### **On subjective rights and some protected interests.**

A claim (which implies an obligation/duty of someone else) is always involved, when there is a subjective right.

If we have just *facoltà*, then we don't have a subjective right.

Factual situations sometimes highlight claims more than *facoltà* (e.g., see the case of the creditor against the case of the owner).

Please note that the bundle of claims, *facoltà*, immunities and powers may undergo identical changes (e.g., in case of extinction of a patrimonial right), but more often just a few of them are changed. An example: the grant of the right of *usufrutto*/usufruct (see article 981 ICC).

## **ARTICOLO 981 CC**

### **Contenuto del diritto di usufrutto**

“[I]. *L'usufruttuario ha diritto di godere della cosa, ma deve rispettarne la destinazione economica.*

[II]. *Egli può trarre dalla cosa ogni utilità che questa può dare, fermi i limiti stabiliti in questo capo*”.

## **ARTICLE 981 ICC**

### **Content of the right of usufruct**

“[I]. *The usufructuary has the right to enjoy the thing, but he must respect its economic destination.*

[II]. *He can draw every kind of utility available from the thing, within the limits established in this chapter*”.

### **3.6 On absolute rights and relative rights.**

A **relative right** is a right that involves interests that the holder of the right can only claim against one or more specified persons. Examples:

- the creditor's right to credit;
- the right of one of the parties which arises from an agreement.

An **absolute right** is a right that involves interests that the holder of the right can claim against everybody else. Examples:

- the right of ownership;
- the right to a name, to honour, to physical integrity, *et cetera*.

### 3.7 On personality rights and patrimonial rights.

**Personality rights:** right to life, name, honour, physical integrity.

Personality rights are untransmissible.

**Patrimonial rights:** their content is a financial utility.

They can be transferred. They can also be **absolute** or **relative**.

**Absolute patrimonial rights:** so-called *diritti reali*; rights over intellectual properties and inventions.

**Relative patrimonial rights:** the right of credit, which entails the birth of obligations.

### 3.8 The (legal) expectation (*aspettativa*).

The acquisition of a right often involves the occurrence of multiple events/factors/elements. If some of these events have already occurred and the others can occur in the future, then the party against whom some events have already occurred, and others can occur in the future, is legally entitled to an **expectation** (*aspettativa*).

The law does not cover factual expectations; it protects just legal expectations (namely, a right *in fieri*).

Examples of expectations:

- a *de facto* expectation: the right of the children to succession *mortis causa* pending the life of the future *deceased* (except in case of *scomparsa* and *morte presunta*, under article 48 ICC and ff. ones);
- a legal expectation: the right of one or both parties of a contract under condition, pursuant to articles 1356 and 1358 ICC. Anyway, first of all, what a condition is? See art. 1353 ICC.

## **ARTICOLO 1353 CC**

### **Contratto condizionale**

“[I]. *Le parti possono subordinare l’efficacia o la risoluzione del contratto o di un singolo patto a un avvenimento futuro e incerto*”.

## **ARTICLE 1353 ICC**

### **Conditional contract**

“[I]. *The parties can agree that the effectiveness or the termination of a contract or a single covenant/clause is subjected to a future and uncertain event*”.

Please note that a condition is a future and uncertain event, which is different from a *termine*. Types of conditions available in the legal system are:

- i) the condition precedent/*condizione sospensiva*: the effectiveness of the contract is subject to the occurrence of the event of the case;
- ii) the condition subsequent/*condizione risolutiva*: the termination of the contract is subject to the occurrence of the event of the case.

Now, as per above, please see article 1356 ICC.

## **ARTICOLO 1356 CC**

### **Pendenza della condizione**

“[I]. *In pendenza della condizione sospensiva l’acquirente di un diritto può compiere atti conservativi*.

[II]. *L’acquirente di un diritto sotto condizione risolutiva può, in pendenza di questa, esercitarlo, ma l’altro contraente può compiere atti conservativi*”.

## **ARTICLE 1356 ICC**

### **Pendency of a condition**

“[I]. *During pendency of a condition precedent, the acquirer of the right of the case can perform conservative acts*.

[II]. *The transferee of a right subject to a condition subsequent can exercise it, during pendency of the condition, but the other contracting party can perform conservative acts*”.

The conservative claim is an expression of a legal expectation.

Again, see also art. 1358 ICC.

## ARTICOLO 1358 CC

### Comportamento delle parti nello stato di pendenza

“[I]. *Colui che si è obbligato o che ha alienato un diritto sotto condizione sospensiva, ovvero lo ha acquistato sotto condizione risolutiva, deve, in pendenza della condizione, comportarsi secondo buona fede per conservare integre le ragioni dell'altra parte*”.

## ARTICLE 1358 ICC

### Behaviour of the parties during pendency of the condition

“[I]. Everyone who is obliged or has transferred a right under a condition precedent, or has acquired it under a condition subsequent, must behave in good faith so to safeguard the interests of the other party, during pendency of the condition”.

Please note that the behaviour is due in accordance with good faith because there is a legal expectation pending on behalf of the counterparty.

Now, please also note the difference between the legal expectation pursuant to article 768-*quater*, paragraph 1, ICC, on the so-called *patto di famiglia* and the expectation of a so-called *legittimario*/forced heir.

## ARTICOLO 768-bis CC

### Nozione

“[I]. *È patto di famiglia il contratto con cui, compatibilmente con le disposizioni in materia di impresa familiare e nel rispetto delle differenti tipologie societarie, l'imprenditore trasferisce, in tutto o in parte, l'azienda, e il titolare di partecipazioni societarie trasferisce, in tutto o in parte, le proprie quote, ad uno o più discendenti*”.

## ARTICLE 768-bis ICC

### Notion

“[I]. *A patto di famiglia is a contract by which, in compliance with the provisions on family business and the different types of companies, the entrepreneur transfers the company, in whole or in part, and the holder of participations in a company transfers, all or part of his own participations, to one or more descendants*”.

## **ARTICOLO 768-*quater* CC**

### **Partecipazione**

*“[I]. Al contratto devono partecipare anche il coniuge e tutti coloro che sarebbero legittimari ove in quel momento si aprisse la successione nel patrimonio dell'imprenditore”.*

## **ARTICLE 768-*quater* ICC**

### **Participation**

*“[I]. The spouse and all those who would be forced heirs if at that moment the succession on the entrepreneur's patrimony should open up must also be parties of the contract”.*

As a consequence, in terms of (legal) expectation, please see art. 768-*sexies* ICC.

## **ARTICOLO 768-*sexies* CC**

### **Rapporti con i terzi**

*“[I]. All'apertura della successione dell'imprenditore, il coniuge e gli altri legittimari che non abbiano partecipato al contratto possono chiedere ai beneficiari del contratto stesso il pagamento della somma prevista dal secondo comma dell'articolo 768-*quater*, aumentata degli interessi legali”.*

## **ARTICLE 768-*sexies* ICC**

### **Relations with third parties**

*“[I]. At the opening of the succession of the entrepreneur, the spouse and the other forced heirs who did not participate to the contract can ask to the beneficiaries of the contract to pay the sum provided for in the second paragraph of article 768-*quater*, increased by legal interests”.*

Having said that, please note that a legal expectation can be generally transferred. See e.g., article 1357 ICC.

## **ARTICOLO 1357 CC**

### **Atti di disposizione in pendenza della condizione**

*“[I]. Chi ha un diritto subordinato a condizione sospensiva o risolutiva può disporre in pendenza di questa; ma gli effetti di ogni atto di disposizione sono subordinati alla stessa condizione”.*

## ARTICLE 1357 ICC

### Acts of disposition during pendency of a condition

“[I]. Anyone who is entitled to a right subject to a condition precedent or subsequent can dispose of it during pendency of the condition; but the effects of each act of disposition are subject to the very same condition”.

### 3.9 The authoritative right (*diritto potestativo*).

It is the right to determine, with an act of will, a modification of the legal sphere of others (which the third party must undergo).

Etymus = *potestas*

Examples in private law:

a) the commercial-urban right of pre-emption: the right of pre-emption of the *locatario/conduttore*/tenant to purchase, at the very same conditions offered by the seller to third parties, a real property subject to commercial activity, provided for by article 38 of the Law July 27, 1978, n. 392.

b) the right of withdrawal from a company or an association or from a contractual relationship. See article 1373 ICC.

## ARTICOLO 1373 CC

### Recesso unilaterale

*“[I]. Se a una delle parti è attribuita la facoltà di recedere dal contratto, tale facoltà può essere esercitata finché il contratto non abbia avuto un principio di esecuzione.*

*[II]. Nei contratti a esecuzione continuata o periodica, tale facoltà può essere esercitata anche successivamente, ma il recesso non ha effetto per le prestazioni già eseguite o in corso di esecuzione.*

*[III]. Qualora sia stata stipulata la prestazione di un corrispettivo per il recesso, questo ha effetto quando la prestazione è eseguita.*

*[IV]. È salvo in ogni caso il patto contrario”.*

## ARTICLE 1373 ICC

### Unilateral withdrawal

“[I]. If one of the parties has the right to withdraw from the contract, this facoltà/right can be exercised until the contract has had execution.

*[II]. In contracts involving continuous or periodic performances, this facultà/right can also be exercised subsequently, but the withdrawal has no effect for services already performed or under way.*

*[III]. If a consideration for the withdrawal has been agreed on, the withdrawal takes effect when the consideration is performed.*

*[IV]. In any case, any different agreement is unaffected”.*

c) the right to a redemption agreement. See article 1500 ICC.

## **ARTICOLO 1500 CC**

### **Patto di riscatto**

*“[I]. Il venditore può riservarsi il diritto di riavere la proprietà della cosa venduta mediante la restituzione del prezzo e i rimborsi stabiliti dalle disposizioni che seguono.*

*[II]. Il patto di restituire un prezzo superiore a quello stipulato per la vendita è nullo per l’eccedenza”.*

## **ARTICLE 1500 ICC**

### **Redemption agreement**

*“[I]. The seller can reserve the right to acquire back ownership of the thing sold by restitution of the price and the reimbursements mentioned in the following provisions.*

*[II]. An agreement to return a price higher than the one agreed on for the sale is void, as for the excessive amount”.*

Sometimes a modification can be obtained only by way of a judgment. Accordingly, the authoritative right is exercised through a judicial claim: see e.g., the claim for avoidance or termination of contracts (under articles 1425 ICC and ff. ones, article 1453 ICC, and article 1467 ICC).

### **3.10 The burden (or *onus*).**

It’s a non-mandatory conduct due as a precondition for the exercise of a power (common saying: *you wanted the honours, now pick up the burdens too!*),

An example: the buyer who wants to point out a defect of a purchased good has the burden of reporting the defects/faults of the thing sold within 8 days from discovery (see article 1495 ICC). It’s the precondition to actually have the vices of the thing asserted afterwards.

### 3.11 On simple legal relationships *versus* complex legal relationships.

An example of contrast: the debtor-creditor relationship *versus* the seller-buyer relationship.

In the second case: price means performance which involves possible non-performance, which means application of the rule *non adimplenti non est adimplendum* (see article 1460 ICC).

#### On separation and transfer of legal positions.

An example: the seller may transfer the right of credit or performance to a third party, while remaining subject to all the duties of seller and while retaining all his other powers linked to the sale contract.

All this can happen, *exempli gratia*, in case of:

- a transfer of a right of credit (see article 1260 ICC);
- an indirect gift/donation performed via a contract on behalf of third parties (see articles 809 ICC and article 1411 ICC and ff. ones).

### 3.12 On legal facts and legal acts.

**Legal facts** are facts that are qualified able, by law, to create, amend or terminate a legal relationship.

Here a distinction is made between:

*i)* **mere legal facts**, like:

- birth (see article 1 ICC)
- the change of the course of a river (see article 946 ICC);
- the collapse of a building (see article 2053 ICC).

*ii)* **human/legal acts**, like:

- acceptance of a contract (see article 1326 ICC);
- a warning for a payment (see article 1219 ICC);
- an act of carelessness of a biker (see article 2054 ICC).

The distinction is based on the relevance, at the eyes of the law, of the subjective moment of human acts. However, there are human acts that legally create mere legal facts: *exempli gratia*, the sowing performed on the soil of others involves acquisition of ownership of the plants that grow up due to sowing. Under the circumstances, the legal effect involved in the acquisition of ownership occurs regardless of the subjective moment of the case (see article 934 ICC): the act is relevant just as a mere legal fact.

**Legal acts** (where the subjective moment is the precondition) are distinguished in:

- **lawful and unlawful acts**;

- **atti negoziali/legal transactions** and **atti non negoziali**.

**Atti negoziali/legal transactions:** they are displays of will according to which individuals, in the exercise of their private autonomy, mean to establish, modify or terminate legal relationships, in order to govern their interests in relations with others.

Examples:

- a promise to the public (see article 1989 ICC);
- a contract (there is an exchange between proposal-acceptance).

**Atti non negoziali:** they are legal acts aimed at producing a factual result legally relevant.

Here another distinction is made between:

- i)* **material legal acts**, aimed at materially changing the external world. Examples:
  - the transfer of domicile (see article 44 ICC);
  - the discovery of a lost thing (see article 927 ICC) or a treasury (see article 932 ICC);
- ii)* **communications**, that are statements released to inform or warn someone (see articles 1219 ICC, 1264 ICC, 1396, par. 1, ICC, 1495, par. 1; ICC);
- iii)* **statements of science (or truth)**, that are communications with pure informative content: see e.g., a (judicial or extrajudicial) confession.

**Atti non negoziali** do involve legal effects established by law (intentional or non-intentional ones).

## 4 Lecture 4: on physical persons (part 1).

SUMMARY: 4.1 On the distinction between legal capacity and capacity to act. – 4.2 On minors (basic legal concepts). – 4.3 Cases for exclusion of the legal capacity. – 4.4 The figure of the conceived child. – 4.5 On personality rights. – 4.6 On natural and legal incapacities of physical persons: on incapacity of understanding and willing, limitation and exclusion of capacity to act, *interdizione*, *inabilitazione*, and support administration. – 4.7 Legal incapacity *versus* natural incapacity. – 4.8 Interdiction at law of a convicted person. – 4.9 Legal consequences of legal transactions performed by minors.

### 4.1 On the distinction between legal capacity and capacity to act.

When we talk about physical (or natural) persons, two main legal concepts (already mentioned in the previous lecture, when we talked about private autonomy) come immediately into play: namely, the concept of legal capacity and the concept of capacity to act.

**Legal capacity** is the *capacity of a person to be subject to rights and obligations*.

Having said that, legal capacity must be distinguished from **capacity to act**, namely *one's capacity to dispose of his/her own rights and to assume obligations through acts of will*.

#### ARTICOLO 1 CC

#### Capacità giuridica

*“[I]. La capacità giuridica si acquista dal momento della nascita.*

*[II]. I diritti che la legge riconosce a favore del concepito sono subordinati all'evento della nascita”.*

#### ARTICLE 1 ICC

#### Legal capacity

*“[I]. Legal capacity is acquired from the time of birth.*

*[II]. The rights that the law recognizes in favour of the conceived child are subject to the event of birth”.*

Now, please note that legal capacity is something that concerns not just physical/natural persons, but legal ones too. Therefore, article 1 ICC, which deals with, strictly speaking, natural persons, is also applicable to legal persons.

Anyway, please also note that, in case of legal persons, there is a peculiarity: in fact, as for legal persons *stricto sensu* meant (to be distinguished, in this case, from “mere” legal entities), legal capacity is closely linked with capacity to act.

In other words, recognition of legal personality (e.g., for companies, associations and foundations) means recognition of existence of the legal person of the case, and therefore immediate assignment of the capacity to act jointly with the legal capacity.

Accordingly, as we shall see, liability related to performance of legal acts lies just against the legal person of the case. Otherwise, the physical persons who represent the legal person of the case would also be liable, like those who act in the name and on behalf of an unincorporated<sup>1</sup> (or unregistered<sup>2</sup>) association (*associazione non riconosciuta*), under art. 38 ICC.

## ARTICOLO 38 CC

### Obbligazioni

*“[I]. Per le obbligazioni assunte dalle persone che rappresentano l’associazione i terzi possono far valere i loro diritti sul fondo comune. Delle obbligazioni stesse rispondono anche personalmente e solidalmente le persone che hanno agito in nome e per conto dell’associazione”.*

## ARTICLE 38 ICC

### Obligations

*“[I]. As far the obligations taken on by the persons representing the association are concerned, third parties can claim their rights against the common fund. Anyway, the persons who acted in name and on behalf of the association are also personally, severally and jointly liable for the same obligations”.*

We said that the capacity to act is one’s capacity to dispose of his/her own rights and to assume obligations through acts of will. Article 2 ICC deals with it.

## ARTICOLO 2 CC

### Maggiore età. Capacità di agire

*“[I]. La maggiore età è fissata al compimento del diciottesimo anno. Con la maggiore età si acquista la capacità di compiere tutti gli atti per i quali non sia stabilita una età diversa.*

*[II]. Sono salve le leggi speciali che stabiliscono un’età inferiore in materia di capacità a prestare il proprio lavoro. In tal caso il minore è abilitato all’esercizio dei diritti e delle azioni che dipendono dal contratto di lavoro”.*

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<sup>1</sup> English way to define them.

<sup>2</sup> Italian way to call them.

## ARTICLE 2 ICC

### Age of majority. Capacity to act

“[I]. *The age of majority is set up at the age of eighteen. With the age of majority, everyone acquires capacity to perform all acts for which a different age is not prescribed.*

[II]. *Special laws that prescribe a lower age on matter of capacity to perform working activities are unaffected. In this case, the minor is entitled to exercise the rights and claims that depend on the contract of employment”.*

#### 4.2 On minors (basic legal concepts).

Minors mainly have the **right to the name** (governed by articles 6, 7, 8, 9 ICC), and the **right to physical integrity** (expressed e.g. in article 5 ICC, on acts of disposition of the body).

Briefly, they are entitled to the so-called **personality rights**, that require legal capacity.

They do not have capacity to act, meaning they cannot enter into contracts or complete other legal transactions. Minors’ rights, when they are due to be exercised, they are exercised throughout legal representatives, such as parents, first of all, and tutore (a specific kind of guardian/protector, as well shall see afterwards), on a residual way.

#### 4.3 Cases for exclusion of the legal capacity.

Now, please note that **legal capacity is basically granted to everybody. It can be excluded in limited cases**, more in public law than in private law.

Examples of public-law exclusion:

- foreigners do not have the right to vote;
- physical persons convicted of certain crimes are banned from public offices.

Instead, examples of exclusions in private law are the following ones:

– minors cannot marry themselves, on an ordinary basis (*rectius*, if we look at them from the perspective of the legal capacity, they cannot be granted the *status* of spouse);

- the bankrupt cannot be *tutore* of a minor, until rehabilitation (see article 350, n. 5, ICC).

Please see also article 2382 ICC, on joint stock companies:

## ARTICOLO 2382 CC

### Cause di ineleggibilità e di decadenza

“[I]. *Non può essere nominato amministratore, e se nominato decade dal suo ufficio, l’interdetto, l’inabilitato, il fallito, o chi è stato condannato ad una pena che importa*

*l'interdizione, anche temporanea, dai pubblici uffici o l'incapacità ad esercitare uffici direttivi”.*

## ARTICLE 2382 ICC

### Reasons for ineligibility and forfeiture

*“[I]. An interdicted person, an inabilitato, a bankrupt, or someone who has been sentenced to a fine that involves interdiction, even a temporary one, from public office, or inability to exercise managerial activities, cannot be appointed manager”.*

Please note that foreigners are granted private-law rights provided for to the Italian citizens, subject to reciprocity. See article 16 Preleggi.

## ARTICOLO 16 PRELEGGI

### Trattamento dello straniero

*“[I]. Lo straniero è ammesso a godere dei diritti civili attribuiti al cittadino a condizione di reciprocità e salve le disposizioni contenute in leggi speciali.*

*[II]. Questa disposizione vale anche per le persone giuridiche straniere”.*

## ARTICLE 16 PRELEGGI

### Treatment of the foreigner

*“[I]. A foreigner is allowed to enjoy the civil rights granted to a citizen subject to condition of reciprocity and subject to the provisions contained in special laws.*

*[II]. This provision applies also to foreign legal persons”.*

#### 4.4 The figure of the conceived child.

Legal capacity, as we saw, is acquired by birth (see article 1, par. 1, ICC), but article 1, par. 2, ICC, deals also with the figure of the so-called *concepito*/conceived child, that therefore needs to be addressed.

Article 1, par. 2, ICC put the rights of the unborn children subject to the condition (event future and uncertain, as we shall see) of birth.

A practical example of application of article 1 ICC: a conceived person can receive properties by way of gift/donation and succession *mortis causa* (due to death), subject to the condition that he/she is born alive. During pregnancy he/she has only an expectation, respectively, under article 643 ICC (on the administration of assets), and article 784, last par., ICC (on gift to unborn persons).

Anyway, please note that for these above-mentioned purposes, the law goes even beyond the figure of the conceived child.

In fact, as for the purposes of the law on succession (*mortis causa*/on death), see art. 462, par. 3, ICC.

## **ARTICOLO 462 CC**

### **Capacità delle persone fisiche**

*“[I]. Sono capaci di succedere tutti coloro che sono nati o concepiti al tempo dell’apertura della successione.*

*[II]. Salvo prova contraria, si presume concepito al tempo dell’apertura della successione chi è nato entro i trecento giorni dalla morte della persona della cui successione si tratta.*

*[III]. Possono inoltre ricevere per testamento i figli di una determinata persona vivente al tempo della morte del testatore, benché non ancora concepiti”.*

## **ARTICLE 462 ICC**

### **Capacity of physical persons**

*“[I]. All those who were born or conceived at the time of the opening of the succession can succeed.*

*[II]. Unless proven otherwise, a person born within three hundred days from the death of the person whose succession is concerned is presumed to have been conceived at the time of the opening of the succession.*

*[III]. Children of a specific person living at the time of the testator’s death can also receive inheritance via will, although they are not yet conceived”.*

Whereas, for the purposes of the gift, see article 784, par. 1, ICC.

## **ARTICOLO 784 CC**

### **Donazione a nascituri**

*“[I]. La donazione può essere fatta anche a favore di chi è soltanto concepito, ovvero a favore dei figli di una determinata persona vivente al tempo della donazione, benché non ancora concepiti.*

*[II]. L’accettazione della donazione a favore di nascituri, benché non concepiti, è regolata dalle disposizioni degli articoli 320 e 321.*

*[III]. Salvo diversa disposizione del donante, l’amministrazione dei beni donati spetta al donante o ai suoi eredi, i quali possono essere obbligati a prestare idonea garanzia. I frutti*

*maturati prima della nascita sono riservati al donatario se la donazione è fatta a favore di un nascituro già concepito. Se è fatta a favore di un non concepito, i frutti sono riservati al donante sino al momento della nascita del donatario”.*

## ARTICLE 784 ICC

### Gift to unborn physical persons

*“[I]. A gift can also be made in favour of those who are only conceived, or in favour of the children of a specific person living at the time of the donation, although they are not yet conceived.*

*[II]. The acceptance of the gift in favour of unborn persons, even if not conceived, is governed by articles 320 and 321.*

*[III]. Unless otherwise provided by the donor, the administration of the gifted properties is up to the donor or his heirs, who may be obliged to provide a suitable guarantee. The fruits accrued before birth are due to the donee if the gift is made in favour of an unborn child already conceived. If it is done in favour of a non-conceived child, then the fruits are due to the donor until the moment of birth of the donee”.*

#### 4.5 On personality rights.

We saw that even minors are entitled to personality rights. Now, main personality rights are the following ones.

##### **The right to physical integrity.**

It is governed primarily by article 13 of the Italian Constitution.

According to this right, patient’s consent is required for medical-health treatments or other kinds of interventions. Ergo, the consent of his/her legal representative is due, in case of a minor.

In case of breach of the physical integrity, damages are due (the act is an unlawful act, for private law purposes, under article 2043 ICC; but there are also heavy consequences of criminal law, in our legal system). Please note that however, article 2045 ICC, on *stato di necessità*, is an exception to the payment of damages due for the harmful act of the case. In this situation only an indennità/indennizzo, namely a mere compensation, is due.

## **ARTICOLO 2045 CC**

### **Stato di necessità**

*“[I]. Quando chi ha compiuto il fatto dannoso vi è stato costretto dalla necessità di salvare sé o altri dal pericolo attuale di un danno grave alla persona, e il pericolo non è stato da lui volontariamente causato né era altrimenti evitabile, al danneggiato è dovuta un’indennità, la cui misura è rimessa all’equo apprezzamento del giudice”.*

## **ARTICLE 2045 ICC**

### **Stato di necessità**

*“[I]. When the person who committed the harmful act was acting under the need of saving herself or others from the present danger of a serious harm to the person of the case, and the danger was neither voluntarily caused by her nor it was otherwise avoidable, then a mere compensation is due to the injured party, whose measure is left to the fair appreciation of the judge”.*

Medical treatments in general require the will of patients.

Anyway, exemptions can be established when public interests are involved. Cases are the compulsory vaccination; the medical treatment under article 32, paragraph 2, of the Italian Constitution, admitted in the case of a reservation provided for by the law (so-called *riserva di legge*).

Moreover, according to the right to physical integrity acts of disposition of the body are illegal if they are against laws, public policy and good customs. See article 5 ICC.

## **ARTICOLO 5 CC**

### **Atti di disposizione del proprio corpo**

*“[I]. Gli atti di disposizione del proprio corpo sono vietati quando cagionino una diminuzione permanente della integrità fisica, o quando siano altrimenti contrari alla legge, all’ordine pubblico o al buon costume”.*

## **ARTICLE 5 ICC**

### **Acts of disposition of someone’s own body**

*“[I]. Acts of disposition of someone’s own body are prohibited when they cause a permanent decrease of his/her physical integrity, or when they are otherwise against laws, public policy and good customs”.*

An example: organ transplants between human beings are allowed within the limits set out by law.

**The right to the freedom of movement (and the freedom to do or not to do something).**

Consequences of this right in private law are the following ones:

a) perpetual obligations/bonds are not covered by the law (usually only temporary or short-term ones are allowed); a permanent contract means that there is always the right to withdraw (see article 1373, par. 2, ICC);

b) no one can be forced to comply. See articles 2930, 2931 and 2932 ICC: the rule is the liability for damages, the “exception” is the case of article 2932 ICC on the so-called *contratto preliminare*/preliminary agreement (which is also explained on the basis of its own coordination with article 1351 ICC).

**The right to a name.**

It means the right to take action (make a claim) against anyone who illegally challenges the use of a name and against anyone who improperly uses the name of others, causing harm.

**ARTICOLO 6 CC**

**Diritto al nome**

*“[I]. Ogni persona ha diritto al nome che le è per legge attribuito.*

*[II]. Nel nome si comprendono il prenome e il cognome.*

*[III]. Non sono ammessi cambiamenti, aggiunte o rettifiche al nome, se non nei casi e con le formalità dalla legge indicati”.*

**ARTICLE 6 ICC**

**Right to a name**

*“[I]. Every person has the right to the name that has been given to her by law.*

*[II]. The first name and the surname are included in the name.*

*[III]. No changes, additions or corrections to the name are allowed, except in the cases and with the formalities indicated by the law”.*

Damages for breach of this right can be:

- patrimonial ones (if there is, e.g., a diversion of clients);
- non-patrimonial ones (e.g., if a person, who did not sign a document, appears to be the signatory of the case, as it happened in cases on electoral lists).

Anyway, as for the non-patrimonial damages, please see article 2059 ICC.

### **ARTICOLO 2059 CC**

#### **Danni non patrimoniali**

“[I]. *Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge*”.

### **ARTICLE 2059 ICC**

#### **Non-patrimonial damages**

“[I]. Non-patrimonial damages are due only in cases established by law”.

Protection available in case of non-patrimonial damages: request for termination of the harmful fact and possible publication of the judgment in newspapers.

#### **The right to honour.**

It is protected against ingiuria and defamation (crimes, in criminal law).

#### **4.6 On natural and legal incapacities of physical persons: on incapacity of understanding and willing, limitation and exclusion of capacity to act, interdizione, inabilitazione, and support administration.**

We learned that the **capacity to act** is someone’s capacity to dispose of his/her own rights and to take on obligations/commitments through manifestations/acts of will.

Therefore, a synthesis could be:

- legal capacity is the capacity to be;
- capacity to act is the capacity to dispose of (to perform dispositive acts), like to buy a thing/property, to rent an apartment, to make a gift (and receive it too), *et cetera*. It is basically involved when a disposition of a right (relevant to the purposes of the law) is involved.

Now, please note that, however, in order to dispose, everyone needs to understand what he/she is disposing of and to actually wish to dispose of.

*Ergo*, **capacity to act** involves **capacity to understand and to want**.

*Ergo*, there is possibility for **exclusion** or **limitation** of the capacity to act, namely when the capacity of understanding and willing is missing or it is reduced.

**Rationale**: basically, the protection of the incapable against the danger of damaging himself/herself.

**Remedies**: avoidance of the legal transaction of the case.

Please also note that the status of failure to act may be a temporary one or a continuous (or even a permanent) one.

If the status of incapacity (namely, to understand and to want) is not a temporary one, then the law grants to specified persons (such as parents, *tutore*, *curatore*, as **legal representatives**) the task of acting in the interests (more precisely, **in the name and on behalf**) of the incapacitated person of the case (such as for her personal care; her representation or assistance in carrying out legal acts; administration of her assets, *et cetera*).

From their perspective, then, legal representatives act under the supervision of judges, namely, under the circumstances of the case, *tribunale* and *giudice tutelare*.

Now, let's go deep into the subject matter of the incapacity to act in general.

## **ARTICOLO 1425 CC**

### **Incapacità delle parti**

*“[I]. Il contratto è annullabile se una delle parti era legalmente incapace di contrattare.*

*[II]. È parimenti annullabile, quando ricorrono le condizioni stabilite dall'articolo 428, il contratto stipulato da persona incapace d'intendere o di volere”.*

## **ARTICLE 1425 ICC**

### **Incapacity of the parties**

*“[I]. A contract can be avoided if one of the parties was legally incapable of contracting.*

*[II]. A contract signed by a person incapable of understanding or willing is likewise voidable, under the conditions laid down in article 428”.*

Please note that here a distinction is already involved, namely the one between persons legally incapable and persons simply incapable of understanding and willing.

Legal incapacity (or incapacity at law) = statutory incapacity (meaning established by law): here we have, first of all, interdiction/*interdizione* and *inabilitazione* (see also below).

General consequences of the incapacity to act: see art. 428 ICC.

## **ARTICOLO 428 CC**

### **Atti compiuti da persona incapace d'intendere o di volere**

*“[I]. Gli atti compiuti da persona che, sebbene non interdetta, si provi essere stata per qualsiasi causa, anche transitoria, incapace d'intendere o di volere al momento in cui gli atti sono stati compiuti, possono essere annullati su istanza della persona medesima o dei suoi eredi o aventi causa, se ne risulta un grave pregiudizio all'autore.*

[II]. *L'annullamento dei contratti non può essere pronunziato se non quando, per il pregiudizio che sia derivato o possa derivare alla persona incapace d'intendere o di volere o per la qualità del contratto o altrimenti, risulta la malafede dell'altro contraente.*

[III]. *L'azione si prescrive nel termine di cinque anni dal giorno in cui l'atto o il contratto è stato compiuto*".

## ARTICLE 428 ICC

### Acts performed by a person incapable of understanding or willing

"[I]. The acts performed by a person who, although not interdicted, is proved to have been from any reason, even a temporary one, incapable of understanding or willing at the time when the acts were performed, can be avoided upon application made by such person or her heirs or successors in interests, if such acts are seriously harmful to the person who performed them.

[II]. Avoidance of contracts cannot be declared except when, due to the prejudice that is derived or may derive to the person incapable of understanding or willing or due to the quality of the contract or otherwise, bad faith of the other contracting party is apparent.

[III]. The claim must be performed within five years from the day on which the act or contract was completed".

Rules related to the above-mentioned figures of statutory incapacity.

As for **personal acts** (like will or marriage), no substitution is allowed. *Ergo*, an interdict/*interdetto* cannot make a will or marry.

**Interdiction/interdizione**: when there is habitual infirmity of mind. There is incapacity in general: therefore, a *tutore* is needed.

**Inabilitazione**: if the infirmity is not such as to justify the interdiction. There is a limited capacity. Subject matter outside the area of the limited capacity: as a rule, the so-called **acts of extraordinary administration**; as far as performance of these acts is concerned, a *curatore* is needed. Inabilitazione is basically declared in case of prodigality, habitual abuse of alcoholic beverages or drugs, et cetera.

Purpose/ratio of interdizione and inabilitazione: protection from exposure to risks of financial prejudice.

Accordingly, natural persons deaf and blind from birth or early childhood or who lack of sufficient education can be declared *inabilitati*, if they cannot provide for their own interests, and, in the most serious cases, they can be interdicted too.

Moreover, as far as elderly people or people with minor infirmities are concerned, nowadays (from year 2004) we also have the figure of the **amministratore di sostegno/support**

**administrator** (see article 404 ICC and ff. ones). Please note that an appointment of a support administrator is a decision that does not provide for general and schematic consequences, but it is structured on the actual needs of the beneficiary of the case (see article 410 ICC).

#### 4.7 Legal incapacity *versus* natural incapacity.

Minors, interdicted persons, *inabilitati*, beneficiaries of support administration are all **legally incapable (to act)**.

Legal incapacity to act can be:

- **absolute** (figures: minors and *interdetti*); or
- **relative** (figures: emancipated minors; *inabilitati*; beneficiaries of support administration).

Please note that for the purposes of determining the legal capacity/incapacity, the law overlaps reality.

*Exempli gratia*, a minor is legally incapable to act, even if he/she is an intelligent and mature person. On the contrary, a person legally capable may be *de facto* incapable to act, in a specific moment, because she is drunk, for example.

*Ergo*, as we said, there is a distinction between legal incapacity and strict incapacity of understanding and willing (meant to be understood as natural incapacity, or incapacity in nature, or in the nature of things).

Accordingly, there is a relationship between the two incapacities, but coincidence is incomplete (e.g., a person legally incapacitated for mental illness can be lucid in a specific moment of her life).

Legal incapacity: in any case, there is protection by the law (the above-mentioned moment of clarity is fully irrelevant).

*Ergo*, if there is legal incapacity, the contract completed, for example, by the minor of the case (naturally capable of understanding and willing), or by the *interdetto*, can always be avoided (for **reasons of simplification and legal certainty**): see artt. 1425 and 1426 ICC.

### ARTICOLO 1425 CC

#### Incapacità delle parti

“[I]. Il contratto è annullabile se una delle parti era legalmente incapace di contrattare.

[II]. È parimenti annullabile, quando ricorrono le condizioni stabilite dall’articolo 428, il contratto stipulato da persona incapace d’intendere o di volere”.

## ARTICLE 1425 ICC

### Incapacity of the parties

“[I]. *A contract can be avoided if one of the parties was legally incapable of contracting.*

*[II]. A contract signed by a person incapable of understanding or willing is likewise voidable, under the conditions laid down in article 428”.*

## ARTICOLO 1426 CC

### Raggiri usati dal minore

“[I]. *Il contratto non è annullabile, se il minore ha con raggiri occultato la sua minore età; ma la semplice dichiarazione da lui fatta di essere maggiorenne non è di ostacolo all’impugnazione del contratto”.*

## ARTICLE 1426 ICC

### Deceptions used by a minor

“[I]. *The contract cannot be avoided if the minor has concealed his minor age by deception; anyway, the mere declaration, made by him, that he is of age cannot prevent from challenging the contract”.*

Now let’s go to the opposite case: namely, the one of the persons naturally incapable of understanding and willing but legally capable.

Here there is the **need to protect not only the incapable person of the case, but also the interests of her counterpart** (which, relying on the general capacity of understanding and willing of the other party, may have specifically relied on the validity of the act, due to his/her unawareness of the factual reality).

Accordingly, there can be a conflict of interests.

The general rules of law on the topic are the following ones:

1) legal incapacity: the aforementioned conflict of interest is resolved in favour of the incapable person (because it is always possible to ascertain the existence of a state of legal incapacity, through e.g., the identity card of the minor, the *registri di stato civile*; the court registries – there is disclosure of the situation: see article 423 ICC);

2) natural incapacity: there may be good faith of the other party. Therefore, distinctions must be taken into consideration among:

a) **family-law transactions.** They can be avoided (see e.g., article 120 ICC). Here the law requires that the legal transaction of the case was actually wanted.

## ARTICOLO 120 CC

### Incapacità di intendere o di volere

*“[I]. Il matrimonio può essere impugnato da quello dei coniugi che, quantunque non interdetto, provi di essere stato incapace di intendere o di volere, per qualunque causa, anche transitoria, al momento della celebrazione del matrimonio.*

*[II]. L'azione non può essere proposta se vi è stata coabitazione per un anno dopo che il coniuge incapace ha recuperato la pienezza delle facoltà mentali”.*

## ARTICLE 120 ICC

### Inability to understand or want

*“[I]. A marriage can be challenged by one of the spouses who, although not interdicted, proves that he/she was incapable of understanding or willing, for any reason, even a temporary one, at the time of the celebration of the marriage.*

*[II]. The claim cannot be advanced if there has been cohabitation for one year after that the interdicted spouse has recovered fullness of his/her mental abilities”.*

b) **will** (see article 591, par. 3, ICC) and **gift** (see article 775 ICC). They can be avoided too.

## ARTICOLO 591 CC

### Casi d'incapacità

*“[I]. Possono disporre per testamento tutti coloro che non sono dichiarati incapaci dalla legge.*

*[II]. Sono incapaci di testare:*

- 1) coloro che non hanno compiuto la maggiore età;*
- 2) gli interdetti per infermità di mente;*
- 3) quelli che, sebbene non interdetti, si provi essere stati, per qualsiasi causa, anche transitoria, incapaci di intendere e di volere nel momento in cui fecero testamento.*

*[III]. Nei casi d'incapacità preveduti dal presente articolo il testamento può essere impugnato da chiunque vi ha interesse. L'azione si prescrive nel termine di cinque anni dal giorno in cui è stata data esecuzione alle disposizioni testamentarie”.*

## ARTICLE 591 ICC

### Cases of incapacity

“[I]. Those who are not declared incapable by law can dispose by will.

[II]. They are unable to make a will:

- 1) those who have not reached the age of majority;
- 2) persons interdicted for infirmity of mind;
- 3) those who, although not interdicted, it is proved that they were, due to any reason, even a temporary one, incapable of understanding and willing at the time in which they made the will.

[III]. In all cases of incapacity provided for in this article, the will can be challenged by anyone who has an interest in it. The claim must be performed within five years from the day in which the testamentary dispositions were executed”.

## ARTICOLO 775 CC

### Donazione fatta da persona incapace d'intendere o di volere

“[I]. La donazione fatta da persona che, sebbene non interdetta, si provi essere stata per qualsiasi causa, anche transitoria, incapace d'intendere o di volere al momento in cui la donazione è stata fatta, può essere annullata su istanza del donante, dei suoi eredi o aventi causa.

[II]. L'azione si prescrive in cinque anni dal giorno in cui la donazione è stata fatta”.

## ARTICLE 775 ICC

### Gift made by a person incapable of understanding or willing

“[I]. The gift made by a person who, although not interdicted, it is proved that he/she was, due to any reason, even a temporary one, unable to understand or to want at the time when the gift was made, can be avoided at request of the donor, his heirs or his successors in interests.

[II]. The claim expires in five years from the day the gift was made”.

By analogy, all acts of indirect gift/indirect donation can be avoided too (the interests of the assignee/donee is sacrificed).

c) **unilateral acts/legal transactions.** Here there is a weak reliance pending on behalf of the “counterpart” (there is not even a counterpart, in a proper way), therefore they can be avoided if they are seriously harmful (see below article 428, par. 1, ICC);

d) **contracts.** Here we are in the field of business and therefore reliance is protected; it is necessary to prove that the act causes a serious damage to the incapable party and that the damage is the outcome of a bad-faith behaviour of the other contracting party (see below article 428, par. 2, ICC).

## **ARTICOLO 428 CC**

### **Atti compiuti da persona incapace d'intendere o di volere**

*“[I]. Gli atti compiuti da persona che, sebbene non interdetta, si provi essere stata per qualsiasi causa, anche transitoria, incapace d'intendere o di volere al momento in cui gli atti sono stati compiuti, possono essere annullati su istanza della persona medesima o dei suoi eredi o aventi causa, se ne risulta un grave pregiudizio all'autore.*

*[II]. L'annullamento dei contratti non può essere pronunciato se non quando, per il pregiudizio che sia derivato o possa derivare alla persona incapace d'intendere o di volere o per la qualità del contratto o altrimenti, risulta la malafede dell'altro contraente.*

*[III]. L'azione si prescrive nel termine di cinque anni dal giorno in cui l'atto o il contratto è stato compiuto”.*

## **ARTICLE 428 ICC**

### **Acts performed by a person incapable of understanding or willing**

*“[I]. The acts performed by a person who, although not interdicted, is proved to have been from any reason, even a temporary one, incapable of understanding or willing at the time when the acts were performed, can be avoided upon application made by such person or her heirs or successors in interests, if such acts are seriously harmful to the person who performed them.*

*[II]. Avoidance of contracts cannot be declared except when, due to the prejudice that is derived or may derive to the person incapable of understanding or willing or due to the quality of the contract or otherwise, bad faith of the other contracting party is apparent.*

*[III]. The claim must be performed within five years from the day on which the act or contract was completed”.*

Then, as for the unlawful acts, on a general basis, the person incapable of understanding and willing is not legally liable for her unlawful acts (see article 2046 ICC).

Exception: if the inability of the case comes out from her own fault.

## ARTICOLO 2046 CC

### Imputabilità del fatto dannoso

“[I]. *Non risponde delle conseguenze dal fatto dannoso chi non aveva la capacità d'intendere o di volere al momento in cui lo ha commesso, a meno che lo stato d'incapacità derivi da sua colpa*”.

## ARTICLE 2046 ICC

### Imputability of the harmful fact

“[I]. *No one who did not have the ability to understand or to want at the time in which he committed a harmful fact is to be liable for the consequences of the harmful event, unless that the state of incapacity has derived from his own fault*”.

Please remember that, when we talk about unlawful acts, everything always starts from article 2043 ICC.

## ARTICOLO 2043 CC

### Risarcimento per fatto illecito

“[I]. *Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*”.

## ARTICLE 2043 ICC

### Damages for unlawful acts

“[I]. *Any intentional or negligent act, which causes unjust harm to others, obliges the one who committed the act to pay for the damage*”.

#### 4.8 Interdiction at law of a convicted person.

This is a peculiar case of interdizione.

Under article 32 of the Italian Criminal Code, a sentence for imprisonment for a period of at least 5 years involves no possibility to dispose of, or to manage, properties.

Accordingly, here we have a case of incapacity to act declared not for a purpose of protection, but for a punitive one.

Therefore, please see article 1441, par. 2, ICC: avoidance of the contract of the case can be claimed by anyone (as an exception to the general rule on avoidance, under article 1441, par. 1, ICC).

## ARTICOLO 1441 CC

### Legittimazione

“[I]. *L’annullamento del contratto può essere domandato solo dalla parte nel cui interesse è stabilito dalla legge.*

[II]. *L’incapacità del condannato in istato di interdizione legale può essere fatta valere da chiunque vi ha interesse”.*

## ARTICLE 1441 ICC

### Entitlement

“[I]. Avoidance of a contract can be claimed only by the party in whose interest it is set up by the law.

[II]. *Incapacity of a convicted person in a state of legal interdiction can be asserted by anyone who has an interest in it”.*

### 4.9 Legal consequences of legal transactions performed by minors.

We saw that generally, a legal transaction carried out by a minor can be avoided (see article 1425 ICC). The claim for avoidance is exercised by the legal representative in the interest of the minor (see article 1441 ICC and article 1442 ICC).

However, this means that the minor’s statement can be taken seriously. On the contrary, if the statement is released by a child, it cannot be taken seriously: accordingly, the legal transaction is void, *rectius* non-existent (*inesistente*).

Now, please note that in the case of a minor, a legal transaction can be avoided either if it is harmful or not.

Anyway, if the minor has received, through the avoidable legal transaction of the case, a non-refundable performance (because, e.g., it consists of a service of transportation or a medical service or a film show, or because the performance is a depletable/consumable one – see food or medicines – or it has actually been consumed), then the minor is required to pay what it’s due within the limits of the benefit received. See article 1443 ICC.

## ARTICOLO 1443 CC

### Ripetizione contro il contraente incapace

“[I]. *Se il contratto è annullato per incapacità di uno dei contraenti, questi non è tenuto a restituire all’altro la prestazione ricevuta se non nei limiti in cui è stata rivolta a suo vantaggio”.*

## ARTICLE 1443 ICC

### Claim for restitution against the incapable party of a contract

*“[I]. If a contract is avoided due to incapacity of one of the contracting parties, then the incapacitated party is not obliged to return the service received to the other party, except to the extent that it was directed to her own advantage”.*

Accordingly, the minor must pay, in any case, the right price of the product of the case bought (see e.g., the case of a sale-purchase of a bottle of coke or a pizza, *et cetera*). Otherwise, a so-called *arricchimento ingiustificato*/unjustified enrichment would occur.

Same thing, as for the undue payments. See art. 2039 ICC.

## ARTICOLO 2039 CC

### Indebito ricevuto da un incapace

*“[I]. L'incapace che ha ricevuto l'indebito, anche in mala fede, non è tenuto che nei limiti in cui ciò che ha ricevuto è stato rivolto a suo vantaggio”.*

## ARTICLE 2039 ICC

### Undue payment received from an incapable person

*“[I]. An incapable person who has received an undue payment or service, even in bad faith, is liable only to the extent to which what she has received has been turned to her own advantage”.*



## 5 Lecture 5: on physical persons (part 2).

SUMMARY: 5.1 On parental authority. – 5.2 On *tutela* of minors. – 5.3 On emancipation (the figure of the emancipated minor). – 5.4 On *tutela* of *interdetti* and *curatela* of *inabilitati*. – 5.5 On support administration. – 5.6 On the legal concepts of abode, residence and domicile.

### 5.1 On parental authority.

We said in lecture 3 (see par. 3.3) that one case of exercise of a *potestà* is the case of the parental authority exercised by the parents on behalf of their children/minors.

Its own subject matter is care of the minor and administration of his/her own assets.

As a rule, parental authority is up to both parents (since the 1975 family-law reform): see article 316, paragraphs 1 and 2, ICC.

Accordingly, **joint decisions of the parents** are required by the law (unless they are not able to act jointly).

On the judicial intervention, in the event of a conflict between parents on some relevant issues, please see article 316, paragraph 3, ICC.

#### ARTICOLO 316 CC

#### Responsabilità genitoriale

*“[I]. Entrambi i genitori hanno la responsabilità genitoriale che è esercitata di comune accordo tenendo conto delle capacità, delle inclinazioni naturali e delle aspirazioni del figlio. I genitori di comune accordo stabiliscono la residenza abituale del minore.*

*[II]. In caso di contrasto su questioni di particolare importanza ciascuno dei genitori può ricorrere senza formalità al giudice indicando i provvedimenti che ritiene più idonei.*

*[III]. Il giudice, sentiti i genitori e disposto l’ascolto del figlio minore che abbia compiuto gli anni dodici e anche di età inferiore ove capace di discernimento, suggerisce le determinazioni che ritiene più utili nell’interesse del figlio e dell’unità familiare. Se il contrasto permane il giudice attribuisce il potere di decisione a quello dei genitori che, nel singolo caso, ritiene il più idoneo a curare l’interesse del figlio.*

*[IV]. Il genitore che ha riconosciuto il figlio esercita la responsabilità genitoriale su di lui. Se il riconoscimento del figlio, nato fuori del matrimonio, è fatto dai genitori, l’esercizio della responsabilità genitoriale spetta ad entrambi.*

*[V]. Il genitore che non esercita la responsabilità genitoriale vigila sull’istruzione, sull’educazione e sulle condizioni di vita del figlio”.*

## ARTICLE 316 ICC

### Parental authority

*“[I]. Both parents have parental authority, which is exercised by mutual agreement taking into account the child’s abilities, natural inclinations and aspirations. Parents establish the child’s habitual residence by mutual agreement.*

*[II]. In the event of a dispute on issues of particular importance, each of the parents can appeal to the judge without formalities, indicating the measures that they deem the most appropriate ones.*

*[III]. The judge, having summoned the parents and ordered to listen to the minor child who has reached the age of twelve, and also younger if capable of discernment, suggests the determinations that he considers the most useful ones, in the interest of the child and the family unit. If the conflict persists, then the judge gives the power of decision to the one of the parents who, in the individual case, thinks is the most suitable to look after the interest of the child.*

*[IV]. The parent who has recognized the child exercises parental authority over him. If the recognition of the child, born out of wedlock, is made by the parents, then the exercise of parental authority belongs to both.*

*[V]. The parent who does not exercise parental authority oversees the child’s education and living conditions”.*

Please note that here, at first, there is no imposition of any decision by the judge.

Please also note that a parent’s power of decision, it’s also a duty; namely it is a power/duty.

In fact, a reverse side of the parental authority is parental liability, under article 2048 ICC, for the unlawful acts committed by the children.

## ARTICOLO 2048 CC

### Responsabilità dei genitori, dei tutori, dei precettori e dei maestri d’arte

*“[I]. Il padre e la madre, o il tutore, sono responsabili del danno cagionato dal fatto illecito dei figli minori non emancipati o delle persone soggette alla tutela, che abitano con essi. La stessa disposizione si applica all’affiliante.*

*[II]. I precettori e coloro che insegnano un mestiere o un’arte sono responsabili del danno cagionato dal fatto illecito dei loro allievi e apprendisti nel tempo in cui sono sotto la loro vigilanza.*

*[III]. Le persone indicate dai commi precedenti sono liberate dalla responsabilità soltanto se provano di non aver potuto impedire il fatto”.*

## ARTICLE 2048 ICC

### Liability of parents, *tutori*, *precettori* and masters of art

“[I]. Father and mother, or tutore, are liable for the damage caused by the unlawful act of non-emancipated minors or persons subject to tutela who live with them. The same provision applies to the adopter.

[II]. *Tutori and those who teach a trade or an art are liable for the damage caused by the unlawful act of their pupils and apprentices during the time they are under their supervision.*

[III]. *The persons indicated in the preceding paragraphs are released from liability only if they prove that they were not able to prevent the fact”.*

Anyway, as for the main duties of the parents: see, e.g., the duty of maintenance of the children.

Power related: the power/duty of surveillance over them and their education.

Legal consequences, in terms of parental authority:

i) in case of a boy/girl leaving home: any act of leaving performed by the minor of the case is subject to the power of recall by his/her parents (see article 318 ICC);

ii) power of surveillance on acquaintances and correspondence (when it's due). Criterion of behaviour for the parents in case of surveillance: reasonableness;

iii) power-duty of education: *ergo* e.g., educational choices of study and religion are basically made by the parents;

iv) power-duty of asset administration. Here there is a distinction between:

a) ordinary administration; and,

b) extraordinary administration (the law requires an authorization issued by *giudice tutelare* under article 320 ICC, and the appointment of a *curatore speciale*, in the cases mentioned in article 321 ICC; otherwise, the act can be avoided, see article 322 ICC).

## ARTICOLO 320 CC

### Rappresentanza e amministrazione

“[I]. *I genitori congiuntamente, o quello di essi che esercita in via esclusiva la responsabilità genitoriale, rappresentano i figli nati e nascituri, fino alla maggiore età o all'emancipazione in tutti gli atti civili e ne amministrano i beni. Gli atti di ordinaria amministrazione, esclusi i contratti con i quali si concedono o si acquistano diritti personali di godimento, possono essere compiuti disgiuntamente da ciascun genitore.*

[II]. *Si applicano, in caso di disaccordo o di esercizio difforme dalle decisioni concordate, le disposizioni dell'articolo 316.*

[III]. *I genitori non possono alienare, ipotecare o dare in pegno i beni pervenuti al figlio a qualsiasi titolo, anche a causa di morte, accettare o rinunciare ad eredità o legati, accettare donazioni, procedere allo scioglimento di comunioni, contrarre mutui o locazioni ultranovennali o compiere altri atti eccedenti la ordinaria amministrazione né promuovere, transigere o compromettere in arbitri giudizi relativi a tali atti, se non per necessità o utilità evidente del figlio dopo autorizzazione del giudice tutelare.*

[IV]. *I capitali non possono essere riscossi senza autorizzazione del giudice tutelare, il quale ne determina l'impiego.*

[V]. *L'esercizio di una impresa commerciale non può essere continuato se non con l'autorizzazione del tribunale su parere del giudice tutelare. Questi può consentire l'esercizio provvisorio dell'impresa, fino a quando il tribunale abbia deliberato sulla istanza.*

[VI]. *Se sorge conflitto di interessi patrimoniali tra i figli soggetti alla stessa responsabilità genitoriale, o tra essi e i genitori o quello di essi che esercita in via esclusiva la responsabilità genitoriale, il giudice tutelare nomina ai figli un curatore speciale. Se il conflitto sorge tra i figli e uno solo dei genitori esercenti la responsabilità genitoriale, la rappresentanza dei figli spetta esclusivamente all'altro genitore”.*

## ARTICLE 320 ICC

### Representation and administration

*“[I]. The parents jointly, or one of them who has exclusive parental authority, are the legal representatives of the children born and unborn, until the age of majority or for emancipation, in all civil acts, and they manage their properties. Acts of ordinary administration, except for contracts according to which right of personal enjoyment are granted or acquired, can be performed separately by each parent.*

*[II]. In the event of disagreement or exercise that differs from the agreed decisions, article 316 applies.*

*[III]. Parents cannot sell, mortgage or pledge the assets received by the child due to any reason, even those received due to death, accept or renounce inheritances or legacies, accept gifts, dissolve sharing of property rights, negotiate mortgages or rent agreements lasting more than nine years or perform other acts exceeding ordinary administration or promote, settle or put under arbitration judgments relating to such acts, except in case of obvious necessity or clear usefulness of the child after authorization of the giudice tutelare.*

*[IV]. Capitals cannot be collected without the authorization of the giudice tutelare, who decides on their use.*

[V]. The exercise of a commercial enterprise cannot be continued except with the authorization of the tribunale issued on the basis of the opinion of the giudice tutelare. The latter can allow the provisional exercise of the entrepreneurial activity of the case, until the tribunale has ruled on the application.

[VI]. If a conflict of financial interests arises between the children subject to the same parental authority, or between them and the parents or the one of them who exclusively exercises parental authority, the giudice tutelare appoints a curatore speciale on behalf of the children. If the conflict arises between the children and the sole parent who exercises parental authority, then the representation of the children rests exclusively with the other parent”.

### **ARTICOLO 321 CC**

#### **Nomina di un curatore speciale**

“[I]. In tutti i casi in cui i genitori congiuntamente, o quello di essi che esercita in via esclusiva la responsabilità genitoriale, non possono o non vogliono compiere uno o più atti di interesse del figlio, eccedenti l’ordinaria amministrazione, il giudice, su richiesta del figlio stesso, del pubblico ministero o di uno dei parenti che vi abbia interesse, e sentiti i genitori, può nominare al figlio un curatore speciale autorizzandolo al compimento di tali atti”.

### **ARTICLE 321 ICC**

#### **Appointment of a curatore speciale**

“[I]. In all cases in which the parents who jointly exercise parental authority, or the one of them who has an exclusive parental authority, can’t or do not want to perform one or more acts on behalf of their child’s interest that exceeds ordinary administration, the judge, at the request of the child himself, of the public prosecutor or one of the relatives who has an interest in it, after having heard the parents, can appoint a curatore speciale on behalf of the child, authorizing him to perform such acts”.

### **ARTICOLO 322 CC**

#### **Inosservanza delle disposizioni precedenti**

“[I]. Gli atti compiuti senza osservare le norme dei precedenti articoli del presente titolo possono essere annullati su istanza dei genitori esercenti la responsabilità genitoriale o del figlio o dei suoi eredi o aventi causa”.

## ARTICLE 322 ICC

### Non-compliance with the previous provisions

*“[I]. Acts carried out without observation of the rules contained in the previous articles of this title may be avoided at request of the parents who exercise parental authority or the child or his heirs or his successors in interests”.*

Please note that, as far as the ordinary and extraordinary administration of things/rights/properties is concerned, article 320 ICC is also qualified as a benchmark.

Please also note that an issue concerning acts of disposition of income, and conservation of assets *versus* acts of disposition of capital, comes out from the text of article 320 ICC.

Then, another legal consequence of the parental authority is the usufrutto legale (usufruct at law) of the parents over the assets of the child. See article 324 ICC.

Purpose/ratio of the provision: to avoid unequal ways of living during family coexistence.

## ARTICOLO 324 CC

### Usufrutto legale

*“[I]. I genitori esercenti la responsabilità genitoriale hanno in comune l’usufrutto dei beni del figlio, fino alla maggiore età o all’emancipazione.*

*[II]. I frutti percepiti sono destinati al mantenimento della famiglia e all’istruzione ed educazione dei figli.*

*[III]. Non sono soggetti ad usufrutto legale:*

- 1) i beni acquistati dal figlio con i proventi del proprio lavoro;*
- 2) i beni lasciati o donati al figlio per intraprendere una carriera, un’arte o una professione;*
- 3) i beni lasciati o donati con la condizione che i genitori esercenti la responsabilità genitoriale o uno di essi non ne abbiano l’usufrutto: la condizione però non ha effetto per i beni spettanti al figlio a titolo di legittima;*
- 4) i beni pervenuti al figlio per eredità, legato o donazione e accettati nell’interesse del figlio contro la volontà dei genitori esercenti la responsabilità genitoriale. Se uno solo di essi era favorevole all’accettazione, l’usufrutto legale spetta esclusivamente a lui”.*

## ARTICLE 324 ICC

### Usufruct at law

*“[I]. Parents who exercise parental authority are jointly entitled to the usufruct of the child’s assets, up to the age of majority or emancipation.*

*[II]. The fruits received are to be used for maintenance of the family and education of the children.*

*[III]. The following properties are not subject to legal usufruct:*

- 1) goods purchased by the child with the proceeds of his/her work;*
- 2) assets left or given to the child to pursue a career, an art or a profession;*
- 3) assets left or gifted subject to the condition that the parents who exercise parental authority, or one of them, do not have the usufruct: the condition, however, has no effect for the assets due to the child by way of forced heirship;*
- 4) goods received by the child by inheritance, legacy or gift and accepted in the interest of the child against the will of the parents who exercise parental authority. If only one of them was in favour of acceptance, then the legal usufruct belongs exclusively to him”.*

Now, penalties for breach/violations of parental authority are:

- forfeiture of the authority;
- removal from administration; and
- other judicial measures deemed to be convenient in the interest of the children of the case (please see articles 330, 333, 334 ICC).

### 5.2 On *tutela* of minors.

It is provided for by article 343 ICC and ff. ones.

Reasons: 1) death of parents; 2) inability of the parents to exercise parental authority.

The criteria for appointment and choice of the *tutore* (or guardian) of the case are established by articles 346 and 348 ICC. An oath by the *tutore* is due, under the law.

Factual situations according to which someone cannot be appointed as *tutore*/guardian are covered by art. 350 ICC.

## ARTICOLO 350 CC

### Incapacità all’ufficio tutelare

*“[I]. Non possono essere nominati tutori e, se sono stati nominati, devono cessare dall’ufficio:*

- 1) *coloro che non hanno la libera amministrazione del proprio patrimonio;*
- 2) *coloro che sono stati esclusi dalla tutela per disposizione scritta del genitore il quale per ultimo ha esercitato la responsabilità;*
- 3) *coloro che hanno o sono per avere o dei quali gli ascendenti, i discendenti o il coniuge hanno o sono per avere col minore una lite, per effetto della quale può essere pregiudicato lo stato del minore o una parte notevole del patrimonio di lui;*
- 4) *coloro che sono incorsi nella perdita della responsabilità genitoriale o nella decadenza da essa, o sono stati rimossi da altra tutela;*
- 5) *il fallito che non è stato cancellato dal registro dei falliti”.*

## ARTICLE 350 ICC

### **Inability to serve as a tutore/guardian**

*“[I]. They cannot be appointed tutori and, if they have been appointed, they must cease from office:*

- 1) *those who do not have the free administration of their assets;*
- 2) *those who have been excluded from tutela by written instruction of the parent who lastly exercised parental authority;*
- 3) *those who have or are to have, or whose ascendants, descendants or spouse have or are to have, a legal dispute with the minor, as a result of which the status of the minor or a significant part of the patrimony of the minor may be compromised;*
- 4) *those who have incurred in the loss of parental authority or in the forfeiture of it, or have been removed from other tutele;*
- 5) *the bankrupt who has not been removed from the bankruptcy register”.*

Purpose of tutela: see article 357 ICC: care; representation; assets administration.

Here we have the same powers of the parents but a greater control (see article 371 ICC on education; article 372 ICC, on capital investments; article 373 ICC, on bearer securities; article 374 ICC, on authorizations by the *giudice tutelare, et cetera*).

Duties of a *tutore*: inventory, administration, accounting, annual report, final account.

Removal of the *tutore* for: abuse, negligence, ineptitude, unworthiness, insolvency (see art. 384 ICC).

### **5.3 On emancipation (the figure of the emancipated minor).**

Marriage (see article 84, paragraph 1, ICC, which is the rule; the exception is in paragraph 2) means emancipation (see article 390 ICC).

## ARTICOLO 84 CC

### Età

*“[I]. I minori di età non possono contrarre matrimonio.*

*[II]. Il tribunale, su istanza dell’interessato, accertata la sua maturità psico-fisica e la fondatezza delle ragioni addotte, sentito il pubblico ministero, i genitori o il tutore, può con decreto emesso in camera di consiglio ammettere per gravi motivi al matrimonio chi abbia compiuto i sedici anni.*

*[III]. Il decreto è comunicato al pubblico ministero, agli sposi, ai genitori e al tutore.*

*[IV]. Contro il decreto può essere proposto reclamo, con ricorso alla corte d’appello, nel termine perentorio di dieci giorni dalla comunicazione.*

*[V]. La corte d’appello decide con ordinanza non impugnabile, emessa in camera di consiglio.*

*[VI]. Il decreto acquista efficacia quando è decorso il termine previsto nel quarto comma, senza che sia stato proposto reclamo”.*

## ARTICLE 84 ICC

### Age

*“[I]. Minors cannot marry.*

*[II]. The tribunale, at request of the interested party, having ascertained her psycho-physical maturity and the grounds of the reasons offered, having heard the public prosecutor, the parents or the tutore, may, by decree issued in the council chamber for serious reasons, allow to marriage who has reached the age of sixteen.*

*[III]. The decree is communicated to the public prosecutor, the spouses, the parents and the tutore.*

*[IV]. A complaint can be lodged against the decree, with recourse to the court of appeal, within the peremptory term of ten days from the communication.*

*[V]. The court of appeal decides with an unchallengeable order, issued in the council chamber.*

*[VI]. The decree takes effect when the term provided for in the fourth paragraph has expired, without a complaint having been lodged”.*

## Articolo 390 CC

### Emancipazione di diritto

*“[I]. Il minore è di diritto emancipato col matrimonio”.*

## ARTICLE 390 ICC

### Emancipation at law

*“[I]. A minor is emancipated at law by way of marriage”.*

The emancipated minor can perform by himself/herself all the acts of ordinary administration; as for the extraordinary administration, he/she needs the help of a *curatore*, that is mentioned in article 392 ICC.

## ARTICOLO 392 CC

### Curatore dell'emancipato

*“[I]. Curatore del minore sposato con persona maggiore di età è il coniuge.*

*[II]. Se entrambi i coniugi sono minori di età, il giudice tutelare può nominare un unico curatore, scelto preferibilmente fra i genitori.*

*[III]. Se interviene l'annullamento per una causa diversa dall'età, o lo scioglimento o la cessazione degli effetti civili del matrimonio o la separazione personale, il giudice tutelare nomina curatore uno dei genitori, se idoneo all'ufficio, o, in mancanza, altra persona. Nel caso in cui il minore contrae successivamente matrimonio, il curatore lo assiste altresì negli atti previsti nell'articolo 165”.*

## ARTICLE 392 ICC

### Curatore of an emancipated minor

*“[I]. The spouse is the curator of a minor married with an adult person.*

*[II]. If both spouses are minors, then the giudice tutelare can appoint a sole curatore, preferably chosen amongst the parents.*

*[III]. If an avoidance occurs due to a reason other than age, or the dissolution or cessation of the civil effects of the marriage or personal separation, then the giudice tutelare appoints one of the parents as curatore, if suitable for the office, or, if not suitable, another person. In the event that the minor subsequently contracts marriage, the curatore also assists him in performing the acts provided for in article 165”.*

Rules on the capacity to act of the emancipated minor: under article 394 ICC substitution is not due (as it happens in legal representation), but mere support (supplementary consent).

## ARTICOLO 394 CC

### Capacità dell'emancipato

“[I]. L'emancipazione conferisce al minore la capacità di compiere gli atti che non eccedono l'ordinaria amministrazione.

[II]. Il minore emancipato può con l'assistenza del curatore riscuotere i capitali sotto la condizione di un idoneo impiego e può stare in giudizio sia come attore sia come convenuto.

[III]. Per gli altri atti eccedenti la ordinaria amministrazione, oltre il consenso del curatore, è necessaria l'autorizzazione del giudice tutelare. Per gli atti indicati nell'articolo 375 l'autorizzazione, se curatore non è il genitore, deve essere data dal tribunale su parere del giudice tutelare.

[IV]. Qualora nasca conflitto di interessi fra il minore e il curatore, è nominato un curatore speciale a norma dell'ultimo comma dell'articolo 320”.

## ARTICLE 394 ICC

### Capacity of the emancipated minor

“[I]. Emancipation gives the minor capacity to perform acts that do not exceed ordinary administration.

[II]. The emancipated minor can, with the assistance of the curatore, collect the capital due under condition of a suitable employment and can stand in court both as plaintiff and as defendant.

[III]. For other acts exceeding ordinary administration, in addition to the consent of the curatore, the authorization of the giudice tutelare is required. For the acts mentioned in article 375, if the curatore is not the parent, then the authorization must be given by the tribunale upon the opinion of the giudice tutelare.

[IV]. If a conflict of interest arises between the minor and the curatore, then a curatore speciale is appointed, pursuant to the last paragraph of article 320”.

In case of non-compliance, please see article 396 ICC.

## ARTICOLO 396 CC

### Inosservanza delle precedenti norme

“[I]. Gli atti compiuti senza osservare le norme stabilite nell'articolo 394 possono essere annullati su istanza del minore o dei suoi eredi o aventi causa.

[II]. Sono applicabili al curatore le disposizioni dell'articolo 378”.

## ARTICLE 396 ICC

### Non-compliance with the previous provisions

*“[I]. Acts carried out without observation of the provisions established in article 394 can be avoided at request of the minor or his heirs or his successors in interests.*

*[II]. The provisions of article 378 are applicable to the curatore”.*

Accordingly, the remedy is avoidance.

### 5.4 On tutela of interdetti and curatela of inabilitati.

See articles 414 ICC and ff. ones.

Here we are talking about measures that can only be taken against aged persons and emancipated minors (in the other cases, i.e., minors, the capacity to act is already missing).

**Interdetto/interdicted person = tutela (tutore/guardian);**

**Inabilitato = curatela (curatore).**

The basic rule is art. 424 ICC.

## ARTICOLO 424 CC

### Tutela dell'interdetto e curatela dell'inabilitato

*“[I]. Le disposizioni sulla tutela dei minori e quelle sulla curatela dei minori emancipati si applicano rispettivamente alla tutela degli interdetti e alla curatela degli inabilitati.*

*[II]. Le stesse disposizioni si applicano rispettivamente anche nei casi di nomina del tutore provvisorio dell'interdicendo e del curatore provvisorio dell'inabilitando a norma dell'articolo 419. Per l'interdicendo non si nomina il protutore provvisorio.*

*[III]. Nella scelta del tutore dell'interdetto e del curatore dell'inabilitato il giudice tutelare individua di preferenza la persona più idonea all'incarico tra i soggetti, e con i criteri, indicati nell'articolo 408”.*

## ARTICLE 424 ICC

### Tutela of interdicted persons and curatela of inabilitati

*“[I]. The provisions on tutela of minors and those on curatela of emancipated minors apply respectively to tutela of interdicted persons and curatela of inabilitati.*

*[II]. The same provisions apply respectively also in cases of appointment either of a provisional tutore to an interdicting person or a temporary curatore to an inabilitando, in accordance with article 419. For an interdicting person, no provisional protutore is due.*

[III]. *The giudice tutelare, in the act of choosing the tutore of the interdicted person and the curatore of the inabilitato, preferably identifies the person most suitable for the assignment among the subjects, and with the criteria, mentioned in article 408*".

Please note that, as we can see, from one side, interdetti/interdicted persons (being physical persons fully incapable to act), are subject to the same rules provided by the law for the minors (who are qualified at law as fully incapable to act too), and, from the other side, inabilitati (being physical personal partially incapable to act) are subject to the same rules provided by the law for emancipated minors (partially incapable to act by themselves).

Please also note that the judicial decisions on the subject matter at stake are all revocable ones (see article 429 ICC).

**Publicity of the measures:** see articles 423 and 430 ICC.

### **ARTICOLO 423 CC**

#### **Publicità**

*"[I]. Il decreto di nomina del tutore o del curatore provvisorio e la sentenza d'interdizione o d'inabilitazione devono essere immediatamente annotati a cura del cancelliere nell'apposito registro e comunicati entro dieci giorni all'ufficiale dello stato civile per le annotazioni in margine all'atto di nascita"*.

### **ARTICLE 423 ICC**

#### **Publicity**

*"[I]. The decree of appointment of a tutore or a curatore provvisorio and the judgment on interdizione or inabilitazione must be immediately registered by the chancellor in the appropriate register and communicated within ten days to the registrar for the annotations due in the margin of the birth certificate"*.

### **ARTICOLO 430 CC**

#### **Publicità**

*"[I]. Alla sentenza di revoca dell'interdizione o dell'inabilitazione si applica l'articolo 423"*.

### **ARTICLE 430 ICC**

#### **Notice**

*"[I]. Article 423 applies to the judgment of revocation of interdiction or inabilitazione"*.

## 5.5 On support administration.

As for the application for support administration, please see articles 404 ICC, 406 ICC, 417 ICC.

As for the content of the appointment: here a decree (instead of a judgment) is issued (see article 405 ICC).

### ARTICOLO 404 CC

#### Amministrazione di sostegno

*“[I]. La persona che, per effetto di una infermità ovvero di una menomazione fisica o psichica, si trova nella impossibilità, anche parziale o temporanea, di provvedere ai propri interessi, può essere assistita da un amministratore di sostegno, nominato dal giudice tutelare del luogo in cui questa ha la residenza o il domicilio”.*

### ARTICLE 404 ICC

#### Support administrator

*“[I]. The person who, as a result of an infirmity or a physical or mental impairment, is unable, even partially or temporarily, to provide for her own interests, can be assisted by a support administrator, appointed by the giudice tutelare of the place where she has her residence or domicile”.*

### ARTICOLO 406 CC

#### Soggetti

*“[I]. Il ricorso per l’istituzione dell’amministrazione di sostegno può essere proposto dallo stesso soggetto beneficiario, anche se minore, interdetto o inabilitato, ovvero da uno dei soggetti indicati nell’articolo 417”.*

### ARTICLE 406 ICC

#### Persons

*“[I]. The application for the establishment of support administration can be proposed by the beneficiary itself, even if a minor, interdetto or inabilitato, or by one of the persons mentioned in article 417”.*

On completion of legal acts/transactions, as for the rule of law, please see article 409 ICC.

## ARTICOLO 409 CC

### Effetti dell'amministrazione di sostegno

*“[I]. Il beneficiario conserva la capacità di agire per tutti gli atti che non richiedono la rappresentanza esclusiva o l'assistenza necessaria dell'amministratore di sostegno.*

*[II]. Il beneficiario dell'amministrazione di sostegno può in ogni caso compiere gli atti necessari a soddisfare le esigenze della propria vita quotidiana”.*

## ARTICLE 409 ICC

### Effects of support administration

*“[I]. The beneficiary retains the capacity to act for all acts that do not require the sole representation or the necessary assistance of the support administrator.*

*[II]. The beneficiary of the support administration can in any case carry out the actions necessary to meet the needs of his daily life”.*

On performance of duties by the support administrator: please see article 410 ICC.

## ARTICOLO 410 CC

### Doveri dell'amministratore di sostegno

*“[I]. Nello svolgimento dei suoi compiti l'amministratore di sostegno deve tener conto dei bisogni e delle aspirazioni del beneficiario.*

*[II]. L'amministratore di sostegno deve tempestivamente informare il beneficiario circa gli atti da compiere nonché il giudice tutelare in caso di dissenso con il beneficiario stesso. In caso di contrasto, di scelte o di atti dannosi ovvero di negligenza nel perseguire l'interesse o nel soddisfare i bisogni o le richieste del beneficiario, questi, il pubblico ministero o gli altri soggetti di cui all'articolo 406 possono ricorrere al giudice tutelare, che adotta con decreto motivato gli opportuni provvedimenti.*

*[III]. L'amministratore di sostegno non è tenuto a continuare nello svolgimento dei suoi compiti oltre dieci anni, ad eccezione dei casi in cui tale incarico è rivestito dal coniuge, dalla persona stabilmente convivente, dagli ascendenti o dai discendenti”.*

## ARTICLE 410 ICC

### Duties of the support administrator

*“[I]. In carrying out his own duties, the support administrator must take into account the needs and aspirations of the beneficiary.*

[II]. *The support administrator must promptly inform the beneficiary about the acts to be performed, as well as the giudice tutelare in case of disagreement with the beneficiary. In case of conflicts, of choices or harmful acts or negligence in pursuing the interest or in satisfying the needs or requests of the beneficiary, the latter, the public prosecutor or the other persons referred to in article 406 may appeal to the giudice tutelare, who adopts the appropriate measures, with a motivated decree.*

[III]. *The support administrator is not required to continue in performance of his own duties beyond ten years, except in cases in which the office is held by the spouse, by the person permanently cohabiting, by the ascendants or descendants*”.

Breach of the rules (by the support administrator): avoidance of the act of the case (see article 412 ICC).

#### **ARTICOLO 412 CC**

##### **Atti compiuti dal beneficiario o dall'amministratore di sostegno in violazione di norme di legge o delle disposizioni del giudice**

“[I]. *Gli atti compiuti dall'amministratore di sostegno in violazione di disposizioni di legge, od in eccesso rispetto all'oggetto dell'incarico o ai poteri conferitigli dal giudice, possono essere annullati su istanza dell'amministratore di sostegno, del pubblico ministero, del beneficiario o dei suoi eredi ed aventi causa.*

[II]. *Possono essere parimenti annullati su istanza dell'amministratore di sostegno, del beneficiario, o dei suoi eredi ed aventi causa, gli atti compiuti personalmente dal beneficiario in violazione delle disposizioni di legge o di quelle contenute nel decreto che istituisce l'amministrazione di sostegno.*

[III]. *Le azioni relative si prescrivono nel termine di cinque anni. Il termine decorre dal momento in cui è cessato lo stato di sottoposizione all'amministrazione di sostegno”.*

#### **ARTICLE 412 ICC**

##### **Acts carried out by the beneficiary or the support administrator in breach of the law or the decisions of the judge**

“[I]. *Acts carried out by the support administrator in breach of legal provisions, or in excess to the subject matter of the assignment or the powers conferred on him by the judge, can be avoided at request of the support administrator, the public prosecutor, the beneficiary or his heirs and successors in interests.*

[II]. Acts carried out personally by the beneficiary in breach of the provisions of the law or those contained in the decree of appointment of the support administration can also be avoided at request of the support administrator, the beneficiary, or his heirs and successors in interests.

[III]. The related claims are to be performed within a period of five years. The deadline starts from the moment in which the state of subjection to support administration ends”.

On revocability of the judicial appointment of a support administrator: see article 413 ICC.

## ARTICOLO 413 CC

### Revoca dell'amministrazione di sostegno

“[I]. Quando il beneficiario, l'amministratore di sostegno, il pubblico ministero o taluno dei soggetti di cui all'articolo 406, ritengono che si siano determinati i presupposti per la cessazione dell'amministrazione di sostegno, o per la sostituzione dell'amministratore, rivolgono istanza motivata al giudice tutelare.

[II]. L'istanza è comunicata al beneficiario ed all'amministratore di sostegno.

[III]. Il giudice tutelare provvede con decreto motivato, acquisite le necessarie informazioni e disposti gli opportuni mezzi istruttori.

[IV]. Il giudice tutelare provvede altresì, anche d'ufficio, alla dichiarazione di cessazione dell'amministrazione di sostegno quando questa si sia rivelata inidonea a realizzare la piena tutela del beneficiario. In tale ipotesi, se ritiene che si debba promuovere giudizio di interdizione o di inabilitazione, ne informa il pubblico ministero, affinché vi provveda. In questo caso l'amministrazione di sostegno cessa con la nomina del tutore o del curatore provvisorio ai sensi dell'articolo 419, ovvero con la dichiarazione di interdizione o di inabilitazione”.

## ARTICLE 413 ICC

### Revocation of the support administration

“[I]. When the beneficiary, the support administrator, the public prosecutor or one of the persons referred to in article 406, consider that the conditions for the termination of the support administration, or for the replacement of the administrator, have been established, they make a motivated claim to the giudice tutelare.

[II]. The request is communicated to the beneficiary and the support administrator.

[III]. The giudice tutelare proceeds with a motivated decree, having acquired the necessary information and having arranged the appropriate investigative means.

[IV]. The giudice tutelare also provides, even ex officio, to the declaration of termination of the support administration when he/she has proved unsuitable to fulfil full protection of the

beneficiary. In this case, if he believes that a judgment of interdiction or inabilitazione should be brought on, he informs the public prosecutor, so that he can take action. In this case, the support administration ceases with the appointment of the tutore or curatore provvisorio pursuant to article 419, or with the declaration of interdiction or inabilitazione”.

## 5.6 On the legal concepts of abode, residence and domicile.

The places where a person lives and works are, of course, relevant, as parameters of reference, for the purpose of carrying out a whole series of legal acts and the occurrence of the legal relationships themselves (e.g., publication of the formalities for marriage – see article 94 ICC; opening of the succession – see article 456 ICC; fulfilment of obligations – see article 1182 ICC; notifications for formal notice, *et cetera*).

Thus, a distinction is made between:

- **abode** = place where the person is usually located;
- **residence** = place where the person has her habitual abode;
- **domicile** = place where the person has established the principal seat of her interests (see article 43 ICC).

### ARTICOLO 43 CC

#### Domicilio e residenza

“[I]. Il domicilio di una persona è nel luogo in cui essa ha stabilito la sede principale dei suoi affari e interessi.

[II]. La residenza è nel luogo in cui la persona ha la dimora abituale”.

### ARTICLE 43 ICC

#### Domicile and residence

“[I]. The domicile of a person is in the place where she has established the principal place of business and interests.

[II]. The residence is in the place where the person has her habitual abode”.

## 6 Lecture 6: on Italian legal persons.

SUMMARY: 6.1 Introduction: on legal person in a broad way, company, and the different companies available in the legal system. – 6.2 On legal personality, and on full and partial financial liability. – 6.3 On some relevant differences between application of the law on companies and the law on contracts. – 6.4 On institutions and corporations, and on bodies of legal persons.

### 6.1 Introduction: on legal person in a broad way, company, and the different companies available in the legal system.

We said that rights and duties are referable not just to physical persons but to so-called *enti giuridici* too.

Accordingly, even *enti giuridici* can be involved in legal relationships (and therefore they have legal capacity): see e.g., the State, public territorial entities, universities, companies, *et cetera*.

All these entities are called legal persons, where the expression “legal person” is used in a broad way.

Here there are some of the various purposes of a legal person:

- a) to pursue public interests:
  - in public law, a public entity can be the institutional bearer of interests having general characterization;
  - b) in private law: *i*) the realization of a purpose of public interests which exceeds life of individual physical persons can be performed, e.g., throughout foundations (where a foundation is also called “a patrimony for a purpose”). Examples of foundations: hospitals, research institutes, universities (please note that, in setting up a foundation, the founder can also subtract the patrimony to be destined for the purpose of the case from the personal events that concern him); *ii*) the fulfilment of purposes whose achievement requires “activities” and “material means” to be coordinated by a few persons. In these cases, there can be a collective organization equipped with the characters of stability and autonomy. Thus, we have, once again, a legal person. Examples: a company (namely, a *società*), an association, a consortium, *et cetera*.

On the legal concept of **company** or *società* (please take note of the multiple meanings, in common language, of the word “company”):

#### ARTICOLO 2247 CC

#### Contratto di società

“*[I]. Con il contratto di società due o più persone conferiscono beni o servizi per l’esercizio in comune di un’attività economica allo scopo di dividerne gli utili*”.

## ARTICLE 2247 ICC

### Contract of company

*“[I]. With the contract of company two or more people confer goods or services for the common exercise of an economic activity to divide profits”.*

Please note that a company can also exist in a *de facto* way (or in the so-called “irregular” form). Here the interpreter looks at the substance of the case.

See **Cassazione civile, sez. I, 25/07/2016, n. 15346**.

*“La società di fatto holding esiste come impresa commerciale per il solo fatto di essere stata costituita tra i soci per l’effettivo esercizio dell’attività di direzione e coordinamento di altre società ed è, pertanto, autonomamente fallibile, a prescindere dalla sua esteriorizzazione mediante la spendita del nome, ove sia insolvente per i debiti assunti, ivi comprese le obbligazioni risarcitorie derivanti dall’abuso sanzionato dall’art. 2497 c.c., nonché al danno così arrecato all’integrità patrimoniale delle società eterodirette e, di riflesso, ai loro creditori”.*

Legal concept behind the judgment: a holding company can exist, *de facto*, as a commercial enterprise, for the sole fact that it has been established among its members, and accordingly it can be put into bankruptcy.

Again, on matter of joint liability of the partners of a *de facto* partnership, see **Cassazione civile, sez. VI, 05/05/2016, n. 8981**.

*“La mancanza della prova scritta del contratto di costituzione di una società di fatto o irregolare (non richiesta dalla legge ai fini della sua validità) non impedisce al giudice del merito l’accertamento aliunde, mediante ogni mezzo di prova previsto dall’ordinamento, ivi comprese le presunzioni semplici, dell’esistenza di una struttura societaria, all’esito di una rigorosa valutazione (quanto ai rapporti tra soci) del complesso delle circostanze idonee a rivelare l’esercizio in comune di una attività imprenditoriale, quali il fondo comune costituito dai conferimenti finalizzati all’esercizio congiunto di un’attività economica, l’alea comune dei guadagni e delle perdite e l’affectio societatis, cioè il vincolo di collaborazione in vista di detta attività nei confronti dei terzi; peraltro, è sufficiente a far sorgere la responsabilità solidale dei soci, ai sensi dell’art. 2297 c.c., l’esteriorizzazione del vincolo sociale, ossia l’idoneità della condotta complessiva di taluno dei soci ad ingenerare all’esterno il ragionevole affidamento circa l’esistenza della società. Tali accertamenti, risolvendosi nell’apprezzamento di elementi di fatto, non sono censurabili in sede di legittimità, se sorrette da motivazioni adeguate ed immuni da vizi logici o giuridici”.*

Now, please note that there are different kinds of companies/società available in our legal system, as art. 2249 ICC explains.

## ARTICOLO 2249 CC

### Tipi di società

*“[I]. Le società che hanno per oggetto l’esercizio di un’attività commerciale devono costituirsi secondo uno dei tipi regolati nei capi III e seguenti di questo titolo.*

*[II]. Le società che hanno per oggetto l’esercizio di un’attività diversa sono regolate dalle disposizioni sulla società semplice, a meno che i soci abbiano voluto costituire la società secondo uno degli altri tipi regolati nei capi III e seguenti di questo titolo.*

*[III]. Sono salve le disposizioni riguardanti le società cooperative e quelle delle leggi speciali che per l’esercizio di particolari categorie di imprese prescrivono la costituzione della società secondo un determinato tipo”.*

## ARTICLE 2249 ICC

### Types of companies

*“[I]. Companies whose subject matter is to exercise a commercial activity, they must be established according to one of the types governed chapters III and following ones of this title.*

*[II]. Companies whose subject matter is to exercise a different activity, they are governed by the rules on simple partnership, unless the partners intended to create the company in accordance with one of the other types set out in Chapters III and following ones of this title.*

*[III]. Provisions regarding cooperative companies, and those inserted in special laws on the exercise of particular categories of enterprise that require the constitution of the company under a specific type are unaffected”.*

Here a distinction is drawn between:

- **partnerships** (*società di persone*); and
- **corporations** or **companies** *stricto sensu* meant (*società di capitali*).

### On partnerships.

Here we have:

- 1) the **simple partnership** (*società semplice*);
- 2) the **general partnership** (*società in nome collettivo*); and
- 3) the **limited partnership** (*società in accomandita semplice*).

## On companies.

Here we have:

- 1) the **limited liability company** (*società a responsabilità limitata*);
- 2) the **joint stock company** (*società per azioni*); and
- 3) the **partnership limited by shares** (*società in accomandita semplice*).

Outcomes of article 2249 ICC:

- companies *versus* cooperative company (purpose of profit *versus* mutual purpose);
- commercial companies (purpose = activity under art. 2195 ICC) *versus* non-commercial companies (purpose = a “different” activity). A simple partnership can only carry out non-commercial activities; the other ones can carry out both commercial and non-commercial activities;

- partnerships *versus* companies.

See also the concept of **consortium**.

## ARTICOLO 2602 CC

### Nozione e norme applicabili

“[I]. Con il contratto di consorzio più imprenditori istituiscono una organizzazione comune per la disciplina o per lo svolgimento di determinate fasi delle rispettive imprese.

[II]. Il contratto di cui al precedente comma è regolato dalle norme seguenti, salve le diverse disposizioni delle leggi speciali”.

## ARTICLE 2602 ICC

### Notion and applicable rules

“[I]. With a contract of consortium, several entrepreneurs set up a common organization for the governance or performance of certain phases of their respective entrepreneurial activities.

[II]. The contract referred to in the previous paragraph is governed by the following rules, without prejudice to the different provisions of the special laws”.

On the concept of consortium in general, see **Cassazione civile, sez. I, 27/01/2014, n. 1636**.

“Il contratto di consorzio di cui all’art. 2602 cod. civ. non comporta l’assorbimento delle imprese contraenti in un organismo unitario, con creazione di un rapporto di immedesimazione organica tra il consorzio e le imprese consorziate ma unicamente la costituzione di una organizzazione comune per lo svolgimento di determinate fasi delle rispettive attività dei contraenti, avente essa stessa carattere strumentale rispetto a quella delle imprese consorziate”.

Legal concept behind the judgment: a consortium does not involve the setting up of a new company.

## 6.2 On legal personality, and on full and partial financial liability.

Question: which is the reason for physical persons to set up a company (to perform the business activity of the case) rather than to act individually throughout contract law?

Here reasons of limitation of the financial liability can enter into play.

Accordingly, please note the general rule of law on debtor's (financial) liability.

### ARTICOLO 2740 CC

#### Responsabilità patrimoniale

*“[I]. Il debitore risponde dell'adempimento delle obbligazioni con tutti i suoi beni presenti e futuri.*

*[II]. Le limitazioni della responsabilità non sono ammesse se non nei casi stabiliti dalla legge”.*

### ARTICLE 2740 ICC

#### Financial liability

*“[I]. The debtor is liable for fulfilment of his obligations with all his present and future assets.*

*[II]. Limitations of liability are not allowed, except in the cases provided for by the law”.*

Therefore, as we shall see, limitation of financial liability can be a reason to set up a company, to perform the business activity of the case.

Anyway, please take note that, in every company (in general), we must always distinguish between the persons who are in charge of administering the company (namely, the managers or directors) and those who are the “owners” of the company of the case (partners or shareholders, namely the persons who are the holders of the title that grant participation in the company of the case).

Therefore, please note that there are some common elements to partnerships and some common law elements to companies (also related to the above-mentioned financial liability).

#### **Common elements of partnerships:**

- the directors of the company are the partners, by *default* rule;
- the partners are liable (albeit in a different way) in an unlimited way, for the debts of the partnership, even with their personal assets.

Here persons are mainly important.

**Common elements of companies:**

- the directors of the company can be, and often are, third parties;
- the shareholders are not personally liable for the obligations of the company (exceptions: article 2325, paragraph 2, ICC and article 2462, paragraph 2, ICC, in case there is a sole shareholder or a sole limited-liability partner).

Here contributions of capital to the company are what counts, above all.

Intermediate figures:

- limited partnership;
- partnership limited by shares.

Here a distinction is made between two types of members:

- *soci accomandanti* (limited partners), who are in a similar situation to the one of the members of a limited liability companies, as they have limited financial liability.
- *soci accomandatari* (general partners), who are in a similar situation to the one of the members of partnerships, as they have unlimited financial liability.

As per above, now, please note that **companies stricto sensu meant have legal personality too (they are legal persons in a strict way), whereas partnerships do not have legal personality (they are not legal persons in a strict way).**

Question: what does it mean, for companies in general, to have legal personality?

It means that they own an autonomous patrimony, and they have full financial autonomy (in Italian language, we say that they are entitled to an “*autonomia patrimoniale perfetta*”).

However, please also note that absence of legal personality does not mean absence of financial autonomy (see also for associations, art. 37 ICC).

**Cassazione 08/11/1984, n. 5642**

*“Le società di persone, pur essendo sformite di personalità giuridica, sono caratterizzate da una propria autonomia patrimoniale che determina la separazione del patrimonio dei soci da quello della società, per cui le sue sfere giuridiche restano separate consentendo rapporti giuridici distinti sia della società, come centro della loro imputazione, nei confronti dei terzi, sia della società stessa nei confronti dei soci e di questi ultimi, separatamente, nei confronti dei terzi”.*

Legal concept behind the judgment: even partnerships, despite of the fact that they do not have legal personality, they have financial autonomy, which involves separation of funds between the funds of the partners and the fund of the partnership.

Therefore, here a distinction is drawn between **full financial autonomy** (“*autonomia patrimoniale perfetta*”) and **partial financial autonomy** (“*autonomia patrimoniale imperfetta*”).

Now, at this point, we have underlined that:

– **companies** *stricto sensu* **meant** have legal personality too (**they are legal persons in a strict way**), whereas partnerships do not have legal personality (**they are not legal persons in a strict way**), even if they remain legal persons in a broad way); and

– accordingly, **companies** have full financial autonomy (“*autonomia patrimoniale perfetta*”), whereas partnerships have partial financial autonomy (“*autonomia patrimoniale imperfetta*”).

Now, here they are the **rules on the financial liability in partnerships:**

i) as for the **general partnership:**

#### ARTICOLO 2291 CC

##### Nozione

“[I]. *Nella società in nome collettivo tutti i soci rispondono solidalmente e illimitatamente per le obbligazioni sociali.*

*[II]. Il patto contrario non ha effetto nei confronti dei terzi”.*

#### ARTICLE 2291 ICC

##### Notion

“[I]. *In a general partnership, all members are jointly, severally and unlimitedly liable for the company’s obligations.*

*[II]. Any contrary agreement has no effect against third parties”.*

ii) as for the **simple partnership:**

#### ARTICOLO 2267 CC

##### Responsabilità per le obbligazioni sociali

“[I]. *I creditori della società possono far valere i loro diritti sul patrimonio sociale. Per le obbligazioni sociali rispondono inoltre personalmente e solidalmente i soci che hanno agito in nome e per conto della società e, salvo patto contrario, gli altri soci.*

*[II]. Il patto deve essere portato a conoscenza dei terzi con mezzi idonei; in mancanza, la limitazione della responsabilità o l’esclusione della solidarietà non è opponibile a coloro che non ne hanno avuto conoscenza”.*

## ARTICLE 2267 ICC

### Liability for social obligations

*“[I]. Creditors of the company can assert their rights on the asset of the company. Members who acted in the name and on behalf of the company and, unless otherwise agreed, the other partners, are also personally, jointly and severally liable for the company’s obligations.*

*[II]. The agreement must be brought to the attention of third parties by suitable means, or both the limitation of liability and the exclusion of solidarity cannot be opposed to those who have not had knowledge of it”.*

It means that the individual member’s disclaimer must be made public.

Please note that the subject matter of the liability is both contractual and extra-contractual liability (meaning liability for an unlawful act, pursuant to art. 2043 ICC, in the second case).

Please also note that the liability stands even in the case that a person has left the company of the case. See **Cassazione civile, sez. I, 30/10/2013, n. 24490**.

*“Nella società in nome collettivo la responsabilità del socio uscente cessa nel momento in cui detto mutamento viene pubblicato presso il registro delle imprese, ovvero cessa dal momento in cui è portato a conoscenza dei terzi con mezzi idonei; in caso contrario non è opponibile ai terzi che lo hanno ignorato senza colpa”.*

*“In a general partnership, the liability of the outgoing partner ceases when said change is published in the register of companies or ceases from the moment in which it is brought to the attention of third parties by way of a suitable mean; otherwise, it cannot be opposed to third parties who have ignored it without fault”.*

Please also note that in case the issue of the liability of a member of a simple partnership should arise, then there is always the benefit of the prior enforcement of the debt, by the creditor, against the company.

## ARTICOLO 2268 CC

### Escussione preventiva del patrimonio sociale

*“[I]. Il socio richiesto del pagamento di debiti sociali può domandare, anche se la società è in liquidazione, la preventiva escussione del patrimonio sociale, indicando i beni sui quali il creditore possa agevolmente soddisfarsi”.*

## ARTICLE 2268 ICC

### Pre-emptive enforcement of the corporate assets

*“[I]. Even if the company is in liquidation, the partner requested to pay company’s debts may demand prior enforcement of the company’s assets, indicating those on which the creditor can easily satisfy himself”.*

*iii)* as for the **limited partnership** (governed by articles 2313-2324 ICC):

## ARTICOLO 2313 CC

### Nozione

*“[I]. Nella società in accomandita semplice i soci accomandatari rispondono solidalmente e illimitatamente per le obbligazioni sociali, e i soci accomandanti rispondono limitatamente alla quota conferita.*

*[II]. Le quote di partecipazione dei soci non possono essere rappresentate da azioni”.*

## ARTICLE 2313 ICC

### Notion

*“[I]. In a limited partnership, soci accomandatari are jointly, severally and unlimitedly liable for the company’s obligations, and soci accomandanti are liable only for the participation conferred.*

*[II]. Participations of partners cannot be represented by shares”.*

Please remember here the distinction between *soci accomandanti* (or limited partners) and *soci accomandatari* (or general partners), with different liability related to them.

Now, let’s go to the **financial liability in companies**.

Accordingly, please see, as for joint stock companies:

## ARTICOLO 2325 CC

### Responsabilità

*“[I]. Nella società per azioni per le obbligazioni sociali risponde soltanto la società con il suo patrimonio.*

*[II]. In caso di insolvenza della società, per le obbligazioni sociali sorte nel periodo in cui le azioni sono appartenute ad una sola persona, questa risponde illimitatamente quando i*

*conferimenti non siano stati effettuati secondo quanto previsto dall'articolo 2342 o fin quando non sia stata attuata la pubblicità prescritta dall'articolo 2362".*

## **ARTICLE 2325 ICC**

### **Liability**

*“[I]. In a joint stock company, only the company is liable, with its assets, for company's obligations.*

*[II]. In the event of insolvency of the company, for the corporate obligations arising in the period in which the shares belonged to a single person, the latter is unlimitedly liable when the contributions have not been made in accordance with the provisions of article 2342 or until the notice prescribed by article 2362 is performed".*

Please note that today, despite the text of art. 2247 ICC (which refers to two or more *soci*), it is possible to establish a single-member company (and such member is personally liable only in case of art. 2325, par. 2, ICC).

As per above, limitation of financial liability also applies to limited liability companies. See art. 2462 ICC.

## **ARTICOLO 2462 CC**

### **Responsabilità**

*“[I]. Nella società a responsabilità limitata per le obbligazioni sociali risponde soltanto la società con il suo patrimonio.*

*[II]. In caso di insolvenza della società, per le obbligazioni sociali sorte nel periodo in cui l'intera partecipazione è appartenuta ad una sola persona, questa risponde illimitatamente quando i conferimenti non siano stati effettuati secondo quanto previsto dall'articolo 2464, o fin quando non sia stata attuata la pubblicità prescritta dall'articolo 2470".*

## **ARTICLE 2462 ICC**

### **Liability**

*“[I]. In a limited liability company, only the company is liable, with its assets, for company's obligations.*

*[II]. In the event of the insolvency of the company, for the corporate obligations arising in the period in which the entire shareholding belonged to a single person, the latter is unlimitedly liable when the contributions have not been made in accordance with the provisions of article 2464, or until the notice prescribed by article 2470 is performed".*

Same thing, as mentioned above (in relation to joint stock companies), as for art. 2462, par. 2, ICC.

Please note that to balance the possible factual issues, within the law on companies there is a set of rules to cover up protection of third parties who can come into contact with the company of the case (not to mention that nowadays there are also the assets destined for a specific business - see art. 2447-*bis* ICC and ff. ones).

As per all the above, in conclusion, physical persons resort to a company in general, to have, as a minimum result, at least a **separation** of the patrimony of the company of the case from their own patrimony, as members of the company itself (in the case of partnerships, where there is still financial autonomy, albeit a partial or an imperfect one), **or, even more**, in order to have a **full limitation** of their financial liability (in the case of companies, where there is full financial autonomy).

Finally, please note that limitation of the financial liability must not be abused, otherwise the figure of the so-called **abuse of legal personality** comes into play.

### **6.3 On some relevant differences between application of the law on companies and the law on contracts.**

Now let's compare, at this point, between:

- a) an autonomous patrimony destined to a specific purpose via a legal person; and
- b) a patrimony destined to satisfy the interests of more physical persons that however does not reach a sufficient degree of unification and therefore does not create an autonomous patrimony, so to allow the existence of a new and distinct legal entity to be recognized.

Let's see the case of the so-called *co-ownership* over one or more assets, or *comunione*/community over *ownership* (or other property rights, namely "*diritti reali*"/***rights in rem***, as we shall see) on goods.

On *comunione* in general, please see art. 1100 ICC and ff. ones (Title VII of Book III of the Italian Civil Code).

#### **ARTICOLO 1100 CC**

##### **Norme regolatrici**

“[I]. *Quando la proprietà o altro diritto reale spetta in comune a più persone, se il titolo o la legge non dispone diversamente, si applicano le norme seguenti*”.

## **ARTICLE 1100 ICC**

### **Regulatory standards**

*“[I]. When ownership or another right in rem belongs to more than one person, if the title or the law does not provide otherwise, the following rules are to be applied”.*

## **ARTICOLO 1101 CC**

### **Quote dei partecipanti**

*“[I]. Le quote dei partecipanti alla comunione si presumono eguali.*

*[II]. Il concorso dei partecipanti, tanto nei vantaggi quanto nei pesi della comunione, è in proporzione delle rispettive quote”.*

## **ARTICLE 1101 ICC**

### **Participants’ shares**

*“[I]. The participations of the members in a community are presumed to be equal.*

*[II]. The participation of the members, both in the advantages and in the burdens of the community, is proportionate to their respective quotas”.*

Please note now the consequences of the interaction between art. 832 ICC, on ownership (if we are talking about community of ownership/co-ownership), and art. 2740 ICC.

## **ARTICOLO 1103 CC**

### **Disposizione della quota**

*“[I]. Ciascun partecipante può disporre del suo diritto e cedere ad altri il godimento della cosa nei limiti della sua quota.*

*[II]. Per le ipoteche costituite da uno dei partecipanti si osservano le disposizioni contenute nel capo IV del titolo III del libro VI”.*

## **ARTICLE 1103 ICC**

### **Disposition of shares**

*“[I]. Each member can dispose of his own right and transfer the enjoyment of the thing to others, within the limits of his participation.*

*[II]. For mortgages created by one of the participants, the provisions contained in Chapter IV of Title III of Book VI are to be observed”.*

## ARTICOLO 1104 CC

### Obblighi dei partecipanti

“[I]. Ciascun partecipante deve contribuire nelle spese necessarie per la conservazione e per il godimento della cosa comune e nelle spese deliberate dalla maggioranza a norma delle disposizioni seguenti, salva la facoltà di liberarsene con la rinuncia al suo diritto.

[II]. La rinuncia non giova al partecipante che abbia anche tacitamente approvato la spesa.

[III]. Il cessionario del partecipante è tenuto in solido con il cedente a pagare i contributi da questo dovuti e non versati”.

## ARTICLE 1104 ICC

### Obligations of the participants

“[I]. Each participant must contribute to the expenses due for maintenance and enjoyment of the common thing and to the expenses decided by the majority in accordance with the following provisions, without prejudice to his right to free himself from them, by way of a renunciation to his own right.

[II]. The renunciation does not benefit the participant who has, even tacitly, approved the expense.

[III]. The transferee of the participant is bound jointly with the transferor to pay the contributions due and not paid by the latter”.

Therefore, to sum up, when it comes to co-ownership:

- as for the common debts, there are no unified and distinct assets from the ones that pertain to co-owners;
- the creditor of the organization/community has the right to act on the common goods or those of the individual co-owner, for the purpose of satisfying his own interests;
- the creditor of the individual co-owner has the right to make claims against the assets of the co-owner who is his debtor as well as against the share of the thing that pertains to the co-owner of the (common) asset co-owned, for the purposes of satisfying his own interests;
- when a creditor of an individual co-owner makes a claim, he competes with the creditor of the community/organization on equal grounds;
- the common thing/property is not meant to be destined to the preferential satisfaction of the creditors of the community/organization.

An example: in case of a contract for the execution of repairs of a common thing, the contractor’s credit can be raised against each individual participant in the community.

Synthesis: **a community on rights in rem** (above all, a community of ownership or co-ownership) **does not have any kind of financial autonomy.**

On the contrary, as we saw, **joint stock companies** enjoy full separation of funds and therefore they **have full financial autonomy.**

Now, please note that if some persons set up a company just to try and avoid the legal regime applicable to community of ownership, art. 2248 ICC is applied.

## ARTICOLO 2248 CC

### Comunione a scopo di godimento

*“[I]. La comunione costituita o mantenuta al solo scopo del godimento di una o più cose è regolata dalle norme del titolo VII del libro III”.*

## ARTICLE 2248 ICC

### Community for the purpose of enjoyment

*“[I]. A community created or maintained for the mere purpose of the enjoyment of one or more things is governed by rules of Title VII of the Book III”.*

An **intermediate position** between full financial autonomy and no financial autonomy (like it happens in co-ownership) is **imperfect/partial financial autonomy.**

Here the assets of the collective legal organization of the case are not entirely insensitive to the personal financial events of the participants of the case.

Examples:

– general partnership: the creditor of the single partner cannot ask the early liquidation of his debtor’s participation in the partnership to satisfy himself on it (see art. 2305 ICC) but, if there is bankruptcy, then debtor’s participation must be liquidated in his favour (see article 2228 ICC jointly with article 2293 ICC);

– simple partnership: further attenuation: the creditor can request early liquidation if the other assets of the partner are insufficient to satisfy his credit (see art. 2270 ICC).

However, there is still separation of funds, aimed at ensuring the stable destination of the partnership’s assets to the pursuit of the common purpose; the personal creditor of the partner of the case cannot act directly against the partnership itself (only liquidation of participations is allowed, determined on the basis of the net of the entity’s debts; the assets are meant to be destined for the preferential satisfaction of the creditors of the legal entity).

Example: active 100 - passive 80; net = 20.

Two partners; individual share: 10

A shareholder has a debt of 50 against a third party (a personal creditor): if the third party could act directly against the corporate assets, then she would be fully satisfied. But a creditor can only ask for the liquidation of the participation in the company. Accordingly, she can only ask for 10.

There is financial autonomy of the entity; the entity operates as a separate legal entity, with its own denomination or company name, its own legal premise, it enters into its own contracts, stands before courts in his own name, *et cetera*.

Please note that the attribution of legal personality (*personalità giuridica*) to the legal entity (or legal person, in a broad way) of the case is the assumption at law according to which its members cannot become personally liable for its own obligations.

Please also note that full financial autonomy is not a due feature of all collective legal entities. Examples: partnerships.

Anyway, a personal guarantee is added (in addition to the one provided for by the corporate assets); still, there is legal subjectivity too (the purpose is, once again, stability of the destination of the assets to pursue company's purposes).

### **On full financial autonomy *versus* partial financial autonomy.**

The greater the autonomy is, the greater is the protection of third parties too (because personal liability of the participants is low).

Please note that the concept of legal personality, within the provisions of the Italian Civil Code, is linked with private-law entities whose separation of funds is greater (see registered associations; foundations; companies).

Furthermore, legal personality is recognized when the organization of the case is set up and, consequently, when the entity is subject to the rules on protection of the creditors of the entity itself.

Accordingly:

- as for foundations and associations: in order to become legal persons (in a strict way), they need recognition/*riconoscimento* throughout registration before the competent authority;
- as for companies: to become legal persons (in a strict way), they need registration in the Companies Register.

As for the legal transactions made before recognition or registration: here there is unlimited financial liability of those who have acted. See e.g., for companies, the above-mentioned art. 2325, par. 2, ICC and art. 2462, par. 2, ICC; and for the unincorporated<sup>3</sup> (or unregistered<sup>4</sup>)

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<sup>3</sup> English way to define them.

<sup>4</sup> Italian way to call them.

associations (*associazioni non riconosciute*), see art. 38 ICC (already mentioned in lecture 4, par. 4.1).

## **ARTICOLO 38 CC**

### **Obbligazioni**

*“[I]. Per le obbligazioni assunte dalle persone che rappresentano l’associazione i terzi possono far valere i loro diritti sul fondo comune. Delle obbligazioni stesse rispondono anche personalmente e solidalmente le persone che hanno agito in nome e per conto dell’associazione”.*

## **ARTICLE 38 ICC**

### **Obligations**

*“[I]. As far as the obligations taken on by the persons representing the association are concerned, third parties can claim their rights against the common fund. Anyway, the persons who acted in name and on behalf of the association are also personally, severally and jointly liable for the same obligations”.*

Please note that joint and several liability means that the creditor of the case can make his claim against every one of those persons who have actually acted, under article 1292 ICC.

## **ARTICOLO 1292 CC**

### **Nozione della solidarietà**

*“[I]. L’obbligazione è in solido quando più debitori sono obbligati tutti per la medesima prestazione, in modo che ciascuno può essere costretto all’adempimento per la totalità e l’adempimento da parte di uno libera gli altri; oppure quando tra più creditori ciascuno ha diritto di chiedere l’adempimento dell’intera obbligazione e l’adempimento conseguito da uno di essi libera il debitore verso tutti i creditori”.*

## **ARTICLE 1292 ICC**

### **Notion of solidarity**

*“[I]. The obligation is a jointly and several one when more than one debtors are all obliged to perform the same performance, so that each one can be forced to fulfil it in its entirety and fulfilment executed by one of them frees the others; or when among more creditors each one of them has the right to request the fulfilment of the entire obligation and the fulfilment achieved by one of them releases the debtor against all creditors”.*

On the acquisition of legal personality/full financial autonomy:

a) in case of companies:

### **ARTICOLO 2331 CC**

#### **Effetti dell'iscrizione**

*“[I]. Con l'iscrizione nel registro la società acquista la personalità giuridica.*

*[II]. Per le operazioni compiute in nome della società prima dell'iscrizione sono illimitatamente e solidalmente responsabili verso i terzi coloro che hanno agito. Sono altresì solidalmente e illimitatamente responsabili il socio unico fondatore e quelli tra i soci che nell'atto costitutivo o con atto separato hanno deciso, autorizzato o consentito il compimento dell'operazione.*

*[III]. Qualora successivamente all'iscrizione la società abbia approvato un'operazione prevista dal precedente comma, è responsabile anche la società ed essa è tenuta a rilevare coloro che hanno agito.*

*[IV] [omissis]”.*

### **ARTICLE 2331 ICC**

#### **Effects of registration**

*“[I]. With the registration in the register, the company acquires legal personality.*

*[II]. For the operations carried out in the name of the company before registration, those who have acted are unlimitedly and jointly and severally liable against third parties. The sole founding shareholder and those among the shareholders who in the deed of incorporation or by separate deed have decided, authorized or permitted the completion of the transaction of the case are also jointly, severally and unlimitedly liable.*

*[III]. If, after registration, the company has approved a transaction provided for in the previous paragraph, then the company is also liable, and it is required to take over those who acted.*

*[IV][omitted]”.*

There is an identical rule, as far as limited liability companies are concerned.

b) as for associations and foundations: please see art. 1 of the Italian D.P.R. dated February 10, 2000, n. 361.

## ARTICOLO 1

### Procedimento per l'acquisto della personalità giuridica

*“[1]. Salvo quanto previsto dagli articoli 7 e 9, le associazioni, le fondazioni e le altre istituzioni di carattere privato acquistano la personalità giuridica mediante il riconoscimento determinato dall'iscrizione nel registro delle persone giuridiche, istituito presso le prefetture.*

*2. La domanda per il riconoscimento di una persona giuridica, sottoscritta dal fondatore ovvero da coloro ai quali è conferita la rappresentanza dell'ente, è presentata alla prefettura nella cui provincia è stabilita la sede dell'ente. Alla domanda i richiedenti allegano copia autentica dell'atto costitutivo e dello statuto. La prefettura rilascia una ricevuta che attesta la data di presentazione della domanda.*

*3. Ai fini del riconoscimento è necessario che siano state soddisfatte le condizioni previste da norme di legge o di regolamento per la costituzione dell'ente, che lo scopo sia possibile e lecito e che il patrimonio risulti adeguato alla realizzazione dello scopo.*

*4. La consistenza del patrimonio deve essere dimostrata da idonea documentazione allegata alla domanda.*

*5. Entro il termine di centoventi giorni dalla data di presentazione della domanda il prefetto provvede all'iscrizione.*

*6. Qualora la prefettura ravvisi ragioni ostative all'iscrizione ovvero la necessità di integrare la documentazione presentata, entro il termine di cui al comma 5, ne dà motivata comunicazione ai richiedenti, i quali, nei successivi trenta giorni, possono presentare memorie e documenti. Se, nell'ulteriore termine di trenta giorni, il prefetto non comunica ai richiedenti il motivato diniego ovvero non provvede all'iscrizione, questa si intende negata.*

*7. Il riconoscimento delle fondazioni istituite per testamento può essere concesso dal prefetto, d'ufficio, in caso di ingiustificata inerzia del soggetto abilitato alla presentazione della domanda.*

*8. Le prefetture istituiscono il registro di cui al comma 1, entro novanta giorni dalla data di entrata in vigore del presente regolamento.*

*9. Le prefetture e le regioni provvedono, ai sensi dell'art. 6 del decreto legislativo 28 agosto 1997, n. 281, ad attivare collegamenti telematici per lo scambio dei dati e delle informazioni.*

*10. Con decreto del Ministro per i beni e le attività culturali, da adottarsi entro novanta giorni dalla data di entrata in vigore del presente regolamento, sentito il Ministro dell'interno, sono determinati i casi in cui il riconoscimento delle persone giuridiche che operano nelle materie di competenza del Ministero per i beni e le attività culturali è subordinato al preventivo parere della stessa amministrazione, da esprimersi nel termine di sessanta giorni dalla richiesta del prefetto. In mancanza del parere il prefetto procede ai sensi dei commi 5 e 6”.*

#### 6.4 On institutions and corporations, and on bodies of legal persons.

Now, let's talk about the various **bodies of the legal persons** (in general).

When legal persons are involved, asset management is due; administration of things/properties is due; accordingly, persons in charge of administration of the assets are needed.

There is a need for an **administrative body** (an **individual** or a **collegial one**).

Other bodies.

As for the organizations that perform general interests, or in any case interests external to the organization (so-called **institutions**), the memorandum of incorporation sets out the general rules for the activities of the managers of the case (who are jointly called *organo servente* of the organization of the case).

As for the organizations that have an associative character (so-called **corporations**): here there is performance of interests that are meant to be internal to the organization, and therefore the participants must make resolutions during existence of the organization of the case.

Accordingly, here there is the **general assembly** (of the shareholders or the associates of the case), which is called sovereign body or *organo dominante* of the organization of the case (it decides purpose and rules of the organization, its dissolution, appointment and revocation of the directors, powers of the directors; all these activities are established by the general assembly).

Then, also other, **control bodies** are available sometimes: see e.g., in joint stock companies, the board of the statutory auditors (see art. 2403 ICC) and the **body for the defence of special interests** (see article 2415 ICC, in case of the bondholders).

**Classification:** as above mentioned, as for all legal persons, there is a general distinction between:

– **institutions:** they are legal persons bound to pursue the purpose stated in the articles of incorporation or the by-laws (a purpose which is relatively unchangeable). The purpose is a general one, or to pursue interests of a particular class of people. Paradigmatic case: the foundation.

– **corporations:** they are groups of people who sovereignly run themselves, their own organization and freely dispose of the common patrimony. They pursue personal interests of the members of the group of the case (examples: a company; a club), or interests of general nature (example: an association for the development of cultural exchanges between two States). Paradigmatic cases: the association, which can have a diversified purpose; the company if the purpose is a lucrative one.

Finally, please note that managers/directors act on behalf of all members. Here the rules on representation are to be applied (see art. 1387 ICC and ff. ones).



## 7 Lecture 7: on properties.

SUMMARY: 7.1 Introduction: things, *rights in rem* and *rights in personam*, movable and immovable properties, *universalità di mobili, pertinenze* and fruits. – 7.2 On material and immaterial things. – 7.3 On the legal concept of property. – 7.4 On the concepts of movable and immovable property and their legal consequences. – 7.5 On replaceable and irreplaceable things. – 7.6 On consumable and inconsumable things. – 7.7 On *pertinenze*. – 7.8 On *universalità di mobili*. – 7.9 On fruits.

### 7.1 Introduction: things, *rights in rem* and *rights in personam*, movable and immovable properties, *universalità di mobili, pertinenze* and fruits.

We have brainstormed about physical and legal persons, and we have seen that both can be holders of rights, legal expectations, various legal positions in general, *et cetera*, all relevant at the eyes of the law.

Now, the question is: if there is a right, it is a right to what?

In other words, is there a thing upon which the right of the case is pending against? Or is the right of the case pending against someone? (please remember the concepts of claim-obligation-*facoltà*).

Then, what does a right consist in?

Eventually, it consists in drawing out utilities. Fine, but utilities from what, or utilities from whom?

If we brainstorm on the “what”, then we get into the law of things (or goods, or, even better, as far law is concerned, properties), otherwise said property law or law of property (with all its own peculiar rules and regulations, as well as remedies, available).

On the contrary, if we brainstorm on the “who”, then we get into the law of obligations (with all its own peculiar rules and regulations, as well as remedies, available).

And accordingly, the distinction between *rights in rem* (property rights called, in Italian language, “*diritti reali*”), from one side, and *rights in personam* (or rights of credit or credit rights), from the other side, comes into play.

Therefore, summing up, utilities can be drawn from:

a) things; or

b) others’ behaviours, like services (e.g., a contract of transportation: the service provided by the transporter of the case involves a utility for the recipient of the service).

Thus, here a clear distinction between property rights and rights of credit is raised up (the right of credit looks at the debtor’s behaviour, even if the behaviour of the counterpart is always and eventually linked to a thing).

If we talk about “things”, as far as law is concerned, at first, we get into Title I of Book III of the Italian Civil Code.

## ARTICOLO 810 CC

### Nozione

*“[I]. Sono beni le cose che possono formare oggetto di diritti”.*

## ARTICLE 810 ICC

### Notion

*“[I]. Properties are things that can be subject matter of rights”.*

Therefore, a property is a) a thing; that b) can be subject matter of rights.

Then, a property is generally a material entity/object (therefore information and health, are not, legally speaking, properties, under our Civil Code).

*Exempli gratia*, art. 812 ICC, when it speaks about properties, makes examples of material things.

## ARTICOLO 812 CC

### Distinzione dei beni

*“[I]. Sono beni immobili il suolo, le sorgenti e i corsi d’acqua, gli alberi, gli edifici e le altre costruzioni, anche se unite al suolo a scopo transitorio, e in genere tutto ciò che naturalmente o artificialmente è incorporato al suolo.*

*[II]. Sono reputati immobili i mulini, i bagni e gli altri edifici galleggianti quando sono saldamente assicurati alla riva o all’alveo e sono destinati ad esserlo in modo permanente per la loro utilizzazione.*

*[III]. Sono mobili tutti gli altri beni”.*

## ARTICLE 812 ICC

### Distinction amongst properties

*“[I]. Land, springs and waterways, trees, buildings, and other constructions, even if they are joined to the ground for a temporary reason, and in general everything that is naturally or artificially incorporated into the ground, are immovable properties.*

*[II]. Mills, baths and other floating buildings are considered immovable when they are firmly secured to the shore or to the riverbed and they are meant to be permanently secured to them in relation to their use.*

*[III]. All other properties are movable ones”.*

Now, see also art. 816 ICC and art. 817 ICC.

## **ARTICOLO 816 CC**

### **Universalità di mobili**

“[I]. È considerata universalità di mobili la pluralità di cose che appartengono alla stessa persona e hanno una destinazione unitaria.

[II]. Le singole cose componenti la universalità possono formare oggetto di separati atti e rapporti giuridici”.

## **ARTICLE 816 ICC**

### **Universalità di mobili**

“[I]. An universalità di mobili is a plurality of things that belong to the same person and have a common destination.

[II]. The single things that are part of an universalità can be the subject matter of separate legal acts and legal relationships”.

## **ARTICOLO 817 CC**

### **Pertinenze**

“[I]. Sono pertinenze le cose destinate in modo durevole a servizio o ad ornamento di un'altra cosa”.

## **ARTICLE 817 ICC**

### **Pertinenze**

“[I]. Pertinenze are things destined to the service or ornament of another thing in a continuous way”.

Then, related to properties are fruits.

## **ARTICOLO 820 CC**

### **Frutti naturali e frutti civili**

“[I]. Sono frutti naturali quelli che provengono direttamente dalla cosa, vi concorra o no l'opera dell'uomo, come i prodotti agricoli, la legna, i parti degli animali, i prodotti delle miniere, cave e torbiere.

[II]. Finché non avviene la separazione, i frutti formano parte della cosa. Si può tuttavia disporre di essi come di cosa mobile futura.

[III]. Sono frutti civili quelli che si ritraggono dalla cosa come corrispettivo del godimento che altri ne abbia. Tali sono gli interessi dei capitali, i canoni enfiteutici, le rendite vitalizie e ogni altra rendita, il corrispettivo delle locazioni”.

## ARTICLE 820 ICC

### Natural fruits and civil fruits

“[I]. Natural fruits are those that come directly from the thing, with or without work of men, such as agricultural products, wood, parts of animals, products of mines, quarries and peat bogs.

[II]. Until separation occurs, fruits are part of the thing. However, they can be disposed of as a future movable thing.

[III]. Civil fruits are those that can be withdrawn from a thing as consideration for the enjoyment that others have of it. They are interests on capital, rents due for enfiteusi, life annuities and any other annuity, considerations due in case of lease”.

## 7.2 On material and immaterial things.

Please note that the above-mentioned character of materiality of a certain property must be seen in a broad way: therefore, it means that a thing is not only what it is visible or tangible, but also what refers to the world of materials (and therefore, more generally, what is empirically verifiable as well as quantifiable).

Thus, things are solids, liquids, gases and, more generally, energies.

## ARTICOLO 814 CC

### Energie

“[I]. Si considerano beni mobili le energie naturali che hanno valore economico”.

## ARTICLE 814 ICC

### Energies

“[I]. Natural energies that have a financial value are movable properties”.

As per above, anyway please note that a peculiarity arises in the field of electricity.

In fact, if we are talking about things/properties in a strict way, then both the concepts of ownership and possession (the latter one, under art. 1140 CC and ff. ones) are closely related to them too, from the legal point of view, and therefore, *exempli gratia*, all remedies for the

protection of possession should come into play too, under art. 1168 ICC and ff. ones (otherwise the kinds of protections available should be the contractual ones).

See **Cassazione civile, sez. II, 03/09/1993, n. 9312.**

*“L’utente di energia elettrica che abbia subito l’indebita interruzione dell’erogazione mediante distacco dei fili conduttori o altra operazione materiale ad opera dell’ente somministrante, può soltanto esercitare l’azione contrattuale di inadempimento, ma non invocare la tutela possessoria ex art. 1168 c.c., in quanto pur definendo l’art. 814 c.c., le energie come beni mobili, non è concretamente configurabile una situazione di autonomo possesso dell’utente sull’energia elettrica fornitagli in base a contratto di somministrazione, neppure per la quantità di energia presente nel circuito privato dell’utente stesso, atteso che l’interruzione in corso di prelievo di energia con fonti di illuminazione attive (o apparecchiature elettriche di accumulo funzionanti) non comporta spogli di energia essendo questa di già consumata (o accumulata), né di quella eroganda, che non è ancora oggetto di possesso attuale, mentre prima dell’apprensione non vi è autonomo possesso dell’utente ma soltanto potenziale disponibilità, realizzabile mediante la concreta utilizzazione solo con la persistente collaborazione dell’ente fornitore”.*

Legal concepts behind the judgment: just a contractual claim is available here (under the law on obligations – Book IV of the Civil Code), for breach of contract, and not a claim for breach of possession.

As per above, then, there is the traditional distinction between **material property** and **immaterial property** (for example, the work of ingenuity, inventions).

Today immaterial properties are defined “*properties that are not things*”.

Anyway, as far as immaterial properties are concerned, intellectual property rights (like, for example, a copyright or a patent for an invention or a model) can have as subject matter, for example, a literary work (a book), an invention, *et cetera*; and therefore, intellectual creations do arise, to be distinguished from the material substratum in which they are incorporated.

Accordingly, ownership of the thing from which a copyright is taken out as well as ownership of the copyright may belong (and actually, they often belong) to different persons (see e.g., as for books, the distinction between publisher and author).

If we brainstorm about the relationship between material properties and immaterial properties (and, e.g., the relationship between ownership of a material property and ownership of an immaterial property), then we must underline that the sole common element is the one of absoluteness.

Above all, the way the asset is enjoyed is different, which, in the case of an intellectual work covered by a copyright, it consists in regulating the competition regime in a different way: the owner has the chance of reproducing the work or to exploit his/her invention, with the exclusion of everybody else.

On other immaterial properties: radio waves and television waves. See **Pretura Trento, 17/05/1983.**

*“Le onde radio e televisive sono beni immateriali che richiedono, tra l’altro, impianti che ne consentono la utilizzazione. Come tali, le onde radio e televisive possono formare oggetto di proprietà, pur se atteggiatesi in maniera particolare rispetto al tradizionale e più antico diritto di proprietà su cose materiali, ed è ammissibile la loro tutela possessoria e petitoria”.*

Legal concepts behind the judgment: radio and television waves are subject matter of ownership, and accordingly possessory claims as well as proprietary claims are both available.

### **7.3 On the legal concept of property.**

Now, let’s go back to the notion of property.

#### **ARTICOLO 810 CC**

##### **Nozione**

*“[I]. Sono beni le cose che possono formare oggetto di diritti”.*

#### **ARTICLE 810 ICC**

##### **Notion**

*“[I]. Properties are things that can be subject matter of rights”.*

Therefore, once again, a property is a) a thing; that b) can be subject matter of rights.

Accordingly, things that cannot be subjected to rights are not properties. In fact, an attribution of a right always solves a conflict of interests, and there is a conflict of interests if and when there is a relative scarcity of what can satisfy a need.

Hence, from this point of view, atmosphere, and sea waters (or, even better, so-called “*acque extraterritoriali*”/oceanic waters) are not properties. We say they are “things common to everybody”.

Same reasoning, from the point of view of the energies, as far as the sun’s rays are concerned (solar energy is a common thing, but, please note, not the plants/*impianti fotovoltaici* that collect sun’s rays).

Again, we said that properties are things that can be subject matter of rights.

Accordingly, it does not mean that they have to be subject matter of rights in a specific moment. There are things, that are not subject matter of rights, but they can become subject matter of rights in the future, and they are called “not appropriated things”.

These are nobody’s things (so-called *res nullius*): e.g., a fish is a *res nullius*, then the fisherman acquires its ownership, under the Italian private law, by so-called *occupazione* (see art. 923 ICC).

Please note that a *res derelicta* (namely, a thing which has been willingly abandoned by its owner) is also a *res nullius*, but not a lost thing (which has by no means been abandoned).

Now let’s see some case studies on art. 810 ICC, more specifically on participations in companies (to be meant in a general way).

See **Cassazione civile, sez. II, 02/02/2009, n. 2569**.

*“La quota di partecipazione ad una società di persone non attribuisce al partecipante una posizione giuridica soggettiva qualificabile in termini di diritto di credito avente ad oggetto la restituzione del conferimento o di una quota proporzionale del patrimonio sociale, ma va ricondotta nella nozione di beni mobili fornita dagli art. 810 e 812, comma ult., c.c. Deriva da quanto precede, pertanto, che la iniziale partecipazione di uno dei coniugi ad una società di persone ed i suoi successivi aumenti - ferma la distinzione tra la loro titolarità e la legittimazione all’esercizio dei diritti nei confronti della società che essi attribuiscono al socio - rientrano tra gli acquisti che, a norma dell’art. 177, lett. a, c.c. costituiscono oggetto della comunione legale tra i coniugi, anche se effettuati durante il matrimonio ad opera di uno solo di essi e con beni personali, ove non ricorra una delle ipotesi previste dall’art. 179 c.c.”.*

Legal concepts behind the judgment: participations in partnerships are movable properties.

The case was a case on separation/divorce: one of the spouses claimed that here there was only a *right in personam* (and therefore nothing that could be claimed as a property under the laws on property); the other argued that instead they were dealing with a property, involving, under the circumstances, the application of the discipline on the legal community of property (namely, *comunione legale dei beni*).

See also **Cassazione civile, sez. III, 21/10/2009, n. 22361**.

*“La quota di partecipazione in una società a responsabilità limitata esprime una posizione contrattuale obiettivata, che va considerata come bene immateriale equiparabile al bene mobile non iscritto in pubblico registro ai sensi dell’art. 812 c.c., per cui ad essa possono applicarsi, a norma dell’art. 813, ultima parte, c.c., le disposizioni concernenti i beni mobili e, in particolare, la disciplina delle situazioni soggettive reali e dei conflitti tra di esse sul medesimo*

*bene, poiché la quota, pur non configurandosi come bene materiale al pari dell'azione, ha tuttavia un valore patrimoniale oggettivo, costituito dalla frazione del patrimonio che rappresenta, e va perciò configurata come oggetto unitario di diritti; ne consegue che le quote di partecipazione ad una società a responsabilità limitata possono essere oggetto di pignoramento nei confronti del socio che ne è titolare, a nulla rilevando il fallimento della società, che è terzo rispetto al processo esecutivo, cui pertanto non si applica l'art. 51 l. fall."*

Legal concepts behind the judgment: same thing as for the previous case on partnership. Here the subject matter of the judgment was a limited liability company<sup>5</sup>.

#### **7.4 On the concepts of movable and immovable property and their legal consequences.**

##### **ARTICOLO 812 CC**

###### **Distinzione dei beni**

*“[I]. Sono beni immobili il suolo, le sorgenti e i corsi d'acqua, gli alberi, gli edifici e le altre costruzioni, anche se unite al suolo a scopo transitorio, e in genere tutto ciò che naturalmente o artificialmente è incorporato al suolo.*

*[II]. Sono reputati immobili i mulini, i bagni e gli altri edifici galleggianti quando sono saldamente assicurati alla riva o all'alveo e sono destinati ad esserlo in modo permanente per la loro utilizzazione.*

*[III]. Sono mobili tutti gli altri beni”.*

##### **ARTICLE 812 ICC**

###### **Distinction amongst properties**

*“[I]. Land, springs and waterways, trees, buildings, and other constructions, even if they are joined to the ground for a temporary reason, and in general everything that is naturally or artificially incorporated into the ground, are immovable properties.*

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<sup>5</sup> Anyway, please note that, when it comes to the actual exercise of all rights linked to a participation in a company in general (such as the right of vote; the right to payment of dividends; *et cetera*), inside the legal relationship company-members of the company, here, instead, the general legal opinion is that we are dealing with a *right in personam*, and not a *right in rem*, because, e.g., shareholders of a joint stock company or partners of a partnership (and so on) are legally qualified as owners of the shares/participations of the case, namely the documents, so-called *titoli di credito* (under art. 1992 ICC and ff. ones) which grant to their owners the mere exercise of all rights mentioned therein, but not the direct ownership over company's assets of the case.

[II]. Mills, baths and other floating buildings are considered immovable when they are firmly secured to the shore or to the riverbed and they are meant to be permanently secured to them in relation to their use.

[III]. All other properties are movable ones".

### **Some cases studies on art. 812 ICC.**

1. On furniture: see **Cassazione civile, sez. II, 07/09/2009, n. 19283.**

*“Chi riceve in eredità l’abitazione eredita anche i quadri che costituiscono parte sostanziale dell’arredo della casa. L’art. 812 c.c. fissa un principio generale: il concetto di beni mobili è, infatti, onnicomprensivo, includendo in sé, con carattere residuale tutti i beni che non siano qualificabili come immobili. Pertanto, l’espressione "mobili", riferita ai beni che corredano un’abitazione, non autorizza di per sé a escludere parte di questi ultimi, qualunque sia il valore, essendo comprensiva, anche nel lessico comune, di quadri, oggetti e arredi in genere”.*

*“Whoever receives a house as inheritance also inherits the paintings that are a substantial part of the furnishings of the house. Article 812 of the Italian Civil Code establishes a general principle: the concept of movable property is, in fact, all-encompassing, including in itself, with a residual character, all assets that cannot be classified as immovable ones. Therefore, the expression “mobili”, referring to the goods that are part of a house, does not in itself authorize the exclusion of part of the latter, whatever the value, since it includes, even in the common lexicon, paintings, objects and furnishings in general”.*

2. On old airplanes not useful (for flying) anymore: see **Cassazione civile, sez. II, 05/01/2017, n. 152.**

*“Bene immobile è soltanto quello incorporato o materialmente congiunto al suolo, e non anche quello meramente aderente ad esso, con mezzi aventi la sola funzione di ottenerne la stabilità necessaria all’uso. Pertanto, uno o più aeromobili in disuso, anche se accatastati e destinati a struttura di ricezione nell’ambito di un complesso immobiliare, vanno qualificati come beni mobili giacché, sia pure attraverso un intervento costoso, sono rimovibili senza che ne sia alterata la struttura, con conseguente inoperatività, rispetto ad essi, degli istituti dell’accessione, della superficie e della servitù”.*

*“Immovable properties are only those incorporated or materially joined to the ground, and not those ones merely adhering to it, with means that have the sole function of obtaining the stability necessary for use. Therefore, one or more disused aircrafts, even if they are stacked and intended for a reception structure within a building complex, they must be qualified as movable property since, albeit through an expensive intervention, they can be removed without*

*altering the structure, with consequent inoperability, with respect to them, of the institutes of accessione, superficie and servitù”.*

Now, on the mobility/immobility as a quality of the thing of the case that has to be qualified at the right/proper time (and therefore in a relative way and not in an absolute one), please see, as for a case on trees, **Cassazione civile, sez. II, 14/02/1980, n. 1109.**

*“L’art. 812 c.c., enumerando fra i beni immobili anche "gli alberi", designa tutto ciò che appartiene all’ordine dei vegetali e trae necessariamente vita dal suolo. Tuttavia, gli alberi - intesa la espressione nella suddetta ampia eccezione - cessano di essere beni immobili con il distacco dal suolo e vanno considerati del pari beni mobili quando formino oggetto di contratto che li contempra per l’epoca in cui saranno divelti (cosiddetti beni mobili per anticipazione)”.*

Please note that **the distinction between immovable properties and movable properties is, legally speaking, quite important in relation to some legal purposes, namely:**

- a) major restrictions, generally related to immovable properties in public law;
- b) the form of the deeds/acts whose subject matter are immovable properties, especially when we deal with contracts concerning transfer of ownership or other rights in rem over said immovable properties. See art. 1350 ICC.

## **ARTICOLO 1350 CC**

### **Atti che devono farsi per iscritto**

*“[I]. Devono farsi per atto pubblico o per scrittura privata, sotto pena di nullità:*

- 1) i contratti che trasferiscono la proprietà di beni immobili;*
- 2) i contratti che costituiscono, modificano o trasferiscono il diritto di usufrutto su beni immobili, il diritto di superficie, il diritto del concedente e dell’enfiteuta;*
- 3) i contratti che costituiscono la comunione di diritti indicati dai numeri precedenti;*
- 4) i contratti che costituiscono o modificano le servitù prediali, il diritto di uso su beni immobili e il diritto di abitazione;*
- 5) gli atti di rinuncia ai diritti indicati dai numeri precedenti;*
- 6) i contratti di affrancazione del fondo enfiteutico;*
- 7) i contratti di anticresi;*
- 8) i contratti di locazione di beni immobili per una durata superiore a nove anni;*
- 9) i contratti di società o di associazione con i quali si conferisce il godimento di beni immobili o di altri diritti reali immobiliari per un tempo eccedente i nove anni o per un tempo indeterminato;*

10) gli atti che costituiscono rendite perpetue o vitalizie, salve le disposizioni relative alle rendite dello Stato;

11) gli atti di divisione di beni immobili e di altri diritti reali immobiliari;

12) le transazioni che hanno per oggetto controversie relative ai rapporti giuridici menzionati nei numeri precedenti;

13) gli altri atti specialmente indicati dalla legge”.

## ARTICLE 1350 ICC

### Acts that must be performed in a written form

“[1]. They must be performed by way of a public deed (atto pubblico) or a private written document (scrittura privata), under penalty of nullity:

1) contracts that transfer ownership of immovable properties;

2) contracts that create, modify or transfer the right in rem of usufrutto on immovable properties, the right in rem of superficie, the right in rem of the concedente and the enfiteuta;

3) contracts which create a community of right over the rights in rem mentioned in the preceding numbers;

4) contracts that create or modify the right in rem of easements, the right in rem of uso over immovable properties and the right in rem of abitazione;

5) acts of renunciation to one of the rights in rem mentioned in the previous numbers;

6) contracts for redemption of a fondo enfiteutico;

7) contracts of anticresi;

8) contracts for rent of **immovable properties** for a duration exceeding nine years;

9) contracts of company or of association according to which the enjoyment of an **immovable property** or another right in rem over an immovable property is granted for a period exceeding nine years or for an indefinite period;

10) acts that create perpetual annuities or life annuities, without prejudice to the provisions concerning State revenues;

11) acts of division of **immovable properties** and other rights in rem over **immovable properties;**

12) settlement which have as their subject matter disputes relating to the legal relationships mentioned in the previous numbers;

13) other acts especially indicated by the law”.

c) **still, the distinction between immovable properties and movable properties is quite important in relation to a specific kind of publicity that can/must be used, in the legal**

system, to disclose *erga omnes* (meaning, against everybody else) a certain legal position pending against a thing. More precisely, when we talk about the so-called *trascrizione*, which is a peculiar kind of publicity related to immovable properties and the so-called *beni mobili registrati* (registered movable properties), namely ships, aircrafts and vehicles. Please see art. 2643 ICC and ff. ones as for the regime of *trascrizione* concerning immovable properties, and art. 2683 ICC and ff. ones, as for the *trascrizione*'s regime on *beni mobili registrati*.

## ARTICOLO 2643 CC

### Atti soggetti a trascrizione

“[I]. Si devono rendere pubblici col mezzo della trascrizione:

- 1) i contratti che trasferiscono la proprietà di beni immobili;
- 2) i contratti che costituiscono, trasferiscono o modificano il diritto di usufrutto su beni immobili, il diritto di superficie, i diritti del concedente e dell'enfiteuta;
- 2-bis) i contratti che trasferiscono, costituiscono o modificano i diritti edificatori comunque denominati, previsti da normative statali o regionali, ovvero da strumenti di pianificazione territoriale;
- 3) i contratti che costituiscono la comunione dei diritti menzionati nei numeri precedenti;
- 4) i contratti che costituiscono o modificano servitù prediali, il diritto di uso sopra beni immobili, il diritto di abitazione;
- 5) gli atti tra vivi di rinuncia ai diritti menzionati nei numeri precedenti;
- 6) i provvedimenti con i quali nell'esecuzione forzata si trasferiscono la proprietà di beni immobili o altri diritti reali immobiliari, eccettuato il caso di vendita seguita nel processo di liberazione degli immobili dalle ipoteche a favore del terzo acquirente;
- 7) gli atti e le sentenze di affrancazione del fondo enfiteutico;
- 8) i contratti di locazione di beni immobili che hanno durata superiore a nove anni;
- 9) gli atti e le sentenze da cui risulta liberazione o cessione di pigioni o di fitti non ancora scaduti, per un termine maggiore di tre anni;
- 10) i contratti di società e di associazione con i quali si conferisce il godimento di beni immobili o di altri diritti reali immobiliari, quando la durata della società o dell'associazione eccede i nove anni o è indeterminata;
- 11) gli atti di costituzione dei consorzi che hanno l'effetto indicato dal numero precedente;
- 12) i contratti di anticresi;
- 12-bis) gli accordi di mediazione che accertano l'usucapione con la sottoscrizione del processo verbale autenticata da un pubblico ufficiale a ciò autorizzato.

13) le transazioni che hanno per oggetto controversie sui diritti menzionati nei numeri precedenti;

14) le sentenze che operano la costituzione, il trasferimento o la modificazione di uno dei diritti menzionati nei numeri precedenti”.

## ARTICLE 2643 ICC

### Acts subject to *trascrizione*

“[I]. The following acts must be made public by way of trascrizione:

- 1) contracts that transfer ownership of immovable properties;
- 2) contracts that create, modify or transfer the right in rem of usufrutto on immovable properties, the right in rem of superficie, the right in rem of the concedente and the enfiteuta;
  - 2-bis) contracts that transfer, create or modify building rights, however labelled, established by state or regional laws, or by territorial planning tools;
- 3) contracts which create a community of right over the rights in rem mentioned in the preceding numbers;
- 4) contracts that create or modify easements, the right in rem of uso over immovable properties and the right in rem of abitazione;
- 5) inter vivos acts of renunciation to one of the rights in rem mentioned in the previous numbers;
- 6) judicial decisions according to which, in case of forced execution, the right of ownership over immovable properties or other rights in rem over immovable properties are transferred, except in case of a sale followed within a proceedings of release of immovable properties from mortgages issued on behalf of a third-party buyer;
- 7) acts and judgments for redemption of a fondo enfiteutico;
- 8) contracts for rent of immovable properties for a duration exceeding nine years;
- 9) acts and judgments according to which there is a release or a transfer of rents or rents not yet expired, for a term greater than three years;
- 10) contracts of company or of association according to which the enjoyment of an immovable property or another right in rem over an immovable property is granted, when the duration of the company or the association exceeds nine years or is undetermined;
- 11) acts of constitution of consortia that have the legal consequences mentioned in the previous number;
- 12) contracts of anticresi;
- 12-bis) mediation agreements that ascertain usucapione with the signature of minutes authenticated by a public official authorized to do so;

13) settlement which have as their subject matter disputes relating to the legal relationships mentioned in the previous numbers;

14) judgments that create, transfer or amend of one of the rights mentioned in the previous numbers”.

Please note that the content of article 2643 ICC is more or less replying the content of article 1350 ICC.

Finally, please note that, when it comes to **publicity**, there are **three different kinds of publicity available in the Italian legal system**, namely:

- 1) **pubblicità notizia** (like the one provided for by the so-called *Registri dello stato civile*);
- 2) **pubblicità dichiarativa** (like the one that we have just seen, provided for, e.g., as far as the immovable properties are concerned, by the so-called *Conservatorie dei Registri Immobiliari* or *Agenzie del Territorio*); and
- 3) **pubblicità costitutiva** (like the one that we saw on the lecture 6, par. 6.3, on legal persons, when we spoke about the attribution of the legal personality. See e.g., article 2331 ICC on the registration of joint stock companies at the Companies House or art. 1 DPR 361/2000 on recognition of associations and foundations at *Registro delle persone giuridiche*).

## 7.5 On replaceable and irreplaceable things.

Replaceable things (so-called *beni fungibili*) are things of a certain kind, namely things that can be substituted one with the other; they are equivalent each other, when we deal with their use. Examples: agricultural and mining products; foodstuffs; serial products until they are new ones (such as copies of a book or a disk, home appliances, automobiles).

On the contrary *beni non fungibili* (irreplaceable things) are things produced in unique pieces. Examples: a tailored suit, a piece of furniture made by a craftsman based on a particular design, originals of non-multiple works of art; used things (two cars, when they are used things, they become *beni non fungibili*); on a general basis, immovable properties (because they differ in their location in space, which is never irrelevant).

Please note that the character of *fungibilità* or *infungibilità* must be assessed under the circumstances of the case.

*Exempli gratia*, cars are not *beni fungibili* for their users; they are *beni fungibili* for demolition. Money is a *bene fungibile* (coins, bank notes, which are relevant just as a symbol for a sum of money).

The distinction here is important for (*exempli gratia*):

- 1) the obligations concerning *beni fungibili* on a general basis:

## ARTICOLO 1178 CC

### Obbligazione generica

“[I]. *Quando l’obbligazione ha per oggetto la prestazione di cose determinate soltanto nel genere, il debitore deve prestare cose di qualità non inferiore alla media*”.

## ARTICLE 1178 ICC

### Generic obligation

“[I]. *When an obligation has as its own subject matter the execution of a performance over things determined only in their genre, then the debtor must provide for the service of things of a quality not below the average one*”.

*Ergo*, here the so-called *tantundem eiusdem generis* is due (provided that it is not below the average quality).

2) the identification of the property of the case. See on the subject matter, art. 1376 ICC and art. 1378 ICC (on the criterion for identification) on the recognition of existence of a right of ownership (due to the pre-emptive fact that right of ownership and the other *rights in rem* are conceivable only over identified things).

Please note that, as far as *beni non fungibili* are concerned, the right of ownership is transferred with the completion of the contract of the case by way of mutual consent lawfully expressed by the parties (see article 1376 ICC).

## ARTICOLO 1376 CC

### Contratto con effetti reali

“[I]. *Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata, la costituzione o il trasferimento di un diritto reale ovvero il trasferimento di un altro diritto, la proprietà o il diritto si trasmettono e si acquistano per effetto del consenso delle parti legittimamente manifestato*”.

## ARTICLE 1376 ICC

### Contract and effects over things

“[I]. *In contracts which have as their subject matter the transfer of ownership over a specified thing, the creation or the transfer of a right in rem or the transfer of another right, ownership or the right of the case is transferred and acquired by way of mutual consent of the parties lawfully expressed*”.

On the contrary, as far as *beni fungibili* are concerned:

### **ARTICOLO 1378 CC**

#### **Trasferimento di cosa determinata solo nel genere**

“[I]. *Nei contratti che hanno per oggetto il trasferimento di cose determinate solo nel genere, la proprietà si trasmette con l’individuazione fatta d’accordo tra le parti o nei modi da esse stabiliti. Trattandosi di cose che devono essere trasportate da un luogo a un altro, l’individuazione avviene anche mediante la consegna al vettore o allo spedizionario*”.

### **ARTICLE 1378 ICC**

#### **Transfer of a thing determined only by genre**

“[I]. In contracts which have as their subject matter the transfer of things determined only by genre, the right of ownership is transferred with the identification made by mutual agreement of the parties or in the way agreed on by them. If the things are to be transported from one place to another, then the identification takes place by delivery to the carrier of the case too”.

3) destruction of the thing of the case: compensation in specific form is available if we are dealing with a *bene fungibile*; otherwise, just a payment of the equivalent in terms of money is due (please remember that e.g., I cannot force a painter to paint the painting of the case).

Moreover, the subject matter of loans can be just *beni fungibili* (see art.1813 ICC).

### **ARTICOLO 1813 CC**

#### **Nozione**

“[I]. *Il mutuo è il contratto col quale una parte consegna all’altra una determinata quantità di danaro o di altre cose fungibili, e l’altra si obbliga a restituire altrettante cose della stessa specie e qualità*”.

### **ARTICLE 1813 ICC**

#### **Notion**

“[I]. *A loan is a contract according to which one party delivers to the other party a certain amount of money or other fungible things, and the counterpart undertakes to give back things of the same kind and quality*”.

## 7.6 On consumable and inconsumable things.

Consumable things are things not susceptible to continuous or repeated use (e.g., food, fuel, money, because we use it, or we spend it, and therefore we deprive ourselves of it).

Inconsumable things are things susceptible to repeated use (e.g., clothes, furniture, cars, buildings).

The distinction is important because inconsumable things can be assigned in temporary use to a person with the obligation of restitution.

*Exempli gratia*, as far as immovable properties are concerned, the owner of an apartment or a flat can sign a contract of *lease*<sup>6</sup> or rent of his/her property of the case to grant a temporary use of it, under art. 1571 ICC.

### ARTICOLO 1571 CC

#### Nozione

“[I]. *La locazione è il contratto col quale una parte si obbliga a far godere all'altra una cosa mobile o immobile per un dato tempo, verso un determinato corrispettivo*”.

### ARTICLE 1571 ICC

#### Notion

“[I]. *A rent agreement is a contract according to which one party undertakes to let the other enjoy a movable or an immovable thing for a certain period of time, against a specific consideration*”.

Then, as for the restitution of leased thing, please see art. 1590 ICC.

### ARTICOLO 1590 CC

#### Restituzione della cosa locata

“[I]. *Il conduttore deve restituire la cosa al locatore nello stato medesimo in cui l'ha ricevuta, in conformità della descrizione che ne sia stata fatta dalle parti, salvo il deterioramento o il consumo risultante dall'uso della cosa in conformità del contratto.*

[II]. *In mancanza di descrizione, si presume che il conduttore abbia ricevuto la cosa in buono stato di manutenzione.*

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<sup>6</sup> Please note that a lease, in English law, is something legally quite different from a *locazione*, under the Italian law. A lease (or *leasehold*), in common law systems, is a specific kind of ownership, along with *freehold*. Please also note that a contract of *lease*, as it is going to be used herein below, is a contract which is different from a *leasing* contract, as a kind of atypical contract (*contratto atipico*) mentioned when we talked about art. 1322 ICC.

[III]. *Il conduttore non risponde del perimento o del deterioramento dovuti a vetustà.*

[IV]. *Le cose mobili si devono restituire nel luogo dove sono state consegnate”.*

## ARTICLE 1590 ICC

### Restitution of the rented property

“[I]. The rentee/tenant must return the thing to the rentor/landlord in the same state in which he received it, in accordance with the description that has been made of it by the parties, except for deterioration or consumption resulting from the use of the thing in accordance with the contract.

[II]. *In case of absence of a description, it is assumed that the tenant has received the object in a good state of maintenance.*

[III]. *The tenant is not liable for death or deterioration due to age.*

[IV]. *Movable things must be returned to the place where they were delivered”.*

This provision/rule of law is not applicable to consumable items, as they cannot be returned after their use. But if the things of the case are *beni fungibili* too, then they can be consumed and therefore a restitution of an equal quantity of things of the same kind is due once again (still see art. 1813 ICC).

### 7.7 On *pertinenze*.

## ARTICOLO 817 CC

### Pertinenze

“[I]. *Sono pertinenze le cose destinate in modo durevole a servizio o ad ornamento di un'altra cosa”.*

## ARTICLE 817 ICC

### *Pertinenze*

“[I]. Pertinenze are things destined to the service or ornament of another thing in a continuous way”.

The destination is imprinted by the owner of the so-called main thing, or by whoever has a right in rem over it.

Examples: the spare wheel of a car; furnishings in a hotel; a box meant to be destined to the service of a residential house.

On the existence of a legal relationship of *pertinenza*: see **Cassazione civile, sez. III, 08/02/2016, n. 2372.**

*“Nel rapporto pertinenziale il collegamento tra la res principale e quella accessoria è preso in considerazione dalla legge non già come connessione materiale, ma come relazione economico giuridica di strumentalità e complementarietà funzionale. Ai fini della sussistenza del vincolo pertinenziale, in particolare, è necessaria la presenza sia del requisito soggettivo, consistente nella effettiva volontà del titolare del diritto di proprietà o di altro diritto reale sui beni collegati, di destinare uno al servizio o all’ornamento dell’altro, sia di quello oggettivo della contiguità, anche solo di servizio, tra i due cespiti, con la precisazione che il bene accessorio deve arrecare una utilità al bene principale e non (o almeno non solo), al proprietario dello stesso”.*

See also **Cassazione civile, sez. II, 30/03/2016, n. 6143.**

*“In tema di condominio, per accertare la natura condominiale o pertinenziale del sottotetto di un edificio, in mancanza del titolo, deve farsi riferimento alle sue caratteristiche strutturali e funzionali, sicché, quando il sottotetto sia oggettivamente destinato (anche solo potenzialmente) all’uso comune o all’esercizio di un servizio di interesse comune, può applicarsi la presunzione di comunione ex art. 1117, comma 1, c.c.; viceversa, allorché il sottotetto assolve all’esclusiva funzione di isolare e proteggere dal caldo, dal freddo e dall’umidità l’appartamento dell’ultimo piano, e non abbia dimensioni e caratteristiche strutturali tali da consentirne l’utilizzazione come vano autonomo, va considerato *pertinenza* di tale appartamento”.*

Here there was a dispute in which the *condominio*/condominium claimed the ownership of the attic as a *pertinenza*, whereas the owner of the apartment adjacent to the attic claimed the individual ownership of the attic itself.

Please note that the legal relationships on the main thing usually concern *pertinenze* too (unless it is otherwise provided for).

However, a *pertinenza* can be the subject matter of a separate dispositive legal act and, accordingly, it can lose its quality of *pertinenza*. See article 818 ICC.

## ARTICOLO 818 CC

### Regime delle pertinenze

*“[I]. Gli atti e i rapporti giuridici che hanno per oggetto la cosa principale comprendono anche le pertinenze, se non è diversamente disposto.*

*[II]. Le pertinenze possono formare oggetto di separati atti o rapporti giuridici.*

[III]. *La cessazione della qualità di pertinenza non è opponibile ai terzi i quali abbiano anteriormente acquistato diritti sulla cosa principale*”.

#### ARTICLE 818 ICC

##### **Legal regime of *pertinenze***

“[I]. The legal acts and the legal relationships that have as their subject matter the main thing also include *pertinenze*, unless otherwise provided for.

[II]. *Pertinenze* can be the subject matter of separate legal acts or legal relationships.

[III]. *Termination of the quality of *pertinenza* cannot be opposed to third parties who have previously acquired rights over the main thing*”.

#### **7.8 On *universalità di mobili*.**

#### ARTICOLO 816 CC

##### **Universalità di mobili**

“[I]. *È considerata universalità di mobili la pluralità di cose che appartengono alla stessa persona e hanno una destinazione unitaria.*

[II]. *Le singole cose componenti la universalità possono formare oggetto di separati atti e rapporti giuridici*”.

#### ARTICLE 816 ICC

##### ***Universalità di mobili***

“[I]. An *universalità di mobili* is a plurality of things that belong to the same person and have a common destination.

[II]. The single things that are part of an *universalità* can be the subject matter of separate legal acts and legal relationships”.

Examples: a flock of sheep; a collection of coins; a library.

Here the destination depends on the will of the owner/possessor of the case too.

Sometimes the applicable rules of law are different from the ones to be applied to movable properties in general (see art. 1156 ICC, art. 1160 ICC, and art. 1170 ICC).

## ARTICOLO 1160 CC

### Usucapione delle universalità di mobili

“[I]. L’usucapione di un’universalità di mobili o di diritti reali di godimento sopra la medesima si compie in virtù del possesso continuato per venti anni.

[II]. Nel caso di acquisto in buona fede da chi non è proprietario, in forza di titolo idoneo, l’usucapione si compie con il decorso di dieci anni”.

## ARTICLE 1160 ICC

### Usucapione of an universalità di mobili

“[I]. Usucapione of an universalità di mobili or of rights in rem of enjoyment over it, it is accomplished by virtue of continued possession for twenty years.

[II]. In case of a sale-purchase in good faith from a non-owner, by virtue of a suitable title, usucapione takes place after ten years”.

Please note that *azienda* (namely, business or firm) is usually qualified as an *universalità di mobili* (see art. 2555 ICC and article 2558 ICC on succession *inter vivos*, by way of contract). See **Cassazione civile, sez. un., 05/03/2014, n. 5087.**

“*Ai fini della disciplina del possesso e dell’usucapione, l’azienda, quale complesso dei beni organizzati per l’esercizio dell’impresa, deve essere considerata come un bene distinto dai singoli componenti, suscettibile di essere unitariamente posseduto e, nel concorso degli altri elementi indicati dalla legge, usucapito (in applicazione di tale principio, la S.C. ha riconosciuto l’usucapibilità, da parte del proprietario della metà di una farmacia al cui interno aveva esercitato l’attività di farmacista per oltre vent’anni comportandosi quale unico proprietario, dell’altra metà della farmacia)”.*

See also **Cassazione civile, sez. II, 26/09/2007, n. 20191.**

“*Qualora l’acquirente di un’azienda con patto di riservato dominio ne effettui a sua volta la vendita, tale vendita non è nulla ma integra una ipotesi di acquisto a non domino per la quale non può trovare applicazione il principio dell’acquisto immediato in virtù del possesso, ai sensi dell’art. 1153 c.c., stante l’esplicita esclusione sancita dall’art. 1156 c.c., giacché il complesso di beni costituito in azienda costituisce una tipica universalità di beni ai sensi dell’art. 816 c.c.; pertanto essa deve qualificarsi come vendita di cosa altrui, ai sensi dell’art. 1478 c.c., con conseguente obbligo del venditore di procurare l’acquisto al compratore, il quale, in mancanza, ha diritto di chiedere la risoluzione del contratto”.*

## 7.9 On fruits.

### ARTICOLO 820 CC

#### Frutti naturali e frutti civili

*“[I]. Sono frutti naturali quelli che provengono direttamente dalla cosa, vi concorra o no l’opera dell’uomo, come i prodotti agricoli, la legna, i parti degli animali, i prodotti delle miniere, cave e torbiere.*

*[II]. Finché non avviene la separazione, i frutti formano parte della cosa. Si può tuttavia disporre di essi come di cosa mobile futura.*

*[III]. Sono frutti civili quelli che si ritraggono dalla cosa come corrispettivo del godimento che altri ne abbia. Tali sono gli interessi dei capitali, i canoni enfiteutici, le rendite vitalizie e ogni altra rendita, il corrispettivo delle locazioni”.*

### ARTICLE 820 ICC

#### Natural fruits and civil fruits

*“[I]. Natural fruits are those that come directly from the thing, with or without work of men, such as agricultural products, wood, parts of animals, products of mines, quarries and peat bogs.*

*[II]. Until separation occurs, fruits are part of the thing. However, they can be disposed of as a future movable thing.*

*[III]. Civil fruits are those that can be withdrawn from a thing as consideration for the enjoyment that others have of it. They are interests on capital, rents due for enfiteusi, life annuities and any other annuity, considerations due in case of lease”.*

Natural fruits are fruits that come directly from the thing of the case (with or without the intermediation of the work of men). As a rule of law, they belong to the owner of the thing that produces them, but it can be established differently: e.g., in case of lease/rent of a rural land (*fondo rustico*), the fruits are due to the tenant/*rentee* of the case.

Acquisition of ownership of the fruits occurs by way of separation: see article 821 ICC.

### ARTICOLO 821 CC

#### Acquisto dei frutti

*“[I]. I frutti naturali appartengono al proprietario della cosa che li produce, salvo che la loro proprietà sia attribuita ad altri. In questo ultimo caso la proprietà si acquista con la separazione.*

[II]. *Chi fa propri i frutti deve, nei limiti del loro valore, rimborsare colui che abbia fatto spese per la produzione e il raccolto.*

[III]. *I frutti civili si acquistano giorno per giorno, in ragione della durata del diritto*".

## ARTICLE 821 ICC

### Acquisition of fruits

*"[I]. Natural fruits belong to the owner of the thing that produces them, unless their ownership is given to others. In the latter case, ownership is acquired by way of separation.*

*[II]. Whoever takes the fruits must, within the limits of their value, reimburse the one who has sustained expenses for the production and the harvest.*

*[III]. Civil fruits are acquired day by day, according to the duration of the right".*

Civil fruits are withdrawn from the thing of the case as a consideration for the enjoyment of others: see e.g., rentals for lease/rent agreement; capital interest (under art. 820, par.3, ICC). See **Cassazione civile, sez. II, 15/03/2006, n. 5776**.

*"In tema di possesso, l'obbligo di restituzione dei frutti della cosa da parte del possessore in favore del proprietario - indipendentemente dalla buona fede o meno del primo - ha carattere di debito di valore relativamente ai frutti naturali, mentre dà luogo ad un debito di valuta, soggetto al principio nominalistico, in relazione ai frutti civili, costituenti il corrispettivo del godimento della cosa (nella specie, somme riscosse a titolo di pigione)".*

Here the dispute was about the "amount" of civil fruits to be given back: there was a discussion/quarrel on the legal concepts of debito di valore (value debt) against debito di valuta (currency debt).



## 8 Lecture 8: on *rights in rem*.

SUMMARY: 8.1 Introduction to the distinction between *rights in rem* and *rights in personam*. – 8.2 On *numerus clausus* of *rights in rem*. – 8.3 On the right of ownership. – 8.4 On the means of acquisition of ownership. – 8.5 On claims for defence of the right of ownership. – 8.6 On prohibition of *atti emulativi*. – 8.7 Introduction to the *rights in rem* over properties of others in general. – 8.8 Introduction to *usufrutto*. – 8.9 On *uso* and *abitazione*. – 8.10 On *superficie*. – 8.11 Introduction to *servitù prediali*.

### 8.1 Introduction to the distinction between *rights in rem* and *rights in personam*.

Previously, we mentioned that a right (conferred to a physical person whomsoever or a legal person whatsoever) practically consists in drawing utilities out of things, and that, when we speak about drawing utilities out of things, we are used to distinguish between:

- the case where these utilities are directly drawn out from the thing itself; and
- the case where these utilities are, on the contrary, drawn out through the activity or a service performed by someone else.

Accordingly, we said that in the first case we are in the field of the law of property (or property law), and therefore we spoke about properties, whereas in the second case we are in the field of the law of obligations.

We also mentioned the fact that, when it comes to the law of property, the holder of the right to draw the utility out of the property of the case is the holder of a so-called right in rem (in Italian language, *diritto reale*); whereas, once again, if are dealing with the law of obligations, the holder of the right to receive performance of a service (or an activity) whatsoever from his/her/its counterpart is the holder of a so-called right in personam (in Italian language, *diritto di credito*).

This distinction is quite important, because it means, on a general basis, in the first case, application of all the rules of law mentioned in Book III of the Italian Civil Code (and particularly all remedies available in this book) and, in the second case, application of all the rules of law mentioned in Book IV of the Italian Civil Code, on obligations and contracts (and particularly all remedies available in this book).

As per above, now, let's deepen a little bit on the law of property, more precisely, on **rights in rem** (*diritti reali*).

### 8.2 On *numerus clausus* of *rights in rem*.

While in contract law the parties can modify/amend the content of a contract that belongs to one of the types of contracts provided for by the Civil Code, as well as they can create contracts that do not belong to these types of contracts still provided for by the Civil Code (so-called

typical contracts), and agree therefore on an atypical contract, pursuant to art. 1322 ICC, this is not possible at all, in the field of rights in rem.

Please remember the text of article 1322 ICC.

### **ARTICOLO 1322 CC**

#### **Autonomia contrattuale**

“[I]. *Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge.*

[II]. *Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l’ordinamento giuridico”.*

### **ARTICLE 1322 ICC**

#### **Contractual autonomy**

“[I]. *The parties can freely determine the content of the contract within the limits imposed by the law.*

[II]. *The parties can also complete contracts that do not belong to the types having a particular discipline, as long as they are aimed at achieving interests worthy of protection according to the legal system”.*

In fact, **rights in rem are a limited number**, or a so-called *numerus clausus*.

Namely, they are:

- 1) **ownership** (*proprietà*);
- and, as far as the **rights in rem of enjoyment** are concerned,
- 2) **right of usufruct** (*usufrutto*);
- 3) **right (in rem) of use** (*uso*);
- 4) **housing/dwelling right** (*abitazione*);
- 5) **right of superficie** (*superficie*);
- 6) **easements** (*servitù prediali*);
- 7) **emphyteusis** (*enfiteusi*);
- and, finally, as far as the **rights in rem of guarantee** are concerned,
- 8) **pledge** (*pegno*); and
- 9) **mortgage** (*ipoteca*)<sup>7</sup>.

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<sup>7</sup> Please note that the above-mentioned translation, in English language, of the Italian *rights in rem* (meaning the *diritti reali* available under the Italian private law) must not be meant to be a technical one,

Please note that there is no rule of law that expressly states that the number of *rights in rem* available in the Italian legal system must be a limited one; the *numerus clausus* of *rights in rem* is the outcome of a public policy rule (*principio di ordine pubblico*, particularly, a principle of public policy of so-called economic nature)<sup>8</sup>.

The reasons for its existence have changed through the years, as principles of public policy are not immutable ones, because they vary in relation to the needs of the time.

Accordingly, this principle meant something very specific at the time of its own introduction, in the French Civil Code, in 1804, and it means something else nowadays, in the Italian legal system.

Anyway, still the rule is that private persons can create a *right in rem* only by choosing it amongst one of the types provided for by the law. If an owner wants to create rights over properties other than those provided for by the law, in relation to a specific asset, with other persons, he/she can do that, but the outcoming rights, which they will necessarily derive from an agreement (and therefore from a contract), shall only have binding effects, on a contractual basis, against the counterpart of the case. They shall be able to be opposed just against that person and no one else (in case, *exempli gratia*, of a further transfer of the very same rights to a third party).

Please note herein below a case that deals with the impossibility of creating a new *right in rem*, and, therefore, on the contrary, with the possibility to remain just within the borders of the characteristics of the types of *rights in rem* available in the legal system.

See **Cassazione civile, sez. un., 04/05/1989, n. 2084**.

*“La donazione, che trasferisca la proprietà, o la nuda proprietà, con riserva di usufrutto, della colonna d’aria sovrastante il fondo del donante, è nulla (e può quindi implicare la responsabilità disciplinare del notaio rogante a norma dell’art. 28 n. 1, l. 16 febbraio 1913 n. 89) posto che detto spazio aereo non può essere oggetto di un autonomo diritto di proprietà e che la riserva di usufrutto non è configurabile in relazione alla costituzione di un diritto di superficie”*.

*“A gift, which transfers full ownership, or bare ownership, subject to a right of usufruct, of the air column above the donor’s land, is void (and can therefore it can involve disciplinary responsibility of the notary pursuant to art. 28 n. 1, l. February 16, 1913 n. 89) because that*

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because, *exempli gratia*, above all, use, easements, pledge and mortgage are, in English private law, specific legal institutions which they do not find a perfect equivalent in the Italian private law at all, and, anyway, in any other private law available in civil-law legal systems (meaning all legal systems that are the counterpart, in terms of private comparative law, of the common-law legal systems, like the English legal system, first of all).

<sup>8</sup> Please see on the subject matter lecture 14, par. 14.3.

said airspace cannot be the subject matter of an autonomous right of ownership and because an act of reserve of a right of usufruct cannot be done in relation to the creation of right of superficie”.

Please note that in this judgment there are three *rights in rem* involved (namely, ownership, right of usufruct and right of *superficie*).

### **8.3 On the right of ownership.**

On the subject matter, please see articles 832-951 ICC.

Please note that art. 832 ICC does not define ownership, as it defines the rights of an owner.

#### **ARTICOLO 832 CC**

##### **Contenuto del diritto**

*“[I]. Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l’osservanza degli obblighi stabiliti dall’ordinamento giuridico”.*

#### **ARTICLE 832 ICC**

##### **Content of the right**

*“[I]. The owner has the right to fully enjoy and dispose of the properties, within the limits and subject to the duties provided for by the legal system”.*

This provision is the direct outcome of art. 544 of the French Civil Code (Code civil), which states that *“[l]a propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse pas un usage prohibé par les lois ou par les règlements”.*

Please note that here two rights strictly linked one to the other are involved, namely, the right of disposition and the right of enjoyment.

Accordingly, some troubles arise, within the Italian legal system, every time a right ownership on behalf of third parties is to be examined (where the two powers are split, like it happens in case of a *trust*).

About the legal consequences of the above-mentioned link, please see the two following judgments, the first one focusing on the right of enjoyment, whereas the second one on the right of disposition:

#### **1) Tribunale Nocera Inferiore, sez. II, 14/01/2013, n. 19.**

*“Il diritto di utilizzare e disporre della cosa in modo pieno ed esclusivo e, ove si tratti di fondo, di effettuare su di esso le opere necessarie per il suo migliore sfruttamento è garantito dall’art. 832 c.c. ed obbliga tutti gli altri soggetti al principio del neminem laedere, con la*

*conseguenza che è configurabile la responsabilità a titolo di risarcimento danni ai sensi dell'art. 2043 c.c. nei confronti dei proprietari nel momento in cui, a seguito di opere, venga determinata l'interclusione dei fondi con la conseguente impossibilità dei loro proprietari di raggiungerli con i mezzi necessari e servirsene per bisogni propri e per produttività. (Nella specie, il Trib. ha quindi condannato al risarcimento dei danni la Cooperativa e il Comune le cui inadempienze - ossia la realizzazione non contemporanea alle strade ma direttamente degli alloggi e la mancata ordinanza di sospensione dei lavori di costruzione di tali edifici - avevano determinato la totale interclusione e la conseguente inutilizzabilità dei fondi da parte degli attori)".*

Summary of the judgment: a liability under art. 2043 ICC and ff. ones, for unlawful acts, arises against everyone that try and impede the exercise of the right of enjoyment of the owner of the case.

**2) Cassazione civile, sez. II, 12/11/2015, n. 23130.**

*"Lo ius aedificandi trova fonte nel diritto di proprietà, del quale rappresenta una facoltà ex art. 832 c.c., sicché i diritti edificatori possono assumere autonoma rilevanza solo in quanto siano oggetto di un'apposita convenzione stipulata dal proprietario dell'area cui accedono; in assenza di tale convenzione, il trasferimento della proprietà del terreno (nella specie, per espropriazione forzata) comporta anche il trasferimento della capacità edificatoria attuale (nella specie, volumetria edificabile connessa a un piano di lottizzazione)".*

Summary of the judgment: every owner of a piece of land is entitled to dispose of it, by default, with all its own qualities.

Now, please note that the right of ownership is covered by articles 42 and 47 of the Italian Constitution too.

## ARTICOLO 42 COST

*"[I]. La proprietà è pubblica o privata. I beni economici appartengono allo Stato, ad enti o a privati.*

*[II]. La proprietà privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti.*

*[III]. La proprietà privata può essere, nei casi preveduti dalla legge, e salvo indennizzo, espropriata per motivi d'interesse generale.*

*[IV]. La legge stabilisce le norme ed i limiti della successione legittima e testamentaria e i diritti dello Stato sulle eredità".*

## ARTICLE 42 IT CONST

*“[I]. Ownership can be public or private. Financial things belong to State, entities or private individuals.*

*[II]. Private ownership is recognized and guaranteed by the law, that dictates the means for its own acquisition and enjoyment and sets up its limits so to ensure its social meaning and make it accessible to everybody.*

*[III]. Private ownership can be expropriated for reasons of public interest in cases provided for by the law and subject to a compensation.*

*[IV]. The law establishes limits and rules on *successione legittima*<sup>9</sup> and testamentary succession, jointly with the rights of the State over inheritances”.*

## ARTICOLO 47 COST

*“[I]. La Repubblica incoraggia e tutela il risparmio in tutte le sue forme; disciplina, coordina e controlla l’esercizio del credito.*

*[II]. Favorisce l’accesso del risparmio popolare alla proprietà dell’abitazione, alla proprietà diretta coltivatrice e al diretto e indiretto investimento azionario nei grandi complessi produttivi del Paese”.*

## ARTICLE 47 IT CONST

*“[I]. The Italian Republic encourages and protects savings in all its forms, and it rules, organizes and controls exercise of credit activities.*

*[II]. It favours access of common savings to ownership over residential immovable properties, to agricultural ownership, and to direct and indirect investments in participations in companies involved in mass production within the country”.*

As per above, when it comes to ownership on a public-law level, it is important to interpret the concept of ownership disclosed in art. 832 ICC subject to rules of law provided for in the Italian Constitution, particularly in art. 42 IT CONST.

Again, on ownership please see also art. 1 of the Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR):

*“Every physical and legal person has a right for ownership of his own properties to be respected.*

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<sup>9</sup> Please note that it’s better not to translate this expression, because *successione legittima* is a peculiar kind of succession *mortis causa* available in the Italian legal system (and not in the English one), which occurs when the deceased/*de cuius* of the case dies *ab intestato*/intestate, meaning without a will.

*No one can be deprived of his own properties except for reasons of public utility and subject to the terms provided for by the law and the general principles of international law.*

*The previous provisions do not prejudice the right of States to enforce the laws that they deem necessary to be enforced so to govern the use of properties in a manner consistent with their general interests or to ensure payment of taxes, other contributions or fines”.*

Now, having said that, as we are talking about the right of ownership in private law, please note that there are some properties (such as State properties and non-disposable State properties, above all) that, in full compliance with art. 42, par. 1, of the Italian Constitution, cannot be subjected to ownership by private citizens, with all legal consequences mentioned in the provisions referred to herein below.

## **ARTICOLO 822 CC**

### **Demanio pubblico**

*“[I]. Appartengono allo Stato e fanno parte del demanio pubblico il lido del mare, la spiaggia, le rade e i porti; i fiumi, i torrenti, i laghi e le altre acque definite pubbliche dalle leggi in materia; le opere destinate alla difesa nazionale.*

*[II]. Fanno parimenti parte del demanio pubblico, se appartengono allo Stato, le strade, le autostrade e le strade ferrate; gli aerodromi; gli acquedotti; gli immobili riconosciuti d’interesse storico, archeologico e artistico a norma delle leggi in materia; le raccolte dei musei, delle pinacoteche, degli archivi, delle biblioteche; e infine gli altri beni che sono dalla legge assoggettati al regime proprio del demanio pubblico”.*

## **ARTICLE 822 ICC**

### **State properties**

*“[I]. Lidos, beaches, bays, and ports, along with rivers, streams, lakes and other waters defined as public waters by their relevant laws, as well as constructions meant to be directed to national defence, belong to the State and are part of State properties.*

*[II]. Roads, motorways and railways are also part of State properties, if they belong to the State, along with aerodromes, aqueducts, buildings recognized as being of historical, archaeological and artistic interest in accordance with their relevant laws, collections of museums, art galleries, archives, libraries, and finally all other assets that are subjected by the laws to the legal regime of State properties”.*

## ARTICOLO 823 CC

### Condizione giuridica del demanio pubblico

“[I]. *I beni che fanno parte del demanio pubblico sono inalienabili e non possono formare oggetto di diritti a favore di terzi, se non nei modi e nei limiti stabiliti dalle leggi che li riguardano.*

[II]. *Spetta all'autorità amministrativa la tutela dei beni che fanno parte del demanio pubblico. Essa ha facoltà sia di procedere in via amministrativa, sia di valersi dei mezzi ordinari a difesa della proprietà e del possesso regolati dal presente codice”.*

## ARTICLE 823 ICC

### Legal status of State properties

“[I]. Assets that are part of State properties cannot be transferred and cannot be subject matter of rights acquired on behalf of third parties, except in the ways and within the limits established by the laws that deal with them.

[II]. *It is up to the administrative authorities to protect all assets that belong to State properties. They have the right both to follow administrative proceedings and to use the customary means useful to defend ownership and possession governed by this code”.*

## ARTICOLO 824 CC

### Beni delle province e dei comuni soggetti al regime dei beni demaniali

“[I]. *I beni della specie di quelli indicati dal secondo comma dell'articolo 822, se appartengono alle province o ai comuni, sono soggetti al regime del demanio pubblico.*

[II]. *Allo stesso regime sono soggetti i cimiteri e i mercati comunali”.*

## ARTICLE 824 ICC

### Properties of provinces and municipalities subject to State-properties regime

“[I]. Assets of the kind mentioned in paragraph two of article 822, if they belong to provinces or municipalities, they are subject to State-properties legal regime.

[II]. *Cemeteries and municipal markets are subject to the same regime”.*

## ARTICOLO 826 CC

### Patrimonio dello Stato, delle province e dei comuni

“[I]. *I beni appartenenti allo Stato, alle province e ai comuni, i quali non siano della specie di quelli indicati dagli articoli precedenti, costituiscono il patrimonio dello Stato o, rispettivamente, delle province e dei comuni.*

[II]. *Fanno parte del patrimonio indisponibile dello Stato le foreste che a norma delle leggi in materia costituiscono il demanio forestale dello Stato, le miniere, le cave e torbiere quando la disponibilità ne è sottratta al proprietario del fondo, le cose d’interesse storico, archeologico, paleontologico, paleontologico e artistico, da chiunque e in qualunque modo ritrovate nel sottosuolo, i beni costituenti la dotazione della Presidenza della Repubblica, le caserme, gli armamenti, gli aeromobili militari e le navi da guerra.*

[III]. *Fanno parte del patrimonio indisponibile dello Stato o, rispettivamente, delle province e dei comuni, secondo la loro appartenenza, gli edifici destinati a sede di uffici pubblici, con i loro arredi, e gli altri beni destinati a un pubblico servizio”.*

## ARTICLE 826 ICC

### Patrimony of State, provinces and municipalities

“[I]. Assets belonging to State, provinces and municipalities which are not of the kinds mentioned in previous articles are still assets of the State or, respectively, of the provinces or municipalities.

[II]. Forests which, according to the laws on the subject matter, are State properties, mines, quarries and peat bogs pertaining to lands non-disposable by their own owners, things of historic, archaeological, paleontologic, palaeontologic and artistic interest, by anyone and in any way found in the subsoil, assets constituting endowment of Presidency of the Italian Republic, barracks, armaments, military aircraft and warships, are part of non-disposable State properties.

[III]. Buildings meant for public offices, along with their furnishings, and other assets meant for public service are part of non-disposable properties of the State or, respectively, provinces or municipalities, according to their belonging”.

Then, as for the case of vacant properties, please see, on immovables, art. 827 ICC, and, as for movables, art. 923 ICC (mentioned herein below, inside the following paragraph, on the different means of acquisition of ownership).

## **ARTICOLO 827 CC**

### **Beni immobili vacanti**

“[I]. *I beni immobili che non sono in proprietà di alcuno spettano al patrimonio dello Stato*”.

## **ARTICLE 827 ICC**

### **Vacant immovable properties**

“[I]. Immovable properties not owned by anyone belong to the patrimony of the State”.

Finally, as for the general legal regime concerning all properties mentioned in the previous articles of the code, please see art. 828 ICC, which works as a *clausola di chiusura*, namely, once again, a closing clause (provided for by the legal system, on the subject matter at stake).

## **ARTICOLO 828 CC**

### **Condizione giuridica dei beni patrimoniali**

“[I]. *I beni che costituiscono il patrimonio dello Stato, delle province e dei comuni sono soggetti alle regole particolari che li concernono e, in quanto non è diversamente disposto, alle regole del presente codice.*

[II]. *I beni che fanno parte del patrimonio indisponibile non possono essere sottratti alla loro destinazione, se non nei modi stabiliti dalle leggi che li riguardano*”.

## **ARTICLE 828 ICC**

### **Legal status of financial assets**

“[I]. Assets which are part of the patrimony of State, provinces and municipalities are subject to the particular rules of law that deals with them and, when it is not otherwise provided for, to the rules of law of this code.

[II]. Assets that are part of non-disposable State properties cannot be withdrawn from their own destination, except in the ways provided for by the laws that deal with them”.

Now, please also note that quite a few rules of law on ownership contained in the Italian Civil Code are set up so to govern relationships between owners of neighbouring lands.

We are not going to analyse them in detail, as they are also related to technicalities of public laws (like the ones concerning so-called *piani regolatori*).

Accordingly, as for the relationships amongst neighbours, please just remember art. 844 ICC, on so-called *immissioni*, previously discussed in lecture 3, par. 3.2.

#### 8.4 On the means of acquisition of ownership.

When we talk about acquisition of rights, being them *rights in rem* or *rights in personam*, a common distinction that stands out between so-called ***acquisti a titolo originario*** (**original acquisitions**) and so-called ***acquisti a titolo derivativo*** (**acquisitions via transfer**).

Namely, a right is acquired by way of an original acquisition when its holder of the case has not received it by another (physical or legal) person that previously held it.

Examples (in addition to those mentioned below, in art. 922 ICC and ff. ones):

- the acquisition of a copyright due to the invention/creation of the idea/service/work of the case;
- the acquisition of ownership over something by *usucapione* (meaning, under art. 1158-1167 ICC, by way of a continuous possession extended for a certain number of years, as we shall see herein below).

On the contrary, a right is acquired by way of an acquisition via transfer when the holder of the case has received it throughout a transfer executed by a previous holder, and it is entitled to it in very same way the previous holder was entitled to. Here, the right of the case is unchanged, from an objective point of view, as just its holder changes. That means, briefly, that the same guarantees due to the said previous holder can be granted to the holder of the case, as well as the same exceptions that were arguable still by the previous holder can be raised by the holder of the case against third parties.

Examples:

- the transfer of ownership over a movable or an immovable property by means of a sale-purchase contract;
- the transfer of the same property arising *mortis causa* (by way of a *successione legittima* or a *successione testamentaria*).

In all these cases we also speak of a *successione traslativa* (succession by transfer) ***a titolo particolare*** (namely, a **particular succession by transfer**) – like in case of a sale-purchase contract or a *legato* over a movable or an immovable property – or a *titolo universale* (namely, **general succession by transfer**) – like in case of heirship.

In both cases there is an *autore* or *dante causa* (transferor of the interest of the case), from one side, which is the person that “abandons/leaves” the legal relationship of the case, and there is a *successore* or *avente causa* (successor in the interest of the case), from the other side, which is the person that enters into the legal relationship of the case.

Then, in other cases, still concerning an acquisition via transfer, we speak of a *successione costitutiva* (**constitutive succession**): e.g., this is the case when an owner of a property grants a

right in rem of usufruct (*diritto reale di usufrutto*) over said property to a different person. The grantee of the case acquires said right of usufruct by way of a constitutive succession.

As per above, the following ones are the rules of law on the subject matter.

As for its own validity, an acquisition via transfer needs the existence of a valid legal title, meaning a valid legal act or fact that justifies said acquisition from the transferor of the case. Moreover, the transferor must be the holder of the right subject to transfer.

On the contrary, the exception is the principle of reliance (*principio dell'affidamento*). This is the case of an ostensible owner that sells a property that is not his own property to a third-party buyer: see art. 1153 ICC on sale-purchases performed *a non-domino* (by non-owners). The rationale of the principle is to protect legal transactions in general, inside the legal system.

Now, going back to the means for an original acquisition of ownership, please see art. 922 ICC.

## ARTICOLO 922 CC

### Modi di acquisto

“[I]. *La proprietà si acquista per occupazione, per invenzione, per accessione, per specificazione, per unione o commistione, per usucapione, per effetto di contratti, per successione a causa di morte e negli altri modi stabiliti dalla legge*”.

## ARTICLE 922 ICC

### Means of acquisition

“[I]. Ownership is acquired by occupazione, invenzione, accessione, specificazione, unione or commistione, by usucapione, by contract, by way of succession due to death and in the other ways provided for by the law”<sup>10</sup>.

As per above, let's examine these means of original acquisition of ownership.

### **On occupazione.**

So-called *res nullius* can be acquired by *occupazione*.

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<sup>10</sup> Once again, most of the terms/words mentioned in art. 922 ICC cannot be translated, as they deal with legal instruments that are peculiar to the Italian private law. Moreover, we could never translate, *exempli gratia*, the Italian word *invenzione* into the English word *invention*, as *invenzione* deals with the discovery of a thing, at law, whereas an invention, in English law, is something covered by a copyright (which is an instrument whose rules of law are mostly contained, in Italy, in particular internal laws enacted outside the boundaries of the ICC).

## ARTICOLO 923 CC

### Cose suscettibili di occupazione

“[I]. *Le cose mobili che non sono proprietà di alcuno si acquistano con l’occupazione.*

[II]. *Tali sono le cose abbandonate e gli animali che formano oggetto di caccia o di pesca”.*

## ARTICLE 923 ICC

### Properties that can be subject matter of *occupazione*

“[I]. Movable things that are not owned by anyone can be acquired through *occupazione*.

[II]. These things are abandoned things and animals that are subject matter of hunting or fishing”.

Please note that State and regional laws can set up limits to fishing and other means of *occupazione* (see the laws on fishing and hunting).

Please also remember that immovable properties cannot be the subject matter of an *occupazione*, due to art. 827 ICC.

## ARTICOLO 827 CC

### Beni immobili vacanti

“[I]. *I beni immobili che non sono in proprietà di alcuno spettano al patrimonio dello Stato”.*

## ARTICLE 827 ICC

### Vacant immovable properties

“[I]. Immovable properties not owned by anyone belong to the patrimony of the State”.

**On *invenzione* (over lost and found).**

## ARTICOLO 927 CC

### Cose ritrovate

“[I]. *Chi trova una cosa mobile deve restituirla al proprietario, e, se non lo conosce, deve consegnarla senza ritardo al sindaco del luogo in cui l’ha trovata, indicando le circostanze del ritrovamento”.*

## ARTICLE 927 ICC

### Things found

*“[I]. Whoever finds a movable thing must return it to its own owner, and, if he does not know the owner, then he must deliver it without delay to the mayor of the place where he found it, mentioning the circumstances of discovery”.*

## ARTICOLO 928 CC

### Pubblicazione del ritrovamento

*“[I]. Il sindaco rende nota la consegna per mezzo di pubblicazione nell’albo pretorio del comune, da farsi per due domeniche successive e da restare affissa per tre giorni ogni volta”.*

## ARTICLE 928 ICC

### Publication of a discovery

*“[I]. Mayors disclose the delivery of the case throughout a publication in the praetorian register of the municipality, to be performed twice in two successive Sundays and to be posted for three days each time”.*

## ARTICOLO 929 CC

### Acquisto di proprietà della cosa ritrovata

*“[I]. Trascorso un anno dall’ultimo giorno della pubblicazione senza che si presenti il proprietario, la cosa oppure il suo prezzo, se le circostanze ne hanno richiesto la vendita, appartiene a chi l’ha trovata.*

*[II]. Così il proprietario come il ritrovatore, riprendendo la cosa o ricevendo il prezzo, devono pagare le spese occorse”.*

## ARTICLE 929 ICC

### Acquisition of ownership over a thing found

*“[I]. After that one year starting from the last day of publication is passed on, and the owner of the case has not showed up himself, then the thing or its price, if circumstances required its sale, belongs to whomever found it.*

*[II]. Owner and finder must pay the expenses needed, if they get back the thing of the case or receive its own price”.*

## ARTICOLO 930 CC

### Premio dovuto al ritrovatore

“[I]. Il proprietario deve pagare a titolo di premio al ritrovatore, se questi lo richiede, il decimo della somma o del prezzo della cosa ritrovata.

[II]. Se tale somma o prezzo eccede i 5,16 euro, il premio per il sovrappiù è solo del ventesimo.

[III]. Se la cosa non ha valore commerciale, la misura del premio è fissata dal giudice secondo il suo prudente apprezzamento”.

## ARTICLE 930 ICC

### Rewards due to the finder

“[I]. The owner must pay one tenth of the sum or the price of the thing found as an award to the finder of the case, if the latter asks for payment.

[II]. If said sum or price exceeds 5.16 euros, then the award for the surplus is only one-twentieth.

[III]. If the thing of the case has no commercial value, then the extent of the award is set by a judge following prudent appreciation”.

## ARTICOLO 931 CC

### Equiparazione del possessore o detentore al proprietario

“[I]. Agli effetti delle disposizioni contenute negli articoli 927 e seguenti, al proprietario sono equiparati, secondo le circostanze, il possessore e il detentore”.

## ARTICLE 931 ICC

### Equivalence of a possessor or a *detentore* to an owner

“[I]. For the purposes of the provisions contained in articles 927 and following ones, an owner is equalized, under the circumstances of the case, to a possessor or a *detentore*”<sup>11</sup>.

### On discovery of a treasure.

## ARTICOLO 932 CC

### Tesoro

“[I]. Tesoro è qualunque cosa mobile di pregio, nascosta o sotterrata, di cui nessuno può provare d’essere proprietario.

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<sup>11</sup> See on possession and *detenzione*, lecture 19, par. 19.2.

[II]. *Il tesoro appartiene al proprietario del fondo in cui si trova. Se il tesoro è trovato nel fondo altrui, purché sia stato scoperto per solo effetto del caso, spetta per metà al proprietario del fondo e per metà al ritrovatore. La stessa disposizione si applica se il tesoro è scoperto in una cosa mobile altrui.*

[III]. *Per il ritrovamento degli oggetti d'interesse storico, archeologico, paleontologico, paleontologico e artistico, si osservano le disposizioni delle leggi speciali*".

## ARTICLE 932 ICC

### Treasure

"[I]. A treasure is any hidden or buried valuable movable property that no one can prove to be the owner of.

[II]. A treasure belongs to the owner of the land where it was found. If a treasure was found in someone else's land, and if it was discovered by mere chance, then it is half owner's property and half finder's property. The same provision applies if a treasure is discovered in someone else's movable property.

[III]. As for discoveries of things of historic, archaeological, palaeontologic, and artistic interest, provisions of special laws are to be observed".

As for paragraph 3, please see today Legislative Decree January 22, 2004 n. 42 (so-called "Codice dei beni artistici e culturali", namely the Italian code on artistic and cultural properties).

### **On accession.**

It governs the case in which two or more things belonging to different owners are joined in such a way that a separation can no longer be performed without occurrence of a serious damage. Examples:

- a) construction of a building on someone else's land with builder's own materials;
- b) use of other persons' materials to repair things;
- c) combination of substances belonging to different owners.

If there is an agreement, then no problem at all; but the mixing of the case can take place by way of an initiative made by others, in good or bad faith, or by a natural fact, or facts of a third parties, and so on.

The law tries and avoid separation and at the same time co-ownership, which would harm circulation of the property of the case inside the market.

Accordingly, it provides for just one final owner, and the rule of law is that ownership of the main thing leads to ownership of the ancillary thing. See art. 934-938 ICC.

### **ARTICOLO 934 CC**

#### **Opere fatte sopra o sotto il suolo**

*“[I]. Qualunque piantagione, costruzione od opera esistente sopra o sotto il suolo appartiene al proprietario di questo, salvo quanto è disposto dagli articoli 935, 936, 937 e 938 e salvo che risulti diversamente dal titolo o dalla legge”.*

### **ARTICLE 934 ICC**

#### **Works done above or below the ground**

*“[I]. Any plantation, construction or work existing above or below the ground belongs to the owner of the ground, except in cases provided for by articles 935, 936, 937 and 938 or unless it is otherwise established by the law or appears from the title”.*

### **ARTICOLO 935 CC**

#### **Opere fatte dal proprietario del suolo con materiali altrui**

*“[I]. Il proprietario del suolo che ha fatto costruzioni, piantagioni od opere con materiali altrui deve pagarne il valore, se la separazione non è chiesta dal proprietario dei materiali, ovvero non può farsi senza che si rechi grave danno all’opera costruita o senza che perisca la piantagione. Deve inoltre, anche nel caso che si faccia la separazione, il risarcimento dei danni, se è in colpa grave.*

*[II]. In ogni caso la rivendicazione dei materiali non è ammessa trascorsi sei mesi dal giorno in cui il proprietario ha avuto notizia della incorporazione”.*

### **ARTICLE 935 ICC**

#### **Works made by the owner of the land with other persons’ materials**

*“[I]. The owner of a land who has built up buildings, plantations or other works with other persons’ materials must pay their value, if a separation is not claimed by the owner of the materials, or it cannot be done without a serious damage to the construction of the case or without death of the plantation of the case. He must also pay for damages if he is in gross negligence, even in case of separation.*

*[II]. In any case, a claim for restitution of materials is no longer allowed once six months starting from the day when the owner was notified of the act of incorporation have gone by”.*

## ARTICOLO 936 CC

### Opere fatte da un terzo con materiali propri

*“[I]. Quando le piantagioni, costruzioni od opere sono state fatte da un terzo con suoi materiali, il proprietario del fondo ha diritto di ritenerle o di obbligare colui che le ha fatte a levarle.*

*[II]. Se il proprietario preferisce di ritenerle, deve pagare a sua scelta il valore dei materiali e il prezzo della mano d’opera oppure l’aumento di valore recato al fondo.*

*[III]. Se il proprietario del fondo domanda che siano tolte, esse devono togliersi a spese di colui che le ha fatte. Questi può inoltre essere condannato al risarcimento dei danni.*

*[IV]. Il proprietario non può obbligare il terzo a togliere le piantagioni, costruzioni od opere, quando sono state fatte a sua scienza e senza opposizione o quando sono state fatte dal terzo in buona fede.*

*[V]. La rimozione non può essere domandata trascorsi sei mesi dal giorno in cui il proprietario ha avuto notizia dell’incorporazione”.*

## ARTICLE 936 ICC

### Works made by third parties with their own materials

*“[I]. When plantations, constructions or works have been made by a third party with her own materials, then the owner of the land has a right to retain them or to force the person who made them to remove the same.*

*[II]. If an owner prefers to retain them, then he must pay at his own choice the value of the materials and the price of the labour or the increase in value acquired by his land.*

*[III]. If the owner of the land demands that they are to be removed, then they must be removed at the expense of the person who made them. Said person can also be condemned to pay for damages.*

*[IV]. An owner cannot force the third party of the case to remove plantations, buildings or works when they have been built up under his own knowledge and without opposition or when they have been made by a third party in good faith.*

*[V]. A removal cannot be requested after six months have elapsed from the day when the owner received notice of the incorporation of the case”.*

## ARTICOLO 937 CC

### Opere fatte da un terzo con materiali altrui

*“[I]. Se le piantagioni, costruzioni o altre opere sono state fatte da un terzo con materiali altrui, il proprietario di questi può rivendicarli, previa separazione a spese del terzo, se la separazione può ottenersi senza grave danno delle opere e del fondo.*

*[II]. La rivendicazione non è ammessa trascorsi sei mesi dal giorno in cui il proprietario ha avuto notizia dell’incorporazione.*

*[III]. Nel caso che la separazione dei materiali non sia richiesta o che i materiali siano inseparabili, il terzo che ne ha fatto uso e il proprietario del suolo che sia stato in mala fede sono tenuti in solido al pagamento di una indennità pari al valore dei materiali stessi. Il proprietario dei materiali può anche esigere tale indennità dal proprietario del suolo, ancorché in buona fede, limitatamente al prezzo che da questo fosse ancora dovuto. Può altresì chiedere il risarcimento dei danni, tanto nei confronti del terzo che ne abbia fatto uso senza il suo consenso, quanto nei confronti del proprietario del suolo che in mala fede abbia autorizzato l’uso”.*

## ARTICLE 937 ICC

### Works made by a third party with other persons’ materials

*“[I]. If plantations, constructions or other works have been made by a third party with materials of others, then the owner of said materials can claim for them, subject to separation at the expense of the third party of the case, if said separation can be obtained without serious harm to works and land.*

*[II]. The claim is not allowed after six months starting from the day when the owner of the case has received notice of the incorporation of the case.*

*[III]. If separation of the materials has not been asked or the materials are inseparable ones, then the third party who has used them and the owner of the land who has been in bad faith are jointly and severally bound to pay an indemnity equal to the value of the materials themselves. The owner of the materials can also demand this indemnity from the owner of the land, albeit in good faith, within the price still owed by him. He can also ask for compensation for damages, both from the third party who has used the materials without his consent and from the owner of the land who has authorized their use in bad faith”.*

## ARTICOLO 938 CC

### Occupazione di porzione di fondo attiguo

“[I]. Se nella costruzione di un edificio si occupa in buona fede una porzione del fondo attiguo, e il proprietario di questo non fa opposizione entro tre mesi dal giorno in cui ebbe inizio la costruzione, l'autorità giudiziaria, tenuto conto delle circostanze, può attribuire al costruttore la proprietà dell'edificio e del suolo occupato. Il costruttore è tenuto a pagare al proprietario del suolo il doppio del valore della superficie occupata, oltre il risarcimento dei danni”.

## ARTICLE 938 ICC

### Occupation of a portion of a contiguous land

“[I]. If a portion of an adjoining land is occupied in good faith during construction of a building, and the owner of it does not raise any objection within three months from the day when the construction began, then judicial authorities, taking into account the circumstances of the case, may grant ownership of building and occupied land to the constructor of the case. The builder must pay to the owner of the land twice the value of the occupied surface, along with damages”.

### **On alluvione, avulsione, specificazione, unione/commistione, and usucapione.**

To end with, other means for acquisition of an original ownership are, respectively:

- i) *alluvione* (governed by art. 941 ICC) and *avulsione* (governed by art. 944 ICC), which they both deal, even if in a different way, with natural events occurring on lands and due to waters;
- ii) *unione* or *commistione*, governed by art. 939 ICC, which deals with a case of mixing occurring amongst two or more movable properties (see e.g., a mixture of wines);
- iii) *specificazione*, governed by art. 940 ICC, which deals with creation of a new property performed by someone with materials of other persons; and
- iv) *usucapione*, that will be particularly examined in lecture 19, par. 19.3.

### **8.5 On claims for defence of the right of ownership.**

Finally, on ownership, please also see the claims that they can be performed by owners to defend their right of ownership under art. 948, 949, 950 and 951 ICC.

## ARTICOLO 948 CC

### Azione di rivendicazione

“[I]. Il proprietario può rivendicare la cosa da chiunque la possiede o detiene e può proseguire l’esercizio dell’azione anche se costui, dopo la domanda, ha cessato, per fatto proprio, di possedere o detenere la cosa. In tal caso il convenuto è obbligato a ricuperarla per l’attore a proprie spese, o, in mancanza, a corrispondergliene il valore, oltre a risarcirgli il danno.

[II]. Il proprietario, se consegue direttamente dal nuovo possessore o detentore la restituzione della cosa, è tenuto a restituire al precedente possessore o detentore la somma ricevuta in luogo di essa.

[III]. L’azione di rivendicazione non si prescrive, salvi gli effetti dell’acquisto della proprietà da parte di altri per usucapione”.

## ARTICLE 948 ICC

### Claim for rei vindicatio

“[I]. An owner can make a claim for restitution of his own properties against anyone who possesses them or holds them by way of detenzione, and he can continue exercising such a claim for restitution even if, after the claim, they have ceased, due to their own activities, to possess or hold by detenzione the thing of the case. In these cases, defendants are bound to recover the properties on behalf of plaintiffs at their own expenses, or, failing to do that, to pay them the value of property of the case, along with damages.

[II]. If the restitution of the thing of the case is performed directly by the new possessor or detentore, then its owner is bound to give back to the previous possessor or detentore of the case the money received in lieu of the thing.

[III]. A claim for rei vindicatio has no time-limitation, save for the effects of an acquisition of ownership performed by third parties by way of usucapione”.

Please note that, here, in compliance with the general rule of law according to which everyone who affirm existence of a right must prove the facts standing behind his claim (see art. 2697 ICC), under the circumstances, every owner must prove his own right of ownership.

Particularly, said owner must prove the existence of an original right of ownership, meaning not just a right of ownership that arises from a transfer executed by a transferee, but a chain of acquisitions that leads to an original right of ownership (unless the rules on *usucapione* – detailed in lecture 19 – can come into play).

Please also note that a claim for *rei vindicatio*, which it could be said to be a peculiar *species* of the *genus* “claims for restitution”, is different in nature from a general claim for restitution, like a claim for restitution arising from an unjustified enrichment (under art. 2033 ICC and ff. ones)<sup>12</sup>. In fact, a claim for *rei vindicatio* is a claim opposable to third parties too, whereas a claim for restitution is just a personal claim.

As per above, another claim that can be performed by an owner is azione negatoria, under art. 949 ICC.

## **ARTICOLO 949 CC**

### **Azione negatoria**

“[I]. *Il proprietario può agire per far dichiarare l’inesistenza di diritti affermati da altri sulla cosa, quando ha motivo di temerne pregiudizio.*

*[II]. Se sussistono anche turbative o molestie, il proprietario può chiedere che se ne ordini la cessazione, oltre la condanna al risarcimento del danno”.*

## **ARTICLE 949 ICC**

### **Claim for denial**

“[I]. When he has reasons to fear for prejudice, an owner can make a claim so to obtain a judgment declaring non-existence of rights affirmed by others over his property of the case.

[II]. If there are also acts of nuisance or harassment, then the owner of the case can ask for them to be stopped, along with damages to be paid”.

Finally, two remaining claims concerning defence of a right of ownership are art. 950 ICC and art. 951 ICC, that respectively deal with *azione di regolamento dei confini* and *azione per apposizione di termini*, namely two claims related to ownership of neighbouring lands.

## **ARTICOLO 950 CC**

### **Azione di regolamento di confini**

“[I]. *Quando il confine tra due fondi è incerto, ciascuno dei proprietari può chiedere che sia stabilito giudizialmente.*

*[II]. Ogni mezzo di prova è ammesso.*

*[III]. In mancanza di altri elementi, il giudice si attiene al confine delineato dalle mappe catastali”.*

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<sup>12</sup> Which will be examined in lecture 9, par. 9.1.

## ARTICLE 950 ICC

### Claim for a settlement of borders

*“[I]. When the border between two lands is an uncertain one, then each owner can ask for it to be judicially established.*

*[II]. Any means of proof is allowed.*

*[III]. In absence of other elements, then the judge abides by the border outlined in cadastral maps”.*

## ARTICOLO 951 CC

### Azione per apposizione di termini

*“[I]. Se i termini tra fondi contigui mancano o sono diventati irriconoscibili, ciascuno dei proprietari ha diritto di chiedere che essi siano apposti o ristabiliti a spese comuni”.*

## ARTICLE 951 ICC

### Claim for setting up borders

*“[I]. If a border between adjoining lands is missing or it has become a blurred one, then each owner has a right for it to be set up or restored at common expenses”.*

## 8.6 On prohibition of *atti emulativi*.

Counterpart of owners’ right to fully enjoy and dispose of their own properties is the prohibition of so-called *atti emulativi*, under art. 833 ICC.

## ARTICOLO 833 CC

### Atti d’emulazione

*“[I]. Il proprietario non può fare atti i quali non abbiano altro scopo che quello di nuocere o recare molestia ad altri”.*

## ARTICLE 833 ICC

### *Atti d’emulazione*

*“[I]. Owners cannot perform acts having no purpose other than harming or harassing third parties”.*

Requirements for existence of an *atto emulativo* are:

- harmfulness of the act of the owner of the case *vis-a-vis* third parties;

- absolute lack of utility for the owner of the case.

These are objective characteristics of the act; intention is presumed.

An example: a wall built up for the sole purpose of denying light or view to neighbours.

Consequences of an *atto emulativo*: payment of damages or restoration.

Please note that prohibition of *atti emulativi* is the original source of the nowadays well-known concept of *abuso di diritto* (abuse of a right).

## 8.7 Introduction to the *rights in rem* over properties of others in general.

Rights in rem over properties of others are also called limited or minor rights in rem.

This characterization comes out from their comparison with the right of ownership.

These *rights in rem* squeeze the content of the right of ownership (and consequently owner's freedom of use of the property of the case), or, more precisely, the *facoltà* as well as the powers of the owner of the case.

Anyway, the limits imposed on the owner are only those mentioned in provisions that govern them.

Accordingly, the right of ownership can be compressed, and it can *re-expand* as soon as the minor *right in rem* ends, due to the reason of the case (we speak about *elasticity of dominion*).

Please note that a limited/minor *right in rem* exists only on things that are owned by others.

Now, here they are these minor *rights in rem*, particularly those ones whose subject matter is the right of enjoyment of the property of the case.

## 8.8 Introduction to *usufrutto*.

On the subject matter, please see articles 978-1020 ICC.

### ARTICOLO 981 CC

#### Contenuto del diritto di usufrutto

“[I]. L'usufruttuario ha diritto di godere della cosa, ma deve rispettarne la destinazione economica.

[II]. Egli può trarre dalla cosa ogni utilità che questa può dare, fermi i limiti stabiliti in questo capo”.

## ARTICLE 981 ICC

### Content of the right of usufruct

“[I]. The usufructuary has the right to enjoy the thing, but he must respect its economic destination.

[II]. *He can draw every kind of utility available from the thing, within the limits established in this chapter*”.

Here, the right of enjoyment is separated from the right of disposition of the property of the case, as the *usufruttuario* has a right (*in rem*) of enjoyment over the property, whereas the owner (so-called *nudo proprietario*) still remains the person in charge of disposition of the very same property (seen in its own entirety).

Please note that the above-mentioned separation can only be a temporary one (under the terms detailed in art. 979 ICC) due to market reasons.

## ARTICOLO 979 CC

### Durata

“[I]. *La durata dell’usufrutto non può eccedere la vita dell’usufruttuario.*

[II]. *L’usufrutto costituito a favore di una persona giuridica non può durare più di trenta anni*”.

## ARTICLE 979 ICC

### Duration

“[I]. A right of usufruct can last no longer than the life of the usufructuary.

[II]. A right of usufruct created on behalf of a legal person can last no longer than 30 years”.

### 8.9 On *uso* and *abitazione*.

On the right (*in rem*) of use (*uso*) and on housing/dwelling right (*abitazione*), please see articles 1021-1026 ICC. They differ from the right of usufruct only for quantitative reasons.

## ARTICOLO 1021 CC

### Uso

“[I]. *Chi ha il diritto d’uso di una cosa può servirsi di essa e, se è fruttifera, può raccogliere i frutti per quanto occorre ai bisogni suoi e della sua famiglia.*

*[II]. I bisogni si devono valutare secondo la condizione sociale del titolare del diritto”.*

#### **ARTICLE 1021 ICC**

##### **Right (*in rem*) of use**

*“[I]. Whoever has a right of use over something can use it and, if it is fruitful, can collect the fruits for what is necessary for the needs of him and his family.*

*[II]. The needs must be assessed according to the social status of the holder of the right”.*

#### **ARTICOLO 1022 CC**

##### **Abitazione**

*“[I]. Chi ha il diritto di abitazione di una casa può abitarla limitatamente ai bisogni suoi e della sua famiglia”.*

#### **ARTICLE 1022 ICC**

##### **Housing/dwelling right**

*“[I]. Whoever has a dwelling right over a house can live in it, within the limits of his and his family’s needs”.*

### **8.10 On superficie.**

On the subject matter, please see articles 952-956 ICC.

#### **ARTICOLO 952 CC**

##### **Costituzione del diritto di superficie**

*“[I]. Il proprietario può costituire il diritto di fare e mantenere al disopra del suolo una costruzione a favore di altri, che ne acquista la proprietà.*

*[II]. Del pari può alienare la proprietà della costruzione già esistente, separatamente dalla proprietà del suolo”.*

#### **ARTICLE 952 ICC**

##### **Creation of a right of superficie**

*“[I]. The owner can grant the right to build and maintain a building above the ground to others, who acquires the ownership.*

*[II]. Likewise, he can alienate the ownership of the existing building separately from the ownership of the land”.*

Please note that what can be done above the ground, it can also be done below the ground.  
See art. 955 ICC.

## **ARTICOLO 955 CC**

### **Costruzioni al disotto del suolo**

*“[I]. Le disposizioni precedenti si applicano anche nel caso in cui è concesso il diritto di fare e mantenere costruzioni al disotto del suolo altrui”.*

## **ARTICLE 955 ICC**

### **Constructions made below the ground**

*“[I]. The previous provisions also apply in the event that a right to build and maintain constructions below the ground of others is granted”.*

Please note that the creation of a right of superficie is an exception to the general rule on acquisition of ownership over lands, under joint applications of article 922 ICC (seen above, on the means of acquisition of the right of ownership in general) and article 934 ICC and ff. ones (on accession).

## **ARTICOLO 922 CC**

### **Modi di acquisto**

*“[I]. La proprietà si acquista per occupazione, per invenzione, per accessione, per specificazione, per unione o commistione, per usucapione, per effetto di contratti, per successione a causa di morte e negli altri modi stabiliti dalla legge”.*

## **ARTICLE 922 ICC**

### **Means of acquisition**

*“[I]. Ownership can be acquired by occupazione, invenzione, accessione, specificazione, unione or commistione, usucapione, by way of contract, by way of succession due to death and in the other ways provided for by the law”.*

## ARTICOLO 934 CC

### Opere fatte sopra o sotto il suolo

“[I]. *Qualunque piantagione, costruzione od opera esistente sopra o sotto il suolo appartiene al proprietario di questo, salvo quanto è disposto dagli articoli 935, 936, 937 e 938 e salvo che risulti diversamente dal titolo o dalla legge*”.

## ARTICLE 934 ICC

### Works done above or below the ground

“[I]. Any plantation, construction or work existing above or below the ground belongs to the owner of the ground, except in cases provided for by articles 935, 936, 937 and 938 or unless it is otherwise established by the law or appears from the title”.

Please note that while a right of usufruct can be just a temporary one, a right of *superficie* can be a permanent *right in rem* (meaning, it can last “forever”).

### 8.11 Introduction to *servitù prediali*.

On *servitù prediali* (or easements), please see articles 1027-1099 ICC.

## ARTICOLO 1027 CC

### Contenuto del diritto

“[I]. *La servitù prediale consiste nel peso imposto sopra un fondo per l'utilità di un altro fondo appartenente a diverso proprietario*”.

## ARTICLE 1027 ICC

### Content of the right

“[I]. An easement consists of a weight imposed over a land for the benefit of another land belonging to a different owner”.

Examples of easements:

1) the right of the landowner of the so-called *fondo dominante* (dominant land) to pass through (by walk, car or other means of transportation) the land of the landowner of the so-called *fondo servente* (serving land). This easement, also called right of way/passage, it can be granted on a contractual basis and, under the circumstances, even at law (if there no other

reasonable ways to reach the public highway – see the case of the so-called *fondo intercluso*, under art.1055 ICC and ff. ones);

2) the right of the landowner of the *fondo dominante* to cross the land of the landowner of the *fondo servente* with an aqueduct to bring water to his land, or with electric cables to receive electricity;

3) the so-called *servitus altius non tollendi*.

Accordingly, easements can be quite different, in terms of kind and nature.

We saw that a *right in rem* grants its right holder the power to draw utilities out of the thing of the case. Herein below there is the definition of utility, as for easements.

### **ARTICOLO 1028 CC**

#### **Nozione dell'utilità**

“[I]. *L'utilità può consistere anche nella maggiore comodità o amenità del fondo dominante. Può del pari essere inerente alla destinazione industriale del fondo*”.

### **ARTICLE 1028 ICC**

#### **Notion of utility**

“[I]. *The utility can even consist in the greater convenience or amenity of the dominant land. It may also be inherent to the industrial use of the land*”.

The above-mentioned provisions are the most relevant ones to define the minor rights in rem of enjoyment in a proper way<sup>13</sup>.

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<sup>13</sup> There is also *emphiteusis* (governed by articles 957-977 ICC), but nowadays it has almost completely lost its own appeal, in terms of use in daily life, and therefore we can avoid it.



## 9 Lecture 9: on *rights in personam*.

SUMMARY: 9.1 Introduction to *rights in personam*. – 9.2 On the means for satisfaction of creditors' rights. – 9.3 On the sources of obligations. – 9.4 On *obbligazioni reali* (or *obligationes propter rem*). – 9.5 A few final observations on the distinction between *rights in rem* and *rights in personam*.

### 9.1 Introduction to *rights in personam*.

While a *right in rem* grants to its holder the right (*rectius*, the *facoltà*, claim or power) to draw utility out of one or more things, in a direct/immediate way, a *right in personam* grants to its holder, in a direct way, the power to demand performance of a service (or an activity) from one or more persons (service/activity by virtue of which, bottom line, he will still withdraw a benefit from one or more of the things of the case).

The relationship between creditor (namely, the holder of the *right in personam* or right of credit) and debtor (the person required to perform) of the service of the case is called **obligation** (or **obligatory relationship**).

The **performance of the case**, due by the debtor, can be a positive or a negative one (it can consist of an action or an act of self-restraint).

Examples of positive performances are:

- the payment of a sum of money;
- the custody of a thing;
- the execution of a job.

Please note that when the performance of the case is a positive one, we distinguish between performances of:

- giving; and
- doing (defined in a residual way, meaning services that have as their subject matter just activities other than giving).

On the contrary, examples of negative performances are:

- the one of not competing;
- the one of not to disclose a secret; or
- the one of not to transfer participations acquired in a company, for a certain period of time;
- the obligation to bear *immissioni* coming out from neighbours' land (see art. 844 ICC).

*Ergo*, the content of an obligation can be quite a different one.

The most important thing is that every performance must be the subject matter of an economic evaluation. Namely, it must have an economic (a financial) character.

## ARTICOLO 1174 CC

### Carattere patrimoniale della prestazione

“[I]. *La prestazione che forma oggetto dell’obbligazione deve essere suscettibile di valutazione economica e deve corrispondere a un interesse, anche non patrimoniale, del creditore*”.

## ARTICLE 1174 ICC

### Financial nature of the activity

“[I]. *The activity which is the subject matter of an obligation has to be able to be subjected to economic evaluation and it must correspond to an interest, even if it is not a financial one, of the creditor*”.

The financial content is the core subject matter of contracts, as it is evidenced by art. 1321 ICC.

## ARTICOLO 1321 CC

### Nozione

“[I]. *Il contratto è l’accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale*”.

## ARTICLE 1321 ICC

### Notion

“[I]. *A contract is an agreement reached by two or more parties to set up, govern or terminate a legal financial relationship amongst them*”.

As far as the subject matter of article 1174 ICC is concerned, everything comes full circle when we look at the legal concept of gift.

## ARTICOLO 769 CC

### Definizione

“[I]. *La donazione è il contratto col quale, per spirito di liberalità, una parte arricchisce l’altra, disponendo a favore di questa di un suo diritto o assumendo verso la stessa una obbligazione*”.

## ARTICLE 769 ICC

### Definition

“[I]. A gift is a contract according to which, out of spirit of liberality, one party enriches the other, arranging for an act of disposition of one of her rights on behalf of the latter, or taking on an obligation against the very same one”.

Hereinabove, the interest of the donor of the case is not a financial one.

In fact, **what really counts, under art. 1174 ICC, is not an issue of measurability of the economic value of the service of the case in relation to a certain market price or another criterium** (in other words, it is not the *quantum* due that establishes whether we are looking at an obligation or not); **it is the fact that the performance of the case must be able to be the subject matter of an economic exchange** (not being against the principles of morality and good custom too).

Thus, manifestations of personal esteem, affection and friendship cannot be subject matter of obligations.

Also, wedding (namely, the commitment to marry, it is not, per se, relevant from a legal point of view, as just the marriage is legally relevant), adoption and most of the other institutions of family law cannot be subject matter of the law on obligations too.

Then, another important thing is to distinguish between **legal obligations** and **moral obligations** (such as courtesy relationships: an invitation to lunch does not create an obligation for those who receive it, in legal terms; the agreement to do a journey together with others too; even if all performances have, per se, a market value)<sup>14</sup>.

Again, **the performance of the case does not have to be necessarily aimed at satisfying a financial interest of the creditor of the case** (e.g., see the above-mentioned contract of gift, but see also the case of a theatrical performance; namely, the commitment to perform a theatrical service, is not aimed at satisfying a financial interest of the creditor/spectator of the case; nevertheless it is subject to economic evaluation, it is the subject matter of an economic exchange – we pay a price to attend the show).

Moreover, creditor's interest can be the one to give advantages to a third party (example: the contract on behalf of third parties).

Please note that **obligatory relationships do not have an elementary structure, but rather a complex one** (if they are not fulfilled exactly, obligations of restitution do arise, repairs or compensations for damages are due, *et cetera*).

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<sup>14</sup> See also lecture 1, par. 1.4.

Still, along with the main obligation, there are often other obligations that have a complementary function too, such as the duty of fairness.

#### **ARTICOLO 1175 CC**

##### **Comportamento secondo correttezza**

*“[I]. Il debitore e il creditore devono comportarsi secondo le regole della correttezza”.*

#### **ARTICLE 1175 ICC**

##### **Behaviour according to fairness**

*“[I]. The debtor and the creditor must behave according to the rules of fairness”.*

And, once again, there are other obligations that have an accessory/instrumental purpose too, such as an obligation of custody.

#### **ARTICOLO 1177 CC**

##### **Obbligazione di custodire**

*“[I]. L’obbligazione di consegnare una cosa determinata include quella di custodirla fino alla consegna”.*

#### **ARTICLE 1177 ICC**

##### **Obligation of custody**

*“[I]. The obligation to deliver a particular thing includes the obligation of safeguarding the thing itself until delivery”.*

Again:

- in a sale-purchase agreement, the seller must inform the buyer about hidden dangers that could come out from the use of the thing of the case (see e.g., medicines);
- in a sale of an immovable property there is the obligation to deliver certain documents;
- *et cetera*.

Please note that the obligation of fairness is due not only by the debtor of the case, but by the creditor of the case too (cooperation of the creditor is required to facilitate performance of the debtor).

If a debtor is in breach of fulfilling the activity/service of the case, his creditor can act (*rectius*, make a claim) before the competent judicial authorities to obtain, in a coercive way, what is due to him.

*Ergo*, here there is a power of action (or, once again, even better, a power to make a claim).

Please also note that fulfilments of obligations are usually spontaneous ones, but the legal concept of obligation is still relevant, because it provides the reason (*causa*) or the **title** that justifies performance.

If a reason/*causa* was missing, and therefore the obligation did not exist, but, anyway, the service of the case has been performed, then there is an unjustified obligation and, accordingly, the person who has received the unjustified service/performance it is subjected to the obligation to return it, or, in any case, its financial value (see article 2033 ICC).

## ARTICOLO 2033 CC

### Indebito oggettivo

*“[I]. Chi ha eseguito un pagamento non dovuto ha diritto di ripetere ciò che ha pagato. Ha inoltre diritto ai frutti e agli interessi dal giorno del pagamento, se chi lo ha ricevuto era in mala fede, oppure, se questi era in buona fede, dal giorno della domanda”.*

## ARTICLE 2033 ICC

### Payment of a non-existing debt

*“[I]. Whoever has made an undue payment has the right to claim for restitution of what he has paid. He is also entitled to the fruits and interests from the day of payment, if the person who has received the payment was in bad faith, or, if the receiver was in good faith, from the day of demand”.*

An example of an undue payment under art. 2033 ICC is, *exempli gratia*, a wire transfer of money made by mistake to the bank account of A instead of B.

*Ergo*, the legal concept of obligation has a double meaning, because it is the proper reason for performance, and it gives the creditor the right to claim what is due to him.

However, there are imperfect obligations too, namely obligations that do not grant a right of claim. See art. 1933 ICC.

## ARTICOLO 1933 CC

### Mancanza di azione

*“[I]. Non compete azione per il pagamento di un debito di giuoco o di scommessa, anche se si tratta di giuoco o di scommessa non proibiti.*

*[II]. Il perdente tuttavia non può ripetere quanto abbia spontaneamente pagato dopo l'esito di un giuoco o di una scommessa in cui non vi sia stata alcuna frode. La ripetizione è ammessa in ogni caso se il perdente è un incapace".*

## **ARTICLE 1933 ICC**

### **Lack of claim**

*"[I]. No action can be brought to collect claims deriving from gambling or wagers, even in case of games and wagers which are not prohibited by law.*

*[II]. However, the loser cannot repeat what he has spontaneously paid following the outcome of a game or wager in which there was no fraud. Restitution is always allowed if the loser is an incapable person".*

Accordingly, if I am going to play at an illegal gambling-den, then, I don't have to pay my debts, legally speaking.

Exceptions to the rule: sporting competitions (see art. 1934 ICC) and so-called authorized lotteries (see art. 1935 ICC).

## **ARTICOLO 1934 CC**

### **Competizioni sportive**

*"[I]. Sono eccettuati dalla norma del primo comma dell'articolo precedente, anche rispetto alle persone che non vi prendono parte, i giuochi che addestrano al maneggio delle armi, le corse di ogni specie e ogni altra competizione sportiva.*

*[II]. Tuttavia il giudice può rigettare o ridurre la domanda, qualora ritenga la posta eccessiva".*

## **ARTICLE 1934 ICC**

### **Competitive sports**

*"[I]. Games which involve training in use of arms, races of all kinds and all other competitive sports are not the subject matter of the provision of the first paragraph of the preceding article, even with reference to persons who do not participate in the games.*

*[II]. However, the judge can reject or reduce the claim, when he considers that the amount of the wager is an excessive one".*

## ARTICOLO 1935 CC

### Lotterie autorizzate

“[I]. *Le lotterie danno luogo ad azione in giudizio, qualora siano state legalmente autorizzate*”.

## ARTICLE 1935 ICC

### Authorized lotteries

“[I]. *Lotteries grant a legal basis for a claim, if they have been legally authorized*”.

More generally speaking, what has been mentioned above applies to debts that do not derive from a rule of law, but from fulfilment of a duty of conscience or honour. See art. 2034 ICC.

## ARTICOLO 2034 CC

### Obbligazioni naturali

“[I]. *Non è ammessa la ripetizione di quanto è stato spontaneamente prestato in esecuzione di doveri morali o sociali, salvo che la prestazione sia stata eseguita da un incapace.*

[II]. *I doveri indicati dal comma precedente, e ogni altro per cui la legge non accorda azione ma esclude la ripetizione di ciò che è stato spontaneamente pagato, non producono altri effetti*”.

## ARTICLE 2034 ICC

### Natural obligations

“[I]. Restitution of what was spontaneously provided for, in execution of moral or social duties, is not allowed, unless the performance of the case was made by an incapable person.

[II]. *The duties mentioned in the previous paragraph, and any other duty for which the law does not grant right of action, but bars recovery of what was spontaneously paid, shall have no other effect*”.

## 9.2 On the means for satisfaction of creditors' rights.

We have previously seen that self-defence (*autotutela*) is not usually allowed. Also, we were saying that an obligation grants the creditor, in case of breach by the debtor, the right to make a claim against the debtor himself.

Accordingly, it is throughout a claim performed before the competent court that the satisfaction of the right of the case can be obtained.

Ergo, debtor's assets must come into play, and they become the subject matter of coercive/compulsory/forced execution.

Examples:

### **ARTICOLO 2930 CC**

#### **Esecuzione forzata per consegna o rilascio**

*“[I]. Se non è adempiuto l’obbligo di consegnare una cosa determinata, mobile o immobile, l’avente diritto può ottenere la consegna o il rilascio forzati a norma delle disposizioni del codice di procedura civile”.*

### **ARTICLE 2930 ICC**

#### **Compulsory execution by delivery or surrender**

*“[I]. If an obligation to deliver a specific thing, movable or immovable, is not fulfilled, then the person that holds the right to receive it can obtain forced delivery or surrender in accordance with the provisions of the code of civil procedure”.*

### **ARTICOLO 2910 CC**

#### **Oggetto dell’espropriazione**

*“[I]. Il creditore, per conseguire quanto gli è dovuto, può fare espropriare i beni del debitore, secondo le regole stabilite dal codice di procedura civile.*

*[II]. Possono essere espropriati anche i beni di un terzo quando sono vincolati a garanzia del credito o quando sono oggetto di un atto che è stato revocato perché compiuto in pregiudizio del creditore”.*

### **ARTICLE 2910 ICC**

#### **Subject matter of expropriation**

*“[I]. The creditor, in order to obtain what is due to him, can obtain expropriation of the debtor’s assets, in accordance with the rules established by the code of civil procedure.*

*[II]. The assets of a third party can also be expropriated, when they are bound to guarantee the credit of the case, or when they are the subject matter of an act that has been revoked because it was done to the detriment of the creditor”.*

Please note that paragraph 2 deals with the case, e.g., of a fideiussore that guarantees, by way of an agreement reached directly with the creditor of the case (under art. 1936 ICC and ff. ones),

to the creditor himself, the payment of the debt of debtor with his own entire patrimony (under art. 2740 ICC).

*Fideiussione* is a contract that creates a right of guarantee *in personam* (for the creditor of the case), as an alternative against a *right in rem* of guarantee, as pledge or mortgage.

These rules also apply in case of an activity of doing or not doing, but here the general rule, in case of breach of the obligation of the case, is compensation for damage (because we cannot force others to do or not do something, as it is against human dignity and freedom of movement). The exception is art. 2932 ICC (that we have already mentioned in relation with the so-called *contratto preliminare*/preliminary agreement).

### ARTICOLO 2932 CC

#### Esecuzione specifica dell'obbligo di concludere un contratto

*“[I]. Se colui che è obbligato a concludere un contratto non adempie l’obbligazione, l’altra parte, qualora sia possibile e non sia escluso dal titolo, può ottenere una sentenza che produca gli effetti del contratto non concluso.*

*[II]. Se si tratta di contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata o la costituzione o il trasferimento di un altro diritto, la domanda non può essere accolta, se la parte che l’ha proposta non esegue la sua prestazione o non ne fa offerta nei modi di legge, a meno che la prestazione non sia ancora esigibile”.*

### ARTICLE 2932 ICC

#### Specific performance of the obligation to complete a contract

*“[I] If the one who is obliged to complete a contract does not fulfil his obligation, the other party, if it is possible and is not excluded from the title, can obtain a judgment that produces the effects of the contract not completed.*

*[II]. In the case of contracts for transfer of ownership of a specific thing or the establishment or transfer of another right, the claim cannot be granted, if the party who advanced it does not carry out his performance or does not offer to do so in accordance with the formalities prescribed by the law, unless such performance cannot yet be demanded”.*

Then, if the breached debtor’s activity (namely, of doing or not doing something) can be replaced with another person’s activity, and therefore the service/activity of the case is a replaceable one, artt. 2931 ICC and 2933 ICC apply.

## ARTICOLO 2931 CC

### Esecuzione forzata degli obblighi di fare

“[I]. *Se non è adempiuto un obbligo di fare, l’avente diritto può ottenere che esso sia eseguito a spese dell’obbligato nelle forme stabilite dal codice di procedura civile*”.

## ARTICLE 2931 ICC

### Compulsory performance of obligations of doing

“[I]. *If an obligation of doing has not been fulfilled, then the beneficiary of the obligation of the case can obtain that it is going to be carried out at the expense of the obliged party in the forms established by the code of civil procedure*”.

## ARTICOLO 2933 CC

### Esecuzione forzata degli obblighi di non fare

“[I]. *Se non è adempiuto un obbligo di non fare, l’avente diritto può ottenere che sia distrutto, a spese dell’obbligato, ciò che è stato fatto in violazione dell’obbligo.*

[II]. *Non può essere ordinata la distruzione della cosa e l’avente diritto può conseguire solo il risarcimento dei danni, se la distruzione della cosa è di pregiudizio all’economia nazionale*”.

## ARTICLE 2933 ICC

### Compulsory performance of obligations of not doing

“[I]. *If an obligation of not doing is not fulfilled, then the beneficiary of the obligation of the case can obtain that what has been done in breach of the obligation is to be destroyed at the expense of the obliged party.*

[II]. *The destruction of the thing cannot be ordered and the beneficiary of the obligation of the case can only obtain compensation for damages, if such destruction is detrimental to the national economy*”.

Please note that, when it comes to damages, just so-called *compensatory damages* can be awarded in the Italian legal system, under the rules provided for in art. 1223 and ff. ones.

So-called *punitive damages* cannot be granted in Italy, against what happens, on the contrary, *exempli gratia*, in United States of America.

Compensation for damages means that debtor’s assets become subject matter of liability, once again, under art. 2740 ICC.

**ARTICOLO 2740 CC**  
**Responsabilità patrimoniale**

“[I]. *Il debitore risponde dell’adempimento delle obbligazioni con tutti i suoi beni presenti e futuri.*

[II]. *Le limitazioni della responsabilità non sono ammesse se non nei casi stabiliti dalla legge”.*

**ARTICLE 2740 ICC**  
**Financial liability**

“[I]. The debtor is liable for fulfilment of his obligations with all his present and future assets.

[II]. Limitations of liability are not allowed, except in the cases provided for by the law”.

Finally, when it comes to liability, please note the difference between an individual execution and an execution performed within the regime of bankruptcy (*fallimento*). In the latter case, the principle of *pari passu* (otherwise called *par condicio creditorum*<sup>15</sup>), under art. 2741 ICC is involved too.

**9.3 On the sources of obligations.**

The sources of obligations are mentioned in art. 1173 ICC, and they are:

- 1) contracts (under art. 1321 ICC and ff. ones);
- 2) unlawful acts (under art. 2043 ICC and ff. ones); and
- 3) “any other act or fact able to produce them”.

**ARTICOLO 1173 CC**  
**Fonti delle obbligazioni**

“[I]. *Le obbligazioni derivano da contratto, da fatto illecito, o da ogni altro atto o fatto idoneo a produrle in conformità dell’ordinamento giuridico”.*

**ARTICLE 1173 ICC**  
**Sources of obligations**

“[I]. Obligations arise from contracts, from unlawful acts, of from any other act or fact able to produce them in accordance with the legal system”.

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<sup>15</sup> *Pari passu* in English law.

A contract requires an agreement of the parties involved, to become a source of obligations. Therefore, here we need the mutual consent of the two or more parties involved, before the obligation of the case can arise from a contract.

Anyway, an obligation can also arise from a unilateral act (or a unilateral legal transaction), meaning an act of one person. See art. 1987 ICC and ff. ones.

### **ARTICOLO 1987 CC**

#### **Efficacia delle promesse**

*“[I]. La promessa unilaterale di una prestazione non produce effetti obbligatori fuori dei casi ammessi dalla legge”.*

### **ARTICLE 1987 ICC**

#### **Effects of promises**

*“[I]. A unilateral promise of performance does not produce binding effects outside the cases permitted by the law”.*

If we read this general provision *a contrariis*, we can see that it means that even a unilateral promise can create obligations. Accordingly, art. 1988 ICC comes into play, at first.

### **ARTICOLO 1988 CC**

#### **Promessa di pagamento e ricognizione di debito**

*“[I]. La promessa di pagamento o la ricognizione di un debito dispensa colui a favore del quale è fatta dall'onere di provare il rapporto fondamentale. L'esistenza di questo si presume fino a prova contraria”.*

### **ARTICLE 1988 ICC**

#### **Promise of payment and recognition of debt**

*“[I]. A promise of payment or a recognition of debt exempts the person in whose favour it has been made from the burden of proving the fundamental relationship. The existence of the relationship is presumed until proven otherwise”.*

The provision states out a specific outcome, in terms of evidence (or means of proof): here a presumption of proof so-called *iuris tantum* stands out (meaning a presumption that can be defeated by way of a contrary proof).

Please note that, incidentally speaking, as for the means of proof (meaning the legal tools according to which a party can prove the existence of a legal relationship), they are governed in Book VI of the Civil Code (on “*tutela dei diritti*”), under art. 2697-2739 ICC, and they are:

- written documents (art. 2699-2720 ICC);
- witness proof (artt. 2721-2726 ICC);
- confession, judicial and extrajudicial one (artt. 2730-2735 ICC);
- oath (artt. 2736-2739 ICC); and
- presumptions (art. 2727-2729 ICC).

As per above, then, other unilateral sources of obligations are the so-called *promesse al pubblico*.

## **ARTICOLO 1989 CC**

### **Promessa al pubblico**

*“[I]. Colui che, rivolgendosi al pubblico, promette una prestazione a favore di chi si trovi in una determinata situazione o compia una determinata azione, è vincolato dalla promessa non appena questa è resa pubblica.*

*[II]. Se alla promessa non è apposto un termine, o questo non risulta dalla natura o dallo scopo della medesima, il vincolo del promittente cessa, qualora entro l’anno dalla promessa non gli sia stato comunicato l’avveramento della situazione o il compimento dell’azione prevista nella promessa”.*

## **ARTICLE 1989 ICC**

### **Promise to the (general) public**

*“[I]. Anyone who, in addressing the (general) public, promises performance in favour of someone who is in a specific situation or undertakes a specific activity, is bound by the promise as soon as it has been made public.*

*[II]. If a deadline is not attached to the promise, or it does not result from its nature or purpose, then the obligation of the promisor ceases, if within the term of the year starting from the time of the promise, he has not been notified either of the fulfilment of the situation or the completion of the activity mentioned in the promise”.*

Please note that a promise to the (general) public is something quite different from an offer to the (general) public, as art. 1326 ICC (on matter of completion of contracts) states out.

## **ARTICOLO 1336 CC**

### **Offerta al pubblico**

*“[I]. L’offerta al pubblico, quando contiene gli estremi essenziali del contratto alla cui conclusione è diretta, vale come proposta, salvo che risulti diversamente dalle circostanze o dagli usi.*

*[II]. La revoca dell’offerta, se è fatta nella stessa forma dell’offerta o in forma equipollente, è efficace anche in confronto di chi non ne ha avuto notizia”.*

## **ARTICLE 1336 ICC**

### **Offer to the public**

*“[I]. An offer to the public, when it contains the essential elements of the contract whose completion is directed to, is valid as a proposal, unless it comes out otherwise, from the circumstances of the case or from the customs.*

*[II]. The revocation of the offer, if it has been made in the same form of the offer or in an equivalent form, is also effective against those who have not been notified of it”.*

Now, let’s go back to the promise to the public. Under certain circumstances, it can be revoked.

## **ARTICOLO 1990 CC**

### **Revoca della promessa**

*“[I]. La promessa può essere revocata prima della scadenza del termine indicato dall’articolo precedente solo per giusta causa, purché la revoca sia resa pubblica nella stessa forma della promessa o in forma equivalente.*

*[II]. In nessun caso la revoca può avere effetto se la situazione prevista nella promessa si è già verificata o se l’azione è già stata compiuta”.*

## **ARTICLE 1990 ICC**

### **Revocation of the promise**

*“[I]. A promise can be revoked before the expiration of the deadline mentioned in the previous article only for just reason, provided that the revocation is made public in the same form of the promise or in an equivalent form.*

*[II]. In no case the revocation can produce effects if the situation envisaged in the promise has already occurred or if a claim has already been carried out”.*

Then, finally, the passage “*any other act or fact able to produce them in accordance with legal system*”, mentioned in art. 1173 ICC, consists in a *clausola di chiusura*, namely, once again, a closing clause, still provided for by the legal system, on the subject matter at stake<sup>16</sup>.

On a practical basis, it means that, apart from contracts and unlawful acts, obligations can come out also from: *i*) unilateral promises, as we saw; *ii*) management of business of others (under art. 2028 ICC); *iii*) undue payments and unjustified enrichments (see art. 2033 ICC); *et cetera*, namely all cases where the law states that an obligation arise due a specific behaviour.

#### 9.4 On *obbligazioni reali* (or *obligationes propter rem*).

There are a few obligations that are owed by a person just because he/she/it is the owner of a thing or the holder of a *right in rem* over it.

As a rule of law, they are involved in case of relationships of neighbourhood, or when *rights in rem* pertaining to different persons coexist on the same thing, as it happens in case of community of ownership (or co-ownership).

Please see, *exempli gratia*:

- the obligation of payment of the expenses due to maintain the common property referred to in art. 1104 ICC; or
- in case of an easement, the obligation to provide for maintenance of the road that crosses the land of the so-called *fondo servente* for the benefit of the owner of the so-called *fondo dominante* (see art. 1069, par. 2, ICC).

### ARTICOLO 1104 CC Obblighi dei partecipanti

“[I]. Ciascun partecipante deve contribuire nelle spese necessarie per la conservazione e per il godimento della cosa comune e nelle spese deliberate dalla maggioranza a norma delle disposizioni seguenti, salva la facoltà di liberarsene con la rinuncia al suo diritto.

[II]. La rinuncia non giova al partecipante che abbia anche tacitamente approvato la spesa.

[III]. Il cessionario del partecipante è tenuto in solido con il cedente a pagare i contributi da questo dovuti e non versati”.

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<sup>16</sup> On the concept of *clausola di chiusura*, please see also, herein, *exempli gratia*, lecture 8, par. 8.3.

## ARTICLE 1104 ICC

### Obligations of the participants

*“[I]. Each participant must contribute to the expenses due for maintenance and enjoyment of the common thing and to the expenses decided by the majority in accordance with the following provisions, without prejudice to his right to free himself from them, by way of a renunciation to his own right.*

*[II]. The renunciation does not benefit the participant who has, even tacitly, approved the expense.*

*[III]. The transferee of the participant is bound jointly with the transferor to pay the contributions due and not paid by the latter”.*

## ARTICOLO 1069 CC

### Opere sul fondo servente

*“[I]. Il proprietario del fondo dominante, nel fare le opere necessarie per conservare la servitù, deve scegliere il tempo e il modo che siano per recare minore incomodo al proprietario del fondo servente.*

*[II]. Egli deve fare le opere a sue spese, salvo che sia diversamente stabilito dal titolo o dalla legge.*

*[III]. Se però le opere giovano anche al fondo servente, le spese sono sostenute in proporzione dei rispettivi vantaggi”.*

## ARTICLE 1069 ICC

### Activities over the serving land

*“[I]. The owner of the dominant land, in carrying out the activities due to maintain the easement, must choose the right time and way so to cause less inconvenience possible to the owner of the serving land.*

*[II]. He must perform the activities at his own expense, unless otherwise established by the title or by the law.*

*[III]. However, if the activities also benefit the serving land, the expenses are due in proportion to the respective benefits”.*

An obligatio propter rem is inherent in a right in rem in a double way, as:

- 1) whoever succeeds in the *right in rem* of the case is legally bound by it; and

2) the obliged party can get rid of the *obligatio propter rem* of the case by way of renunciation to the correspondent *right in rem* performed on behalf of a third party (see above; see also the case of the “common walls” in neighbourhoods relationships governed by artt. 882 ICC, 886 ICC, 888 ICC).

### 9.5 A few final observations on the distinction between *rights in rem* and *rights in personam*.

Now let's sum up the most relevant common characteristics of *rights in rem*, from one side, and *rights in personam*, from the other side.

#### ***Rights in rem.***

A right in rem involves an immediate legal relationship between its right-holder and the property of the case (the subject matter of a *right in rem* are all – in case of ownership – or some – in case of a minor *right in rem* – of the utilities that can be drawn out from a certain thing);

Third parties must only refrain from interposing obstacles to the holder of a right in rem.

Accordingly, here **immediacy** stands out as a core characteristic/quality of every right in rem.

Then, the owner of the res (rectius, the owner of the right of ownership over the res), as well as the holder of the minor right in rem of the case, can follow the thing against every person in possession of it: here there is also a right of tracing (e.g., against the illegitimate possessor of the case, as possession is protected by the law as a *de facto* power which corresponds to the exercise of a *right in rem*, pursuant to art.1140 ICC).

#### ***Rights in personam.***

A credit right “follows” the person of the debtor (the subject matter of a *right in personam* is performance of an activity due by the debtor); performance of an obligation involves cooperation of others (the debtor, above all).

The difference is lessened (on a mere behavioural ground) when the performance due is a performance of not doing.

Moreover, we also talk about absoluteness of a right in rem against relativity of a right in personam (where both voices must be considered in terms of enforceability of the right of the case against third parties).

**Absoluteness means enforceability erga omnes, namely against everybody else** (or against all world).

Examples of absoluteness:

a) the owner can exercise the claim of so-called *rei vindicatio* of the property of the case (under art. 948 ICC and ff. ones) against everyone who is in possession of it without any title.

b) the issue acquires even more apparent relevance in the case of the rights in rem of guarantee (namely, pledge and mortgage): the transfer of the property of the case to a third party (buyer or done) of the case does not prevent the creditor his right of being satisfied over the assets that are the subject matter of the *right in rem* of guarantee of the case.

Please finally take note of the distinction between a ***right in rem of enjoyment*** and a ***right of enjoyment in personam***, such as the right to enjoy an immovable property. It can be either a *right in rem*, if its right holder is the owner of the property of the case or its usufructuary, or a *right in personam*, if the right arises from the signature of a rent agreement.

## 10 Lecture 10: on legal transactions.

SUMMARY: 10.1 General introductory concepts: on legal transactions as an expression of private autonomy, and on behaviour and declaration as means to complete a legal transaction. – 10.2 On the role of the will of the party in a legal transaction. – 10.3 On limits to private autonomy in legal transactions. – 10.4 On integration of the settlement of interests amongst the parties in a legal transaction. 10.5 Introduction to the essential and accidental elements of a legal transaction. – 10.6 On the different legal transactions available in the legal system. – 10.7 On *dichiarazioni recettizie* and *non recettizie*. – 10.8 On the acts of disclosure/manifestation of will. – 10.9 On interpretation of legal transactions.

### 10.1 General introductory concepts: on legal transactions as an expression of private autonomy, and on behaviour and declaration as means to complete a legal transaction.

When we talk about legal transactions, an immediate link with the concept of private autonomy comes to mind.

We have already talked about private autonomy (see lecture 3, par. 3.4).

Just to remember, private autonomy means the possibility for single persons to govern their legal relationships with other persons in the chosen way.

The basic legal instrument for the implementation of private autonomy is the **legal transaction** (so-called *negozio giuridico*).

Accordingly, a legal transaction is an act (or set of acts) performed by one or more persons/party, aimed at producing effects recognized and guaranteed by the legal system.

Having said that, a legal transaction can consist of:

1) a **declaration** (see e.g., both the proposal/offer and the acceptance in an exchange between proposal and acceptance for completion of a contract; the power of attorney; the promise to the public; the will, and so on); or

2) a **behaviour** (of a physical or a legal person), with which the person of the case materially gives birth to a legal *settlement of interests* (see e.g., the behaviour of someone who gets on a bus, according to which a contract of transportation is meant to be completed; the abandonment of something done with the will to give up ownership of the property of the case, which is meant to create the so-called *derelizione*).

As far as the law is concerned, **declaration and behaviour of the party of the case are equalised one to the other, when the latter is a determining behaviour** (so-called *comportamento conclusivo*), namely for the production of the effects of the legal transaction of the case.

Now, please note that all the above-mentioned behaviours involve the will of the person of the case.

Ergo, the purpose of a legal transaction is to allow individuals to independently rule their interests, giving them the wished structure, in accordance with their will.

Ergo, once again, the will of the person/party of the case is due, even if it's not enough. In fact, so to have a binding obligation (that produces legal effects), a settlement of interests with other persons (implemented throughout the declaration or the determining behaviour of the case) is needed too.

## **10.2 On the role of the will of the party in a legal transaction.**

A declaration should match the will of the declaring party.

However, a declaration may not coincide with the wishes of the declaring party, as it happens in the following cases:

- mental reservation;
- declaration released for fun or joke;
- divergence coming out from mistake, rather than threat or deception or an error performed in the procedure of formation of the will.

The first two cases are not legally relevant: namely, mental reservation is not considered by the legal system; in the second case, the declaration is qualified as non-existent.

Problems may arise, however, in cases of error, threat or deception.

Here in fact an issue of conflict of interests can arise, between the interests of the declaring party and the interests of the party who relies on the declaring party's declaration.

The solution to this problem can be found in art. 1427 ICC and ff. ones, on avoidance of contracts for vices of will.

Please note that, as you can see, in this case the rules of law on contracts are applied, unless otherwise stated by the law under the circumstances of the case, even to other legal transactions different from contracts.

Another case of applications of the rules provided in contract law to the remaining legal transaction is the one of the rules on the interpretation of contracts (see art. 1362 ICC and ff. ones). These rules can be applied even to the interpretation of wills, according to jurisprudence.

Accordingly, that's the reason why, on a general basis, we are talking about legal transactions in general, even before contracts, which are a species of the genus legal transaction.

Therefore, the one that deals with *negozi giuridici* can be qualified as a major class where contracts are contained into.

### 10.3 On limits to private autonomy in legal transactions.

The general rule is that private interests must not conflict with the interest of the society and it must be worthy of legal protection.

***Ergo*, there are limits to private autonomy.**

Namely, sometimes it's the legal system itself that allows private individuals to choose only between certain types of legal transactions. This is the case of family law: here, e.g., there are the rules on marriage, with their mandatory legal regime; again, adoption is possible only in the cases provided for by law; *et cetera*.

In this case, we speak of a typical nature for the legal transaction of the case. Here typicality occurs because the prevailing interests are those related to issues concerning daily life of the family of the case, not the financial ones.

However, sometimes the principle of typicality of a certain legal transaction can also be found in the field of financial legal transactions, if there is a need for protection of interests of third parties or of the legal transactions as a whole. This occurs, for example:

- in succession law (if we accept inheritance, the legal consequences of it are just the ones established by the law);
- in company law, where we can only choose the types of companies provided for by the law; recognition of a legal person is governed by specific rules that must be abided by the physical persons behind it.

Elsewhere, the law intervenes by rigidly determining the content of the legal transaction of the case, or, in other cases, it leaves a narrow rather than a large space within which private autonomy can express itself and thus determine the content of the legal transaction of the case.

*Exempli gratia*, in the field of contract law, we already talked about typical and atypical contracts (see art. 1322 ICC).

#### **ARTICOLO 1322 CC**

#### **Autonomia contrattuale**

“[I]. *Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge.*

[II]. *Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico”.*

## ARTICLE 1322 ICC

### Contractual autonomy

*“[I]. The parties can freely determine the content of the contract within the limits imposed by the law.*

*[II]. The parties can also complete contracts that do not belong to the types having a particular discipline, as long as they are aimed at achieving interests worthy of protection according to the legal system”.*

The above-mentioned provision means that, in any case, the contract of the case must comply with mandatory rules and principles of public policy (and good customs).

In fact, the activity of control over the existence of the so-called *deserving interests* is, in case of atypical contracts, the outcome of the activity of compliance with the very same above-mentioned rules of law already carried out in case of typical contracts under the joint application of art. 1418 ICC and 1343 ICC.

## ARTICOLO 1418 CC

### Cause di nullità del contratto

*“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.*

*[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’articolo 1325, l’illiceità della causa, la illiceità dei motivi nel caso indicato dall’articolo 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’articolo 1346.*

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.*

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

*“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.*

*[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.*

*[III]. A contract is also null and void in the other cases established by law”.*

## ARTICOLO 1343 CC

### Causa illecita

“[I]. *La causa è illecita quando è contraria a norme imperative, all’ordine pubblico o al buon costume*”.

## ARTICLE 1343 ICC

### Illegal causa

“[I]. Causa is illegal when it is against mandatory rules of law, public policy and good customs”.

### 10.4 On integration of the settlement of interests amongst the parties in a legal transaction.

Sometimes the parties of a legal transaction do not deal with all its own legal effects.

See, e.g., the paradigmatic case of the contract of sale-purchase: the price is always agreed on by the parties, but often nothing is ruled on delivery of the property of the case.

In these cases, in our legal system, there is an intervention of the law: the law fills in directly the gap outcoming from the settlement of interests of the parties (see art. 1340 and 1374 ICC).

## ARTICOLO 1374 CC

### Integrazione del contratto

“[I]. *Il contratto obbliga le parti non solo a quanto è nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge, o, in mancanza, secondo gli usi e l’equità*”.

## ARTICLE 1374 ICC

### Integration of a contract

“[I]. *A contract obliges the parties not only to what is expressed therein, but also to all the consequences that derive from it, according to the law, or, otherwise, according to customs and fairness*”.

## ARTICOLO 1340 CC

### Clausole d’uso

“[I]. *Le clausole d’uso s’intendono inserite nel contratto, se non risulta che non sono state volute dalle parti*”.

## ARTICLE 1340 ICC

### Customary clauses

“[I]. Customary clauses are meant to be included in the contract, if it does not appear that they were not wanted by the parties”.

Please note that, as already said, the Civil Code contains numerous supplementary rules of law. This simplifies the bargaining activity in general.

Accordingly, in our legal system, the parties can just agree on the so-called *elementi essenziali* (fundamental/essential elements) of a certain legal transaction, and leave aside other details, if they do not intend to establish different rules from the ones otherwise applicable, under the circumstances, by *default*.

### Other examples of supplementary rules of law.

Again, in case of a sale-purchase contract, if the parties do not expressly agree on that, it is the law that determines where the delivery of the subject matter of the contract of the case must take place.

## ARTICOLO 1510 CC

### Luogo della consegna

“[I]. In mancanza di patto o di uso contrario, la consegna della cosa deve avvenire nel luogo dove questa si trovava al tempo della vendita, se le parti ne erano a conoscenza, ovvero nel luogo dove il venditore aveva il suo domicilio o la sede dell'impresa.

[II]. Salvo patto o uso contrario, se la cosa venduta deve essere trasportata da un luogo all'altro, il venditore si libera dall'obbligo della consegna rimettendo la cosa al vettore o allo spedizionario; le spese del trasporto sono a carico del compratore”.

## ARTICLE 1510 ICC

### Place of delivery

“[I]. In absence of an agreement or a contrary use, the delivery of the thing must take place in the place where it was at the time of the sale, if the parties were aware of it, or otherwise in the place where the seller had his domicile or the headquarters of the company.

[II]. Unless otherwise agreed on or used to, if the thing sold must be transported from one place to another, the seller frees himself from the obligation of delivery by handing the thing to the carrier or the forwarder; transport costs are to be paid by the buyer”.

Again, the law establishes by *default* rule that the service of the case must be performed at creditor's domicile.

### **ARTICOLO 1182 CC**

#### **Luogo dell'adempimento**

*[I]. Se il luogo nel quale la prestazione deve essere eseguita non è determinato dalla convenzione o dagli usi e non può desumersi dalla natura della prestazione o da altre circostanze, si osservano le norme che seguono.*

*[II]. L'obbligazione di consegnare una cosa certa e determinata deve essere adempiuta nel luogo in cui si trovava la cosa quando l'obbligazione è sorta.*

*[III]. L'obbligazione avente per oggetto una somma di danaro deve essere adempiuta al domicilio che il creditore ha al tempo della scadenza. Se tale domicilio è diverso da quello che il creditore aveva quando è sorta l'obbligazione e ciò rende più gravoso l'adempimento, il debitore, previa dichiarazione al creditore, ha diritto di eseguire il pagamento al proprio domicilio.*

*[IV]. Negli altri casi l'obbligazione deve essere adempiuta al domicilio che il debitore ha al tempo della scadenza”.*

### **ARTICLE 1182 ICC**

#### **Place of performance**

*“[I]. If the place where the service is to be performed is not determined by the agreement or by the customs and cannot be inferred from the nature of the service or other circumstances, the following rules are observed.*

*[II]. The obligation to deliver a certain thing must be fulfilled in the place where the thing was when the obligation arose.*

*[III]. The obligation concerning a sum of money must be fulfilled at the domicile that the creditor has at the time of its deadline. If this domicile is different from the one that the creditor had when the obligation arose and this makes the fulfilment more burdensome, the debtor, after completion of an ad hoc declaration to the creditor, has the right to make the payment at his own domicile.*

*[IV]. In other cases, the obligation must be fulfilled at the domicile that the debtor has at the time of its deadline”.*

Moreover, the seller is required to ensure that the thing sold is not a defective one (see art. 1490 ICC).

## ARTICOLO 1490 CC

### Garanzia per i vizi della cosa venduta

“[I]. Il venditore è tenuto a garantire che la cosa venduta sia immune da vizi che la rendano inidonea all’uso a cui è destinata o ne diminuiscano in modo apprezzabile il valore.

[II]. Il patto con cui si esclude o si limita la garanzia non ha effetto, se il venditore ha in mala fede taciuto al compratore i vizi della cosa”.

## ARTICLE 1490 ICC

### Guarantee for defects of the thing sold

“[I]. The seller must ensure that the thing sold is free from defects that make it unsuitable for the use for which it is meant to be used or appreciably decrease its value.

[II]. The agreement by which the guarantee is excluded or limited has no effect if the seller has concealed in bad faith the defects of the thing to the buyer”.

Accordingly, bottom line, a distinction arises between so-called essential elements (like, as for contracts, those mentioned in art. 1325 ICC) and so-called accidental elements of the legal transaction of the case (like, as for contracts once again, a condition, under art. 1353 ICC and ff. ones).

## 10.5 Introduction to the essential and accidental elements of a legal transaction.

The essentials elements (or requirements) of a contract are the following ones.

## ARTICOLO 1325 CC

### Indicazione dei requisiti

“[I]. I requisiti del contratto sono:

- 1) l’accordo delle parti;
- 2) la causa;
- 3) l’oggetto;
- 4) la forma, quando risulta che è prescritta dalla legge sotto pena di nullità”.

## ARTICLE 1325 ICC

### Requirements’ indication

“[I]. Requirements of a contract are:

- 1) the agreement of the parties;

- 2) *the causa*;
- 3) *the subject matter*;
- 4) *the form, when it is prescribed by law under penalty of nullity*".

These are the sole requirements needed, under the Italian private law, to complete every contract.

Accordingly, in a contract the parties can set up the mere clauses needed to satisfy them. In such a case, then the dispositive/supplementary provisions of the Civil Code come into play, to fill in the possible gaps left in, by the parties, on other contractual details.

*Ergo*, once again the distinction between dispositive rules of law and mandatory rules of law become relevant (see previously, on the distinction, lecture 2, par. 2.8).

Mandatory rules are rules of law whose breach means voidity (or /nullity, or inexistence) of the legal transaction of the case.

Dispositive rules are default rules (of law) that can be derogated by the parties, by way of a different agreement, and are to be applied only when there is a lack of regulation by the parties.

Incidentally speaking, please note that, sometimes, the voidity of the case is just a partial one. See *exempli gratia*:

– a sale-purchase of a property, or a contract to supply services, both to be completed at prices governed by the law. In these situations, if a price higher than the maximum one allowed is set up in the contract of the case, then the contract remains valid, and just the price is adjusted;

– art. 1419 ICC;

– art 1500 ICC (on the redemption agreement – see on the topic lecture 3, par. 3.9).

Then, as already mentioned, there are also the so-called *elementi accidentali/accidental elements*, namely, above all, *condizione*, *termine* and *modo* (we have already briefly looked at *condizione* when we spoke about the concept of expectation/*aspettativa*, still in lecture 3, in par. 3.8).

Please note that accidental elements are useful to disclose the motives (personal reasons) according to which one or both the parties enter into a contract, because, at the eyes of the law, motives are relevant only in peculiar situations. Please see on motive art. 1345 ICC.

## ARTICOLO 1345 CC

### Motivo illecito

“[I]. *Il contratto è illecito quando le parti si sono determinate a concluderlo esclusivamente per un motivo illecito comune ad entrambe*”.

## ARTICLE 1345 ICC

### Illegal motive

*“[I]. A contract is illegal when the parties have agreed on completing it just for an illegal personal reason common to both”.*

### 10.6 On the different legal transactions available in the legal system.

Traditionally, there is distinction between unilateral legal transactions, from one side, and bilateral or multilateral legal transactions, from the other side.

A **unilateral legal transaction** consists in a declaration of will or a determining behaviour of a single party (examples: the will/testament; the abandonment of a movable thing; the declaration of acceptance or renunciation to inheritance).

Please note that, here, by party we mean a person or a group of persons who acts as a single centre of interests, referring to the legal transaction of the case.

If the legal transaction consists, on the contrary, in declarations of will or determining behaviours of two or more parties, then we speak of a **bilateral or multilateral legal transaction**. The paradigmatic case is the contract case: see again art. 1321 of the civil code.

## ARTICOLO 1321 CC

### Nozione

*“[I]. Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale”.*

## ARTICLE 1321 ICC

### Notion

*“[I]. A contract is an agreement reached by two or more parties to set up, govern or terminate a legal financial relationship amongst them”.*

Now, the question is: on a general basis, which legal transactions can be performed by way of a unilateral legal transaction and which ones by way of a contract?

If all the interested parties of the case take on obligations, or dispose of their own rights, then a contract is obviously required, because consent (*consensus*) of the person involved is always required for her to be charged with obligations.

Anyway, what happens in case of attributions free of charge? Exempli gratia, in case of a promise or a renunciation done on behalf of others?

Here the beneficiary's will could appear to be unnecessary. Still, acquisitions of properties, even free of charge, do not always involve just benefits. See e.g., the case of a collapse of a building just received by the donee of the case as subject matter of a gift. Once ownership is transferred, the new owner of a property is liable for any inconvenience concerning it, under the rule of law "*res perit domino*", and therefore, in this case the donee could be liable for any unlawful act, pursuant to art. 2053 ICC.

Ergo, there may be an interest in not receiving the financial attribution of the case.

Accordingly, **attributions of rights, promises and renunciations done in favour (or on behalf) of specific persons involve the need of acceptance by the beneficiary of the case, or they must be able to be refused by him.**

An example: the gift (or donation) is a legal transaction (namely, a contract) that entails attributions of rights free of charge, but it still requires acceptance by the donee (the beneficiary) of the case. See art. 769 ICC jointly with art. 782 ICC.

## ARTICOLO 769 CC

### Definizione

*"[I]. La donazione è il contratto col quale, per spirito di liberalità, una parte arricchisce l'altra, disponendo a favore di questa di un suo diritto o assumendo verso la stessa una obbligazione".*

## ARTICLE 769 ICC

### Definition

*"[I]. A gift is a contract according to which, out of spirit of liberality, one party enriches the other, arranging for an act of disposition of one of her rights on behalf of the latter, or taking on an obligation against the very same one".*

## ARTICOLO 782 CC

### Forma della donazione

*"[I]. La donazione deve essere fatta per atto pubblico, sotto pena di nullità. Se ha per oggetto cose mobili, essa non è valida che per quelle specificate con indicazione del loro valore nell'atto medesimo della donazione, ovvero in una nota a parte sottoscritta dal donante, dal donatario e dal notaio.*

*[II]. L'accettazione può essere fatta nell'atto stesso o con atto pubblico posteriore. In questo caso la donazione non è perfetta se non dal momento in cui l'atto di accettazione è notificato al donante.*

[III]. *Prima che la donazione sia perfetta, tanto il donante quanto il donatario possono revocare la loro dichiarazione*”.

## ARTICLE 782 ICC

### Form of a gift

“[I]. A gift must be made by atto pubblico (public deed), under penalty of nullity. If it concerns movable things, then it is valid only for those things specified with indication of their value in the deed of donation itself, or in a separate document signed by the donor, the donee and the notary public.

[II]. Acceptance can be declared in the deed itself or in a subsequent public deed. In this case the donation is not completed until the act of acceptance is notified to the donor.

[III]. Both the donor and the donee can revoke their declarations, before the donation of the case becomes a completed one”.

**Other legal acts free of charge** (apart from donation):

- 1) the promise to pay a debt of others (see articles 1268, 1272, 1273 ICC); or
- 2) the promise to guarantee the payment of a debt of others, which can create a contract of so-called *fideiussione* under art. 1936 ICC;
- 3) the *remissione del debito* (see art. 1236 ICC).

All of them they do not require the beneficiary’s express acceptance, but the beneficiary can always refuse the service/activity of the case, within the term required by the nature of the deal or by customs.

### On the promise to pay a debt of others.

Herein below there are three different cases, in which a promise to pay a debt of others stands out, and all of them share the common element that they always need, in a way or another, acceptance performed by the final beneficiary of the case:

- 1) the agreement amongst delegator (the original debtor), delegatee (the supervening debtor), and the beneficiary of the delegation (the creditor), namely *delegazione*:

## ARTICOLO 1268 CC

### Delegazione cumulativa

“[I]. *Se il debitore assegna al creditore un nuovo debitore, il quale si obbliga verso il creditore, il debitore originario non è liberato dalla sua obbligazione, salvo che il creditore dichiari espressamente di liberarlo.*

[II]. *Tuttavia il creditore che ha accettato l'obbligazione del terzo non può rivolgersi al delegante, se prima non ha richiesto al delegato l'adempimento*".

## ARTICLE 1268 ICC

### Cumulative delegation

*"[I]. If a debtor assigns a new debtor to his creditor, who undertakes the obligation against the creditor, then the original debtor is not released from his own obligation, unless the creditor expressly declares to release him.*

[II]. *However, a creditor who has accepted the third party's obligation cannot make demands against the delegator, if he has not previously demanded fulfilment to the delegatee*".

2) the agreement third party-creditor, namely *espromissione*:

## ARTICOLO 1272 CC

### Espromissione

*"[I]. Il terzo che, senza delegazione del debitore, ne assume verso il creditore il debito, è obbligato in solido col debitore originario, se il creditore non dichiara espressamente di liberare quest'ultimo.*

[II]. *Se non si è convenuto diversamente, il terzo non può opporre al creditore le eccezioni relative ai suoi rapporti col debitore originario.*

[III]. *Può opporgli invece le eccezioni che al creditore avrebbe potuto opporre il debitore originario, se non sono personali a quest'ultimo e non derivano da fatti successivi all'espromissione. Non può opporgli la compensazione che avrebbe potuto opporre il debitore originario, quantunque si sia verificata prima dell'espromissione*".

## ARTICLE 1272 ICC

### Espromissione

*"[I]. The third party that, without an act of delegation of the debtor, takes on a debt against the creditor, is jointly and severally obliged with the original debtor, if the creditor does not expressly declare to release the latter.*

[II]. *Unless otherwise agreed, the third party cannot oppose to the creditor any exception concerning his own legal relationships with the original debtor.*

[III]. *On the other hand, she may oppose the exceptions that the original debtor could have opposed to the creditor, if they are not personal ones to the latter and they do not derive from*

events occurred after the *espromissione*. She cannot oppose him any compensation that the original debtor could have opposed to, even if it has occurred before the *espromissione*”.

3) the agreement third party-debtor, namely *accollo*:

### ARTICOLO 1273 CC

#### **Accollo**

“[I]. *Se il debitore e un terzo convengono che questi assuma il debito dell’altro, il creditore può aderire alla convenzione, rendendo irrevocabile la stipulazione a suo favore.*

[II]. *L’adesione del creditore importa liberazione del debitore originario solo se ciò costituisce condizione espressa della stipulazione o se il creditore dichiara espressamente di liberarlo.*

[III]. *Se non vi è liberazione del debitore, questi rimane obbligato in solido col terzo.*

[IV]. *In ogni caso il terzo è obbligato verso il creditore che ha aderito alla stipulazione nei limiti in cui ha assunto il debito, e può opporre al creditore le eccezioni fondate sul contratto in base al quale l’assunzione è avvenuta”.*

### ARTICLE 1273 ICC

#### **Accollo**

“[I]. *If the debtor and a third party agree that the latter will take on the debt of the other, then the creditor can adhere to the agreement, making the legal transaction irrevocable on his own behalf.*

[II]. *Creditor’s acceptance means release of the original debtor only if that constitutes an express condition of the agreement or if the creditor expressly declares to release him.*

[III]. *If there is no release of the debtor, then he remains jointly and severally liable with the third party.*

[IV]. *In any case, the third party is obliged against the creditor who has accepted the agreement, within the limits in which she has taken on the debt, and she may oppose to the creditor exceptions based on the contract according to which the undertaking took place”.*

Then, as for *remissione del debito*:

## ARTICOLO 1236 CC

### Dichiarazione di remissione del debito

“[I]. *La dichiarazione del creditore di rimettere il debito estingue l’obbligazione quando è comunicata al debitore, salvo che questi dichiari in un congruo termine di non volerne profittare*”.

## ARTICLE 1236 ICC

### Declaration of remissione del debito

“[I]. Creditor’s declaration to remit the debt extinguishes the obligation when it is notified to the debtor, if the latter does not declare that he does not want to profit from it within a reasonable period of time”.

Please note that the above-mentioned legal transactions, namely *delegazione*, *espromissione*, *accollo*, and *remissione del debito*, are means of performance of obligations, even if the last one, is a means of performance different from “performance” in a strict way<sup>17</sup>.

Now, going on, as far as the proposal to complete a contract with obligations of sole proposing party is concerned, please see art. 1333 ICC.

## ARTICOLO 1333 CC

### Contratto con obbligazioni del solo proponente

“[I]. *La proposta diretta a concludere un contratto da cui derivino obbligazioni solo per il proponente è irrevocabile appena giunge a conoscenza della parte alla quale è destinata.*

*[II]. Il destinatario può rifiutare la proposta nel termine richiesto dalla natura dell’affare o dagli usi. In mancanza di tale rifiuto il contratto è concluso*”.

## ARTICLE 1333 ICC

### Contract with obligations of the sole proposer

“[I]. *A proposal aimed at completing a contract from which obligations arise for the sole proposer is an irrevocable one as soon as it is known by the party to which it is meant to be directed.*

*[II]. The recipient can refuse the proposal within the time limit required by the nature of the deal or by the customs. The contract is completed, in case of absence of such a refusal*”.

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<sup>17</sup> We will meet them again in lecture 18, the first three ones especially in par. 18.10.

In all these cases that we have just seen, in which the will of both parties is required, we speak of a contract. This proves that the contract covers most of the legal financial transactions amongst living people.

Nevertheless, in certain cases, as we have already seen, someone can also take on obligations by way of a unilateral promise. See e.g., the promise to the public and the recognition of a debt, herein below once again.

#### **ARTICOLO 1987 CC**

##### **Efficacia delle promesse**

*“[I]. La promessa unilaterale di una prestazione non produce effetti obbligatori fuori dei casi ammessi dalla legge”.*

#### **ARTICLE 1987 ICC**

##### **Effects of promises**

*“[I]. A unilateral promise of performance does not produce binding effects outside the cases permitted by the law”.*

#### **ARTICOLO 1988 CC**

##### **Promessa di pagamento e ricognizione di debito**

*“[I]. La promessa di pagamento o la ricognizione di un debito dispensa colui a favore del quale è fatta dall’onere di provare il rapporto fondamentale. L’esistenza di questo si presume fino a prova contraria”.*

#### **ARTICLE 1988 ICC**

##### **Promise of payment and recognition of debt**

*“[I]. A promise of payment or a recognition of debt exempts the person in whose favour it has been made from the burden of proving the fundamental relationship. The existence of the relationship is presumed until proven otherwise”.*

#### **ARTICOLO 1989 CC**

##### **Promessa al pubblico**

*“[I]. Colui che, rivolgendosi al pubblico, promette una prestazione a favore di chi si trovi in una determinata situazione o compia una determinata azione, è vincolato dalla promessa non appena questa è resa pubblica.*

[II]. *Se alla promessa non è apposto un termine, o questo non risulta dalla natura o dallo scopo della medesima, il vincolo del promittente cessa, qualora entro l'anno dalla promessa non gli sia stato comunicato l'avveramento della situazione o il compimento dell'azione prevista nella promessa*".

## ARTICLE 1989 ICC

### Promise to the (general) public

"[I]. *Anyone who, in addressing the (general) public, promises performance in favour of someone who is in a specific situation or undertakes a specific activity, is bound by the promise as soon as it has been made public.*

[II]. *If a deadline is not attached to the promise, or it does not result from its nature or purpose, then the obligation of the promisor ceases, if within the term of the year starting from the time of the promise, he has not been notified either of the fulfilment of the situation or the completion of the activity mentioned in the promise*".

Now, generally speaking, **which are the legal transactions that can be carried out by way of a unilateral declaration?**

They are:

a) **the acts that directly concern the sole assets of those who carry them out.**

Examples:

- the act which grants a power of attorney;
- the case of *derelizione*/abandonment of a movable property (see art. 923 ICC);
- the declaration of acceptance of inheritance;
- the declaration of renunciation to inheritance;
- the unilateral act of renunciation to a *right in rem* over a property of others (it is a unilateral act whose consequence is the elasticity of dominion);
- the unilateral abandonment of ownership over an immovable property, which involves the acquisition of ownership of the property by the State (see art. 827 ICC).

b) **the unilateral acts which involve amendments, even unfavourable ones, of the assets of others, in the case of legal transactions that require the exercise of a power, deriving from the contract of the case or arising from the law, upon the person who carries them out.**

Examples:

- i) the act of withdrawal from a contract (see art. 1373 ICC) or from an association or a company.

## ARTICOLO 1373 CC

### Recesso unilaterale

“[I]. Se a una delle parti è attribuita la facoltà di recedere dal contratto, tale facoltà può essere esercitata finché il contratto non abbia avuto un principio di esecuzione.

[II]. Nei contratti a esecuzione continuata o periodica, tale facoltà può essere esercitata anche successivamente, ma il recesso non ha effetto per le prestazioni già eseguite o in corso di esecuzione.

[III]. Qualora sia stata stipulata la prestazione di un corrispettivo per il recesso, questo ha effetto quando la prestazione è eseguita.

[IV]. È salvo in ogni caso il patto contrario”.

## ARTICLE 1373 ICC

### Unilateral withdrawal

“[I]. If one of the parties has the right to withdraw from the contract, this facoltà/right can be exercised until the contract has had execution.

[II]. In contracts involving continuous or periodic performances, this facoltà/right can also be exercised subsequently, but the withdrawal has no effect for services already performed or under way.

[III]. If a consideration for the withdrawal has been agreed on, the withdrawal takes effect when the consideration is performed.

[IV]. In any case, any different agreement is unaffected”.

Please note that art. 1373 ICC must be read jointly with art. 1372 ICC.

ii) the declaration to take advantage of the termination of a contract in presence of a *clausola risolutiva espressa*. See art. 1456, par. 2, ICC.

## ARTICOLO 1456 CC

### Clausola risolutiva espressa

“[I]. I contraenti possono convenire espressamente che il contratto si risolva nel caso che una determinata obbligazione non sia adempiuta secondo le modalità stabilite.

[II]. In questo caso, la risoluzione si verifica di diritto quando la parte interessata dichiara all'altra che intende valersi della clausola risolutiva”.

## ARTICLE 1456 ICC

### Express termination clause

*“[I]. Contracting parties may expressly agree on the fact that contract of the case shall be terminated in case that a certain obligation is not performed in the manner approved.*

*[II]. In this case, termination occurs at law when the interested party declares to the other party that she wants to avail herself of the termination clause”.*

Finally, please note that even resolutions of a collegial body of a legal person are unilateral legal transactions (there is a unique centre of interest).

### 10.7 On *dichiarazioni recettizie* and *non recettizie*.

Declarations can be distinguished due to the fact that their legal effects (the fact that they produce effects) can be subordinated or not to its own reception in the legal sphere of others.

In bilateral and multilateral legal transactions, the declarations of each party are always meant to be addressed to the other party, and therefore they are *dichiarazioni recettizie*.

Examples: as for contracts, see artt.1326 and 1335 ICC.

## ARTICOLO 1326 CC

### Conclusione del contratto

*“[I]. Il contratto è concluso nel momento in cui chi ha fatto la proposta ha conoscenza dell'accettazione dell'altra parte.*

*[II]. L'accettazione deve giungere al proponente nel termine da lui stabilito o in quello ordinariamente necessario secondo la natura dell'affare o secondo gli usi.*

*[III]. Il proponente può ritenere efficace l'accettazione tardiva, purché ne dia immediatamente avviso all'altra parte.*

*[IV]. Qualora il proponente richieda per l'accettazione una forma determinata, l'accettazione non ha effetto se è data in forma diversa.*

*[V]. Un'accettazione non conforme alla proposta equivale a nuova proposta”.*

## ARTICLE 1326 ICC

### Completion of contract

*“[I]. A contract is completed when the proposer is aware of the acceptance of the other party.*

[II]. Acceptance must reach the proposer within the time limit established by him or as ordinarily necessary according to the nature of the deal or according to customs.

[III]. The proposer can accept late acceptance, provided that he immediately gives notice to the other party.

[IV]. If the proposer requires a specific form for the acceptance, then acceptance has no effect if it has been issued in a different form.

[V]. An acceptance that does not comply with the proposal is equivalent to a new proposal”.

Then, as for unilateral legal transactions:

### **ARTICOLO 1334 CC**

#### **Efficacia degli atti unilaterali**

“[I]. Gli atti unilaterali producono effetto dal momento in cui pervengono a conoscenza della persona alla quale sono destinati”.

### **ARTICLE 1334 ICC**

#### **Effectiveness of unilateral acts**

“[I]. Unilateral acts take effect from the moment they are known by the person to whom they are addressed to”.

Please note that the above-mentioned acts are the unilateral acts referred to in art. 1324 ICC.

### **ARTICOLO 1324 CC**

#### **Norme applicabili agli atti unilaterali**

“[I]. Salvo diverse disposizioni di legge, le norme che regolano i contratti si osservano, in quanto compatibili, per gli atti unilaterali tra vivi aventi contenuto patrimoniale”.

### **ARTICLE 1324 ICC**

#### **Rules applicable to unilateral acts**

“[I]. Unless otherwise provided by the law, the rules of law governing contracts are applied to unilateral acts amongst living individuals having a financial content, insofar as they are compatible ones”.

Again, in contract law, see also art. 1335 ICC, which clarifies the above-mentioned concept of *dichiarazione recettizia*.

## ARTICOLO 1335 CC

### Presunzione di conoscenza

“[I]. *La proposta, l'accettazione, la loro revoca e ogni altra dichiarazione diretta a una determinata persona si reputano conosciute nel momento in cui giungono all'indirizzo del destinatario, se questi non prova di essere stato, senza sua colpa, nell'impossibilità di averne notizia*”.

## ARTICLE 1335 ICC

### Presumption of knowledge

“[I]. Proposal, acceptance, their revocation and any other declaration addressed to a specific person are deemed to be known when they reach the address of the recipient, if the latter does not prove to have been, without his own fault, in the impossibility of having news about it”.

As for the unilateral legal transactions, we have already seen art. 1334 ICC, but, on a general basis, they can be *dichiarazioni recettizie* or *non recettizie*.

*Dichiarazioni recettizie*: see e.g., the unilateral withdrawal from a company or an association.

*Dichiarazioni non recettizie*: the will/testament; acceptance of inheritance; the promise to the public (which is binding as soon as it is published).

## 10.8 On the acts of disclosure/manifestation of will.

Will can be disclosed/manifested:

- in an **express** way; or
- in a **tacit way**, which means through a **determining behaviour**, or
- sometimes, even by **silence**.

Now, please note that a behaviour can be considered a determining one, because:

- a) the law itself gives it such a value.

Examples:

- 1) a voluntary performance of a contract that can be avoided by the party that is entitled to the avoidance. This kind of performance is called *convalida* of the contract, under art. 1444 ICC;

- 2) a voluntary restitution of a *titolo*.

## ARTICOLO 1237 CC

### Restituzione volontaria del titolo

“[I]. *La restituzione volontaria del titolo originale del credito, fatta dal creditore al debitore, costituisce prova della liberazione anche rispetto ai condebitori in solido.*

[II]. *Se il titolo del credito è in forma pubblica, la consegna volontaria della copia spedita in forma esecutiva fa presumere la liberazione, salva la prova contraria”.*

## ARTICLE 1237 ICC

### Voluntary restitution of the title

“[I]. Voluntary restitution of the original title of credit, made by creditor to debtor, constitutes proof of release even on behalf of joint and several debtors.

[II]. *If the title of credit is in a public form, then voluntary delivery of a copy sent in enforceable form leads to presumption of release, except in case of evidence of the contrary”.*

Please note that in the above-mentioned provision the use of the word *titolo*/title is meant to be distinguished from the use of the word which appears on art. 1992 ICC and ff. ones, on “*titoli di credito*”, where specific rules of law are set forth by the Code to govern them.

Here, like in art. 1153 ICC (on transfer of ownership of movable properties by non-owners), the word *titolo*/title is referred to the actual source of obligation of the case, like, on a general basis, a contract, that, when it involves immovable properties, must have the form of a written document.

Accordingly, hereinabove, *titolo* means, if we are talking about an obligation that arises from a contract, the contract itself.

Then, still, a behaviour can be considered a determining one, because:

b) the actual circumstances give it such a value.

Examples:

– the immediate execution of a contract by a supplier means acceptance of the supply contract;

– getting on the bus means acceptance of the contract of transportation.

Please note that sometimes the apparent completion of the contract can be excluded by release of an explicit explanatory statement in the opposite sense, namely, the so-called *protestatio*. An example: the delivery of an asset forwarded with a paper explaining that it was sent for mere inspection, rather than for the conclusion of a sale-purchase agreement.

However, sometimes the *protestatio* has no legal effect too. *Exempli gratia*: if I get on the bus, or if I park in a parking lot subject to payment, I cannot declare, afterwards, that I did not want to complete the contract of the case.

What really matters, in these cases, is the actual implementation of the legal transaction of the case.

### **On silence.**

As a rule of law, it does not involve any disclosure/manifestation of will.

In some circumstances, however, it can have a declarative effect.

Example: the vote of someone that, called in to respond to a request for a vote on approval of a certain resolution, abstain himself.

Please note that the recognition of a declarative value to silence can:

- be given only by the *law* (see e.g., art. 1333, paragraph 2, ICC); or
- derive from a *previous agreement* between the parties, or from *good faith*, taking into account the customs of a specific social circle or a specific business practice in a certain area.

On silence in the form of the (mere) omission of a declaration: please see the case of the acceptance of inheritance, under art. 481 ICC.

## **ARTICOLO 481 CC**

### **Fissazione di un termine per l'accettazione**

“[I]. Chiunque vi ha interesse può chiedere che l'autorità giudiziaria fissi un termine entro il quale il chiamato dichiari se accetta o rinunzia all'eredità. Trascorso questo termine senza che abbia fatto la dichiarazione, il chiamato perde il diritto di accettare”.

## **ARTICLE 481 ICC**

### **Setting a deadline for acceptance**

“[I]. Everyone who has an interest in it can ask that the judicial authority fix a term within which the person called declares whether she is going to accept or renounce to inheritance. Once this term is expired without any declaration, then the called person loses her right to accept”.

## **10.9 On interpretation of legal transactions.**

The meaning of words and signs that we customarily use in our daily life as our means of expression varies in relation to the context of the case, or the circumstances of the case, or with the ways according to which single individuals or social groups express themselves.

*Ergo*, there is a need for construction/interpretation in general.

Accordingly, there can be areas of dim light, and therefore there is the problem of determining the proper choice, even at law, between different legal meanings.

### **The rules of law on interpretation of legal transactions.**

In contract law, please see artt. 1362-1371 ICC, also applicable to unilateral legal transactions, pursuant to art. 1324 ICC.

Therein, there is a distinction between the rules on subjective interpretation and those on objective interpretation.

### **The subjective interpretation.**

See art. 1362 ICC.

## **ARTICOLO 1362 CC**

### **Intenzione dei contraenti**

*“[I]. Nell’interpretare il contratto si deve indagare quale sia stata la comune intenzione delle parti e non limitarsi al senso letterale delle parole.*

*[II]. Per determinare la comune intenzione delle parti, si deve valutare il loro comportamento complessivo anche posteriore alla conclusione del contratto”.*

## **ARTICLE 1362 ICC**

### **Intention of the contracting parties**

*“[I]. In interpreting a contract, it is necessary to investigate what was the common intention of the parties and not to remain limited to the literal sense of the words.*

*[II]. To determine the common intention of the parties, it is necessary to evaluate their overall behaviour even after completion of the contract”.*

The first criterion is interpreting the declarations of the case in accordance with the meaning given to them by the parties (the rule is worthy to be applied, once again, also to unilateral legal transaction with a financial content).

In this sense, please also see the role of the context, covered by art. 1363 ICC.

## ARTICOLO 1363 CC

### Interpretazione complessiva delle clausole

“[I]. *Le clausole del contratto si interpretano le une per mezzo delle altre, attribuendo a ciascuna il senso che risulta dal complesso dell’atto*”.

## ARTICLE 1363 ICC

### Overall interpretation of the clauses

“[I]. The clauses of the contract must be interpreted one through the others, giving each one the meaning that comes out from the act as a whole”.

Then, as for the “*overall behaviour*” of the parties mentioned in art. 1362, par. 2, ICC, it means: negotiations; customs; behaviour after completion of contract; performance of contract, and so on.

The second paragraph of art. 1362 ICC discloses the prevailing role of common meaning over literal meaning (also for the cases in which a particular form is required, under art. 1350 ICC).

### **The objective interpretation.**

It comes into play if a difference of meaning arises between the declaring party and the recipient of the case.

Rationale for application: reasonableness.

The rules for the choice of the right meaning: see artt. 1367-1371 ICC.

## ARTICOLO 1367 CC

### Conservazione del contratto

“[I]. *Nel dubbio, il contratto o le singole clausole devono interpretarsi nel senso in cui possono avere qualche effetto, anziché in quello secondo cui non ne avrebbero alcuno*”.

## ARTICLE 1367 ICC

### Preservation of the contract

“[I]. When there is a doubt, then the contract or the individual clauses must be interpreted in the sense in which they can produce some effect, rather than in the one according to which they would produce none”.

Therefore, first of all, we look at the preservation of the contract of the case.

Then,

### **ARTICOLO 1368 CC**

#### **Pratiche generali interpretative**

*“[I]. Le clausole ambigue s’interpretano secondo ciò che si pratica generalmente nel luogo in cui il contratto è stato concluso.*

*[II]. Nei contratti in cui una delle parti è un imprenditore, le clausole ambigue s’interpretano secondo ciò che si pratica generalmente nel luogo in cui è la sede dell’impresa”.*

### **ARTICLE 1368 ICC**

#### **General constructive practices**

*“[I]. Ambiguous clauses are interpreted according to what is generally practiced in the place where the contract was completed.*

*[II]. In contracts in which one of the parties is an entrepreneur, the ambiguous clauses are interpreted according to what is generally practiced in the place where the company has its own headquarters”.*

### **ARTICOLO 1369 CC**

#### **Espressioni con più sensi**

*“[I]. Le espressioni che possono avere più sensi devono, nel dubbio, essere intese nel senso più conveniente alla natura e all’oggetto del contratto”.*

### **ARTICLE 1369 ICC**

#### **Expressions with multiple meanings**

*“[I]. In doubt, the expressions that may have several meanings must be interpreted in the utmost convenient way in relation to the nature and the subject matter of the contract”.*

### **ARTICOLO 1370 CC**

#### **Interpretazione contro l’autore della clausola**

*“[I]. Le clausole inserite nelle condizioni generali di contratto o in moduli o formulari predisposti da uno dei contraenti s’interpretano, nel dubbio, a favore dell’altro”.*

## ARTICLE 1370 ICC

### Interpretation against the drafter of the clause

*“[I]. Clauses inserted in general terms of contract or in forms or pre-forms drafted by one of the contracting parties are interpreted, when there is a doubt, in favour of the other”.*

Please note that this rule of law does not apply to the so-called “individual contracts”, meaning contracts actually negotiated by the parties, but it rather applies to the clauses included in the general terms of contract or in the pre-forms already drafted by a contracting party.

Finally,

## ARTICOLO 1371 CC

### Regole finali

*“[I]. Qualora, nonostante l’applicazione delle norme contenute in questo capo, il contratto rimanga oscuro, esso deve essere inteso nel senso meno gravoso per l’obbligato, se è a titolo gratuito, e nel senso che realizzi l’equo contemperamento degli interessi delle parti, se è a titolo oneroso”.*

## ARTICLE 1371 ICC

### Final rules

*“[I]. If the contract remains obscure, despite application of the rules of law contained in this chapter, then it must be interpreted in the least burdensome sense for the obliged party, if it is free of charge, and in the sense apt to achieve a fair balance between the interests of the parties, if it was completed for a consideration”.*

Please note that article 1371 ICC is a closing term/provision (*clausola di chiusura*)<sup>18</sup>.

Inside these rules, art. 1366 ICC is, in any case, a limit to the objective interpretation too.

## ARTICOLO 1366 CC

### Interpretazione di buona fede

*“[I]. Il contratto deve essere interpretato secondo buona fede”.*

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<sup>18</sup> We spoke about the concept of “*clausola di chiusura*” even in lecture 8, par. 8.3, on ownership, and lecture 9, par. 9.3, when we were dealing with sources of obligations.

## ARTICLE 1366 ICC

### Good faith interpretation

*“[I]. The contract must be interpreted in good faith”.*

See e.g., the case of the declaring party that knows that the recipient has understood otherwise.

Please note that in this system of rules of law, there is a principle of hierarchy: the rules on subjective interpretation precede those on objective interpretation; art. 1366 ICC prevails in the case of objective interpretation; art. 1371 ICC is a closing provision.

To end with, as for the rules on interpretation/construction of wills, there is slight difference, as the judgment reported herein below discloses.

See **Cassazione civile sez. II, 22 luglio 2004, n. 13785**.

*“L’interpretazione del testamento, cui in linea di principio sono applicabili le regole di ermeneutica dettate dal codice in tema di contratti, con la sola eccezione di quelle incompatibili con la natura di atto unilaterale non recettizio del negozio mortis causa, è caratterizzata rispetto a quella contrattuale da una più penetrante ricerca, aldilà della dichiarazione, della volontà del testatore, la quale, alla stregua dell’art. 1362, c.c., va individuata con riferimento ad elementi intrinseci alla scheda testamentaria, sulla base dell’esame globale della scheda stessa e non di ciascuna singola disposizione, e, solo in via sussidiaria, ove cioè dal testo dell’atto non emerga con certezza l’effettiva intenzione del de cuius e la portata della disposizione, con il ricorso ad elementi estrinseci al testamento, ma pur sempre riferibili al testatore”.*

Accordingly, the rules on interpretation of contract are applied also to wills, as they are legal transactions too, but the interpreter must mainly rely on the sole subjective interpretation and look at the rules on objective one just in residual cases.

## **11 Lecture 11: on Italian contract law. Introduction to the subject matter, different types of contracts and completion of a contract.**

SUMMARY: 11.1 On contract and society in general. – 11.2 On the different types of contracts. – 11.3 On completion of contracts.

### **11.1 On contract and society in general.**

We have already learned that

#### **ARTICOLO 1321 CC**

##### **Nozione**

*“[I]. Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale”.*

#### **ARTICLE 1321 ICC**

##### **Notion**

*“[I]. A contract is an agreement reached by two or more parties to set up, govern or terminate a legal financial relationship amongst them”.*

The contract was originally seen as an important means of expression of men's freedom (during 1800s) aimed at achieving their autonomy in their private life and in the carrying out of the productive activities.

See art. 1134 of the French Civil Code dated 1804: *“Agreements legally concluded have the force of law between those who have signed them”.*

The context is a society in which the constraints imposed by the State are minimal ones, and the law of the State has the task of guaranteeing the free expression of the will of individuals, as long as it does not affect the freedom of others.

The idea of the underlying capitalist society at the time was that freedom had to be seen as the prerequisite for allowing everyone to enter, with their material means, into the game of the free competition.

Related economic theories: the pursuit of individual interests involves a full and efficient use of the productive resources.

The contract was the basic way to express freedom.

As for the justice of the contractual relationship of the case, it was guaranteed by the fact that there was freedom of negotiation, and therefore the parties were placed on a level of legal equality.

But societies are always under evolutions, and accordingly the above-mentioned theories did not take into account the fact that there may be economic and social inequalities between the contracting parties of the case, and that consequently there is the possibility that one of them imposes unfair conditions on the counterparty and effectively nullifies the contractual freedom.

In this sense, there are major historic examples in:

- the field of labour law; and
- the field of the supply of services or the sale of goods by companies of a certain economic importance.

In all these cases, the contractual freedom of the worker/employee of the case, or the user/consumer of the case, became seriously limited as time went by.

Outcome: there was no bargaining power; there was just the possibility of mere adherence or refusal of the contract of the case.

Therefore, the so-called *laissez faire* was abandoned, and interventionist doctrines were affirmed (which advocate the State's intervention in the economic process).

But experience shows us the general inefficiency of the State's intervention in the direct management of economic activities.

*Ergo*, a renewed confidence in a system based on a private economic initiative governed in a way as to ensure its development in accordance with social utility came into play.

*Ergo*, further developments in the discipline of private autonomy in contracts, thanks to the perception of market and competition imperfections, were introduced.

An example.

From an economic point of view, even nowadays, consumers benefit from competition, in terms of choice and quality of the product.

From a legal point of view, on the contrary, it is quite the opposite, even due to the modern bargaining techniques.

Production of standardized goods and services means simplification of the process of formation of the will of the parties.

Where there are uniform contractual schemes there is no negotiation at all.

Therefore, because of this actual policy on completion of contracts, an intervention of the legislator was due.

Accordingly, please note that artt. 1341 and 1342 were originally inserted in the ICC.

## ARTICOLO 1341 CC

### Condizioni generali di contratto

“[I]. *Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell’altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l’ordinaria diligenza.*

*[II]. In ogni caso non hanno effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità, facoltà di recedere dal contratto o di sospenderne l’esecuzione, ovvero sanciscono a carico dell’altro contraente decadenze, limitazioni alla facoltà di opporre eccezioni, restrizioni alla libertà contrattuale nei rapporti coi terzi, tacita proroga o rinnovazione del contratto, clausole compromissorie o deroghe alla competenza dell’autorità giudiziaria”.*

## ARTICLE 1341 ICC

### General terms of contract

“[I]. General terms of contract drafted by one of the contracting parties are effective against the other if the latter knew them, or should have known them, using ordinary diligence, at the time of completion of contract.

[II]. In any case, terms that introduce, in favour of the person who drafted them, limitations of liability, right to withdraw from contract or to suspend its own execution, or that provide for, against the other contracting party, deadlines, limitations to the possibility to raise exceptions, restrictions to the freedom of contracts towards third parties, silent extension or renewal of the contract of the case, arbitration clauses or exceptions to the jurisdiction of judicial authorities, they do not produce any effect, if they are not specifically approved in writing”.

## ARTICOLO 1342 CC

### Contratto concluso mediante moduli o formulari

“[I]. *Nei contratti conclusi mediante la sottoscrizione di moduli o formulari, predisposti per disciplinare in maniera uniforme determinati rapporti contrattuali, le clausole aggiunte al modulo o al formulario prevalgono su quelle del modulo o del formulario qualora siano incompatibili con esse, anche se queste ultime non sono state cancellate.*

*[II]. Si osserva inoltre la disposizione del secondo comma dell’articolo precedente”.*

## ARTICLE 1342 ICC

### Contract concluded through forms or pre-forms

*“[I]. In contracts completed through signature of forms or pre-forms, drafted to govern certain contractual relationships in a uniform manner, the clauses added to the form or pre-form prevail over those of the form or pre-form if they are inconsistent with them, even if the latter ones have not been erased.*

*[II]. The provisions of the second paragraph of the previous article are observed too”.*

Along with that, as the time went by, the most important deals were completed between representatives of legal persons and/or their teams of lawyers.

Here, an exchange of “anonymous”/group wills came out.

The outcome is a contract that is very different from the one that originally expressed the previously mentioned full freedom of contract.

Again, the ideologists of the nineteenth century had put the will of the parties at the centre of the contractual activities and given prevalent relevance to the rules on formation and declaration of contractual will and, therefore, to the vices of the will.

On the contrary, standardized bargaining means less relevance for mistake, (moral) violence or threat and fraud, namely, the three vices of will ruled by art. 1427 ICC and ff. ones.

Accordingly, clients’ and customers’ protection has passed more and more through rules and principles of public policy aimed at prohibiting the most unfair clauses.

Still, let’s compare the contrast between the increasing role of negotiations in today’s practice and the discipline of the Civil Code on pre-contractual liability (art. 1337 ICC).

## ARTICOLO 1337 CC

### Trattative e responsabilità precontrattuale

*“[I]. Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede”.*

## ARTICLE 1337 ICC

### Negotiations and pre-contractual liability

*“[I]. Parties must behave in good faith, during negotiations and before completion of contract”.*

Moreover, vices of will are also less relevant in case of negotiations and contracts completed by and between companies, as here the will of the party of the case is not an individual one, but, again, an “anonymous” one.

Accordingly, a need for rules of law on conflict of interests grew up too, so to protect the company of the case from abuses performed by its representatives.

Eventually, the major outcomes are:

- as for the contracts completed by private individuals, the consumers’ protection, developed throughout public policy rules of protection;
- in the field of labour law, workers’ unions have developed a policy for the signature of collective contracts designed as a framework contract for the individual contract of employment of the case.

Then, as for the contracts completed between entrepreneurs, traditional principles on the original individual negotiations (meaning contractual freedom) are still applied over here.

Limits to freedom are sometimes provided for by the *antitrust law* and by principles of public policy of protection and financial direction (see art. 9 of the law June 18, 1998, n. 192, on the so-called *abuso di posizione dominante*).

Finally, other limits introduced to original contractual full freedom of contract: in some cases, the mere repeal of some contractual clauses (namely, e.g., when issues of control of prices or application of forced prices were involved).

Examples of forced contracts: the imposition of the obligation to contract and equal treatment (see art. 2597 ICC) for the suppliers of public services.

## 11.2 On the different types of contracts.

As far as contracts are concerned, there are various kinds of contracts (or contractual structures) available in the Italian legal system, which are to be distinguished, as herein below detailed:

1) **Contracts signed for a consideration (*contratti a titolo oneroso*) versus contracts free of charge (*contratti a titolo gratuito*).**

Please see, e.g., a sale-purchase agreement *versus* a gift.

2) **Contracts with corresponding services (*contratti a prestazioni corrispettive*) versus associative contracts (*contratti associativi*).**

Please see, e.g., a sale-purchase agreement *versus* a contract of company.

3) ***Contratti commutativi versus contratti aleatori.***

The word “*aleatorio*” comes from the word “*alea*”, which is, legally speaking, related to the concept of risk involved, in case of a contractual relationship, with a variation of cost or value of one or more of the services of the case.

Please note that a general risk is inherent in every kind of legal relationship; accordingly, when it does not exceed the customary limits, it usually falls on each contracting party.

On the contrary, a *contratto aleatorio* is a contract that involves a peculiar risk for one or both contracting parties. Examples: a life annuity (*rendita vitalizia*); a stock-exchange contract; a contract signed to participate to a game or a bet (when they are legally allowed); a contract of insurance.

On life annuity, see art. 1872 ICC.

## **ARTICOLO 1872 CC**

### **Modi di costituzione**

*“[I]. La rendita vitalizia può essere costituita a titolo oneroso, mediante alienazione di un bene mobile o immobile o mediante cessione di capitale.*

*[II]. La rendita vitalizia può essere costituita anche per donazione o per testamento, e in questo caso si osservano le norme stabilite dalla legge per tali atti”.*

## **ARTICLE 1872 ICC**

### **Means of constitution**

*“[I]. A life annuity can be created for a consideration, by way of sale of a movable or an immovable property, or through a transfer of a capital.*

*[II]. A life annuity can also be set up via a gift or a will, and in this case the rules of law provided for such acts are to be observed”.*

On contract of insurance, see art. 1882 ICC.

## **ARTICOLO 1882 CC**

### **Nozione**

*“[I]. L’assicurazione è il contratto col quale l’assicuratore, verso pagamento di un premio, si obbliga a rivalere l’assicurato, entro i limiti convenuti, del danno ad esso prodotto da un sinistro, ovvero a pagare un capitale o una rendita al verificarsi di un evento attinente alla vita umana”.*

## ARTICLE 1882 ICC

### Notion

“[I]. An insurance is a contract according to which the insurer, upon payment of a premium, undertakes to cover the insured party, within the terms agreed on, for the damages caused to her by an accident, or to pay a capital or an annuity upon occurrence of an event related to human life”.

Please note that *aleatorietà* can arise from the will of the parties or at law (as it happens in the above-mentioned contracts).

Consequences are involved, herein, *exempli gratia*, when we deal with the legal contractual remedy called *rescissione* (under art. 1447 ICC and ff. ones, as we shall see *infra*, in lecture 16, par. 16.5).

Then, again other kinds of contracts available are:

#### 4) **Contracts providing for a continuous or a periodic performance/execution.**

These are contracts, whose execution continues over time, to meet needs that also last over time.

Examples: employment contracts, supply contracts, rent agreements, deposit contracts, loan agreements, insurance contracts, contracts of company, agency agreements, *et cetera*.

Please note that these contracts differ from contracts providing for a deferred execution (*contratti ad esecuzione differita*). Here, the deferral of the service is simply helpful to make it more convenient, for one party, to perform the service of the case, or for the other to receive it.

Now, there is a peculiar rule of law on termination of, and withdrawal from, contracts which provide for continuous/periodic performances. See art. 1458 ICC; art. 1373, par. 2, ICC.

Contracts for a continuous or a periodic performance are contracts with a duration that is often undetermined. Accordingly, a unilateral withdrawal is always possible: just a notice of withdrawal is due, except in cases of “*giusta causa*”.

#### 5) **Consensual and formal contracts, *contratti reali* and *contratti a effetti reali*.**

Consensual contracts are contracts that can be completed by the mere *consensus*/consent of the parties (however disclosed, in compliance with the general rule on the freedom of forms).

Please note that the concept of a “consensual contract” is not to be confused, per se, with the so-called *principio consensualistico*, which does not represent a specific kind of contract, but a general rule of law, provided for by our legal system, for transfers of ownership or minor rights in rem over properties/things (namely, in Latin “*res*”) or personal rights, under article 1376 ICC, labelled *contratto a effetti reali*.

**ARTICOLO 1376 CC**  
**Contratto con effetti reali**

“[I]. *Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata, la costituzione o il trasferimento di un diritto reale ovvero il trasferimento di un altro diritto, la proprietà o il diritto si trasmettono e si acquistano per effetto del consenso delle parti legittimamente manifestato*”.

**ARTICLE 1376 ICC**  
**Contracts and effects over things**

“[I]. *In contracts which have as their subject matter the transfer of ownership over a specified thing, the creation or the transfer of a right in rem or the transfer of another right, ownership or the right of the case is transferred and acquired by way of mutual consent of the parties lawfully expressed*”.

Formal contracts: these are contracts that require, for their completion, in addition to the consent of the parties, a specific form (as it happens, for example, for the contracts provided for by art. 1350 ICC, or a gift/donation, whose form is ruled by art. 782 ICC, which requires an *atto pubblico*, plus, due to art. 48 of the notarial law n. 89/1913, 2 witnesses).

Contratti reali: these are contracts that require, for completion of the contract of the case, in addition to the consent of the parties, the delivery of the thing of the case.

Traditional examples: loan; deposit; a contract that creates a right of pledge; a gratuitous bailment (namely, a *comodato*).

Then, a gift of a thing of modest value gives birth to a *contratto reale* too. Please see art. 783 ICC.

**ARTICOLO 783 CC**  
**Donazioni di modico valore**

“[I]. *La donazione di modico valore che ha per oggetto beni mobili è valida anche se manca l'atto pubblico, purché vi sia stata la tradizione.*

[II]. *La modicità deve essere valutata anche in rapporto alle condizioni economiche del donante*”.

## ARTICLE 783 ICC

### Gift of modest value

*“[I]. A gift of modest value whose subject matter is movable properties, it is a valid one, even if an atto pubblico is missing, as long as there has been delivery.*

*[II]. The modesty of value must be assessed taking into account also the financial conditions of the donor”.*

### 11.3 On completion of contracts.

There are different ways to complete (or enter into) a contract. The rules of law on completion of contracts are artt. 1326-1342 ICC.

## ARTICOLO 1326 CC

### Conclusione del contratto

*“[I]. Il contratto è concluso nel momento in cui chi ha fatto la proposta ha conoscenza dell'accettazione dell'altra parte.*

*[II]. L'accettazione deve giungere al proponente nel termine da lui stabilito o in quello ordinariamente necessario secondo la natura dell'affare o secondo gli usi”.*

## ARTICLE 1326 ICC

### Completion of contract

*“[I]. A contract is completed when the proposer is aware of the acceptance of the other party.*

*[II]. Acceptance must reach the proposer within the time limit established by him or as ordinarily necessary according to the nature of the deal or according to customs”.*

## ARTICOLO 1327 CC

### Esecuzione prima della risposta dell'accettante

*“[I]. Qualora, su richiesta del proponente o per la natura dell'affare o secondo gli usi, la prestazione debba eseguirsi senza una preventiva risposta, il contratto è concluso nel tempo e nel luogo in cui ha avuto inizio l'esecuzione.*

*[II]. L'accettante deve dare prontamente avviso all'altra parte dell'iniziata esecuzione e, in mancanza, è tenuto al risarcimento del danno”.*

## ARTICLE 1327 ICC

### Execution before acceptor's reply

*“[I]. If, at request of the proposer or due to the nature of the deal or according to customs, the service must be performed without a prior reply, then the contract is completed at the time and place where execution began.*

*[II]. The acceptor must promptly notify the other party of the initiated execution and, failing that, is obliged to pay damages”.*

## ARTICOLO 1328 CC

### Revoca della proposta e dell'accettazione

*“[I]. La proposta può essere revocata finché il contratto non sia concluso. Tuttavia, se l'accettante ne ha intrapreso in buona fede l'esecuzione prima di avere notizia della revoca, il proponente è tenuto a indennizzarlo delle spese e delle perdite subite per l'iniziata esecuzione del contratto.*

*[II]. L'accettazione può essere revocata, purché la revoca giunga a conoscenza del proponente prima dell'accettazione”.*

## ARTICLE 1328 ICC

### Revocation of proposal and acceptance

*“[I]. The proposal can be revoked until the contract is completed. However, if the acceptor has undertaken execution in good faith before being informed of the revocation, then the proposer is obliged to indemnify him for the expenses and losses suffered for the initiated execution of contract.*

*[II]. Acceptance can be revoked, provided that revocation is known to the proposer before acceptance”.*

What are the rules that can be drawn from the abovementioned *norme giuridiche*?

The traditional completion of a contract occurs through an exchange of declarations (see art. 1326 ICC).

Anyway, a determining behaviour may also suffice, for example, if a proposal is received and an execution is started, without a declaration of acceptance (see art. 1327 ICC). This in compliance with the general rule of law according to which a declaration and a determining behaviour are equalized one to the other by the law.

Sometimes it is the proponent himself who requests the other party to perform the service immediately, without a prior response.

Incidentally speaking, please note that, as for the right of indemnity mentioned above, in art. 1328 ICC, for the expenses and the losses incurred by the acceptor, here we are talking about a compensation based on the so-called *interesse negativo*, as there is no contract in force, and the behaviour of the damaging party is related, *stricto sensu*, to the legal concept of negotiations (mentioned herein below).

### **On the proposal-acceptance exchange.**

The proposal must be such that the mere consent of the counterparty can suffice for the completion of the contract.

The proposal must contain the essential requirements due for every contract.

Accordingly, please remember that art. 1325 ICC must come into play.

### **ARTICOLO 1325 CC**

#### **Indicazione dei requisiti**

“[I]. *I requisiti del contratto sono:*

- 1) *l'accordo delle parti;*
- 2) *la causa;*
- 3) *l'oggetto;*
- 4) *la forma, quando risulta che è prescritta dalla legge sotto pena di nullità”.*

### **ARTICLE 1325 ICC**

#### **Requirements' indication**

“[I]. *Requirements of a contract are:*

- 1) *the agreement of the parties;*
- 2) *the causa;*
- 3) *the subject matter;*
- 4) *the form, when it is prescribed by law under penalty of nullity”.*

Moreover, there must be full compliance between proposal and acceptance, otherwise that second declaration can be qualified as a counterproposal at the most (see art. 1326, last paragraph, ICC).

Then, as for the value of the binding value of a proposal, please also see artt. 1329 and 1330 ICC.

## **ARTICOLO 1329 CC**

### **Proposta irrevocabile**

*“[I]. Se il proponente si è obbligato a mantenere ferma la proposta per un certo tempo, la revoca è senza effetto.*

*[II]. Nell'ipotesi prevista dal comma precedente, la morte o la sopravvenuta incapacità del proponente non toglie efficacia alla proposta, salvo che la natura dell'affare o altre circostanze escludano tale efficacia”.*

## **ARTICLE 1329 ICC**

### **Irrevocable proposal**

*“[I]. If the proposer has obliged himself to keep the proposal steady for a certain period of time, then revocation is without effect.*

*[II]. In the case provided for in the previous paragraph, the death or the incapacity of the proposer does not invalidate the proposal, unless the nature of the deal or other circumstances exclude such effectiveness”.*

## **ARTICOLO 1330 CC**

### **Morte o incapacità dell'imprenditore**

*“[I]. La proposta o l'accettazione, quando è fatta dall'imprenditore nell'esercizio della sua impresa, non perde efficacia se l'imprenditore muore o diviene incapace prima della conclusione del contratto, salvo che si tratti di piccoli imprenditori o che diversamente risulti dalla natura dell'affare o da altre circostanze”.*

## **ARTICLE 1330 ICC**

### **Death or incapacity of the entrepreneur**

*“[I]. A proposal or an acceptance, when it is made by an entrepreneur in the exercise of his own business, does not lose its effectiveness if the entrepreneur of the case dies or becomes incapable before completion of the contract, except in case of small entrepreneurs or if otherwise comes out from the nature of the deal or from other circumstances”.*

## On other ways to complete a contract.

### ARTICOLO 1331 CC

#### Opzione

“[I]. Quando le parti convengono che una di esse rimanga vincolata alla propria dichiarazione e l'altra abbia facoltà di accettarla o meno, la dichiarazione della prima si considera quale proposta irrevocabile per gli effetti previsti dall'articolo 1329.

[II]. Se per l'accettazione non è stato fissato un termine, questo può essere stabilito dal giudice”.

### ARTICLE 1331 ICC

#### Option

“[I]. When the parties agree that one of them remains bound by her declaration and the other has the right to accept it or not, then the declaration of the first party is considered as an irrevocable proposal for the effects provided for in article 1329.

[II]. If a deadline has not been set up for acceptance, then it can be established by the judge”.

Here there is a similarity with the irrevocable proposal referred to in art. 1329 ICC.

The irrevocability of the proposal of the case can derive, in fact, from a unilateral declaration of the proposer (see art. 1329 ICC) or from an agreement between the parties (the parties agree that one of them will remain bound by its own proposal and the other can accept it, or not, later): in the latter case there is, precisely, an option agreement.

The difference between an irrevocable proposal and an option agreement becomes relevant when we deal with possible amendments to these two schemes. Namely, because parties can agree on changes in case of an option agreement, whereas a proposer cannot amend an irrevocable proposal.

Please note that an option agreement can either be an accessorial agreement to another contract with a broader content (see e.g., a sale of a land with an option for the purchase of neighbouring land) or an independent contract/source of obligations.

#### Examples of the second case.

On the use of an option agreement (signed upon payment of a consideration) for the purchase of a specific property/asset:

– if I do not have the money to buy the property right away, but I know that I can find it shortly, I can ask for the issuing of an option agreement; or

– if I intend to speculate and resell at a higher price, I can ask for the release of a transferable option agreement.

The beneficiary of the right of option can exercise it or not. If he exercises it, his/her own declaration creates an acceptance that joins the proposal (which has remained firm) and automatically completes the contract.

Then, another way to complete a contract is art. 1333 ICC.

## **ARTICOLO 1333 CC**

### **Contratto con obbligazioni del solo proponente**

*“[I]. La proposta diretta a concludere un contratto da cui derivino obbligazioni solo per il proponente è irrevocabile appena giunge a conoscenza della parte alla quale è destinata.*

*[II]. Il destinatario può rifiutare la proposta nel termine richiesto dalla natura dell'affare o dagli usi. In mancanza di tale rifiuto il contratto è concluso”.*

## **ARTICLE 1333 ICC**

### **Contract with obligations of the sole proposer**

*“[I]. A proposal aimed at completing a contract from which obligations arise for the sole proposer is an irrevocable one as soon as it is known by the party to which it is meant to be directed.*

*[II]. The recipient can refuse the proposal within the time limit required by the nature of the deal or by the customs. The contract is completed, in case of absence of such a refusal”.*

Here, please remember that silence is relevant for the completion of the contract of the case.

A particular case of application of art. 1333 ICC is the one that concerns the so-called contratto preliminare unilaterale (namely, the unilateral preliminary agreement), still, on a technical basis, a bilateral legal transaction (as every contract is a bilateral legal transaction – see art. 1321 ICC).

The unilateral preliminary agreement is a peculiar kind of preliminary contract (which will be analysed herein below) that binds just one of the parties to complete the so-called *contratto definitivo* (final agreement), as the other party is free to complete the final agreement of the case or not (as we shall see in lecture 13, par. 13.1).

Again, another way to complete a contract is the case of a proposal issued on behalf of more than one person, as it occurs in the case of an offer to the public, under art. 1336 ICC.

## ARTICOLO 1336 CC

### Offerta al pubblico

“[I]. L’offerta al pubblico, quando contiene gli estremi essenziali del contratto alla cui conclusione è diretta, vale come proposta, salvo che risulti diversamente dalle circostanze o dagli usi.

[II]. La revoca dell’offerta, se è fatta nella stessa forma dell’offerta o in forma equipollente, è efficace anche in confronto di chi non ne ha avuto notizia”.

## ARTICLE 1336 ICC

### Offer to the public

“[I]. An offer to the public, when it contains the essential elements of the contract whose completion is directed to, is valid as a proposal, unless it comes out otherwise, from the circumstances of the case or from the customs.

[II]. The revocation of the offer, if it has been made in the same form of the offer or in an equivalent form, is also effective against those who have not been notified of it”.

Please note that customs and circumstances may require us to consider what would otherwise be an offer to the public (and would account to a binding proposal) as a mere invitation to propose.

Examples: 1) a catalogue of goods for sale with indication of the price: here the seller wants to be free to complete the contract with whoever he wants, in case of any product shortage; 2) an announcement for a rent agreement made in a newspaper.

Finally, we have already seen other ways for completion of contracts when we talked about the general terms of a contract, namely those under art. 1341 ICC and art. 1342 ICC.

## ARTICOLO 1341 CC

### Condizioni generali di contratto

“[I]. Le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell’altro, se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l’ordinaria diligenza.

[II]. In ogni caso non hanno effetto, se non sono specificamente approvate per iscritto, le condizioni che stabiliscono, a favore di colui che le ha predisposte, limitazioni di responsabilità, facoltà di recedere dal contratto o di sospenderne l’esecuzione, ovvero sanciscono a carico dell’altro contraente decadenze, limitazioni alla facoltà di opporre

eccezioni, restrizioni alla libertà contrattuale nei rapporti coi terzi, tacita proroga o rinnovazione del contratto, clausole compromissorie o deroghe alla competenza dell'autorità giudiziaria”.

## ARTICLE 1341 ICC

### General terms of contract

*“[I]. General terms of contract drafted by one of the contracting parties are effective against the other if the latter knew them, or should have known them, using ordinary diligence, at the time of completion of contract.*

*“[II]. In any case, terms that introduce, in favour of the person who drafted them, limitations of liability, right to withdraw from contract or to suspend its own execution, or that provide for, against the other contracting party, deadlines, limitations to the possibility to raise exceptions, restrictions to the freedom of contracts towards third parties, silent extension or renewal of the contract of the case, arbitration clauses or exceptions to the jurisdiction of judicial authorities, they do not produce any effect, if they are not specifically approved in writing”.*

## ARTICOLO 1342 CC

### Contratto concluso mediante moduli o formulari

*“[I]. Nei contratti conclusi mediante la sottoscrizione di moduli o formulari, predisposti per disciplinare in maniera uniforme determinati rapporti contrattuali, le clausole aggiunte al modulo o al formulario prevalgono su quelle del modulo o del formulario qualora siano incompatibili con esse, anche se queste ultime non sono state cancellate.*

*“[II]. Si osserva inoltre la disposizione del secondo comma dell'articolo precedente”.*

## ARTICLE 1342 ICC

### Contract concluded through forms or pre-forms

*“[I]. In contracts completed through signature of forms or pre-forms, drafted to govern certain contractual relationships in a uniform manner, the clauses added to the form or pre-form prevail over those of the form or pre-form if they are inconsistent with them, even if the latter ones have not been erased.*

*“[II]. The provisions of the second paragraph of the previous article are observed too”.*

Here, under art. 1341 ICC, the so-called *clausole vessatorie*, mentioned in art. 1341, par. 2, ICC, are particularly important. Anyway, nowadays, as for the consumers' contracts (which can be considered particular kinds of general terms of contract), please also see the Consumer Code

(namely, the legislative decree September 6, 2005, n. 206).



## **12 Lecture 12: on Italian contract law. On negotiations, contracts for persons to be appointed, content and effects of a contract.**

SUMMARY: 12.1 On negotiations and progressive completion of contracts. – 12.2 On contracts for persons to be appointed. – 12.3 On the content of a contract. – 12.4 On some common legal effects/consequences of a contract. – 12.5 On contracts and effects over things.

### **12.1 On negotiations and progressive completion of contracts.**

More and more frequently, the completion of a contract is preceded by a very long preliminary activity, that the persons involved carry out to arrive, precisely, at it.

In all these cases, there is often a need to rule all the activities, preliminary to the completion of the contract of the case.

Therefore, nowadays, there are, *exempli gratia*, so-called *minuta* or *puntuazione*, which are documents usually signed, along the path, before the actual completions of contracts.

Purpose of a *minuta*: on a general basis, to remind of, and disclose, the negotiation under way, in case of a claim for damages due to future, unlawful breach of the negotiation in place.

Let's remember that we can talk about completion of a contract only and exclusively if there is an actual agreement on the four essential elements mentioned in art. 1325 ICC; accordingly, the rules on interpretation of all legal transactions (namely, art. 1362 ICC and ff. ones) are also to be applied hereto, so to check out, when a document is signed during a negotiation, if it is a contract or a *minuta*, and the interpretation of the document of the case is to be performed by the interpreter/judge in charge under the general principle *iura novit curia*.

Anyway, parties, even at some stage of the activities preliminary to completion of contract, may desire to bound each other, after having reached an agreement on some elements, while reserving themselves the right to subsequently negotiate on other elements.

As per above, we have the following rules of law on negotiations in the Italian Civil Code, namely artt. 1337-1338 ICC.

### **ARTICOLO 1337 CC**

#### **Trattative e responsabilità precontrattuale**

“[I]. *Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede*”.

## ARTICLE 1337 ICC

### Negotiations and pre-contractual liability

“[I]. Parties must behave in good faith, during negotiations and before completion of contract”.

## ARTICOLO 1338 CC

### Conoscenza delle cause d'invalidità

“[I]. *La parte che, conoscendo o dovendo conoscere l'esistenza di una causa d'invalidità del contratto, non ne ha dato notizia all'altra parte è tenuta a risarcire il danno da questa risentito per avere confidato, senza sua colpa, nella validità del contratto*”.

## ARTICLE 1338 ICC

### Knowledge of the reasons for invalidity

“[I]. The party that, knowing or having to know that there is a reason for the contract of the case to be an invalid one, fails to notify the other party about that, she must pay the damages that the latter has suffered due to the fact that she has relied, without any fault, on the validity of the contract”.

Please note that the good faith mentioned in art. 1337 ICC is an objective one, governed by art. 1176 ICC, different from the subjective one required by art. 1147 ICC, on possession (textually related to “*ignorance of breaching the right of another*”)<sup>19</sup>.

Please also note that deception and threat, which are vices of wills (ruled under art. 1427 ICC and ff. ones) that bring to avoidance of contracts, are also behaviours sources of a pre-contractual liability.

A problem here is that even a judicial release of a judgment for avoidance could not be enough to cover all damages suffered by the damaged party, because she could have sustained losses for expenses incurred in the meantime, as well as losses of alternative deals.

*Ergo*, a compensation for damages (in terms of *interesse negativo*, as herein below assessed) is to be allowed, sometimes, even when avoidance is granted, under art. 1337 ICC (please see, e.g., as a case of pre-contractual liability already expressly covered by the law, art. 1440 ICC, on so-called *dolo incidente*, namely a non-determining fraud).

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<sup>19</sup> As we shall see in lecture 19, par. 19.2.

Please note now that even fault can lead to pre-contractual liability, because the counterparty may have relied on what has been declared to her. See e.g., the case of a not notified withdrawal from negotiations or an unjustified withdrawal from negotiations.

In case of breach of duties of information, see also art. 1338 ICC.

Eventually, please also remember the case of art. 1328 ICC (on the revocation of a proposal for a contract whose execution has already begun by the acceptor throughout an outright performance of the service of the case)<sup>20</sup>.

As we said, all the above-mentioned situations can lead to a payment of damages.

Question: how are the damages to be assessed?

Here a distinction is drawn between the so-called:

- *interesse negativo*, composed by the benefits that would have been obtained and harms that would have been avoided by not engaging in the negotiations of the case; and
- *interesse positivo*, composed by the benefits that would have been obtained and damages that would have been avoided if the contract of the case was executed.

As per above, the general rules for the assessment of damages are art. 1223 ICC and ff. ones.

## ARTICOLO 1223 CC

### Risarcimento del danno

*“[I]. Il risarcimento del danno per l’inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta”.*

## ARTICLE 1223 ICC

### Compensation for damages<sup>21</sup>

*“[I]. Compensation for damages due to non-performance or delay in performing must include the losses suffered by the creditor as well as his missing profits, insofar as they are an immediate and direct consequence of the damaging event of the case”.*

The voices involved under art. 1223 ICC are:

- so-called *danno emergente* (emerging losses, generally consisting of the living expenses); and

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<sup>20</sup> Please see once again lecture 11, par. 11.3.

<sup>21</sup> Please note that here the word *risarcimento* has been translated, technically speaking, with the word *compensation*, because damages can be awarded, in the Italian legal system, just to restore the legal position of the damaged party, meaning to put her in the very same position in which she was before the damaging event of the case occurred. Punitive damages are not allowed in Italy, against what happens in other legal systems, like the ones pertaining to U.S.A.

- so-called *lucro cessante* (missing profits or loss of earnings).

Now, let's make an example, so we can understand how to distinguish a case involving *interesse negativo* from a case involving *interesse positivo*: the case of a negotiation for a contract for the sale-purchase of goods for 50,000 euros *versus* the case of a contract for the sale-purchase of the very same goods.

Possible consequences of the breach of the negotiation:

- emerging loss: living expenses for 300 euros, due, e.g., to travels;
- the prospective buyer had to renounce to negotiate the possible purchase of alternative goods for 55,000 euros.

Possible consequences of the breach of contract:

- the buyer could have resold the purchased goods for 60,000 euros.

Accordingly, here we have:

as *interesse positivo* = 10,000 euros (profits from the difference between the purchase price and the resale price)<sup>22</sup>; whereas,

as *interesse negativo* = 5,300 euros (living expenses, plus the possibility of buying, alternatively, other goods for 55,000 euros, against 50,000 euros for the goods subject to negotiation).

Having said that, when we deal with the subject matter of the completion of contracts, we have also to deal with the scheme of the: contract for a person to be appointed. Accordingly, let's see the provision concerning this way of completion of a contract too.

## **12.2 On contracts for persons to be appointed.**

Rules of law involved: artt. 1401-1405 ICC.

### **ARTICOLO 1401 CC**

#### **Riserva di nomina del contraente**

“[I]. *Nel momento della conclusione del contratto una parte può riservarsi la facoltà di nominare successivamente la persona che deve acquistare i diritti e assumere gli obblighi nascenti dal contratto stesso*”.

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<sup>22</sup> Obviously, here the voice *interesse positivo* takes into account just the mere damages mentioned in art. 1453 ICC (as the damaged party, under this rule of law, can always file a claim for specific performance, instead of a claim for termination of the contract of the case).

## ARTICLE 1401 ICC

### Appointment of the contracting party retained

“[I]. At the time of completion of a contract a party can retain the right to subsequently appoint the person who shall acquire the rights and take on the obligations arising from the contract itself”.

## ARTICOLO 1402 CC

### Termine e modalità della dichiarazione di nomina

“[I]. *La dichiarazione di nomina deve essere comunicata all'altra parte nel termine di tre giorni dalla stipulazione del contratto, se le parti non hanno stabilito un termine diverso.*

*[II]. La dichiarazione non ha effetto se non è accompagnata dall'accettazione della persona nominata o se non esiste una procura anteriore al contratto”.*

## ARTICLE 1402 ICC

### Deadline and procedures for a declaration of appointment

“[I]. If the parties have not agreed on a different term, then the declaration of appointment must be notified to the other party within three days from completion of contract.

[II]. The declaration has no effect if it is not accompanied by the acceptance of the appointee or if there is no power of attorney issued prior to the contract”.

Please note that article 1402 ICC is a dispositive rule of law.

The declaration of appointment is called, in Italian language, *electio amici*.

Here the provision discloses that the completion of a contract of agency with representation (that we will examine in one of the following lectures and which is governed, jointly, by art. 1704 ICC and art. 1389 ICC and ff. ones) could be involved before the completion of a contract for a person to be appointed. That's because a power of attorney is a unilateral legal transaction according to which the *rappresentato* grants to the *rappresentante* the power to represent him and complete the contract of the case in his own name and on his own behalf<sup>23</sup>; and said power of attorney, under the circumstances, could be disclosed after the completion of the contract for a person to be appointed of the case.

Now, going on with the examination of the rules of law on the contract for a person to be appointed, please also see artt. 1403-1405 ICC.

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<sup>23</sup> Please see lecture 17, par. 17.3, afterwards.

## **ARTICOLO 1403 CC**

### **Forme e pubblicità**

*“[I]. La dichiarazione di nomina e la procura o l'accettazione della persona nominata non hanno effetto se non rivestono la stessa forma che le parti hanno usata per il contratto, anche se non prescritta dalla legge.*

*[II]. Se per il contratto è richiesta a determinati effetti una forma di pubblicità, deve agli stessi effetti essere resa pubblica anche la dichiarazione di nomina, con l'indicazione dell'atto di procura o dell'accettazione della persona nominata”.*

## **ARTICLE 1403 ICC**

### **Forms and publicity**

*“[I]. The declaration of appointment and the power of attorney or the acceptance of the appointee shall have no effect if they are not issued in the same form that the parties used for the contract of the case, even if it is not prescribed by the law.*

*[II]. If a form of publicity is required for certain effects of the contract of the case to be produced, then the declaration of appointment must be made public too, along with the mention of the power of attorney or the acceptance of the appointee”.*

## **ARTICOLO 1404 CC**

### **Effetti della dichiarazione di nomina**

*“[I]. Quando la dichiarazione di nomina è stata validamente fatta, la persona nominata acquista i diritti e assume gli obblighi derivanti dal contratto con effetto dal momento in cui questo fu stipulato”.*

## **ARTICLE 1404 ICC**

### **Effects/consequences of a declaration of appointment**

*“[I]. Once a declaration of appointment has been validly made, then the appointee acquires the rights and takes on the obligations which arise from the contract of the case, with effect from the time of completion of contract”.*

Please note that, according to art. 1404 ICC, under this kind of contract, the appointee acquires the legal position of party of the contract of the case, with retroactive effects, that start from the time of its own completion.

Finally, if the appointee does not accept the appointment, then art. 1405 ICC is to be applied.

## ARTICOLO 1405 CC

### Effetti della mancata dichiarazione di nomina

“[I]. *Se la dichiarazione di nomina non è fatta validamente nel termine stabilito dalla legge o dalle parti, il contratto produce i suoi effetti fra i contraenti originari*”.

## ARTICLE 1405 ICC

### Effects/consequences of a missing declaration of appointment

“[I]. If a declaration of appointment has not been validly made within the deadline set up by the law or by the parties, then the contract of the case produces its own (legal) effects amongst its original contracting parties”.

Accordingly, here we also talk about a contract with an alternative party.

### **On some practical uses of a contract for a person to be appointed.**

A contract for a person to be appointed can be useful in the following cases:

1) in case of a purchase performed for a future/possible resale at a higher price (to be used as a scheme alternative to the option agreement governed by art. 1331 ICC<sup>24</sup>), the mechanism of a sale-purchase contract followed by another contract of sale-purchase for resale involves double taxation. Accordingly, the scheme of the contract for a person to be appointed can be used as an instrument to avoid said double taxation (but for tax-law purposes, please note that the *electio amici* must necessarily take place within the 3 days from the completion of the contract mentioned in art. 1402, par. 1, ICC);

2) again, the contract for a person to be appointed is a scheme which is also useful when someone does not want to appear at the time of completion of the contract of the case, not to jeopardize the negotiation, e.g., on the price to be paid. In this case, here, there is a sort of parallelism, on a practical basis, with the rules of law on agency/*mandato* (governed by art. 1703 ICC and ff. ones), with or without representation (see art. 1704 ICC), as already mentioned above.

### **12.3 On the content of a contract.**

In terms of general content of every contract, please remember, first and foremost, that a contract is an agreement that involves a financial content.

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<sup>24</sup> Analysed in lecture 11, par. 11.3.

## ARTICLE 1321 ICC

### Notion

*“[I]. A contract is an agreement reached by two or more parties to set up, govern or terminate a legal financial relationship amongst them”.*

As for the content itself, please also remember art. 1325 ICC, which speaks of the four essential requirements due for any kind of contract, subject to voidity under art. 1418 ICC.

Again, we have already spoken about art. 1322 ICC, on typical and atypical contracts, and art. 1374 ICC, on integration of contracts, which are both relevant, when we deal with the content of every contract.

## ARTICOLO 1322 CC

### Autonomia contrattuale

*“[I]. Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge.*

*[II]. Le parti possono anche concludere contratti che non appartengano ai tipi aventi una disciplina particolare, purché siano diretti a realizzare interessi meritevoli di tutela secondo l'ordinamento giuridico”.*

## ARTICLE 1322 ICC

### Contractual autonomy

*“[I]. The parties can freely determine the content of the contract within the limits imposed by the law.*

*[II]. The parties can also complete contracts that do not belong to the types having a particular discipline, as long as they are aimed at achieving interests worthy of protection according to the legal system”.*

## ARTICOLO 1374 CC

### Integrazione del contratto

*“[I]. Il contratto obbliga le parti non solo a quanto è nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge, o, in mancanza, secondo gli usi e l'equità”.*

## ARTICLE 1374 ICC

### Integration of a contract

“[I]. A contract obliges the parties not only to what is expressed therein, but also to all the consequences that derive from it, according to the law, or, otherwise, according to customs and fairness”.

#### 12.4 On some common legal effects/consequences of a contract.

The legal effects/consequences of every contract are, basically, *inter partes* effects, as art. 1372 ICC explains.

## ARTICOLO 1372 CC

### Efficacia del contratto

“[I]. Il contratto ha forza di legge tra le parti. Non può essere sciolto che per mutuo consenso o per cause ammesse dalla legge.

[II]. Il contratto non produce effetto rispetto ai terzi che nei casi previsti dalla legge”.

## ARTICLE 1372 ICC

### Effectiveness of a contract

“[I]. A contract has force of law amongst the parties. It can be terminated only by mutual consent or for the reasons established by the law.

[II]. A contract does not produce any (legal) effect against third parties, except in the cases provided for by the law”.

Then, a contract can be generally terminated only by mutual consent (as *pacta sunt servanda*), but please also see art. 1373 ICC.

## ARTICOLO 1373 CC

### Recesso unilaterale

“[I]. Se a una delle parti è attribuita la facoltà di recedere dal contratto, tale facoltà può essere esercitata finché il contratto non abbia avuto un principio di esecuzione.

[II]. Nei contratti a esecuzione continuata o periodica, tale facoltà può essere esercitata anche successivamente, ma il recesso non ha effetto per le prestazioni già eseguite o in corso di esecuzione.

[III]. *Qualora sia stata stipulata la prestazione di un corrispettivo per il recesso, questo ha effetto quando la prestazione è eseguita.*

[IV]. *È salvo in ogni caso il patto contrario”.*

## **ARTICLE 1373 ICC**

### **Unilateral withdrawal**

*“[I]. If one of the parties has the right to withdraw from the contract of the case, this facultà/right can be exercised until the contract has had execution.*

*[II]. In contracts involving continuous or periodic performances, this facultà/right can also be exercised subsequently, but the withdrawal has no effect for services already performed or under way.*

*[III]. If a consideration for the withdrawal has been agreed on, the withdrawal takes effect when the consideration is performed.*

*[IV]. In any case, any different agreement is unaffected”.*

Please note that article 1373 ICC is a dispositive rule of law.

Cases of rights of withdrawal provided for by the law are those:

- allowed on a general basis: please see art. 1671 ICC on *appalto*; art. 1723, par. 1, ICC on *mandato/agency*; artt. 2227 and 2237 ICC, in labour law;
- allowed in peculiar circumstances: please see artt. 1660 ICC and art. 1674 ICC on *appalto* too.

Please also note that a conventional right of withdrawal usually involves the payment of a sum of money. Accordingly, in this case, art. 1386 ICC is called in too.

## **ARTICOLO 1386 CC**

### **Caparra penitenziale**

*“[I]. Se nel contratto è stipulato il diritto di recesso per una o entrambe le parti, la caparra ha la sola funzione di corrispettivo per il recesso.*

*[II]. In questo caso, il recedente perde la caparra data o deve restituire il doppio di quella che ha ricevuta”.*

## **ARTICLE 1386 ICC**

### **Penitential deposit**

*“[I]. If a right of withdrawal has been granted to one or both parties, in a contract, then the deposit has the sole function of consideration for the withdrawal.*

*[II]. In this case, the withdrawing party loses the deposit given or must give back the double of the deposit that she has received”.*

The deposit is generally constituted by a delivery of a sum of money (see herein below art. 1385 ICC). In case of a regular execution of the contract of the case, the deposit is ascribed to the performance due. In case of withdrawal, the deposit can be retained as a means of compensation for the damages suffered.

If the right of withdrawal is granted to the party who has received the deposit too, in case of withdrawal that party must give back the double of the deposit received.

Please note that if the deposit is not delivered at the time of completion of the contract of the case, but it is simply promised as a consideration for the granting of right of withdrawal, then we speak of a *multa penitenziale*.

Please also note that art. 1386 ICC speaks of the deposit in relation to the right of withdrawal, whereas art. 1385 ICC talks about the deposit on a more general basis.

## **ARTICOLO 1385 CC**

### **Caparra confirmatoria**

*“[I]. Se al momento della conclusione del contratto una parte dà all'altra, a titolo di caparra, una somma di danaro o una quantità di altre cose fungibili, la caparra, in caso di adempimento, deve essere restituita o imputata alla prestazione dovuta.*

*[II]. Se la parte che ha dato la caparra è inadempiente, l'altra può recedere dal contratto, ritenendo la caparra; se inadempiente è invece la parte che l'ha ricevuta, l'altra può recedere dal contratto ed esigere il doppio della caparra.*

*[III]. Se però la parte che non è inadempiente preferisce domandare l'esecuzione o la risoluzione del contratto, il risarcimento del danno è regolato dalle norme generali”.*

## **ARTICLE 1385 ICC**

### **Confirmation deposit**

*“[I]. If one party gives to the other, at the time of completion of contract, as a deposit, a sum of money or a quantity of other fungible things, then the deposit, in case of performance, must be given back or ascribed to the service due.*

*[II]. If the party who gave the deposit is in default, then the other party can withdraw from contract, retaining the deposit; if the party who received it is in default, then the other party can withdraw from contract and demand the double of the deposit.*

*[III]. However, if the non-defaulting party prefers to demand execution or termination of contract, then compensation for damages is governed by the general rules of law”.*

There can be different reasons behind the exercise of a right of withdrawal: namely, there could be a withdrawal due to a *ius poenitendi*; a right of withdrawal exercisable *ad nutum*; and a determining right of withdrawal.

## 12.5 On contracts and effects over things.

We have already spoken about the so-called *principio consensualistico*, ruled by art. 1376 ICC<sup>25</sup>. Now, let’s deepen a little bit more the subject matter at stake.

### ARTICOLO 1376 CC

#### Contratto con effetti reali

*“[I]. Nei contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata, la costituzione o il trasferimento di un diritto reale ovvero il trasferimento di un altro diritto, la proprietà o il diritto si trasmettono e si acquistano per effetto del consenso delle parti legittimamente manifestato”.*

### ARTICLE 1376 ICC

#### Contract and effects over things

*“[I]. In contracts which have as their subject matter the transfer of ownership over a specified thing, the creation or the transfer of a right in rem or the transfer of another right, ownership or the right of the case is transferred and acquired by way of mutual consent of the parties lawfully expressed”.*

As already said, here we are talking of a general principle of law on the transfer of ownership or other minor rights in rem on properties or even other/personal rights (rights in *personam*).

Requirements of art. 1376 ICC: the property of the case must be existent and determined/identified.

If the subject matter of the contract of the case are things determined just by genre, then the right of ownership is transferred upon identification, under art. 1378 ICC.

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<sup>25</sup> More specifically, in lecture 7, par. 7.5 (when we were dealing with replaceable and irreplaceable things), as well as in lecture 11, par. 11.2 (when we were speaking of the different kinds of contracts available in the Italian legal system).

## ARTICOLO 1378 CC

### Trasferimento di cosa determinata solo nel genere

“[I]. Nei contratti che hanno per oggetto il trasferimento di cose determinate solo nel genere, la proprietà si trasmette con l'individuazione fatta d'accordo tra le parti o nei modi da esse stabiliti. Trattandosi di cose che devono essere trasportate da un luogo a un altro, l'individuazione avviene anche mediante la consegna al vettore o allo spedizioniere”.

## ARTICLE 1378 ICC

### Transfer of a thing determined only by genre

“[I]. In contracts which have as their subject matter the transfer of things determined only by genre, the right of ownership is transferred with the identification made by mutual agreement of the parties or in the way agreed on by them. If the things are to be transported from one place to another, the identification takes place by delivery to the carrier of the case too”.

Please note that **the moment of the transfer of ownership (above all rights) is relevant:**

- in case of a fortuitous death of the property of the case (e.g., in the case of a thing destroyed or deteriorated for reasons not attributable to the seller, once the transfer of ownership is occurred, the consideration is still due from the buyer to the seller of the case – the general rule is “*res perit domino*”);
- because the transfer of ownership can lead to liabilities (see e.g., the strict liability for collapse of a building or for an unlawful act arising from the use of a car: see artt. 2053, 2054 ICC);
- because, from the moment of the transfer of the right over the property of the case, the seller can no longer lawfully dispose of the same property to other parties. Every possible/future act of disposition is, technically speaking, performed “*a non domino*”, meaning as non-owner, with damages to be paid, at the very least, by the illegally disposing party.

Anyway, art. 1376 ICC means that an issue must be resolved, so to ascertain, in case of double transfers of the very same property/right, who can be qualified as the final owner (or titleholder) of the property/right of the case, whose right of ownership (or other right *in rem* or *in personam*) can be opposed to everybody else (namely, *erga omnes* or against all world).

Here the starting point is that, if a conflict of interests arises between multiple buyers from the very same seller, the principle of reliance of the third party (namely, *principio dell'affidamento del terzo*, usually a third-party buyer for a consideration) comes into play; but everything is also strictly related, in case of ownership or other minor *rights in rem*, to the

property of the case, meaning if such a property is either a movable property or an immovable one. That's because, as far as immovable properties are concerned, the rules on *trascrizione* (namely, art. 2643 ICC and ff. ones) come into play too.

Now, please remember that an *atto di trascrizione* is an act or registration whose performance grants to its own beneficiary one of three kinds of publicity available in our legal system.

Accordingly, please also remember that, when it comes to publicity, there are three different kinds of publicity available in the Italian legal system, namely:

1) ***pubblicità notizia*** (like the one provided for by the so-called *Registri dello stato civile*);  
2) ***pubblicità dichiarativa*** (like the one that we have just seen, provided for, e.g., as far as the immovable properties are concerned, by the so-called *Conservatorie dei Registri Immobiliari* or *Agenzie del Territorio*); and

3) ***pubblicità costitutiva*** (like the one that we saw on the lecture 6, par. 6.3), on legal persons, when we spoke about the attribution of the legal personality. See e.g. article 2331 ICC on the registration of joint stock companies at the Companies House or art. 1 DPR 361/2000 on recognition of associations and foundations at *Registro delle persone giuridiche*).

Therefore, **an *atto di trascrizione* grants to its own beneficiary a *pubblicità dichiarativa*, opposable to every third party of the case or opposable *erga omnes*/against all world.**

## ARTICOLO 2643 CC

### Atti soggetti a trascrizione

“[I]. Si devono rendere pubblici col mezzo della trascrizione:

1) i contratti che trasferiscono la proprietà di beni immobili;  
2) i contratti che costituiscono, trasferiscono o modificano il diritto di usufrutto su beni immobili, il diritto di superficie, i diritti del concedente e dell'enfiteuta;

2-bis) i contratti che trasferiscono, costituiscono o modificano i diritti edificatori comunque denominati, previsti da normative statali o regionali, ovvero da strumenti di pianificazione territoriale;

3) i contratti che costituiscono la comunione dei diritti menzionati nei numeri precedenti;  
4) i contratti che costituiscono o modificano servitù prediali, il diritto di uso sopra beni immobili, il diritto di abitazione;

5) gli atti tra vivi di rinuncia ai diritti menzionati nei numeri precedenti;

6) i provvedimenti con i quali nell'esecuzione forzata si trasferiscono la proprietà di beni immobili o altri diritti reali immobiliari, eccettuato il caso di vendita seguita nel processo di liberazione degli immobili dalle ipoteche a favore del terzo acquirente;

- 7) gli atti e le sentenze di affrancazione del fondo enfiteutico;
- 8) i contratti di locazione di beni immobili che hanno durata superiore a nove anni;
- 9) gli atti e le sentenze da cui risulta liberazione o cessione di pigioni o di fitti non ancora scaduti, per un termine maggiore di tre anni;
- 10) i contratti di società e di associazione con i quali si conferisce il godimento di beni immobili o di altri diritti reali immobiliari, quando la durata della società o dell'associazione eccede i nove anni o è indeterminata;
- 11) gli atti di costituzione dei consorzi che hanno l'effetto indicato dal numero precedente;
- 12) i contratti di anticresi;
- 12-bis) gli accordi di mediazione che accertano l'usucapione con la sottoscrizione del processo verbale autenticata da un pubblico ufficiale a ciò autorizzato.
- 13) le transazioni che hanno per oggetto controversie sui diritti menzionati nei numeri precedenti;
- 14) le sentenze che operano la costituzione, il trasferimento o la modificazione di uno dei diritti menzionati nei numeri precedenti”.

## ARTICLE 2643 ICC

### Acts subject to *trascrizione*

“[I]. The following acts must be made public by way of *trascrizione*:

- 1) contracts that transfer ownership of immovable properties;
- 2) contracts that create, modify or transfer the right in rem of usufrutto on immovable properties, the right in rem of superficie, the right in rem of the concedente and the enfiteuta;
  - 2-bis) contracts that transfer, create or modify building rights, however labelled, established by state or regional laws, or by territorial planning tools;
- 3) contracts which create a community of right over the rights in rem mentioned in the preceding numbers;
- 4) contracts that create or modify easements, the right in rem of uso over immovable properties and the right in rem of abitazione;
- 5) inter vivos acts of renunciation to one of the rights in rem mentioned in the previous numbers;
- 6) judicial decisions according to which, in case of forced execution, the right of ownership over immovable properties or other rights in rem over immovable properties are transferred, except in case of a sale followed within a proceedings of release of immovable properties from mortgages issued on behalf of a third-party buyer;
- 7) acts and judgments for redemption of a fondo enfiteutico;

- 8) contracts for rent of immovable properties for a duration exceeding nine years;
- 9) acts and judgments according to which there is a release or a transfer of rents or rents not yet expired, for a term greater than three years;
- 10) contracts of company or of association according to which the enjoyment of an immovable property or another right in rem over an immovable property is granted, when the duration of the company or the association exceeds nine years or is undetermined;
- 11) acts of constitution of consortia that have the legal consequences mentioned in the previous number;
- 12) contracts of anticresi;
- 12-bis) mediation agreements that ascertain usucapione with the signature of minutes authenticated by a public official authorized to do so;
- 13) settlement which have as their subject matter disputes relating to the legal relationships mentioned in the previous numbers;
- 14) judgments that create, transfer or amend of one of the rights mentioned in the previous numbers”.

## **ARTICOLO 2644 CC**

### **Effetti della trascrizione**

“[I]. Gli atti enunciati nell’articolo precedente non hanno effetto riguardo ai terzi che a qualunque titolo hanno acquistato diritti sugli immobili in base a un atto trascritto o iscritto anteriormente alla trascrizione degli atti medesimi.

[II]. Seguita la trascrizione, non può avere effetto contro colui che ha trascritto alcuna trascrizione o iscrizione di diritti acquistati verso il suo autore, quantunque l’acquisto risalga a data anteriore”.

## **ARTICLE 2644 ICC**

### **(Legal) effects/consequences of a trascrizione**

“[I]. The acts set out in the previous article have no effect on third parties who, for whatever reason, have acquired rights over immovable properties on the basis of an act registered prior to the registration of the very same acts.

[II]. After that a trascrizione is occurred, then no registration of rights acquired from the transferor of the case can produce any (legal) effect against the person that has performed the trascrizione itself, even if her own acquisition dates back to an earlier date”.

Eventually, therefore, as far as the immovable properties are concerned, in case of a double transfer of ownership or other rights *in rem* over them, the joint application of art. 1376 ICC and the abovementioned artt. 2643 ICC and 2644 ICC<sup>26</sup> establishes who can be qualified as the “final owner”, or the “final title-holder of the *right in rem*”, of the case, whose ownership/*right in rem* can be opposed *erga omnes*, namely against all world<sup>27</sup>.

As per above, instead, still in case of a double transfer of the very same property, as far movable properties are concerned, the rule on so-called *possesso vale titolo* (“possession means a *right in rem* over the property”), under art. 1153 ICC, is to be applied, jointly with art.1155 ICC.

## ARTICOLO 1153 CC

### Effetti dell’acquisto del possesso

“[I]. *Colui al quale sono alienati beni mobili da parte di chi non ne è proprietario, ne acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà.*

[II]. *La proprietà si acquista libera da diritti altrui sulla cosa, se questi non risultano dal titolo e vi è la buona fede dell’acquirente.*

[III]. *Nello stesso modo si acquistano i diritti di usufrutto, di uso e di pegno”.*

## ARTICLE 1153 ICC

### Effects/consequences of an acquisition of possession

“[I]. Anyone to whom a movable property is alienated/transferred by someone who is not its own owner, acquires ownership through possession, provided that he is in good faith at the time of delivery and a suitable title for the transfer of ownership is available.

[II]. Ownership is acquired free from the rights of other persons over the thing, if they cannot be perceived from the title and the acquirer/transferee is in good faith.

[III]. Rights of usufruct, right of use and pledge are acquired/transferred in the same way”.

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<sup>26</sup> Actually, plus art. 1350 ICC, on the form of contracts, and either art. 2699 ICC, on *atto pubblico*, or art. 2701 ICC, on *scrittura privata autenticata*, which they both define the sole ways according to which an *atto di trascrizione* can be awarded.

<sup>27</sup> Leaving aside the transferor of the case, to whom just the mere application of art. 1376 ICC is meant to be enough, as for the transfer of ownership between transferor and transferee.

## ARTICOLO 1155 CC

### Acquisto di buona fede e precedente alienazione ad altri

*“[I]. Se taluno con successivi contratti aliena a più persone un bene mobile, quella tra esse che ne ha acquistato in buona fede il possesso è preferita alle altre, anche se il suo titolo è di data posteriore”.*

## ARTICLE 1155 ICC

### Acquisition in good faith and previous transfer to others

*“[I]. If someone alienates/transfers a movable property with successive contracts to more than one person, then the one who has acquired possession in good faith is preferred to the others, even if her own title has a later date”.*

Then, going on with comparisons, as for a double transfer of a credit, the assignment firstly notified to the debtor prevails, along with the assignment firstly accepted by the debtor of the case at a certain date:

## ARTICOLO 1265 CC

### Efficacia della cessione riguardo ai terzi

*“[I]. Se il medesimo credito ha formato oggetto di più cessioni a persone diverse, prevale la cessione notificata per prima al debitore, o quella che è stata prima accettata dal debitore con atto di data certa, ancorché essa sia di data posteriore.*

*[II]. La stessa norma si osserva quando il credito ha formato oggetto di costituzione di usufrutto o di pegno”.*

## ARTICLE 1265 ICC

### Effectiveness of an assignment against third parties

*“[I]. If the same credit has been the subject matter of several assignments to different persons, then the assignment firstly notified to the debtor prevails, or otherwise the one that was firstly accepted by the debtor with an act of certain date, even if it is of a later date.*

*[II]. The same rule is observed when the credit has been the subject matter of a right of usufruct or a right of pledge”.*

Then, again, if the credit of the case is incorporated in a titolo di credito (namely, an instrument of credit), like a check or a cambiale, art. 1992 ICC and ff. ones come into play.

## ARTICOLO 1994 CC

### Effetti del possesso di buona fede

“[I]. *Chi ha acquistato in buona fede il possesso di un titolo di credito, in conformità delle norme che ne disciplinano la circolazione, non è soggetto a rivendicazione*”.

## ARTICLE 1994 ICC

### (Legal) effects/consequences of possession in good faith

“[I]. Anyone who has acquired possession of a credit instrument in good faith, in accordance with the rules governing its own circulation, cannot be subjected to a proprietary claim”.

Now, please note that even shares in joint stock companies (or companies limited by shares) and participations in limited liability companies are generally qualified by the jurisprudence as titoli di credito, and therefore art. 1992 ICC and ff. ones are to be applied even to them.

Accordingly, nowadays, as for shares and corporate bonds (*rectius*, bonds), the accounting records registered before a centralized management company are what actually count (the buyer of the case who has obtained registration therein, in good faith, in his own name, prevails).

Finally, as for the case of inconsistent rights in personam of enjoyment over the same property (see e.g., the case of a double tenancy/rent), the rule is: the contracting party who has firstly obtained the actual enjoyment of the case prevails. If no one has obtained the enjoyment, then the one whose title has an earlier certain date is to be preferred. See art. 1380 ICC.

## ARTICOLO 1380 CC

### Conflitto tra più diritti personali di godimento

“[I]. *Se, con successivi contratti, una persona concede a diversi contraenti un diritto personale di godimento relativo alla stessa cosa, il godimento spetta al contraente che per primo lo ha conseguito*.

[II]. *Se nessuno dei contraenti ha conseguito il godimento, è preferito quello che ha il titolo di data certa anteriore*.

[III]. *Sono salve le norme relative agli effetti della trascrizione*”.

## ARTICLE 1380 ICC

### Conflicts amongst multiple personal rights of enjoyment

*“[I]. If a person grants to several contracting parties a right in personam of enjoyment over the same thing by successive contracts, then the enjoyment belongs to the contracting party who firstly obtained it.*

*[II]. If none of the contracting parties has obtained the enjoyment of the case, then the one whose title is of a certain earlier date is to be preferred.*

*[III]. The rules of law on the legal effects/consequences of a trascrizione are unaffected”.*

As per above, anyway, in some cases (*id est*, personal rights of enjoyment over properties granted for a duration of more than 9 years; personal enjoyment rights on patents for inventions or trademarks), under art. 1380, par. 3, ICC, the rules on registration are also to be applied hereto (please see, as for the first ones, the joint application of art. 1380, par. 3, ICC, art. 2643, numbers 8, 10, 11 and 12, ICC and art. 2644 ICC).

## **13 Lecture 13: on Italian contract law. On preliminary agreements, contracts on behalf of third parties, promise of facts of others, and assignment of contracts.**

SUMMARY: 13.1 On preliminary agreements (*contratti preliminari*). – 13.2 On contracts on behalf of third parties. – 13.3 On the promise of facts of others. – 13.4 On assignment of contracts.

### **13.1 On preliminary agreements (*contratti preliminari*).**

A preliminary agreement is a contract according to which the parties undertake to complete a future contract, so-called *contratto definitivo* (or final/closing contract<sup>28</sup>).

Please note that the parties involved here are called, taking into account the most common case of a preliminary agreement for a *contratto definitivo* of sale-purchase, *promittente venditore* and *promittente acquirente*.

The ICC does not contain a definition of the preliminary agreement, but there are rules of law that deal with it. Namely, they are:

- art. 1351 ICC, on the form of the preliminary agreement;
- art. 2645-*bis* ICC, on matter of *trascrizione* of the preliminary agreement;
- art. 2932 ICC, on specific performance.

#### **ARTICOLO 1351 CC**

##### **Contratto preliminare**

“[I]. *Il contratto preliminare è nullo, se non è fatto nella stessa forma che la legge prescrive per il contratto definitivo*”.

#### **ARTICLE 1351 ICC**

##### **Preliminary agreement**

“[I]. *A preliminary agreement is null and void, if it has not been completed in the same form that the law prescribes for the closing contract*”.

Please note that art. 1351 ICC is strictly linked with art. 1350 ICC.

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<sup>28</sup> In English private law (and more generally, in private laws in common-law legal systems), the procedure for the completion of contracts is quite different. Accordingly, there is no relationship *contratto preliminare-contratto definitivo*; in case of a long procedure for completion of contracts and, more generally, to figure out a relationship between two different agreements having “more or less” (in a very broad way, actually) the same effects of the ones mentioned hereinabove, they talk about an *exchange of contracts*, from one side, and a *closing* (per se), from the other side.

## ARTICOLO 1350 CC

### Atti che devono farsi per iscritto

“[I]. Devono farsi per atto pubblico o per scrittura privata, sotto pena di nullità:

- 1) i contratti che trasferiscono la proprietà di beni immobili;
- 2) i contratti che costituiscono, modificano o trasferiscono il diritto di usufrutto su beni immobili, il diritto di superficie, il diritto del concedente e dell'enfiteuta;
- 3) i contratti che costituiscono la comunione di diritti indicati dai numeri precedenti;
- 4) i contratti che costituiscono o modificano le servitù prediali, il diritto di uso su beni immobili e il diritto di abitazione;
- 5) gli atti di rinuncia ai diritti indicati dai numeri precedenti;
- 6) i contratti di affrancazione del fondo enfiteutico;
- 7) i contratti di anticresi;
- 8) i contratti di locazione di beni immobili per una durata superiore a nove anni;
- 9) i contratti di società o di associazione con i quali si conferisce il godimento di beni immobili o di altri diritti reali immobiliari per un tempo eccedente i nove anni o per un tempo indeterminato;
- 10) gli atti che costituiscono rendite perpetue o vitalizie, salve le disposizioni relative alle rendite dello Stato;
- 11) gli atti di divisione di beni immobili e di altri diritti reali immobiliari;
- 12) le transazioni che hanno per oggetto controversie relative ai rapporti giuridici menzionati nei numeri precedenti;
- 13) gli altri atti specialmente indicati dalla legge”.

## ARTICLE 1350 ICC

### Acts that must be performed in a written form

“[I]. They must be performed by way of a public deed (atto pubblico) or a private written document (scrittura privata), under penalty of nullity:

- 1) contracts that transfer ownership of immovable properties;
- 2) contracts that create, modify or transfer the right in rem of usufrutto on immovable properties, the right in rem of superficie, the right in rem of the concedente and the enfiteuta;
- 3) contracts which create a community of right over the rights in rem mentioned in the preceding numbers;
- 4) contracts that create or modify the right in rem of easements, the right in rem of uso over immovable properties and the right in rem of abitazione;
- 5) acts of renunciation to one of the rights in rem mentioned in the previous numbers;

- 6) *contracts for redemption of a fondo enfiteutico;*
- 7) *contracts of anticresi;*
- 8) *contracts for rent of immovable properties for a duration exceeding nine years;*
- 9) *contracts of company or of association according to which the enjoyment of an immovable property or another right in rem over an immovable property is granted for a period exceeding nine years or for an indefinite period;*
- 10) *acts that create perpetual annuities or life annuities, without prejudice to the provisions concerning State revenues;*
- 11) *acts of division of immovable properties and other rights in rem over immovable properties;*
- 12) *settlement which have as their subject matter disputes relating to the legal relationships mentioned in the previous numbers;*
- 13) *other acts especially indicated by the law”.*

Anyway, please also note that despite the connection between the two above-mentioned rules of law, their rationale is different.

The rationale of art. 1350 ICC is certainty of the law.

On the contrary, the rationale of art. 1351 ICC is a need for consistency of the legal system; in fact, art. 1351 ICC must be read and interpreted closely with art. 2932 ICC.

## **ARTICOLO 2932 CC**

### **Esecuzione specifica dell’obbligo di concludere un contratto**

*“[I]. Se colui che è obbligato a concludere un contratto non adempie l’obbligazione, l’altra parte, qualora sia possibile e non sia escluso dal titolo, può ottenere una sentenza che produca gli effetti del contratto non concluso.*

*[II]. Se si tratta di contratti che hanno per oggetto il trasferimento della proprietà di una cosa determinata o la costituzione o il trasferimento di un altro diritto, la domanda non può essere accolta, se la parte che l’ha proposta non esegue la sua prestazione o non ne fa offerta nei modi di legge, a meno che la prestazione non sia ancora esigibile”.*

## **ARTICLE 2932 ICC**

### **Specific performance of the obligation to complete a contract**

“[I]. If the one who is obliged to complete a contract does not fulfil his obligation, the other party, if it is possible and is not excluded from the title, can obtain a judgment that produces the effects of the contract not completed.

[II]. *In the case of contracts for transfer of ownership of a specific thing or the establishment or transfer of another right, the claim cannot be granted, if the party who advanced it does not carry out his performance or does not offer to do so in accordance with the formalities prescribed by the law, unless such performance cannot yet be demanded*".

The judgment issued by the courts in case of a breach of a preliminary agreement is a so-called *sentenza costitutiva* (which is different, from the point of view of the Italian private procedural law, from a so-called *sentenza dichiarativa*).

Accordingly, the legal reasons behind the two provisions (*id est*, art. 1350 ICC and art. 1351 ICC) are quite different one to the other.

Now, let's talk about trascrizione of preliminary agreements.

Art. 2645-*bis* ICC deals with it, and it is a provision that was not originally inserted in the ICC, as it was inserted just during the 1990's, actually to solve a big issue on behalf of clients of *promittenti venditori* who had completed preliminary agreements for the sale of immovable properties "on paper" and had eventually gone into bankruptcy (where *par condicio creditorum* – called *pari passu*, in English law – mentioned in art. 2741 ICC, is the basic rule of law).

## **ARTICOLO 2645-*bis* CC**

### **Trascrizione di contratti preliminari**

*"[I]. I contratti preliminari aventi ad oggetto la conclusione di taluno dei contratti di cui ai numeri 1), 2), 3) e 4) dell'articolo 2643, anche se sottoposti a condizione o relativi a edifici da costruire o in corso di costruzione, devono essere trascritti se risultano da atto pubblico o da scrittura privata con sottoscrizione autenticata o accertata giudizialmente.*

*[II]. La trascrizione del contratto definitivo o di altro atto che costituisca comunque esecuzione dei contratti preliminari di cui al comma 1, ovvero della sentenza che accoglie la domanda diretta ad ottenere l'esecuzione in forma specifica dei contratti preliminari predetti, prevale sulle trascrizioni ed iscrizioni eseguite contro il promittente alienante dopo la trascrizione del contratto preliminare.*

*[III]. Gli effetti della trascrizione del contratto preliminare cessano e si considerano come mai prodotti se entro un anno dalla data convenuta tra le parti per la conclusione del contratto definitivo, e in ogni caso entro tre anni dalla trascrizione predetta, non sia eseguita la trascrizione del contratto definitivo o di altro atto che costituisca comunque esecuzione del contratto preliminare o della domanda giudiziale di cui all'articolo 2652, primo comma, numero 2).*

[IV]. I contratti preliminari aventi ad oggetto porzioni di edifici da costruire o in corso di costruzione devono indicare, per essere trascritti, la superficie utile della porzione di edificio e la quota del diritto spettante al promissario acquirente relativa all'intero costruendo edificio espressa in millesimi.

[V]. Nel caso previsto nel comma 4 la trascrizione è eseguita con riferimento al bene immobile per la quota determinata secondo le modalità di cui al comma stesso. Non appena l'edificio viene ad esistenza gli effetti della trascrizione si producono rispetto alle porzioni materiali corrispondenti alle quote di proprietà predeterminate nonché alle relative parti comuni. L'eventuale differenza di superficie o di quota contenuta nei limiti di un ventesimo rispetto a quelle indicate nel contratto preliminare non produce effetti.

[VI]. Ai fini delle disposizioni di cui al comma 5, si intende esistente l'edificio nel quale sia stato eseguito il rustico, comprensivo delle mura perimetrali delle singole unità, e sia stata completata la copertura”.

## ARTICLE 2645-bis ICC

### *Trascrizione of a preliminary agreement*

“[I]. Preliminary agreements concerning completion of one of the contracts referred to in numbers 1), 2), 3) and 4) of article 2643, even if they are subject to conditions or related to buildings to be built or under construction, they must be registered/trascritti, if they are completed throughout either an atto pubblico or a private document with signature authenticated or judicially ascertained.

[II]. Registration/trascrizione of a contratto definitivo or another act that is, in any case, the execution of the preliminary agreements referred to in paragraph 1, or of a judgment that agrees on the claim issued to obtain specific performance of the aforementioned preliminary agreements, prevails over registrations/trascrizioni performed against the seller after trascrizione of the preliminary agreement of the case.

[III]. The (legal) effects of a trascrizione of a preliminary agreement end and are to be considered as never produced if, within one year starting from the date agreed on, between the parties, for the completion of the contratto definitivo, and, in any case, within three years from the aforementioned registration, the trascrizione of the contratto definitivo, or another act that represent, in any case, either the execution of the preliminary agreement of the case or of the judicial claim referred to in article 2652, first paragraph, number 2), has not been performed.

[IV]. Preliminary agreements concerning parts of buildings to be built or under construction must indicate, so to be registered, the useful area of the part of the building and the share of the

right pertaining to the promittente acquirente related to the whole building expressed in thousandths.

[V]. In the case provided for in paragraph 4, the *trascrizione* is carried out, with reference to the immovable property, for the quota identified under the procedures referred to in the same paragraph. As soon as the building comes into existence, the (legal) effects of the registration are produced against the material parts that correspond to the predetermined shares of ownership as well as their common parts. Any difference in surface or altitude contained within the limits of one twentieth to those indicated in the preliminary agreement has no effect.

[VI]. For the purposes of the provisions referred to in paragraph 5, a building is considered to be existent if it is a building in which the rustic of the case has been built up, along with the perimeter walls of its own individual units, and its roof has been completed too”.

Please remember here, once again, that *trascrizione* is one of three kinds of publicity available in our legal system, namely, *pubblicità notizia*, *pubblicità dichiarativa*, and *pubblicità costitutiva* (already seen previously in lecture 7, par. 7.4, and lecture 12, par. 12.5).

More precisely, *trascrizione* before the competent *Land Registry* and *iscrizione* before the competent *Companies House/Registry* are both different kinds of registration.

### **On a case involving application of art. 2645-bis ICC.**

During the time between the occurred completion of the preliminary agreement and the future completion of the contratto definitivo the property is sold by the promittente venditore to a third party. Here, the third-party buyer would buy well, on the basis of the *principio dell'affidamento del terzo*; anyway, if the preliminary agreement has been registered/*trascritto*, everything changes, under the regime provided for by art. 2645-bis ICC.

Now, please also note that even in case of a preliminary agreement the issue of the essential elements of a contract arises, as it is a contract like all contracts.

Accordingly, the rule of law on the four requirements due for every contract is to be applied to the preliminary contract.

## **ARTICOLO 1325 CC**

### **Indicazione dei requisiti**

“[I]. I requisiti del contratto sono:

- 1) l'accordo delle parti;
- 2) la causa;
- 3) l'oggetto;

- 4) *la forma, quando risulta che è prescritta dalla legge sotto pena di nullità*".

## **ARTICLE 1325 ICC**

### **Requirements' indication**

*"[I]. Requirements of a contract are:*

- 1) *the agreement of the parties;*
- 2) *the causa;*
- 3) *the subject matter;*
- 4) *the form, when it is prescribed by law under penalty of nullity*".

Same reasoning, as for the possible gaps/*lacunas* of a preliminary agreement: there are gaps/*lacunas* that can be filled in, by dispositive rules of law, and lacunas that bring the contract of the case to voidity. Therefore, please remember the different value of art. 1374 ICC and art. 1418 ICC.

## **ARTICOLO 1374 CC**

### **Integrazione del contratto**

*"[I]. Il contratto obbliga le parti non solo a quanto è nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge, o, in mancanza, secondo gli usi e l'equità*".

## **ARTICLE 1374 ICC**

### **Integration of a contract**

*"[I]. A contract obliges the parties not only to what is expressed therein, but also to all the consequences that derive from it, according to the law, or, otherwise, according to customs and fairness*".

## **ARTICOLO 1418 CC**

### **Cause di nullità del contratto**

*"[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.*

*[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall'articolo 1325, l'illiceità della causa, la illiceità dei motivi nel caso indicato dall'articolo 1345 e la mancanza nell'oggetto dei requisiti stabiliti dall'articolo 1346.*

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge*".

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.

[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.

[III]. A contract is also null and void in the other cases established by law”.

### The preliminary agreement and its own legal effects.

A preliminary agreement has (and can only have) binding/mandatory effects between the parties, whereas just a *contratto definitivo* can have *effetti reali*.

Now, please note two particular kinds of preliminary agreements to be taken into account:

- the so-called *preliminare a effetti anticipati*;
- the so-called *preliminare di preliminare* (preliminary agreement for a preliminary agreement).

Then, the unilateral preliminary agreement is also a peculiar kind of (preliminary) contract that binds just one party (the other one is free to complete the *contratto definitivo* of the case or not), and, as far as its own legal effects, it is an expression of art. 1333 ICC.

An example: a unilateral contractual promise of sale: A undertakes by contract to sell a property to B, if he shall ask him for it within 6 months. A is obliged to complete the *contratto definitivo* of sale, whereas B is free to decide whether to complete it or not.

Please see **Cassazione civile, sez. I, 04/09/2001, n. 11391**, on art. 1333 ICC.

“*Pur sottraendosi la fattispecie del cosiddetto contratto unilaterale allo schema generale di formazione contrattuale, derivante dall’incontro delle volontà delle parti, per il fatto di perfezionarsi in virtù del mancato rifiuto della proposta, il fine, cui sovrintende la disposizione di cui al comma 2 dell’art. 1333 c.c., di evitare che la sfera giuridica del soggetto possa essere interessata da una manifestazione di volontà altrui, consente che l’inefficacia della proposta possa desumersi, oltre che da un rifiuto espresso, anche da un comportamento del destinatario della proposta, inequivocabilmente apprezzabile come dettato dalla volontà di non avvalersene. (Nella specie è stato ritenuto tale il ricorso alla procedura espropriativa, da parte di un comune, pur in presenza di una proposta di cessione del bene a prezzo simbolico, formulata dal proprietario)”.*

Please remember the legal relationship with the option (agreement).

## ARTICOLO 1331 CC

### Opzione

“[I]. Quando le parti convengono che una di esse rimanga vincolata alla propria dichiarazione e l'altra abbia facoltà di accettarla o meno, la dichiarazione della prima si considera quale proposta irrevocabile per gli effetti previsti dall'articolo 1329.

[II]. Se per l'accettazione non è stato fissato un termine, questo può essere stabilito dal giudice”.

## ARTICLE 1331 ICC

### Option

“[I]. When the parties agree that one of them remains bound by her declaration and the other has the right to accept it or not, then the declaration of the first party is considered as an irrevocable proposal for the effects provided for in article 1329.

[II]. If a deadline has not been set up for acceptance, then it can be established by the judge”.

There may be a similar financial purpose, but while in case of an option a new disclosure of consent of the beneficiary is still required, in the case of a unilateral preliminary agreement that's not due (as silence is enough for the completion of this kind of preliminary agreement too).

Please note that the so-called patto di prelazione (an agreement for a pre-emption) is also a type of unilateral preliminary agreement.

An example: “*I promise you that if I am going to sell this apartment within the year, I shall prefer you against everybody else*”.

Here there is:

- a preliminary agreement (there is a commitment to complete a *contratto definitivo*);
- namely, a unilateral preliminary agreement (only the so-called *parte promittente* is bound); and
- a condition (precedent) called *condizione potestativa* (as the event that triggers the right of pre-emption depends on the will of the very same *parte promittente*) which is valid, at law, because it is not considered as a *condizione meramente potestativa* (under art. 1355 ICC).

Accordingly, the *patto di prelazione* is a unilateral preliminary agreement subject to a *condizione potestativa*.

### 13.2 On contracts on behalf of third parties.

Each contracting party generally tends to retain for himself/herself the right to the performance due by the counterparty.

Anyway, an exception to this rule is so-called *contratto a favore di terzi* (contract on behalf of third parties): here the performance due by one of the parties goes to a third party, namely, the beneficiary of the contract.

Please note that the contract on behalf of third parties is also an exception provided for by law to the rule of law set up by art. 1372 ICC, where the provision states that “*the contract has force of law amongst the parties*”.

The persons involved herein are called *stipulante* or promisee, *promittente* or promisor, and third party or beneficiary; and the provisions that deals with this “contract” (which is not a kind of contract, per se, but a legal scheme applicable to every kind of contract) are artt. 1411-1413 ICC.

#### ARTICOLO 1411 CC

##### Contratto a favore di terzi

“[I]. È valida la stipulazione a favore di un terzo, qualora lo stipulante vi abbia interesse.

[II]. Salvo patto contrario, il terzo acquista il diritto contro il promittente per effetto della stipulazione. Questa però può essere revocata o modificata dallo stipulante, finché il terzo non abbia dichiarato, anche in confronto del promittente, di volerne profittare.

[III]. In caso di revoca della stipulazione o di rifiuto del terzo di profittarne, la prestazione rimane a beneficio dello stipulante, salvo che diversamente risulti dalla volontà delle parti o dalla natura del contratto”.

#### ARTICLE 1411 ICC

##### Contract on behalf of third parties

“[I]. A completion made on behalf of a third party is a valid one, when the stipulante/promisee has an interest therein.

[II]. The third party acquires her right against the promittente/promisor by completion of the agreement, unless otherwise agreed. However, the stipulante/promisee can revoke or amend his own declaration on behalf of the third party of the case until the third party declares, even to the promittente/promisor, that she intends to take advantage of the agreement.

[III]. In case the declaration has been revoked, or the third party to take advantage of the agreement, then performance of the obligation due by the promisor remains due to promisee, unless it appears otherwise from the intention of the parties or the nature of the contract”.

### **On the interest of the *stipulante*.**

Every kind of interest is allowed, including a non-financial one (e.g., when the *stipulante* means to gift something to the third party of the case throughout this scheme, instead of resorting to a formal gift).

Other kinds of interests: see e.g., the fulfilment of an obligation in an indirect way too.

On the effects of the *stipulante*'s interest on the validity of a clause completed on behalf of third parties: if the debt is a non-existent one, or there is an unlawful reason behind it, then the non-existence or the unlawfulness of the case affects the validity of the clause on behalf of the third party of the case.

Please also note that, as for the vices of will, here mistake, threat/(moral) violence and fraud are relevant against the *stipulante*.

Then, as for a contract on behalf of third parties with effect to be produced after the death of the *stipulante*, please see art. 1412 ICC.

## **ARTICOLO 1412 CC**

### **Prestazione al terzo dopo la morte dello stipulante**

*“[I]. Se la prestazione deve essere fatta al terzo dopo la morte dello stipulante, questi può revocare il beneficio anche con una disposizione testamentaria e quantunque il terzo abbia dichiarato di volerne profittare, salvo che, in quest'ultimo caso, lo stipulante abbia rinunciato per iscritto al potere di revoca.*

*[II]. La prestazione deve essere eseguita a favore degli eredi del terzo se questi premuore allo stipulante, purché il beneficio non sia stato revocato o lo stipulante non abbia disposto diversamente”.*

## **ARTICLE 1412 ICC**

### **Performance on behalf of the third party after death of the *stipulante***

*“[I]. If the service is to be made to the third party after death of the stipulante, then the latter can revoke the benefit also with a testamentary disposition and although the third party has declared that she wishes to take advantage of the agreement, unless, in the latter case, the stipulante has waived in writing his own power of revocation.*

*[II]. The service must be performed on behalf of the heirs of the third party if the latter is dead before the stipulante, provided that the benefit has not been revoked or the stipulante has not decided otherwise”.*

Finally, as for the legal relationship between the promisor and the third party/beneficiary:

## ARTICOLO 1413 CC

### Eccezioni opponibili dal promittente al terzo

“[I]. Il promittente può opporre al terzo le eccezioni fondate sul contratto dal quale il terzo deriva il suo diritto, ma non quelle fondate su altri rapporti tra promittente e stipulante”.

## ARTICLE 1413 ICC

### Exceptions that can be opposed by the promisor to the third party

“[I]. The promisor can oppose to the third party all the exceptions based on the contract from which the third party takes out her own right, but not those based on other (legal) relationships between promisor and promisee”.

### Cases of contracts on behalf of third parties.

- 1) The contract of transportation on behalf of third parties.

## ARTICOLO 1689 CC

### Diritti del destinatario

“[I]. I diritti nascenti dal contratto di trasporto verso il vettore spettano al destinatario dal momento in cui, arrivate le cose a destinazione o scaduto il termine in cui sarebbero dovute arrivare, il destinatario ne richiede la riconsegna al vettore.

[II]. Il destinatario non può esercitare i diritti nascenti dal contratto se non verso pagamento al vettore dei crediti derivanti dal trasporto e degli assegni da cui le cose trasportate sono gravate. Nel caso in cui l'ammontare delle somme dovute sia controverso, il destinatario deve depositare la differenza contestata presso un istituto di credito”.

## ARTICLE 1689 ICC

### Rights of the recipient/addressee

“[I]. The rights arising from the contract of transportation against the carrier are due to the recipient/addressee from the moment in which, once the things have arrived at their destination or after the deadline in which they should have arrived, the recipient/addressee of the case demands their return to the carrier.

[II]. The recipient/addressee cannot exercise any right arising from the contract except against payment to the carrier of all his own credits deriving from the transportation, along with the checks that encumber the transported items. In case the amount of the sums due is disputed, then recipient/addressee must deposit the disputed difference at a credit institution”.

- 2) The life annuity on behalf of third parties.

### **ARTICOLO 1875 CC**

#### **Costituzione della rendita vitalizia a favore di un terzo**

*“[I]. La rendita vitalizia costituita a favore di un terzo, quantunque importi per questo una liberalità, non richiede le forme stabilite per la donazione”.*

### **ARTICLE 1875 ICC**

#### **Establishment of a life annuity on behalf of a third party**

*“[I]. An annuity created on behalf of a third party does not require the form set up for gifts, even if it involves a liberality to said third party”.*

This is a case of an indirect gift, meaning a gift/donation performed in a way different from the outright gift governed by art. 769 ICC (which requires the form set up by art. 782 ICC).

Accordingly, we are in the field of application of art. 809 ICC too.

### **ARTICOLO 809 CC**

#### **Norme sulle donazioni applicabili ad altri atti di liberalità**

*“[I]. Le liberalità, anche se risultano da atti diversi da quelli previsti dall’articolo 769, sono soggette alle stesse norme che regolano la revocazione delle donazioni per causa d’ingratitude e per sopravvenienza di figli, nonché a quelle sulla riduzione delle donazioni per integrare la quota dovuta ai legittimari.*

*[II]. Questa disposizione non si applica alle liberalità previste dal secondo comma dell’articolo 770 e a quelle che a norma dell’articolo 742 non sono soggette a collazione”.*

### **ARTICLE 809 ICC**

#### **Rules on gifts applicable to other acts of liberality**

*“[I]. Liberalties performed through acts other than those provided for by article 769 are subject to the very same rules that govern revocation of gifts for ingratitude or due to supervening children, as well as the provisions on riduzione of gifts, due to match the shares of forced heirs.*

*[II]. This provision does not apply to the liberalities covered by the second paragraph of article 770, or to those that, according to article 742, are not subject to collazione”.*

Incidentally speaking, on the form of an indirect gift (not expressly covered by art. 809 ICC), please see **Cassazione civile, sez. II, 16/03/2004, n. 5333**.

*“Per la validità delle donazioni indirette non è richiesta la forma dell’atto pubblico, essendo sufficiente l’osservanza delle forme prescritte per il negozio tipico utilizzato per realizzare lo scopo di liberalità, dato che l’art. 809 c.c., nello stabilire le norme sulle donazioni applicabili agli altri atti di liberalità realizzati con negozi diversi da quelli previsti dall’art. 769 c.c., non richiama l’art. 782 c.c., che prescrive l’atto pubblico per la donazione”*.

Summary of the judgment: an indirect gift does not require the form mentioned in art. 782 ICC for the outright gift. Compliance with the forms required for all single acts that create the gift of the case is enough.

Please note that here there is full compliance with art. 1875 ICC too.

3) The contract of insurance on behalf of third parties.

## **ARTICOLO 1920 CC**

### **Assicurazione a favore di un terzo**

*“[I]. È valida l’assicurazione sulla vita a favore di un terzo.*

*[II]. La designazione del beneficiario può essere fatta nel contratto di assicurazione, o con successiva dichiarazione scritta comunicata all’assicuratore, o per testamento; essa è efficace anche se il beneficiario è determinato solo genericamente. Equivale a designazione l’attribuzione della somma assicurata fatta nel testamento a favore di una determinata persona.*

*[III]. Per effetto della designazione il terzo acquista un diritto proprio ai vantaggi dell’assicurazione”*.

## **ARTICLE 1920 ICC**

### **Insurance on behalf of third parties**

*“[I]. A life insurance on behalf of a third party is a valid agreement.*

*[II]. The appointment of the beneficiary can be made in the contract of insurance, or with a subsequent written declaration notified to the insurer, or by will; it is effective even if the beneficiary is identified only in a general way. An assignment of an insured sum to a certain person made in a will is equivalent to an appointment.*

*[III]. As a result of the appointment, the third party acquires a personal right to the benefits of the insurance”*.

Accordingly, in summary, as far as the legal relationship *stipulante*-third party is concerned, a contract on behalf of third parties is a scheme used to complete an indirect gift pursuant to art. 809 ICC.

Having said that, the contract on behalf of third parties is also as a scheme that can be used to pay off debts that the *stipulante*/promisee of the case has against third parties: e.g., there is a sale-purchase agreement between the *stipulante*/promisee acting as a seller and the *promittente*/promisor acting as a buyer; the *stipulante* is indebted against a third party. The promisor pays his own debt (due for the sale to the *stipulante*) to the third party so that the promisee can extinguish his own debt against the third party (this kind of agreement is told to be *solvendi causa*).

Therefore, here we have a trilateral legal relationship: promisee - promisor - third party.

The legal relationship between promisor and promisee is called ***rapporto di procura***: the promisor draws the funds, *id est* the consideration for the service on behalf of the third party, from this relationship.

The legal relationship between promisee and third party is called ***rapporto di valuta***.

Please note that the acquisition of the right of the case by the third party of the case is an automatic one. In fact, to complete the contract of the case, there is no need of his own acceptance; but please see art. 1411, par. 2, ICC on the legal consequences that could occur if an acceptance is not performed, as well as art. 1689 ICC on the request of delivery, which implies prior acceptance.

In case of refusal by the third party, please see above art. 1411, par. 3, ICC: the contract is not meant to remain in place in all cases, as it happens, on the contrary, in any case of contract for a person to be appointed, under art. 1405 ICC.

### **On the possible subject matters of a contract on behalf of third parties:**

- both *rights in rem* and *rights in personam*;
- the release of the promisee from a debt against the third party (see the abovementioned example);
- the release of the third party from a debt against the promisor (there is a legal relationship in place between the *stipulante* and third party; the third party is the debtor of the promisor; the *stipulante* agrees on a sale contract with the promisor according to which the promisor acquires ownership of the property without payment of any consideration, but freeing the third party, who accepts it, from his own obligation against him; the promisor's performance is the release of the third party from his own debt due to him).

Finally, please note the distinction between a factual and a legal (third party) benefit: the contract of *fideiussione* (governed by art. 1936 ICC and ff. ones) is an agreement between a third-party guarantor and the creditor of the case. The debtor of the case takes advantage of the agreement (completed by and between the guarantor and the creditor) in relation to which he is a third party too; but a *fideiussione* is not a contract on behalf of third parties, technically speaking. Here, the benefit for the debtor of the case comes out as an indirect one.

### 13.3 On the promise of facts of others.

#### ARTICOLO 1381 CC

##### Promessa dell'obbligazione o del fatto del terzo

“[I]. *Colui che ha promesso l'obbligazione o il fatto di un terzo è tenuto a indennizzare l'altro contraente, se il terzo rifiuta di obbligarsi o non compie il fatto promesso*”.

#### ARTICLE 1381 ICC

##### Promise of a third party's obligation or fact

“[I]. Whoever has promised either the obligation or the fact of a third party must indemnify the other contracting party if said third party refuses to bind herself or does not perform the promised fact”.

Please note that a contract can assign a right to a third party, but it cannot impose an obligation on him or deprive him of a right.

Ergo, if a fact of a third party is promised and the third party of the case does not perform/fulfil his own promise, only a right of indemnity, between the parties, arises.

An example: an agent (*mandatario*) wishes to complete a contract that does not fall within the scope of the agency (*mandato*). The counterpart is hesitant. The agent, in order to convince her, promises the ratification of the contract by the principal. This case is expressly governed by the institution of ratification (namely, *ratifica*) under art. 1399 ICC. Anyway, in the meantime a non-binding promise of a fact of a third party arises between the parties and if the promise is not fulfilled, then art. 1398 ICC applies<sup>29</sup> (under the motto “*lex specialis derogat legi generali*”).

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<sup>29</sup> Please note that art. 1398 ICC (which has already been discussed in lecture 3, par. 3.5, and is going to be discussed in lecture 17, par. 17.3. too) is, in its turn, a so-called *lex specialis*, if it is seen against art. 1381 ICC, as *lex generalis*, and accordingly the motto is the one mentioned above in the text.

## ARTICOLO 1398 CC

### Rappresentanza senza potere

“[I]. *Colui che ha contrattato come rappresentante senza averne i poteri o eccedendo i limiti delle facoltà conferitegli, è responsabile del danno che il terzo contraente ha sofferto per avere confidato senza sua colpa nella validità del contratto*”.

## ARTICLE 1398 ICC

### Representation without power

“[I]. *Anyone who has contracted as a representative without having the powers or exceeding the boundaries of the facoltà conferred on him is liable for the damages that the third party has suffered for having, without fault, relied on the validity of the contract of the case*”.

### 13.4 On assignment of contracts.

In case of a contract with corresponding services still to be performed, before execution of all services, each party can assign another contracting party to her counterparty.

Parties involved here are called, respectively, assignor (*cedente*), assignee (*cessionario*) and assigned party (*ceduto*).

The rules of law are artt. 1406-1410 ICC.

## ARTICOLO 1406 CC

### Nozione

“[I]. *Ciascuna parte può sostituire a sé un terzo nei rapporti derivanti da un contratto con prestazioni corrispettive, se queste non sono state ancora eseguite, purché l'altra parte vi consenta*”.

## ARTICLE 1406 ICC

### Definition

“[I]. *In case of contracts with corresponding services, each party can substitute herself with a third party, if said services have not yet been performed, provided that the other party agrees on it*”.

As for the form of the act/deed of assignment, please note the different forms provided for by art. 1407 ICC.

## ARTICOLO 1407 CC

### Forma

“[I]. *Se una parte ha consentito preventivamente che l'altra sostituisca a sé un terzo nei rapporti derivanti dal contratto, la sostituzione è efficace nei suoi confronti dal momento in cui le è stata notificata o in cui essa l'ha accettata.*

[II]. *Se tutti gli elementi del contratto risultano da un documento nel quale è inserita la clausola «all'ordine» o altra equivalente, la girata del documento produce la sostituzione del giratario nella posizione del girante”.*

## ARTICLE 1407 ICC

### Form

“[I]. If a party has previously allowed the other to replace herself with a third party in all legal relationships arising from the contract of the case, then the replacement is effective against her from the time it was notified to her or she accepted it.

[II]. If all elements of the contract of the case are disclosed in a document which contains a clause “to the order of” or an equivalent one, then the endorsement of said document produces replacement of the endorsee in the position of the endorser”.

Then, as for the three relationships amongst the different parties involved, meant to occur after completion of assignment of the contract of the case, please see artt. 1408-1410 ICC<sup>30</sup>.

Namely, as for the relationship assignor-assigned party, please see art. 1408 ICC.

## ARTICOLO 1408 CC

### Rapporti fra contraente ceduto e cedente

“[I]. *Il cedente è liberato dalle sue obbligazioni verso il contraente ceduto dal momento in cui la sostituzione diviene efficace nei confronti di questo.*

[II]. *Tuttavia il contraente ceduto, se ha dichiarato di non liberare il cedente, può agire contro di lui qualora il cessionario non adempia le obbligazioni assunte.*

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<sup>30</sup> Please remember here that, in dealing with private-law (and especially contract-law) relationships that are meant to involve more than two parties (please note, not persons, but parties, as for the concept of party previously explained), anyway, when it comes to all legal consequences of the relationship of the case, we must always brainstorm on a bilateral level, meaning between two of all parties involved, depending on the issue under examination in the circumstances of the case. Accordingly, here we must brainstorm, once the completion of the assignment of the case is performed, respectively, in terms of: *i)* assignor-assignee legal relationship; *ii)* assignor-assigned party legal relationship; *iii)* assignee-assigned party legal relationship. Same reasoning must be applied, *exempli gratia* and above all, still in contract law, in case of contracts for persons to be appointed and contracts on behalf of third parties, as we have already seen.

[III]. *Nel caso previsto dal comma precedente, il contraente ceduto deve dare notizia al cedente dell'inadempimento del cessionario, entro quindici giorni da quello in cui l'inadempimento si è verificato; in mancanza è tenuto al risarcimento del danno*".

#### **ARTICLE 1408 ICC**

##### **Relationship between assigned party and assignor**

*"[I]. An assignor is freed from his own obligations against the assigned party from the time in which replacement becomes effective against the latter.*

*[II]. However, the assigned party can make a claim against the assignor, if the assignee fails to perform the obligations taken on, if she has declared not to free the assignor himself.*

*[III]. In the case provided for in the previous paragraph, the assigned party must notify to the assignor the assignee's breach of contract within fifteen days starting from the day in which the breach of the case occurred; otherwise, failing that, she has to pay for damages*".

Then, as for the relationship assignee-assigned party, please see art. 1409 ICC.

#### **ARTICOLO 1409 CC**

##### **Rapporti fra contraente ceduto e cessionario**

*"[I]. Il contraente ceduto può opporre al cessionario tutte le eccezioni derivanti dal contratto, ma non quelle fondate su altri rapporti col cedente, salvo che ne abbia fatto espressa riserva al momento in cui ha consentito alla sostituzione*".

#### **ARTICLE 1409 ICC**

##### **Relationship between assigned party and assignee**

*"[I]. An assigned party can oppose to the assignee of the case all exceptions arising from the assigned contract, but not those based on other relationships with the assignor, unless she has made an express reservation about it when replacement was agreed on*".

And finally, as for the relationship assignor-assignee, please see art. 1410 ICC.

#### **ARTICOLO 1410 CC**

##### **Rapporti fra cedente e cessionario**

*"[I]. Il cedente è tenuto a garantire la validità del contratto.*

*[II]. Se il cedente assume la garanzia dell'adempimento del contratto, egli risponde come un fideiussore per le obbligazioni del contraente ceduto*".

## ARTICLE 1410 ICC

### Relationship between assignor and assignee

“[I]. Assignors must guarantee validity of the contracts assigned.

[II]. If the assignor of the case guarantees performance of the contract assigned, then he is liable as a fideiussore for the obligations of the assigned party”.

As per above, here a distinction arises between so-called *cessione pro soluto* (an assignment where the assignor of the case does not guarantee, against his/her assignee, for performance by his/her assigned party) and *cessione pro solvendo* (an assignment where, on the contrary, the assignor of the case guarantees for performance by his/her assigned party).

Again, please note that the word *fideiussore*, mentioned in art. 1410, par. 2, ICC, comes from *fideiussione*, which is a typical personal guarantee governed by art. 1936 ICC and ff. ones.

Finally, please also note that an assignment of a contract is legally different from an assignment of a credit (that we will analyse when we deal with obligations in general, in lecture 18), and that's mainly because the rules of law are different, in terms of acceptance by debtor/assigned person, as we shall see afterwards.

## 14 Lecture 14: on Italian contract law. On the essential elements of a contract.

SUMMARY: 14.1 Introduction. – 14.2 On the subject matter of a contract. – 14.3 On the *causa* of a contract. – 14.4 On form of contracts.

### 14.1 Introduction.

We learned that every contract, to be an existing and a valid one (under art. 1418 ICC), must have four essential elements.

#### ARTICOLO 1325 CC

##### Indicazione dei requisiti

“[I]. *I requisiti del contratto sono:*

- 1) *l'accordo delle parti;*
- 2) *la causa;*
- 3) *l'oggetto;*
- 4) *la forma, quando risulta che è prescritta dalla legge sotto pena di nullità”.*

#### ARTICLE 1325 ICC

##### Requirements' indication

“[I]. Requirements of a contract are:

- 1) the agreement of the parties;
- 2) the causa;
- 3) the subject matter;
- 4) the form, when it is prescribed by law under penalty of nullity”.

As per above, we have already talked about *consensus* (namely the agreement of the parties) in lecture 11, when we were dealing with completion of contracts; and we are going to talk about it in lectures 11 and 12 too, particularly in relation with invalidity of contracts and vices of will. On the contrary, now it's time to talk about the three remaining requirements.

### 14.2 On the subject matter of a contract.

#### ARTICOLO 1346 CC

##### Requisiti

“[I]. *L'oggetto del contratto deve essere possibile, lecito, determinato o determinabile”.*

## ARTICLE 1346 ICC

### Requirements

“[I]. The subject matter of a contract must be possible, legal, determined or determinable”.

Otherwise, art. 1418, par. 2, ICC is to be applied.

## ARTICOLO 1418 CC

### Cause di nullità del contratto

“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.

[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’articolo 1325, l’illiceità della causa, la illiceità dei motivi nel caso indicato dall’articolo 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’articolo 1346.

[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.

[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.

[III]. A contract is also null and void in the other cases established by law”.

*Ergo*, the subject matter of every contract must be **possible, legal, and determined or determinable**.

### About the possibility of the subject matter.

The (original) impossibility makes the contract of the case a void one.

Please note that the impossibility must be an objective and an absolute one; it means that the service of the case cannot be performed by anyone. Subjective impossibility is not relevant at all.

Examples of an objective impossibility:

- when a ship that has already sunk is sold;
- when a building that has already collapsed is sold;

- when a furnished apartment is rented, but it has already burned out;
- when a car that has already been destroyed is sold;
- *et cetera*.

Please also note that here, whoever signs the contract of the case, which has an impossible subject matter, without knowledge of its own impossibility, completes the agreement based on the erroneous belief that the subject matter is a possible one. Despite this, the law states that the rules of law on the impossible subject matter must prevail over those on mistake, because the legal consequences of voidity are stronger than those provided for by the legal regime on avoidance of contracts, typical for mistakes (under art. 1427 ICC and ff. ones), *vis-à-vis* a case in which there is no intention at all, pending against whomever is supposed to perform the service of the case, to perform it for a consideration consisting in an impossible subject matter.

On the other hand, a party that completes a contract knowing that the subject matter is an impossible one (because he/she knows, e.g., that the car has been destroyed) must pay the damages suffered by the other party for having relied, without any fault, in the validity of the contract of the case (there is a pre-contractual liability here too, under art. 1338 ICC).

The assessment of impossibility must be executed by the interpreter of the case subject to reasonableness.

Now, going back to the examples mentioned above, if the destroyed car, e.g., can be completely recrafted (or the sunken ship can be recovered from the seabed), then the sale-purchase agreement still remains a void contract, if the costs due to repair or to recover the thing of the case are such that the agreement has lost its own meaning anyway (in this very case, for the seller).

Then, please note that if a certain contract is subject to a condition precedent (namely, a future and uncertain event, under art. 1353 ICC and ff. ones) or a *termine* (namely, a future and certain event), art. 1347 ICC can come into play.

## ARTICOLO 1347 CC

### Possibilità sopravvenuta dell'oggetto

*“[I]. Il contratto sottoposto a condizione sospensiva o a termine è valido, se la prestazione inizialmente impossibile diviene possibile prima dell'avveramento della condizione o della scadenza del termine”.*

## ARTICLE 1347 ICC

### Supervening possibility of the subject matter

*“[I]. A contract subject to a condition precedent or a termine is a valid one, if the originally impossible performance becomes possible before fulfilment of either the condition or the deadline of the termine of the case”.*

### About the legality of the subject matter.

The subject matter of a contract must be a legal one: this means that it has not to be against mandatory rules, public policy or good customs. See once again art. 1418, par. 2, ICC.

## ARTICOLO 1418 CC

### Cause di nullità del contratto

*“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.*

*[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall'articolo 1325, l'illiceità della causa, la illiceità dei motivi nel caso indicato dall'articolo 1345 e la mancanza nell'oggetto dei requisiti stabiliti dall'articolo 1346.*

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.*

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

*“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.*

*[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.*

*[III]. A contract is also null and void in the other cases established by law”.*

### About the determination of the subject matter.

The subject matter must also be determined (or identified) or determinable (identifiable).

Accordingly, the parties must agree, in the contract, on at least a criterion to determine/identify the subject matter of the case (e.g., making reference to the market price of an asset which is meant to be sold), or they can surrender its own determination to a third party (so-called arbitrator).

The criteria for referring the determination of the subject matter of the contract to a third-party arbitrator can be either fair appreciation or mere free will.

## ARTICOLO 1349 CC

### Determinazione dell'oggetto

*“[I]. Se la determinazione della prestazione dedotta in contratto è deferita a un terzo e non risulta che le parti vollero rimettersi al suo mero arbitrio, il terzo deve procedere con equo apprezzamento. Se manca la determinazione del terzo o se questa è manifestamente iniqua o erronea, la determinazione è fatta dal giudice.*

*[II]. La determinazione rimessa al mero arbitrio del terzo non si può impugnare se non provando la sua mala fede. Se manca la determinazione del terzo e le parti non si accordano per sostituirlo, il contratto è nullo.*

*[III]. Nel determinare la prestazione il terzo deve tener conto anche delle condizioni generali della produzione a cui il contratto eventualmente abbia riferimento”.*

## ARTICLE 1349 ICC

### Determination of the subject matter

*“[I]. If the determination of a performance provided for in a contract is referred to a third party, and it does not appear that the parties wished to refer it to her mere free will, then the third party must proceed with fair appreciation. If the third party's determination is missing, or it is clearly unfair or erroneous, then the determination is made by a judge.*

*[II]. The determination left to the mere free will of the third party of the case cannot be challenged unless by proving her own bad faith. If the determination of the third party is lacking, and the parties of the contract do not agree on replacing her, then the contract is null and void.*

*[III]. In determining the service of the case, the third party must also take into account the general conditions of production to which the contract may have made reference to”.*

Then, as for future things/properties qualified as possible subject matter of a contract, please see art. 1348 ICC.

## ARTICOLO 1348 CC

### Cose future

*“[I]. La prestazione di cose future può essere dedotta in contratto, salvi i particolari divieti della legge”.*

## ARTICLE 1348 ICC

### Future properties

“[I]. Future properties can be agreed on as subject matter of a contract, except in cases prohibited by law”.

The above-mentioned case is the case, *exempli gratia*, of:

- the sale of future things, generally allowed (see art. 1472 ICC);
- the gift of future things, on the contrary, generally denied (see art. 771 ICC);
- the so-called *divieto dei patti successori* (prohibition of agreements on inheritance), under art. 458 ICC.

### 14.3 On the *causa* of a contract.

The reason/purpose according to which a person transfers a right on a property (e.g., if the property of the case is an immovable one, its own ownership), or creates a right (e.g., if the property is still an immovable one, a right of usufruct) or renounces to it, or, otherwise, disposes of it to third parties, can consist in:

- 1) the desire to grant a simple gratuitous advantage, that lacks any connection with a pre-existing legal relationship; or
- 2) the intention of carrying out a financial legal transaction, in the context of which his/her own declarations (or his/her own dispositive acts) are *i*) to be coordinated with the declarations (or the acts) of other persons; or *ii*) to be connected with pre-existing obligations.

An example of case 1) is a gift; an example of case 2), lett. *i*), is a sale-purchase agreement, which is a contract according to which a party transfers ownership (or another right in right in rem) over a property against payment of a consideration; an example of case 2), let. *ii*), is a creation of right in rem of guarantee, which has to be linked with the payment of a debt that is going to be guaranteed by it.

All the above is worthy to be mentioned because:

*a*) if the transaction of the case (e.g., the exchange of the thing of the case for a price; the arrangement of the guarantee of the case) lacks one of its own fundamental “parts” (e.g., the thing on sale is not a property of the seller because, e.g., it is already a property of the buyer), then the other fundamental “parts” also lose meaning and justification;

*b*) the transaction must be assessed, by the legal system, as a lawful one, meaning something that deserves to be protected (see art. 1418, par. 1, ICC, on a general basis, and art. 1322, par. 2, ICC, as for the atypical contracts).

The *causa* of a legal transaction is the immediate purpose/reason behind it, as for the parties who set it up. Meaning, “I enter into the sale of a house because I want to sell that house” (the seller says) or “I want to buy it” (the buyer says); maybe, because, afterwards, “I want to use the price to buy another house or to pay a debt” (the seller says, once again) or “I want to resell it to third parties (to make a profit) or to go to live there or to rent it” (the buyer says, once again).

Therefore, here, seller and buyer have the very same immediate purpose, which comes out, in case of completion of such an agreement, from the very definition of the sale-purchase agreement, offered by art. 1470 ICC: namely, the exchange of a property for a price (which is the financial transaction that the parties carry out).

Then, each party performs the legal transaction of the case inside the path of a personal business plan, which is, however, generally irrelevant to the other party (because, e.g., the buyer buys the property of the case to resell it, rather than to rent it, rather than to enjoy it, which is quite irrelevant, as already said, to the seller).

This is what distinguishes the legal concept of *causa* from the legal concept of motive (personal reason).

Please note that the very same reasoning is also true in terms of legality, because if the transaction is an illegal one, then the legal system must provide for a reaction that has to have repercussions on the illegal transaction of the case. Whereas, if the transaction is a legal one, per se, and it is just the motive according to which one of the parties puts it in place that is an illegal one, then a reaction by the legal system, against the transaction of the case, is not always due and justified. Indeed, an intervention of this type can even jeopardize the certainty of the legal traffics.

The *causa* is the scheme of the financial-legal transaction that the legal transaction of the case immediately provides for; it is the reason that justifies the legal transaction of the case, both at the eyes of the parties and at the eyes of the legal system. Any other reason/purpose is a motive (personal reason) of the legal transaction of the case.

However, a motive/personal reason may be common to both parties of the legal transaction of the case. An example: I grant a loan to one of my partners to allow her to complete an increase of the share capital of a company in which we are both shareholders.

The immediate purpose of the loan is the delivery/transfer of money against payment/restitution of the so-called *tantundem eiusdem generis* (see art. 1813 ICC).

The further (common) purpose is the completion of a share-capital increase, so to, e.g., allow the company of the case to receive more financings from third parties.

A motive (personal reason) is relevant, legally speaking, on a general basis<sup>31</sup>, only in a negative way, meaning as a reason for voidity of the contract of the case (under art. 1418, par. 2, ICC), when it is illegal and is common to both parties (see art. 1345 ICC).

### **ARTICOLO 1345 CC**

#### **Motivo illecito**

*“[I]. Il contratto è illecito quando le parti si sono determinate a concluderlo esclusivamente per un motivo illecito comune ad entrambe”.*

### **ARTICLE 1345 ICC**

#### **Illegal motive**

*“[I]. A contract is illegal when the parties have agreed on completing it just for an illegal personal reason common to both”.*

### **ARTICOLO 1418 CC**

#### **Cause di nullità del contratto**

*“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.*

*[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’articolo 1325, l’illiceità della causa, la illiceità dei motivi nel caso indicato dall’articolo 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’articolo 1346.*

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.*

### **ARTICLE 1418 ICC**

#### **Grounds for voidity of a contract**

*“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.*

*[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.*

*[III]. A contract is also null and void in the other cases established by law”.*

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<sup>31</sup> The exception is when the motive is disclosed throughout a condition or a *termine* or a *modo* (that we shall see herein below, in lecture 15, parr. 15.1-15.4).

Please note that the word “common”, as it is mentioned in art. 1345 ICC, does not mean that the mere knowledge of the personal reason of one party by the other party is enough to say that the motive is common to both of them; to be qualified as a common one, it is necessary that one of the parties takes profit from the illegal motive/personal reason of the other.

A few examples:

1) I buy a boat to organize a quick escape after a robbery in Venice (see the movie called “*Italian job*”). This is a case of an individual illegal motive/personal reason, for the completion of the sale-purchase agreement of the boat of the case, that does not matter per se, even if the other party knows about it (obviously, just as far as private law is concerned, not criminal law). But it becomes illegal (in private law), pursuant to art. 1345 ICC, if, by virtue of this, the seller charges me the double of the market price. The contract becomes null and void straight away;

2) I rent an apartment to use it as a house for paid dates: same reasoning;

3) I complete a loan so to grant to the borrower of the case the money enough to gamble (or to continue to gamble). The contract is not void for the sole reason that I know, as lender, about it, but it becomes null and void if, apart from being lender, I am also the owner of the gambling house (because, accordingly, the borrower is pushed to gamble and, potentially, to lose money, so I can take a profit out of it).

Please note that the *causa* of a typical legal transaction is independent from its variations of content. For example, the sale is an exchange of a thing for a price, regardless of whether the thing of the case is a movable property or an immovable one. An agency is a contract by which a person undertakes to perform one or more legal acts on behalf of someone else, regardless of which specific legal act is to be performed.

On the contrary, everything is different, when it comes to **atypical** legal transactions: here the interpreter must evaluate all facts standing behind the legal transaction of the case, to learn if its own *causa* is a valid one or not (see the case of the leasing contract: generally speaking, it is valid; sometimes can be invalid, as if it has been agreed on in breach of art. 2744 ICC).

### **About so-called *negozio indiretto*.**

This is a case that occurs when there is a divergence between the practical purpose and the typical/legal purpose of the legal transaction of the case.

Examples:

1) a sale at a sort-of-fake price (so-called *vendita nummo uno*, namely for a penny) creates, practically speaking, an indirect gift (which is a kind of *negozio indiretto*);

2) the setting up of a so-called *società di comodo* (namely, a company created for the mere purpose of the enjoyment of one or more assets) performs, on a practical basis, a community of ownership, and accordingly art. 2248 ICC is to be applied<sup>32</sup>.

### **ARTICOLO 2248 CC**

#### **Comunione a scopo di godimento**

“[I]. *La comunione costituita o mantenuta al solo scopo del godimento di una o più cose è regolata dalle norme del titolo VII del libro III*”.

### **ARTICLE 2248 ICC**

#### **Community for the purpose of enjoyment**

“[I]. *A community created or maintained for the mere purpose of the enjoyment of one or more things is governed by rules of Title VII of the Book III*”.

3) a sale performed for the sole purpose to create a guarantee carries out, in practice, a legal transaction aimed at creating a guarantee alternative to the formal creation of a pledge or a mortgage (actually, it is a more flexible guarantee).

4) the sale of an asset between A and B with payment of the price performed by B and transfer of ownership of the asset of the case from A to C achieves, between B and C, an indirect gift, under art. 809 ICC.

Now, please note that a negozio indiretto is a valid legal transaction, until it breaches mandatory rules. See on the contrary, e.g., art. 2744 ICC.

### **ARTICOLO 2744 CC**

#### **Divieto del patto commissorio**

“[I]. *È nullo il patto col quale si conviene che, in mancanza del pagamento del credito nel termine fissato, la proprietà della cosa ipotecata o data in pegno passi al creditore. Il patto è nullo anche se posteriore alla costituzione dell’ipoteca o del pegno*”.

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<sup>32</sup> Please remember that we talked about it in lecture 6, par. 6.3, when we were speaking about some of the most relevant differences that come out from the application of the law on companies, on one side, and the law on contracts, from the other side; and we compared, accordingly, the full financial autonomy of companies *stricto sensu* with no financial autonomy at all of the legal regime coming out from a community over a *right in rem*.

## ARTICLE 2744 ICC

### Prohibition of foreclosure agreements (*pactum commissorium*)

“[I]. Any covenant according to which its parties agree that, in case of failure of payment of the credit of the case within the time limit agreed on by them, ownership of the mortgaged or pledged property is transferred to the creditor of the case, it is a void agreement. The agreement is void even when it is completed after creation of the mortgage or the pledge of the case”.

Please note that in most legal transactions, the legal concept of *causa* consists in the synthesis of its own essential legal effects/consequences (this is the case, e.g., of the *causa* of a sale, or an insurance contract, or a contract of company, *et cetera*). In all these cases, every conventional legal effect of one party finds its own justification in the legal effects of the other party. Examples: “*I sell to You because you pay me a price*”; “*I take the risk of insuring a certain asset because a premium is paid to me*”.

All the above is missing when a transfer made free-of-charge is involved; but, here, the *causa* of the gift comes into play (see art. 769 ICC).

Then, a financial-legal transaction is often an autonomous and a complete one, but sometimes it finds its own assumption in a previous (pre-existing) obligation. Examples: the creation of a pledge or a mortgage (or even the completion of a contract of *fideiussione*) is agreed on due the previous issuing of a loan.

In all these cases, if the pre-existing legal transaction, on which the linked one is based on, ceases to exist or does not exist at all, then the linked legal transaction ceases too, because it is without *causa*.

Please note that the *causa* of a certain legal transaction can even consist in a legal transaction completed between other persons (this is, actually, the case of the abovementioned *fideiussione*, which is a contract completed by and between a third party and the creditor of the case).

Again, it may happen that a legal transaction is simply the execution of a previous one (and therefore it is based on it, in terms of its own *causa*).

Examples:

- the transfer of a property purchased by the agent, from a third-party seller, to his own principal of the case, finds its own *causa* in the agency agreement originally signed between principal and agent;
- the so-called *datio in solutum* (see art. 1197 ICC), which covers the case of a performance whose subject matter is different from the one originally agreed on by the parties, finds its own *causa* in a pre-existing obligation.

### **About lack of *causa*.**

It means that the contract is void, pursuant to art. 1418, par. 2, ICC.

## **ARTICOLO 1418 CC**

### **Cause di nullità del contratto**

*“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.*

*[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’articolo 1325, l’illiceità della causa, la illiceità dei motivi nel caso indicato dall’articolo 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’articolo 1346.*

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.*

## **ARTICLE 1418 ICC**

### **Grounds for voidity of a contract**

*“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.*

*[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.*

*[III]. A contract is also null and void in the other cases established by law”.*

There is lack of *causa* when one of the essential elements of the legal transaction of the case cannot be absolutely produced, due to the lack of one of its own logical assumptions.

Examples: the sale-purchase agreement of a property which is already a property of the buyer; the insurance contract against fires whose subject matter is a house already burnt out.

Then, a *causa* is missing if the obligation that the legal transaction of the case intends to execute, amend or guarantee, is a non-existent one (see e.g., the cases of a mortgage or a *fideiussione* that find their own *causa* in a non-existing debt).

### **About illegality of *causa*.**

It means voidity of the contract of the case too, under art. 1418, par. 2, ICC.

## ARTICOLO 1418 CC

### Cause di nullità del contratto

“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.

[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall’articolo 1325, l’illiceità della causa, la illiceità dei motivi nel caso indicato dall’articolo 1345 e la mancanza nell’oggetto dei requisiti stabiliti dall’articolo 1346.

[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.

[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.

[III]. A contract is also null and void in the other cases established by law”.

Question: when a *causa* is an illegal one? See art. 1343 ICC.

## ARTICOLO 1343 CC

### Causa illecita

“[I]. La causa è illecita quando è contraria a norme imperative, all’ordine pubblico o al buon costume”.

## ARTICLE 1343 ICC

### Illegal causa

“[I]. Causa is illegal when it is against mandatory rules of law, public policy and good customs”.

### About a *causa* against mandatory rules of law.

Here we go back to the distinction, already seen, between mandatory rules of law and dispositive rules of law.

An example of a mandatory rule: art. 979 ICC on the duration of the *right in rem* of usufruct. Whereas, an example of a dispositive rule, once again, on matter of right of usufruct, are art. 1004 ICC and art. 1005 ICC on ordinary and extraordinary expenses.

Consequences of a dispositive rule of law: for example, the different still legal effects of an agreement which does not comply with the text of the rule of law of the case.

Criteria to distinguish a mandatory rule of law from a dispositive rule of law:

- if the rule of law of the case expressly speaks of voidity, then it is certainly a mandatory rule of law;
- on the contrary, it is a dispositive one, if it states that the different will of the parties remains unaffected;
- in the other, remaining cases we must proceed by interpretation, bearing in mind the purpose (the *ratio/rationale*) of the rule of law of the case.

### **About a *causa* against public policy.**

The label **public policy** is customarily used to identify, per se, a set of fundamental and mandatory rules of law that disclose general principles of the entire legal system too.

Alongside the express prohibitions provided for by the law, there are other situations where the prohibition of the case can be drawn down by induction from the legal system as a whole, the most relevant of which can be found out in the Constitution.

Here, a distinction is made between **political public policy** (pertaining to the defence of the structure of the State (1), the family (2) or the freedom and integrity of individuals (3)) and **financial public policy**.

### **On political public policy.**

Examples of behaviours against political public policy.

Case (1): the sale of a vote; an act of corruption of a public official; the subornation of a witness; an agreement for the renunciation to run for elections against payment of a price; a contract of insurance completed to cover possible payments of fines; a legal transaction that endanger the State.

Case (2): any legal transaction that tends to limit the freedom of decision regarding the establishment, or the claim against, or the dissolution, of family ties.

Case (3): boycott agreements against those who belong to a certain religious confession or association.

### **On financial public policy.**

Under the label financial public policy, we distinguish between:

a) **financial public policy of protection:** here the purpose is to protect the weaker contractual party of the case.

Examples of financial public policies of protection:

- the prohibition of *usura* (see art. 1815, par. 2, ICC);
- art. 9 of law no. 192/1998 on *subfornitura*;
- the mandatory rules for the protection of savers and consumers;
- art. 1229, par. 1, ICC, on the exclusion from liability on obligations.

b) **financial public policy of economic direction:** here we talk about a set of rules that establish the criteria on the basis of which financial activities of public and private operators must be performed.

Examples of financial public policies of economic direction:

- most of the rules and principles governing competition and market;
- art. 979 ICC (because the regime for the circulation of goods also falls within this provision);
- the principle of the debtor's financial liability (namely, art. 2740 ICC).

A behaviour against this kind of public policy: the promise to give a sum of money to an employee in exchange for the disclosure of confidential information on the company he/she works for.

### **About a *causa* against good customs.**

Here, we are talking about rules of social behaviour whose breach is qualified immoral and scandalous, by the legal system, on a general basis.

Please note that these are rules of law to be related to the historical period of reference and therefore they can change over time.

Examples of behaviours against good customs:

- bribery agreements (public or private ones);
- legal transactions according to which someone agrees on lying, being dishonest, reticent, and so on;
- legal transactions against sexual decency (e.g., the contract of prostitution; the contract for the management of a house of paid dates).

Please also remember the case of contracts for management of gambling houses (here it depends on the activity of the case, namely if it is legally allowed or not).

Please note that if a performance is against good customs/morality, a claim for its own restitution is not allowed, according to art. 2035 ICC.

Please also note that often the concept of illegal causa is a duplication of the concept of illegal subject matter.

Please finally even note that sometimes the *causa* can be an illegal one, even if the individual services of the case are legal ones, per se. See e.g., the case of a promise of money made by a private individual: it is illegal when it is done to a public official for the performance, by the latter, of an act in accordance with his duties.

### **On *causa* and deserving interests.**

This is the case, e.g., of a bet, which does not grant the right to make a claim for payment, under art. 1933 ICC.

This is also the case of art. 1322, par. 2, ICC, for atypical contracts.

As for unilateral legal transactions: here the legal schemes worthy of protection are those already established by the law. The parties are not allowed to use others, different schemes from the ones provided for by the law.

### **On *negozi causali* and *negozi astratti*.**

If the causa is an illegal one, or not worthy of protection, then the legal system always reacts; and reacts by denying any effect to the legal transaction of the case.

Other times, however, the legal reaction does not directly affect the legal transaction of the case, which produces anyway its own effects, and, on the contrary, it affects some of the consequences that arise from the very same legal transaction.

When a legal transaction can produce its own legal effects regardless of the validity of its own causa, then we talk of a *negozio astratto*.

An example: a *cambiale*/promissory note.

There is a sale-purchase agreement. The buyer (B) pays the seller (A) by issuing a *cambiale*, which contains the commitment of the so-called *emittente* to pay a certain amount of money to its own legitimate holder, who can be its first recipient (so-called *primo prenditore*) or an endorsee (so-called *giratario*).

Here A, the first recipient of the *cambiale*, can forward it to a third party C (who becomes an endorsee), and C can forward it to D, and every endorsee can, at a certain point, cash-in the *cambiale* and therefore ask the issuer to pay the amount mentioned in the *cambiale*, even if there is no legal relationship between the endorsee of the case and B.

In this case, the issuer/buyer must pay even if there are vices of will or other issues that involve invalidity (namely, voidity or avoidance) of the original sale-purchase contract completed between A and B.

That's possible because a *cambiale* is a *titolo di credito* (an instrument of credit) and is qualified as a *negozio astratto*.

Now, if everything would end like this, A would be unduly enriched, and B would be unduly impoverished. Accordingly, then, the law allows B to make a claim against A for unjustified enrichment, under art. 2041 ICC, to solve every issue behind the case.

Please note that the above-mentioned case is an exception, in our legal system, to the general rule of law that legal transactions having *effetti reali* over things (under art. 1376 ICC) must always be *negozi causali*; and most of the legal transactions having *effetti obbligatori* (binding effect amongst their parties) are *negozi causali* too.

Our legal system never allows a transfer of ownership based on a *negozio astratto*. Without a valid *causa*, there is no transfer of ownership.

*Negozi astratti* that deal with promises involved in plurilateral legal relationships (like a promissory note or a *delegazione astratta*) are allowed.

The purpose is to make legal transactions safer, easier and faster.

**On *negozi in frode alla legge* (legal transactions in fraud of law).**

#### **ARTICOLO 1344 CC**

##### **Contratto in frode alla legge**

“[I]. *Si reputa altresì illecita la causa quando il contratto costituisce il mezzo per eludere l'applicazione di una norma imperativa*”.

#### **ARTICLE 1344 ICC**

##### **Contract in fraud of law**

“[I]. *Causa is also considered to be an illegal one when the contract of the case is the means to avoid application of a mandatory rule*”.

Examples: the combination of two or more legitimate legal transactions per se made out to achieve an outcome equivalent to the one of an illegal transaction.

E.g., the law denies to certain persons, in specific circumstances, the right of buying (see art. 1471 ICC). Here we are in fraud of law if, e.g., I use a *fiduciario* who buys on my behalf and then transfers the property to me afterwards, upon demand.

#### **14.4 On form of contracts.**

The basic rule is the freedom of forms.

However, sometimes the law requires a certain form for the completion of a certain legal transaction.

Which is the form? On a general basis, it is the written one.

Now, there are three kinds of written forms available in our legal system, namely:

- 1) *scrittura privata* (or private written document);
- 2) *scrittura privata autenticata* (or certified private written document);
- 3) *atto pubblico* (or public deed)<sup>33</sup>.

## ARTICOLO 1350 CC

### Atti che devono farsi per iscritto

“[I]. Devono farsi per atto pubblico o per scrittura privata, sotto pena di nullità:

- 1) i contratti che trasferiscono la proprietà di beni immobili;
- 2) i contratti che costituiscono, modificano o trasferiscono il diritto di usufrutto su beni immobili, il diritto di superficie, il diritto del concedente e dell'enfiteuta;
- 3) i contratti che costituiscono la comunione di diritti indicati dai numeri precedenti;
- 4) i contratti che costituiscono o modificano le servitù prediali, il diritto di uso su beni immobili e il diritto di abitazione;
- 5) gli atti di rinuncia ai diritti indicati dai numeri precedenti;
- 6) i contratti di affrancazione del fondo enfiteutico;
- 7) i contratti di anticresi;
- 8) i contratti di locazione di beni immobili per una durata superiore a nove anni;
- 9) i contratti di società o di associazione con i quali si conferisce il godimento di beni immobili o di altri diritti reali immobiliari per un tempo eccedente i nove anni o per un tempo indeterminato;
- 10) gli atti che costituiscono rendite perpetue o vitalizie, salve le disposizioni relative alle rendite dello Stato;
- 11) gli atti di divisione di beni immobili e di altri diritti reali immobiliari;
- 12) le transazioni che hanno per oggetto controversie relative ai rapporti giuridici menzionati nei numeri precedenti;
- 13) gli altri atti specialmente indicati dalla legge”.

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<sup>33</sup> Always taking into account that a public deed is, in English private law, a peculiar kind of *atto pubblico*, with specific elements, different from the ones involved in an Italian public deed.

## ARTICLE 1350 ICC

### Acts that must be performed in a written form

“[I]. They must be performed by way of an atto pubblico or a scrittura privata, under penalty of nullity:

- 1) contracts that transfer ownership of immovable properties;
- 2) contracts that create, modify or transfer the right in rem of usufrutto on immovable properties, the right in rem of superficie, the right in rem of the concedente and the enfiteuta;
- 3) contracts which create a community of right over the rights in rem mentioned in the preceding numbers;
- 4) contracts that create or modify the right in rem of easements, the right in rem of uso over immovable properties and the right in rem of abitazione;
- 5) acts of renunciation to one of the rights in rem mentioned in the previous numbers;
- 6) contracts for redemption of a fondo enfiteutico;
- 7) contracts of anticresi;
- 8) contracts for rent of immovable properties for a duration exceeding nine years;
- 9) contracts of company or of association according to which the enjoyment of an immovable property or another right in rem over an immovable property is granted for a period exceeding nine years or for an indefinite period;
- 10) acts that create perpetual annuities or life annuities, without prejudice to the provisions concerning State revenues;
- 11) acts of division of immovable properties and other rights in rem over immovable properties;
- 12) settlement which have as their subject matter disputes relating to the legal relationships mentioned in the previous numbers;
- 13) other acts especially indicated by the law”.

**On atto pubblico.**

## ARTICOLO 2699 CC

### Atto pubblico

“[I]. L’atto pubblico è il documento redatto, con le richieste formalità, da un notaio o da altro pubblico ufficiale autorizzato ad attribuirgli pubblica fede nel luogo dove l’atto è formato”.

## ARTICLE 2699 ICC

### *Atto pubblico*

“[I]. An atto pubblico is a document drafted with the required formalities by a (public) notary or another public official authorized to give public faith to it in the place where the atto of the case is completed”.

Point of reference: art. 47, law February 16, 1913, n. 89 (so-called *legge notarile*):

1. *The notarial deed cannot be received by the notary except in presence of the parties and, in the cases provided for by article 48, of two witnesses.*

2. *The (public) notary scrutinises the will of the parties and takes care, under his own direction and liability, of the full completion of the deed.*

## ARTICOLO 2700 CC

### **Efficacia dell'atto pubblico**

“[I]. *L'atto pubblico fa piena prova, fino a querela di falso, della provenienza del documento dal pubblico ufficiale che lo ha formato, nonché delle dichiarazioni delle parti e degli altri fatti che il pubblico ufficiale attesta avvenuti in sua presenza o da lui compiuti*”.

## ARTICLE 2700 ICC

### **Effectiveness of an *atto pubblico***

“[I]. An atto pubblico grants full proof, up to complaint of forgery, of the origin of the document of the case from the public official who drafted it, along with the declarations of the parties and of other facts that the public official certifies as occurred in his presence or made by him”.

**On *scrittura privata* (or private written document).**

## ARTICOLO 2702 CC

### **Efficacia della scrittura privata**

“[I]. *La scrittura privata fa piena prova, fino a querela di falso, della provenienza delle dichiarazioni da chi l'ha sottoscritta, se colui contro il quale la scrittura è prodotta ne riconosce la sottoscrizione, ovvero se questa è legalmente considerata come riconosciuta*”.

## ARTICLE 2702 ICC

### Effectiveness of a private written document

*“[I]. A private written document grants full proof, up to complaint of forgery, of the origin of the declarations made by the person who signed it, if the person against whom the deed is produced recognizes her own signature, or if that is legally meant to be as recognized”.*

As for private written documents, the more difficult thing is to ascertain the date of a legal transaction of the case behind it to eventually oppose them to third parties, under art. 2704 ICC.

## ARTICOLO 2704 CC

### Data della scrittura privata nei confronti dei terzi

*“[I]. La data della scrittura privata della quale non è autenticata la sottoscrizione non è certa e computabile riguardo ai terzi, se non dal giorno in cui la scrittura è stata registrata o dal giorno della morte o della sopravvenuta impossibilità fisica di colui o di uno di coloro che l'hanno sottoscritta o dal giorno in cui il contenuto della scrittura è riprodotto in atti pubblici o, infine, dal giorno in cui si verifica un altro fatto che stabilisca in modo egualmente certo l'antiorità della formazione del documento.*

*[II]. La data della scrittura privata che contiene dichiarazioni unilaterali non destinate a persona determinata può essere accertata con qualsiasi mezzo di prova.*

*[III]. Per l'accertamento della data nelle quietanze il giudice, tenuto conto delle circostanze, può ammettere qualsiasi mezzo di prova”.*

## ARTICLE 2704 ICC

### Date of a private written document against third parties

*“[I]. The date of a private written document whose signature is not certified, it is not a certain one, and it cannot be opposed to third parties, except from the day of registration of the same document, or from the day of the death, or the supervening physical impossibility, of the person who has signed it, or from the day of reproduction of its content in an atto pubblico, or, finally, from the day in which has occurred another fact that establishes in an equally certain way that the completion of the document was a previous one.*

*[II]. The date of a private written document that contains unilateral declarations not meant to be directed to a specific person can be ascertained by any means of proof.*

*[III]. To ascertain a date inserted in a receipt, under the circumstances of the case, a judge can admit any means of proof”.*

Accordingly, that's the reason why the certification of a private written document becomes important too.

**On *scrittura privata autenticata* (or certified private written document).**

**ARTICOLO 2703 CC**

**Sottoscrizione autenticata**

*“[I]. Si ha per riconosciuta la sottoscrizione autenticata dal notaio o da altro pubblico ufficiale a ciò autorizzato.*

*[II]. L'autenticazione consiste nell'attestazione da parte del pubblico ufficiale che la sottoscrizione è stata apposta in sua presenza. Il pubblico ufficiale deve previamente accertare la identità della persona che sottoscrive”.*

**ARTICLE 2703 ICC**

**Certified subscription**

*“[I]. A signature certified by a (public) notary or another public official authorized to do so is meant to be as recognized.*

*[II]. The certification consists in a declaration made by the public official that the signature of the case was performed in his presence. The public official must firstly ascertain the identity of the person who is going to sign the document of the case”.*

Now, please note that the written form can be satisfied not only through the drafting of a single document signed by all parties interested by it, but also through the drafting of several written documents, each coming from the very same parties (see e.g., an exchange of letters for the completion of sale-purchase contract over an immovable property).

**On the evolution of formalism.**

Originally form was a tool to distinguish legal commitments from moral ones.

In modern private laws, a disappearance of the solemn formalism for the legal transactions with patrimonial content occurred.

On the different purposes of the modern formalism:

– the form, today, as a tool necessary to distinguish between agreements reached during negotiations and binding contracts, like *contratti preliminari* or *contratti definitivi*;

– the form as a tool aimed at inducing thoughts (particularly when the law requires attendance of a public official)

- the written form as a tool to ease the proof of the existence of the legal transaction of the case (see art. 2721 ICC and ff. ones on matter of witnesses' evidence and *presunzioni*);
- the form as a tool aimed at avoiding misunderstandings about the nature or the subject matter of the legal transaction of the case (so to apply all rules of law on *titoli di credito*, if a promissory note or a check is issued, the document of the case must necessarily mention the label “promissory note” or “check”);
- the form as a suitable tool to ease control of documents (in the case of legal transactions completed by the public administrations: contracts with public entities can only be entered into in a written form);
- the form as a suitable tool to ensure clarity on the contents of the contract of the case (see e.g., art. 23, par. 1, of Legislative Decree 24/02/1998, n. 58).

Possible side effects: sometimes, an obstacle to the completion of the legal transaction of the case.

Binding forms:

- see art. 1350 ICC, as for contracts in general;
- see art. 792 ICC, as for gifts (which is a contract) in particular;
- see art. 2328 ICC and art. 2463 ICC, as for the deeds to set up a joint stock company or a limited liability company;
- see art. 1341 ICC, as for the *clausole vessatorie*;
- as for the will, please see the forms of the so-called *testamento olografo*, *testamento pubblico* and *testamento segreto* (see art. 601 ICC and ff. ones).

**About *forma convenzionale*.**

## **ARTICOLO 1352 CC**

### **Forme convenzionali**

“[I]. *Se le parti hanno convenuto per iscritto di adottare una determinata forma per la futura conclusione di un contratto, si presume che la forma sia stata voluta per la validità di questo*”.

## **ARTICLE 1352 ICC**

### **Conventional forms**

“[I]. *If the parties have agreed in writing on using a certain form for the future completion of a contract, then it is supposed that the form was agreed on for the validity of said contract*”.

Finally, please note the distinction between the so-called *forma ad substantiam* and the so-called *forma ad probationem*: it involves the distinction between voidity of the legal transaction of the case, from one side, and impossibility to prove its own existence, on the other side (see art. 2725 ICC and art. 2729, par. 2, ICC).

## 15 Lecture 15: on Italian contract law. On accidental elements and invalidity of contracts.

SUMMARY: 15.1 On the accidental elements of a contract. – 15.2 On condition. – 15.3 On *termine*. – 15.4 On *modo* or *onus*. – 15.5 On invalidity of contracts and legal transactions: introduction to voidity and avoidance. – 15.6 On voidity. – 15.7 On avoidance. – 15.8 On claims for voidity and avoidance. – 15.9 On legal effects/consequences of voidity and avoidance. – 15.10 On opposability to third parties of the invalidity of a legal transaction or a contract. – 15.11 On the field of application of voidity.

### 15.1 On the accidental elements of a contract.

We learned that there is a basic division in place, inside the Italian private law on contracts, between the essential elements of a contract and the accidental elements of a contract, which are, namely, *condizione* (condition), *termine* and *modo* (or *onus*).

### 15.2 On condition.

A condition is a future and uncertain event. We are used to say that there is a condition when we talk about a *dies incertus an incertus quando*<sup>34</sup>.

The rules of law on condition/*condizione* are artt. 1353-1361 ICC.

#### ARTICOLO 1353 CC

#### Contratto condizionale

“[I]. *Le parti possono subordinare l’efficacia o la risoluzione del contratto o di un singolo patto a un avvenimento futuro e incerto*”.

#### ARTICLE 1353 ICC

#### Conditional contract

“[I]. *The parties can agree that the effectiveness or the termination of a contract or a single covenant/clause<sup>35</sup> is subjected to a future and uncertain event*”.

A condition can be a *condizione sospensiva* (condition precedent) or a *condizione risolutiva* (condition subsequent)<sup>36</sup>.

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<sup>34</sup> Please note that here the Italian word *condizione* means something quite different from the very same word as used inside, e.g., art. 1341 ICC, on the so-called *condizioni generali di contratto*, because in the latter case the proper translation of *condizione* is *clause* (or *term*, which means *termine* in a very broad way).

<sup>35</sup> Please note that *covenant* is the proper English word to translate, per se, the Italian private-law concept of *patto*. If the *patto* of the case is contained inside a contract, then, from our point of view, again it’s better to talk about a clause.

Examples of a *condition precedent* and a *condition subsequent*:

1) a *condition precedent*: an agreement between two parties according to which one of them buys (or undertakes to buy/purchase – in case of a preliminary agreement) a certain immovable property if she is going to be transferred to work (from the company she works for), in the future, in a borough near the place where the property under sale is located;

2) a *condition subsequent*: an agreement between two parties according to which a party buys a certain immovable property but agrees that the legal effects/consequences of such an agreement are going to terminate in case that she is going to be transferred (from the company she works for), in the future, to another borough, far away from the place where she is currently located.

Please note that a *condition* is an institution/instrument useful to shape the legal transaction of the case to the most diverse, still uncertain, circumstances of the case, that may concern one or more of its own parties.

Please also note that there are a few legal transactions that cannot bear any condition at all, namely:

- marriage;
- legal transactions in family-law in general;
- issuance, forward and acceptance of a *cambiale*/promissory note or an *assegno*/check or other *titoli di credito*/instruments of credit in general;
- acceptance of, and renunciation to, inheritance.

### **On illegal and impossible conditions.**

#### **ARTICOLO 1354 CC**

#### **Condizioni illecite o impossibili**

“[I]. È nullo il contratto al quale è apposta una condizione, sospensiva o risolutiva, contraria a norme imperative, all’ordine pubblico o al buon costume.

[II]. La condizione impossibile rende nullo il contratto se è sospensiva; se è risolutiva, si ha come non apposta.

[III]. Se la condizione illecita o impossibile è apposta a un patto singolo del contratto, si osservano, riguardo all’efficacia del patto, le disposizioni dei commi precedenti, fermo quanto è disposto dall’articolo 1419”.

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<sup>36</sup> Please note that *condition precedent* and *condition subsequent* are the very same words used in English private law to define an institution like our *condizione sospensiva* and *risolutiva* (even if they are also linked, over there, with the legal concept of *successive interests*, in succession law, which is not allowed, on the contrary, in Italian succession law).

## ARTICLE 1354 ICC

### Illegal or impossible conditions

“[I]. A contract to which is attached either a condition precedent or a condition subsequent against mandatory rules, public policy or good customs, it is a null and void contract.

[II]. An impossible condition makes the contract null and void if it is a precedent one; if it is a subsequent condition, then it is to be meant as non-attached.

[III]. *If an illegal or an impossible condition is attached to a single clause of a contract, then the provisions of the preceding paragraphs are to be observed too, as far as the effectiveness of the agreement is concerned, without prejudice to the provisions of article 1419”.*

As for illegality of a condition, the point of reference is still art. 1343 ICC, which means invalidity, namely voidity of the contract or the unilateral legal transaction of the case (in the latter case, under joint application of art. 1324 ICC too).

An example of a contract subject to an illegal condition is a gift subject to the condition precedent that the donee is going to perform an unlawful act, or shall marry a certain person, or shall change religion. The gift is void, because in this way the donor wishes he could unduly influence the exercise of the freedom of movement (*latu sensu* meant) of the donee of the case<sup>37</sup>.

### The case of the authorization.

An authorization can be a prerequisite for the effectiveness of a certain legal transaction, due at law and not agreed on by the parties. In these circumstances, the authorization is a *condicio iuris* or a condition at law.

### About *condizione casuale, potestativa, mista* and *meramente potestativa*.

Conditions can be distinguished in *condizione causale* (random condition), *condizione potestativa*, *condizione mista* (mixed condition) and *condizione meramente potestativa*.

A random condition is a condition whose occurrence is independent from the will of the parties. Examples: “*If it is going to rain*”; “*If it is going to be sunny*”; “*If A buys that apartment*”<sup>38</sup>.

On the contrary, a *condizione potestativa* is a condition that depends on the will of one or both the parties. An example: “*If I am going to move abroad*”.

<sup>37</sup> As for the cases concerning legal transactions that do not accept conditions, please note that the above-mentioned *titoli di credito* are a paradigmatic case of a legal instrument that remains valid even if a condition in breach of law is attached to them. On the contrary, as for the voidity at law of the legal transaction of the case subjected to a condition of whatever kind, please see the case of the acceptance of, or the renunciation to, inheritance.

<sup>38</sup> Where A is a third party, against the parties of the contract of the case.

Instead, a mixed condition is a condition whose occurrence depends partly on the will of a party and it is partly independent from it. An example: “*If I am going to get a loan*”. Here there is a need for:

- a) a request of loan, that involves a legal transaction which depends on the will of the prospective borrower; and
- b) the grant of the loan, that involves a legal transaction which fully depends, on the contrary, on the will of a third party, namely, the prospective lender.

Then, when it comes to *condizione potestativa*, there is a legally relevant distinction between a customary *condizione potestativa* and a pure *condizione potestativa* (namely, once again a *condizione meramente potestativa*).

## ARTICOLO 1355 CC

### Condizione meramente potestativa

“*[I]. È nulla l’alienazione di un diritto o l’assunzione di un obbligo subordinata a una condizione sospensiva che la faccia dipendere dalla mera volontà dell’alienante o, rispettivamente, da quella del debitore*”.

## ARTICLE 1355 ICC

### Pure *condizione potestativa*

“*[I]. A transfer of a right or an engagement in an obligation subject to a condition precedent that depends on the mere will of the transferor or, respectively, of the debtor, it is a null and void legal transaction*”.

Here the expression “*mere will*” means “*mere free will*”, as in case of art. 1349 ICC. A party that accepts such a condition submits herself to other party’s exclusive assessment on the opportunity about the completion of the legal transaction of the case. Examples: “*I’ll pay if I want*”; “*I’ll buy it if I want/if I like it*”.

On the contrary, in case of a customary *condizione potestativa*, the future and uncertain event depends on the behaviour (and therefore on the will) of one of the parties, but the behaviour of said party does not depend only and exclusively on her will, but also on objective reasons about the opportunity to behave in that way. An example: “*If I start a company for construction of cars, I will buy all components to assemble them from your own company*”.

To sum up, in case of a *condizione meramente potestativa* there is no interest at all in binding. Therefore, if it is a condition precedent, it means voidity of the clause or the contract/legal transaction of the case, whereas if it is a condition subsequent it means that:

a) if the subject matter of the legal transaction is a transfer of a right, then it is a valid legal transaction (see e.g., the case of a sale with a redemption agreement under art. 1500 ICC), because the property is transferred straight away;

b) if the subject matter of the legal transaction is an engagement into an obligation, then the legal transaction is void, because it makes no sense to speak of an obligation when there is no will to abide by it.

### **On pendency of a condition.**

A condition is pending if there is still uncertainty as to whether the future and uncertain event is going to occur or not.

Pending a condition, the legal positions of the parties are, from one side, a position of **expectation at law** (covered by the law)<sup>39</sup> and, from the other side, a position of **exercise of a so-called conditioned right**.

## **ARTICOLO 1356 CC**

### **Pendenza della condizione**

*“[I]. In pendenza della condizione sospensiva l’acquirente di un diritto può compiere atti conservativi.*

*[II]. L’acquirente di un diritto sotto condizione risolutiva può, in pendenza di questa, esercitarlo, ma l’altro contraente può compiere atti conservativi”.*

## **ARTICLE 1356 ICC**

### **Pendency of a condition**

*“[I]. During pendency of a condition precedent, the acquirer of the right of the case can perform conservative acts.*

*[II]. The transferee of a right subject to a condition subsequent can exercise it, during pendency of the condition, but the other contracting party can perform conservative acts”<sup>40</sup>.*

We talk about conservative acts when there is a reason to fear for an incoming prejudice. An example: a claim for a conservative forfeiture/*sequestro conservativo* of the assets of a debtor (under artt. 2905-2906 ICC), when there is the risk that he/she may become insolvent.

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<sup>39</sup> Please remember the distinction between a *de facto* expectation and an expectation at law, as discussed in lecture 3, paragraph 3.8.

<sup>40</sup> Please note that here the words *acquirer* and *transferee* can be equally used to translate the meaning of the Italian word *acquirente*, because every kind of transfer/acquisition, either by consideration or free of charge, is covered by the provision in charge (as it happens every time a rule of law speaks of either an *alienazione* or an *acquisizione*).

## **On the acts of disposition of properties pending a condition.**

Question: can the holder of a right acquired subject to a condition dispose of it? See art. 1357 ICC.

### **ARTICOLO 1357 CC**

#### **Atti di disposizione in pendenza della condizione**

*“[I]. Chi ha un diritto subordinato a condizione sospensiva o risolutiva può disporre in pendenza di questa; ma gli effetti di ogni atto di disposizione sono subordinati alla stessa condizione”.*

### **ARTICLE 1357 ICC**

#### **Acts of disposition during pendency of a condition**

*“[I]. Anyone who is entitled to a right subject to a condition precedent or subsequent can dispose of it during pendency of the condition; but the effects of each act of disposition are subject to the very same condition”.*

Accordingly, a right subject to a condition is still a disposable right. And please note, if someone who is entitled to a right subject to condition does not reveal the existence of the condition to the third-party transferee of the case, then the rules of law on the protection of the third-party buyer for value that relies on the validity of the legal transaction without fault are to be applied (see e.g., art. 1153 ICC, as far as movable properties are concerned).

### **ARTICOLO 1358 CC**

#### **Comportamento delle parti nello stato di pendenza**

*“[I]. Colui che si è obbligato o che ha alienato un diritto sotto condizione sospensiva, ovvero lo ha acquistato sotto condizione risolutiva, deve, in pendenza della condizione, comportarsi secondo buona fede per conservare integre le ragioni dell'altra parte”.*

### **ARTICLE 1358 ICC**

#### **Behaviour of the parties during pendency of a condition**

*“[I]. Everyone who is obliged or has transferred a right under a condition precedent, or has acquired it under a condition subsequent, must behave in good faith so to safeguard the interests of the other party, during pendency of the condition”.*

Now, please note that to behave in good faith also means not to improperly prevent the condition from occurring. Accordingly,

#### **ARTICOLO 1359 CC**

##### **Avveramento della condizione**

*“[I]. La condizione si considera avverata qualora sia mancata per causa imputabile alla parte che aveva interesse contrario all’avveramento di essa”.*

#### **ARTICLE 1359 ICC**

##### **Fulfilment of the condition**

*“[I]. A condition is qualified as fulfilled when it has not occurred due to a reason ascribable to the party who had an interest against its own fulfilment”.*

**On the (legal) effects/consequences of a condition.**

#### **ARTICOLO 1360 CC**

##### **Retroattività della condizione**

*“[I]. Gli effetti dell’avveramento della condizione retroagiscono al tempo in cui è stato concluso il contratto, salvo che, per volontà delle parti o per la natura del rapporto, gli effetti del contratto o della risoluzione debbano essere riportati a un momento diverso.*

*[II]. Se però la condizione risolutiva è apposta a un contratto ad esecuzione continuata o periodica, l’avveramento di essa, in mancanza di patto contrario, non ha effetto riguardo alle prestazioni già eseguite”.*

#### **ARTICLE 1360 ICC**

##### **Retroactivity of a condition**

*“[I]. The effects of fulfilment of a condition date back to the time of completion of the contract of the case, unless by will of the parties or due the nature of their legal relationship the effects of said contract or its own termination must be dated back to a different time.*

*[II]. However, if a condition subsequent is attached to a contract for a continuous or a periodic execution, then its fulfilment has no effect on the services already performed, in absence of any agreement up to the contrary”.*

Here retroactivity works against third parties too, except in cases where the rules of law on affidamento/reliance are also to be applied (rules of law that, as far as immovable properties are

concerned, are also linked to registration/*trascrizione* of the very same condition before the competent Land Registry of the case).

Accordingly, here we talk about a *retroattività reale* against a *retroattività obbligatoria* which is applied, *exempli gratia* and above all, in case of termination of a contract for breach, under art. 1458 ICC.

*Retroattività reale* deals with, in substance, both the strengthening of the acts of disposition carried out during the pending period by the holder of the legal expectancy of the case and the lapse of those carried out by the holder of the conditioned right (see above art. 1357 ICC).

Please note that, however, retroactivity does not deal with all features of every conditioned right. An example: the fruits collected are due, as a rule, from the time of occurrence of the condition of the case; the acts of administration carried out by the party entitled to exercise the right of the case during pendency of the condition are going to remain valid ones; in contracts for a continuous or a periodic execution, its own fulfilment does not affect the services already performed.

#### **ARTICOLO 1361 CC**

##### **Atti di amministrazione**

“[I]. *L'avveramento della condizione non pregiudica la validità degli atti di amministrazione compiuti dalla parte a cui, in pendenza della condizione stessa, spettava l'esercizio del diritto.*

[II]. *Salvo diverse disposizioni di legge o diversa pattuizione, i frutti percepiti sono dovuti dal giorno in cui la condizione si è avverata”.*

#### **ARTICLE 1361 ICC**

##### **Acts of administration**

“[I]. Fulfilment of a condition does not affect the validity of the acts of management carried out by the party that, pending condition itself, was entitled to exercise the right of the case.

[II]. Unless otherwise provided by the law or differently agreed on by the parties, the fruits collected are due from the day of occurrence of the condition of the case”.

### **15.3 On *termine*.**

A *termine* is a future and certain event.

Here, basically speaking, we talk about a *dies certus an certus quando*.

Now, the issue is to understand what are:

- a *dies incertus an certus quando*; and

- a *dies certus an incertus quando*.

**On a *dies incertus an certus quando*.**

An example: the day concerning an event whose exact date is known but it's not sure if it is going to happen or not (Tizio's 50<sup>th</sup> birthday; we are not sure if it is going to occur).

Here we are dealing with a condition.

**On a *dies certus an incertus quando*.**

An example: the day concerning an event that we are sure that it will occur, but we don't know when (the day when Tizio dies; the day when the government falls).

Here we are dealing with an unidentified/uncertain *termine*.

Accordingly, a *termine* can be a **certain** (e.g., December 25, 2021) or an **uncertain** one (see above).

**On the distinction between an initial *termine* and a final *termine*.**

An **initial *termine*** is a *termine* on whose occurrence the effects of the legal transaction of the case are going to be produced, whereas a **final *termine*** is a *termine* on the occurrence of which the effects of the legal transaction of the case are going to terminate (see e.g., a rent agreement starting from January 1<sup>st</sup>, 2022 and a rent agreement terminating on December 31<sup>st</sup>, 2021).

Please note that a *termine* can be referred to a single legal effect of the legal transaction of the case to which it has been attached to. See e.g., a *termine* to perform an obligation.

**ARTICOLO 1184 CC**

**Termine**

*“[I]. Se per l'adempimento è fissato un termine, questo si presume a favore del debitore, qualora non risulti stabilito a favore del creditore o di entrambi”.*

**ARTICLE 1184 ICC**

**Termine**

*“[I]. If a termine is set up for performance, then it is meant to be on behalf of the debtor, unless it turns out that it was established on behalf of the creditor or both parties”.*

Accordingly, a *termine* is generally set up in favour of the debtor of the case, and in this case the creditor cannot ask for performance before occurrence of the *termine* of the case, whereas the debtor can perform before it.

Anyway, there are cases where a *termine* can be set up in favour of the creditor too, e.g., if a creditor does not want to receive the properties that are the subject matter of the obligation before a certain date.

### **ARTICOLO 1185 CC**

#### **Pendenza del termine**

*“[I]. Il creditore non può esigere la prestazione prima della scadenza, salvo che il termine sia stabilito esclusivamente a suo favore.*

*[II]. Tuttavia il debitore non può ripetere ciò che ha pagato anticipatamente, anche se ignorava l’esistenza del termine. In questo caso però egli può ripetere, nei limiti della perdita subita, ciò di cui il creditore si è arricchito per effetto del pagamento anticipato”.*

### **ARTICLE 1185 ICC**

#### **Pendency of a *termine***

*“[I]. A creditor cannot ask for performance before the due date, unless the termine of the case has been established exclusively in his own favour.*

*[II]. However, a debtor cannot recover what he has already paid, even if he was unaware of the existence of a *termine*. Anyway, in this case, he can claim for the restitution of the properties that the creditor has enriched himself with, out of the advanced payment, within the limits of the loss suffered”.*

### **ARTICOLO 1186 CC**

#### **Decadenza dal termine**

*“[I]. Quantunque il termine sia stabilito a favore del debitore, il creditore può esigere immediatamente la prestazione se il debitore è divenuto insolvente o ha diminuito, per fatto proprio, le garanzie che aveva date o non ha dato le garanzie che aveva promesse”.*

### **ARTICLE 1186 ICC**

#### **Loss of a *termine***

*“[I]. Although a *termine* has been set up on behalf of the debtor of the case, the creditor of the case can immediately demand performance if the debtor has become insolvent or has diminished, due to a fact of his own, the guarantees that he had given, or he has not given the guarantees that he had promised”.*

**On the importance of a *termine* when performance of a contract is involved.**

**ARTICOLO 1457 CC**

**Termine essenziale per una delle parti**

“[I]. *Se il termine fissato per la prestazione di una delle parti deve considerarsi essenziale nell’interesse dell’altra, questa, salvo patto o uso contrario, se vuole esigerne l’esecuzione nonostante la scadenza del termine, deve darne notizia all’altra parte entro tre giorni.*

[II]. *In mancanza, il contratto s’intende risolto di diritto anche se non è stata espressamente pattuita la risoluzione”.*

**ARTICLE 1457 ICC**

**Essential *termine* for one of the parties**

“[I]. *If the termine of the case set up for performance by one of the parties is an essential one, in the interests of the other, then, if the latter wants to demand performance despite expiration of said termine, she must notify it to the other party, within three days, unless otherwise agreed on by the parties or except in case of a contrary custom.*

[II]. *In case of missing notification, then the contract of the case is meant to be terminated at law, even if termination has not been expressly agreed on”.*

An example of an **essential *termine***: a deadline for delivery of a wedding gown or a birthday cake.

Finally, as for the case of a *termine* inserted in a legal transaction completed *mortis causa*, see article 637 ICC.

**ARTICOLO 637 CC**

**Termine**

“[I]. *Si considera non apposto a una disposizione a titolo universale il termine dal quale l’effetto di essa deve cominciare o cessare”.*

**ARTICLE 637 ICC**

***Termine***

“[I]. *A termine according to which the legal effects of a universal-mortis-causa legal arrangement are going to start or end is to be meant as a non-attached one”.*

#### 15.4 On modo or onus.

A *modo* or an *onus* consists in an institution/arrangement that can only be attached to a gratuitous legal transaction. It is a means according to which the financial benefit of the beneficiary of the case can be limited by way of setting up an obligation.

An example: a so-called *donazione modale* of a sum of money performed to an institute of scientific research to be used for research purposes.

#### ARTICOLO 793 CC

##### Donazione modale

“[I]. *La donazione può essere gravata da un onere.*

[II]. *Il donatario è tenuto all’adempimento dell’onere entro i limiti del valore della cosa donata.*

[III]. *Per l’adempimento dell’onere può agire, oltre il donante, qualsiasi interessato, anche durante la vita del donante stesso.*

[IV]. *La risoluzione per inadempimento dell’onere, se preveduta nell’atto di donazione, può essere domandata dal donante o dai suoi eredi”.*

#### ARTICLE 793 ICC

##### Donazione modale

“[I]. A gift can be subjected to an onus.

[II]. The donee is required to discharge the onus within the limits of the value of the gifted property.

[III]. In addition to the donor, any other interested party can make a claim for fulfilment of the onus, even during life of the donor himself.

[IV]. If it has been agreed on in the deed of gift, then termination of a gift for non-fulfilment of the onus can be claimed either by the donor or by his own heirs”.

Again, as for the legacies (*latu sensu* meant) performed *mortis causa* subject to an *onus*, see artt. 647 and 648 ICC.

#### ARTICOLO 647 CC

##### Onere

“[I]. *Tanto all’istituzione di erede quanto al legato può essere apposto un onere.*

[II]. *Se il testatore non ha diversamente disposto, l'autorità giudiziaria, qualora ne ravvisi l'opportunità, può imporre all'erede o al legatario gravato dall'onere una cauzione.*

[III]. *L'onere impossibile o illecito si considera non apposto; rende tuttavia nulla la disposizione, se ne ha costituito il solo motivo determinante”.*

#### ARTICLE 647 ICC

##### *Onus*

“[I]. Both an appointment for heirship and a legato can be subjected to an onus.

[II]. Unless the testator has otherwise provided for, judicial authorities may impose a bail on the heir or the legatee of the case bound by the onus, if they think that it is appropriate.

[III]. An impossible or an illegal onus is to be meant as a non-attached one; however, it makes the arrangement null and void, if it was the sole decisive reason behind it”.

#### ARTICOLO 648 CC

##### **Adempimento dell'onere**

“[I]. *Per l'adempimento dell'onere può agire qualsiasi interessato.*

[II]. *Nel caso d'inadempimento dell'onere, l'autorità giudiziaria può pronunciare la risoluzione della disposizione testamentaria, se la risoluzione è stata prevista dal testatore, o se l'adempimento dell'onere ha costituito il solo motivo determinante della disposizione”.*

#### ARTICLE 648 ICC

##### **Fulfilment of an onus**

“[I]. Any interested party can make a claim for fulfilment of an onus.

[II]. In case of non-fulfilment of the onus of the case, judicial authorities can declare termination of the testamentary arrangement of the case, if the termination was provided for by the testator or if fulfilment of the onus was the sole decisive reason behind said arrangement”.

### **15.5 On invalidity of contracts and legal transactions: introduction to voidity and avoidance.**

For the purposes of the discipline of invalidity of contracts and legal transactions, two basic concepts are to be distinguished: namely, **voidity** (or nullity), from one side, and **avoidance** (or annulment), from the other side.

**Voidity:** it means that the legal transaction of the case (e.g., a contract) does not produce any legal effect/consequence at all, according to the motto “*quod nullum est, nullum producit effectum*”.

Outcomes: a void contract cannot be, *exempli gratia*, confirmed (or validated).

## ARTICOLO 1423 CC

### Inammissibilità della convalida

“[I]. *Il contratto nullo non può essere convalidato, se la legge non dispone diversamente*”.

## ARTICLE 1423 ICC

### Inadmissibility of a confirmation

“[I]. A null and void contract cannot be confirmed, unless the law provides for otherwise”.

**Avoidance:** it means that the effects of the legal transaction of the case are produced but they can be cancelled/deleted if (and only if) said legal transaction is promptly challenged by the party in whose interest this kind of invalidity is set up by the law (unless the very same party has previously confirmed it).

Accordingly, a voidable contract can be confirmed/validated.

## ARTICOLO 1444 CC

### Convalida

“[I]. *Il contratto annullabile può essere convalidato dal contraente al quale spetta l'azione di annullamento, mediante un atto che contenga la menzione del contratto e del motivo di annullabilità, e la dichiarazione che s'intende convalidarlo.*

[II]. *Il contratto è pure convalidato, se il contraente al quale spettava l'azione di annullamento vi ha dato volontariamente esecuzione conoscendo il motivo di annullabilità.*

[III]. *La convalida non ha effetto, se chi l'esegue non è in condizione di concludere validamente il contratto*”.

## ARTICLE 1444 ICC

### Confirmation

“[I]. A voidable contract can be confirmed by the party that could otherwise perform a claim for its own avoidance, by means of an act that mentions the contract, the reason for avoidance, and the declaration that it is meant to be confirmed.

[II]. A contract can also be confirmed if the contracting party that was entitled to the claim for avoidance has voluntarily performed it, being aware of all reasons for avoidance.

[III]. *A confirmation does not produce any effect if the person that performs it can't validly complete the contract of the case*”.

Please note that, according to art. 1444 ICC, **there are two kinds of confirmation**: an **express** one, and a silent, or tacit, or **implicit** one.

Please also note that a confirmation is a unilateral legal transaction.

Again, please also note that in order to produce effects, a confirmation must not be affected by the very same vices of the legal transaction subject to validation (meaning e.g., that the possible vice of will/consent or incapacity to act of the case must have previously ceased).

As far as a void legal transaction is concerned, we can speak, instead, at the most, of a renewal, which occurs when the content of the void legal transaction of the case is transferred into a new legal transaction, free of voidity. Here, technically speaking, there is a new completion. An example: a transaction that is void due to lack of form can be renewed by way of a new completion, carried out with the form prescribed by the law.

Anyway, please note that a renewed legal transaction produces its own legal effects *ex nunc* (meaning, **from now on**), whereas a confirmed contract produces its own legal effects *ex tunc* (meaning, **since then**)<sup>41</sup>.

Indeed, the parties may, even in the case of renewal, agree on the retroactivity of the effects, but such an agreement is relevant only *inter partes* (not for third parties).

Finally, please also note that a void contract can also be converted, under art. 1424 ICC.

## ARTICOLO 1424 CC

### Conversione del contratto nullo

*“[I]. Il contratto nullo può produrre gli effetti di un contratto diverso, del quale contenga i requisiti di sostanza e di forma, qualora, avuto riguardo allo scopo perseguito dalle parti, debba ritenersi che esse lo avrebbero voluto se avessero conosciuto la nullità”.*

## ARTICLE 1424 ICC

### Conversion of a void contract

*“[I]. A void contract can produce the effects of a different contract, whose requirements of substance and form are fulfilled, if, having regard to the aim pursued by the parties, it is reasonable to think that they would have wanted it if they were aware of its own voidity”.*

Purpose of the provision: to cover the financial interest of the parties. An example: a withdrawal for “*giusta causa*” from a company, if there is no *giusta causa*, can still be converted into an ordinary withdrawal, pursuant to art. 2285 ICC, if the latter is admissible and

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<sup>41</sup> Accordingly, here, in the second case, we are still brainstorming in terms of retroactive effects.

if it appears that in any case the withdrawing person wanted to terminate the legal relationship of the case.

As per art. 1424 ICC, conversion can only be performed by judges.

## 15.6 On voidity.

A contract is void when:

- 1) there are no interests to be handled;
- 2) the management of the interests of the case is an unachievable one;
- 3) it lacks the required form under penalty of nullity (see art. 1350 ICC);
- 4) it is an illegal one (see art. 1418, par. 1, ICC), or there are no deserving interests to be covered (see art. 1322, par. 2, ICC).

As for cases 1 and 2. **Interests to be managed are missing when:**

- a) there are no declarations that can be taken seriously (see e.g., the statement made out of joke; the statement issued for illustrative or educational purposes; the theatrical statement; the statement of a child);
- b) the declaration of the case cannot be ascribed to its alleged performer (due to physical violence, which is different from violence as a vice of will and a source of avoidance of contracts);
- c) there is a clear discrepancy, like, e.g., between a proposal and an acceptance (here an agreement is missing).

In all these cases, it is also said that there is no legal transaction at all, meaning the legal transaction is a non-existent one.

Again, someone talks about voidity for missing interests in case of *simulazione*, as in case of sham on contracts the so-called *contratto simulato* does not produce any legal effect between its own parties (see art. 1414, par. 1, ICC).

Then, there is voidity for missing interests when the subject matter is unidentified or unidentifiable (see art. 1346 ICC), under art. 1418 ICC.

## ARTICOLO 1418 CC

### Cause di nullità del contratto

“[I]. Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.

[II]. Producono nullità del contratto la mancanza di uno dei requisiti indicati dall'articolo 1325, l'illiceità della causa, la illiceità dei motivi nel caso indicato dall'articolo 1345 e la mancanza nell'oggetto dei requisiti stabiliti dall'articolo 1346.

*[III]. Il contratto è altresì nullo negli altri casi stabiliti dalla legge”.*

## ARTICLE 1418 ICC

### Grounds for voidity of a contract

*“[I]. A contract is void when it is against mandatory rules, unless the law provides otherwise.*

*[II]. The lack of one of the requirements mentioned in article 1325, the illegality of the causa, the illegality of the motives in the case mentioned in article 1345 and the lack of the requirements established by article 1346 on the subject matter produce voidity of the contract.*

*[III]. A contract is also null and void in the other cases established by law”.*

Then, as per the abovementioned case 3, **management of the interests of the case is an unachievable one, when:**

- there is impossibility of the subject matter (see art. art. 1346 ICC jointly with art. 1418, par. 2, ICC);
- the *causa* is missing.

### 15.7 On avoidance.

Here we are dealing with disposable interests of one of the parties. Accordingly, the law thinks that the legal transaction of the case has to be eventually repealed via a claim of the party of the case. An example: the case of mistake/error (vice of will): in order for a mistake to be ascertained, it is a necessary precondition that the mistaken party expressly challenges the legal transaction/contract of the case for mistake, because said party, despite the error, could in fact be equally interested in said legal transaction/contract.

Therefore, the choice whether to maintain the contractual bound or not is left to the mistaken party; if voidity would be granted, then the very same mistaken party could be damaged.

Same reasoning is to be done for:

- violence (moral one);
- fraud (or wilful misconduct);
- incapacity to act;
- conflict of interests (in case of representation – see artt. 1394-1395 ICC).

Please note that we have said that a contract without a *causa* and a contract with an impossible subject matter are null and void contracts, but even if in these cases there may be, substantially, an error. However, here the discipline on voidity prevails over the discipline of mistake because it implies more severe legal consequences: the rationale is that, in case of an

error that makes the legal transaction of the case without a *causa*, there is no possible residual interest by the person fallen into mistake that deserves to be protected.

## 15.8 On claims for voidity and avoidance.

On the power/right to make a claim for voidity: see art. 1421 ICC.

### ARTICOLO 1421 CC

#### Legittimazione all'azione di nullità

“[I]. *Salvo diverse disposizioni di legge, la nullità può essere fatta valere da chiunque vi ha interesse e può essere rilevata d'ufficio dal giudice*”.

### ARTICLE 1421 ICC

#### Entitlement to make a claim for voidity

“[I]. *Unless otherwise provided by law, voidity can be asserted by anyone who has an interest in it, as well as detected ex officio by the judge*”.

Accordingly, we say that **voidity** is, on a general basis, an **absolute legal remedy**, meaning available to everybody. In any case, a third party must have an interest legally relevant so to perform a claim for voidity.

As per above, anyway there are cases of so-called *nullità relativa* too.

A case of *nullità relativa* (**relative voidity**) is, *exempli gratia*, the one on voidity for protection. Namely, there are situations where a voidity for protection is granted to a sole party, to cover her from decisions not properly evaluated or against possible damaging agreements. Here a *convalida*/confirmation is not allowed, because we are still dealing with voidity, but the party of the case could be interested in the contract. On the contrary, even traditional voidity (meaning an absolute one) could allow the counterpart to get rid of the contract of the case.

Therefore, a *nullità relativa* is provided for, and is declared only upon, a claim performed by protected party of the case. Examples: the lack of the form required for a contract completed by a bank or a financial broker (see art. 117, par. 3, and art. 127, par. 2, of the legislative decree September 1, 1993, n. 385); art. 167, par. 2, of the legislative decree September 7, 2005, n. 209, on insurance contracts.

Rule of law on *nullità relativa*/relative voidity: it is not detectable by the judge. An exception: see art. 36, par. 3, of the Consumer Code (Legislative Decree n. 206/2005).

On the power/right to make a claim for avoidance: see art. 1441 ICC.

## ARTICOLO 1441 CC

### Legittimazione

“[I]. L’annullamento del contratto può essere domandato solo dalla parte nel cui interesse è stabilito dalla legge.

[II]. L’incapacità del condannato in istato di interdizione legale può essere fatta valere da chiunque vi ha interesse”.

## ARTICLE 1441 ICC

### Entitlement

“[I]. Avoidance of a contract can be claimed only by the party in whose interest it is set up by the law.

[II]. Incapacity of a convicted person in a state of legal interdiction can be asserted by anyone who has an interest in it”.

Please note the paragraph 2 is an exception to the rule of law set in paragraph 1: its rationale is a punitive one (and it is different from the one that protects a person incapable to act due to *interdizione, inabilitazione*, and so on)<sup>42</sup>. In this case, we speak of a case of **absolute avoidance**.

An “exception” to the “rule” referred to in paragraph 1 is, as we have seen, the case of the confirmation/validation (see art. 1444 ICC).

The protected person (entitled to make the claim for avoidance) is therefore the arbitrator of the fate of the legal transaction of the case.

Please note that avoidance is substantially close to nullità relativa, but while in the first case the party in whose favour the law provides protection can validate the transaction, in the second one she cannot.

On prescrizione of (or statutory timing-limitation on) the power/right to make a claim for voidity: see art. 1422 ICC.

## ARTICOLO 1422 CC

### Imprescrittibilità dell’azione di nullità

“[I]. L’azione per far dichiarare la nullità non è soggetta a prescrizione, salvi gli effetti dell’usucapione e della prescrizione delle azioni di ripetizione”.

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<sup>42</sup> We talked about it when we spoke about interdiction at law of a convicted person (see lecture 4, par. 4.8).

## ARTICLE 1422 ICC

### Imprescrittibilità of a claim for voidity

*“[I]. A claim for declaration of a voidity is subject to no time-limitation, except as far as the effects of usucapione and prescrizione of claims for restitution are concerned”.*

On prescrizione of (or statutory time limitation on) the power/right to make a claim for avoidance: see art. 1442 ICC.

## ARTICOLO 1442 CC

### Prescrizione

*“[I]. L'azione di annullamento si prescrive in cinque anni.*

*[II]. Quando l'annullabilità dipende da vizio del consenso o da incapacità legale, il termine decorre dal giorno in cui è cessata la violenza, è stato scoperto l'errore o il dolo, è cessato lo stato d'interdizione o d'inabilitazione, ovvero il minore ha raggiunto la maggiore età.*

*[III]. Negli altri casi il termine decorre dal giorno della conclusione del contratto.*

*[IV]. L'annullabilità può essere opposta dalla parte convenuta per l'esecuzione del contratto, anche se è prescritta l'azione per farla valere”.*

## ARTICLE 1442 ICC

### Time limitation

*“[I]. A claim for avoidance expires in five years.*

*[II]. When avoidance depends on a vice of consent or legal incapacity, then the time for claim starts from the day when violence ceased, error or wilful misconduct were discovered, state of interdizione or inabilitazione ceased, or the minor of the case reached the age of majority.*

*[III]. In other cases, the time for claim starts from the day of completion of contract.*

*[IV]. Avoidance can be opposed by the defendant summoned for execution of contract, even if the claim to enforce it is no longer available”.*

### 15.9 On legal effects/consequences of voidity and avoidance.

As for voidity, as already said, the motto/rule is *quod nullum est nullum producit effectum*.

Therefore, a void legal transaction does not produce any legal effect.

In case of a voidable legal transaction, on the contrary, the legal transaction produces its own effects, but once avoidance has been declared by judgment, the judgment itself deprives it of all the effects, even as for the services already performed.

Accordingly, avoidance has retroactive effect.

Anyway, here we are talking *inter partes*. What about third parties?

### **15.10 On opposability to third parties of the invalidity of a legal transaction or a contract.**

As voidity means that no legal effects are produced, it also means that it is customarily opposable to third parties. An example: A sells a property to B with a void contract; B sells it to C; A can claim restitution of the property against C.

Instead, a voidable contract, until cancelled, as mentioned, produces its own effects. Accordingly, the question here is the following one: can a judgment of avoidance produce retroactive effects against third parties too?

Here there is a conflict of interests between the third party and whoever makes the claim and obtains avoidance.

#### **ARTICOLO 1445 CC**

##### **Effetti dell'annullamento nei confronti dei terzi**

*“[I]. L'annullamento che non dipende da incapacità legale non pregiudica i diritti acquistati a titolo oneroso dai terzi di buona fede, salvi gli effetti della trascrizione della domanda di annullamento”.*

#### **ARTICLE 1445 ICC**

##### **Effects of avoidance against third parties**

*“[I]. Avoidance that does not depend on legal incapacity does not affect the rights acquired for consideration by third parties in good faith, except in case of registration of a claim for avoidance”.*

Accordingly, third parties are safe if they are in good faith and the acquisition of the case is occurred for a consideration. Then, as far as immovable properties are concerned, the rules of law on trascrizione come into play too.

Finally, in case of legal incapacity the rules of law on reliance are not applicable.

### 15.11 On the field of application of voidity.

Voidity may concern the entire legal transaction/contract of the case or just one or more of its own clauses. An example: a loan with a mortgage related. Lack of written form means voidity for the sole mortgage, at law (under art. 2821 ICC).

Now, can voidity of a clause involve voidity of the entire contract? The rule of law on the topic is art. 1419 ICC.

#### ARTICOLO 1419 CC

##### Nullità parziale

*“[I]. La nullità parziale di un contratto o la nullità di singole clausole importa la nullità dell’intero contratto, se risulta che i contraenti non lo avrebbero concluso senza quella parte del suo contenuto che è colpita dalla nullità.*

*[II]. La nullità di singole clausole non importa la nullità del contratto, quando le clausole nulle sono sostituite di diritto da norme imperative”.*

#### ARTICLE 1419 ICC

##### Partial voidity

*“[I]. Partial voidity of a contract or voidity of single clauses means voidity of the entire contract if it appears that the contracting parties would not have completed it without that part of its content which is affected by voidity.*

*[II]. Voidity of single clauses does not mean voidity of the contract of the case, when the void clauses are replaced at law by mandatory rules”.*

Here there is a deferment to the will of the parties. Accordingly, there is an issue of interpretation of their will. The rule is respect for private autonomy, but there are cases where the law, instead of making the disapproved legal transaction a null and void one, still means to impose a regulation different from the one chosen by the parties. See e.g., the areas where there is a legal-price discipline: the sale remains firm, but the price is adjusted. Again, the rent of a rustic land: the term on duration of the contract cannot be less than 15 years at law, in favour of the tenant of the case. Here the rule works jointly with art. 1339 ICC.

Please note that the automatic insertion of clauses is a kind of limitation of private autonomy<sup>43</sup>.

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<sup>43</sup> As we mentioned in lecture 3, par. 3.4, on private autonomy, dealing with the limits to private autonomy.

Then, as for the associative contracts (e.g., a contract of company) in particular, please see art. 1420 ICC.

### **ARTICOLO 1420 CC**

#### **Nullità del contratto plurilaterale**

*“[I]. Nei contratti con più di due parti, in cui le prestazioni di ciascuna sono dirette al conseguimento di uno scopo comune, la nullità che colpisce il vincolo di una sola delle parti non importa nullità del contratto, salvo che la partecipazione di essa debba, secondo le circostanze, considerarsi essenziale”.*

### **ARTICLE 1420 ICC**

#### **Voidity of a multilateral contract**

*“[I]. In contracts with more than two parties, in which the performances of all parties are meant to achieve a common purpose, voidity affecting the bond of just one party does not mean voidity of the contract of the case, unless the participation of such a party must be considered essential, according to the circumstances of the case”.*



## 16 Lecture 16: on Italian contract law. On vices of will, *rescissione* and termination of contracts.

SUMMARY: 16.1 On vices of will. – 16.2 On error/mistake. – 16.3 – On violence. – 16.4 On fraud/wilful misconduct. – 16.5 On *rescissione* of contracts. – 16.6 On missing performance of contracts. – 16.7 On termination of contracts in general. – 16.8 On termination for breach of contract. – 16.9 On termination of contracts for supervening impossibility. – 16.10 On termination of contracts for supervening excessive onerousness.

### 16.1 On vices of will.

To talk about vices of will (or vices of consent) we need to start, once again, from the four requirements due for any contract.

#### ARTICOLO 1325 CC

##### Indicazione dei requisiti

“[I]. *I requisiti del contratto sono:*

- 1) *l'accordo delle parti;*
- 2) *la causa;*
- 3) *l'oggetto;*
- 4) *la forma, quando risulta che è prescritta dalla legge sotto pena di nullità”.*

#### ARTICLE 1325 ICC

##### Requirements' indication

“[I]. *Requirements of a contract are:*

- 1) *the agreement of the parties;*
- 2) *the causa;*
- 3) *the subject matter;*
- 4) *the form, when it is prescribed by law under penalty of nullity”.*

As per above, agreement means consent and consent needs will, as a pre-requirement. Accordingly, the will of the parties must be a free will.

The rules of law on the vices of will (or consent) are artt. 1427-1440 ICC.

#### ARTICOLO 1427 CC

##### Errore, violenza e dolo

“[I]. *Il contraente, il cui consenso fu dato per errore, estorto con violenza o carpito con dolo, può chiedere l'annullamento del contratto secondo le disposizioni seguenti”.*

## ARTICLE 1427 ICC

### Mistake, violence and fraud

“[I]. A contracting party whose consent was given by mistake, violently extorted or intentionally stolen, can ask for avoidance of the contract of the case under the following provisions”.

#### 16.2 On error/mistake.

A mistake can fall on:

- the declaration of the case (so-called **mistake on the declaration** or *errore ostativo*) or;
- on the circumstances that may impact on the process of formation of the will (so-called **faulty mistake** or *errore vizio*).

A case of mistake on the declaration: I declare 100 but I meant 200; I raise my hand at the assembly at the time of the vote, believing that I am voting in favour of a proposal and in reality I am voting against it. Here I do not want what I have declared.

A case of a faulty mistake: I buy a property offered to me because I believe it is precious one and instead it is not. Here I want what I have declared, but I want it because my will is flawed.

Please note that a mistake, to be legally relevant, can only refer to the past or the present, not to the future. An error about the future is irrelevant at law, in terms of vices of will; the content of the provisions on mistake discloses it in a clear way.

Now, from the point of view of the party fallen into it, an error involves the completion of a legal transaction not suitable to fulfil its own purpose. Anyway, the declaring party is not alone, under the circumstances, because she interacts with other persons; and the other persons usually rely on the legal transaction and behaves themselves accordingly.

An example: in case of a mistake on the declaration, if I declare that I want to sell some properties at the unit price of 100, but in reality, I want to sell it at 200, still the buyer relies on my declaration and wants to buy them at a unit price of 100.

Theoretically speaking, therefore, here there are two valid interests, both worthy of protection, that they could be claimed by the persons involved (the one whose consent is based on an error, and the other who relies on that consent).

Accordingly, the rule of law is that **reliance must prevail, in case of contracts completed for a consideration** (both to avoid a jam of the legal transactions inside the legal system as a whole and because those who have relied may have missed other opportunities), **along with the protection of the declaring party, in case of contracts completed free of charge.**

Anyway, please note that the rule of law on reliance, in case of contracts for a consideration, does not mean that the declaring party is always bound: if the error has been detected by the counterparty, then there is no reliance to be protected.

Moreover, there is no reliance to be protected even if the error has not been detected, but it could have been detected using customary diligence.

Therefore, an error/a mistake is legally relevant, as for avoidance, if it is a recognizable one. Again. The error must be essential too, pursuant to art. 1429 ICC.

An example: I purchase a certain quantity of goods to increase my warehouse without knowing that my employee already provided for it.

In this case there is an error, but it is not relevant at all, because it is not essential pursuant to the content of art. 1429 ICC.

Again, I buy a wedding gift for a friend of mine, but I don't know that in the meantime his engagement was broken down.

These are two mistakes concerning the reason that led me to complete the contract of the case, which are not relevant at the eyes of the law.

As advanced, in free-of-charge contracts, reliance (of the beneficiary of the case) is not covered by the law: here a mistake can be a valid reason for avoidance, even if it is not essential and recognizable, as long as it is determining the consent of the disposing party of the case.

Indeed, the law requires the erroneous reason to be the only one that determined the completion of the act.

Moreover, the reason behind the error must appear in the deed of the case.

An example is provided for, in case of a gift, by art. 787 ICC.

## **ARTICOLO 787 CC**

### **Errore sul motivo della donazione**

*“[I]. La donazione può essere impugnata per errore sul motivo, sia esso di fatto o di diritto, quando il motivo risulta dall'atto ed è il solo che ha determinato il donante a compiere la liberalità”.*

## **ARTICLE 787 ICC**

### **Error on personal reasons for a gift**

*“[I]. A gift can be challenged by mistake on the motive, being it a factual or a legal one, when the personal reason of the case appears from the deed and it is the sole one that determined the donor to perform the gift”.*

Now, let's go to the rules of law on mistake.

### **ARTICOLO 1428 CC**

#### **Rilevanza dell'errore**

*“[I]. L'errore è causa di annullamento del contratto quando è essenziale ed è riconoscibile dall'altro contraente”.*

### **ARTICLE 1428 ICC**

#### **Relevance of the error**

*“[I]. An error can cause avoidance of a contract when it is essential and recognizable by the other contracting party”.*

#### **On essential mistake.**

### **ARTICOLO 1429 CC**

#### **Errore essenziale**

*“[I]. L'errore è essenziale:*

- 1) quando cade sulla natura o sull'oggetto del contratto;*
- 2) quando cade sull'identità dell'oggetto della prestazione ovvero sopra una qualità dello stesso che, secondo il comune apprezzamento o in relazione alle circostanze, deve ritenersi determinante del consenso;*
- 3) quando cade sull'identità o sulle qualità della persona dell'altro contraente, sempre che l'una o le altre siano state determinanti del consenso;*
- 4) quando, trattandosi di errore di diritto, è stata la ragione unica o principale del contratto”.*

### **ARTICLE 1429 ICC**

#### **Essential mistake**

*“[I]. An error is essential:*

- 1) when it falls on the nature or the subject matter of the contract of the case;*
- 2) when it falls on the identity of the subject matter of the service of the case or on a quality of the very same service that, according to common appreciation or in relation to the circumstances of the case, must be meant to be decisive for consent;*
- 3) when it falls either on the identity or the qualities of the other contracting party, provided that both the former and the latter were decisive for consent;*

4) when, being it an error at law, it was the sole or the main reason behind the contract of the case".

### Cases:

– **under art. 1429, n. 1, ICC:** I want to complete a rent agreement, but I don't know the Italian language very well so I enter into a sale-purchase contract;

– **under art. 1429, n. 2, ICC:** I believe that the land offered to me on sale is the one that I saw yesterday, but in reality, it is another one (mistake on identity); I think I am buying olive oil, but actually I am buying seed oil (mistake on quality).

Please note that, here, even an error on the quality, to be a relevant one, it must be decisive for consent (on the basis of the common appreciation or the circumstances of the case). *Exempli gratia*, I buy a land of 1000 square meters, 10 square meters smaller than I thought. This error is not legally relevant, as it cannot be qualified as decisive for consent.

Also, the concept of quality must be considered in a broad way, meaning that not only material qualities are relevant, but qualities of another type too, like, e.g., those concerning the historical value of the property of the case, *et cetera*.

Finally, please note that an error on a price is not an error on quality. The economic value of the property of the case matters, as for the purposes of the law on mistake, only when it is the consequence of an error on the quality. *Ergo*, if the price is set up by the seller by mistake, such a mistake is not relevant at all;

– **under art. 1429, n. 3, ICC:** please note that in certain contracts an error concerning identity and qualities of the other contracting party is always legally relevant. See e.g., the case of a partnership agreement or an agency agreement or a *contratto di appalto*. Whereas, in other cases, this is not relevant at all: see e.g., in case of a sale-purchase agreement. Here the person of the buyer is generally irrelevant if the payment is immediate. It becomes more relevant if the payment is to be performed by instalments. Also, here, by quality we mean physical, intellectual and moral ones (e.g., criminal convictions, bankruptcy, religious belief can be relevant).

– **under art. 1429, n. 4, ICC:** here a foreword is due. An error can be an **error of fact** (if it falls on the factual circumstances of the case) or an **error at law** (if it falls on the existence or on the interpretation of a rule of law).

Now, even an error at law can make a contract voidable, even if the basic rule is *ignorantia legis non excusat*. An example: in case of a sale of inheritance (see art. 542 ICC), the subject matter is a share of the inheritance of the case. I am not a lawyer, I am wrong, and I think I am entitled to a share of 1/4, whereas in reality I am entitled to 1/3; this is an error at law on the "legal qualities" of the subject matter of the contract. Again: I hire a person, namely, a

construction engineer with a qualification obtained abroad, ignoring the fact that under foreign law he cannot, as for the Italian-law purposes, sign construction projects in Italy; this is an error at law, on the “legal qualities” of the person of the case.

On the other hand, instead, an error on the legal regime of the completed contract of the case is not relevant at all, unless it comes out to be an error so radical as to determine a full misunderstanding of the nature of the contract and to result in an error regarding the legal language and therefore the declaration of the case.

All the above means, in fact, that art. 1429, n. 4, ICC is not to be added to the other three voices of the very same provision, but it identifies a vice that “increases” the content of the other 3 ones.

It is therefore proper to say that an error at law can be a valid reason for avoidance of a contract for consideration when it is an error on the nature or the subject matter of the contract or on the “legal qualities” of the subject matter or on the person of the other contracting party.

*Ergo*, the boundaries of an error at law are the same of an error of fact.

### **On recognizable mistake.**

#### **ARTICOLO 1431 CC**

##### **Errore riconoscibile**

*“[I]. L’errore si considera riconoscibile quando in relazione al contenuto, alle circostanze del contratto ovvero alla qualità dei contraenti, una persona di normale diligenza avrebbe potuto rilevarlo”.*

#### **ARTICLE 1431 ICC**

##### **Recognizable mistake**

*“[I]. An error is a recognizable one when, in relation to the content or the circumstances of the contract of the case or the quality of the contracting parties, a person of customary diligence could have detected it”.*

Please note that the requirement on the awareness of the error of the case by the counterparty has been added to the one on its own essentiality, because otherwise, theoretically speaking, given that a common diligence is just required over here, a very wide duty of diligence would be pending against the party fallen into mistake, concerning also depiction of circumstances fully outside the boundaries of the contract of the case.

Please also note that an error is relevant, as far as avoidance is concerned, even if it is an inexcusable one. In fact, if it is a recognizable mistake, then, there is negligence pending against

both parties, namely, the declaring party, due to her inexcusability, and the recipient, due to her chance to recognize it. Accordingly, it is believed that it would not be right to deny, even in this case, avoidance.

Then, on **errors of calculation**, please see art. 1430 ICC.

#### **ARTICOLO 1430 CC**

##### **Errore di calcolo**

*“[I]. L’errore di calcolo non dà luogo ad annullamento del contratto, ma solo a rettifica, tranne che, concretandosi in errore sulla quantità, sia stato determinante del consenso”.*

#### **ARTICLE 1430 ICC**

##### **Error of calculation**

*“[I]. An error of calculation does not mean avoidance of the contract of the case, but just its own rectification, except that, being it an error on quantity, it was decisive for consent”.*

**About some limits to a claim for avoidance.**

#### **ARTICOLO 1432 CC**

##### **Mantenimento del contratto rettificato**

*“[I]. La parte in errore non può domandare l’annullamento del contratto se, prima che ad essa possa derivarne pregiudizio, l’altra offre di eseguirlo in modo conforme al contenuto e alle modalità del contratto che quella intendeva concludere”.*

#### **ARTICLE 1432 ICC**

##### **Maintenance of a rectified contract**

*“[I]. A party in error cannot demand avoidance of the contract of the case if, before being prejudiced, the other party offers to perform it in a manner in compliance with the content and terms of the contract that she was meaning to complete”.*

We have spoken about faulty mistakes. Instead, as for errors on declarations, please see art. 1433 ICC.

## ARTICOLO 1433 CC

### Errore nella dichiarazione o nella sua trasmissione

“[I]. *Le disposizioni degli articoli precedenti si applicano anche al caso in cui l'errore cade sulla dichiarazione, o in cui la dichiarazione è stata inesattamente trasmessa dalla persona o dall'ufficio che ne era stato incaricato*”.

## ARTICLE 1433 ICC

### Error on the declaration or in its own transmission

“[I]. The provisions of the preceding articles are also to be applied if the error of the case falls on a declaration, or in case the declaration of the case has been incorrectly transmitted by the person or the office in charge of it”.

Therefore, even in case of an error on a declaration the very same requirements are due, namely essentiality and awareness (by the counterparty) of the mistake of the case.

Finally, as for unilateral *inter vivos* legal transactions, there are no provisions *ad hoc*. Accordingly, art. 787 ICC (as far as the legal transactions free-of-charge are concerned) and art. 1324 ICC (as for the legal transactions for a consideration) are to be applied, by *analogia legis*, as for example, in case of either a power of attorney issued for completion of a contract for a consideration or a gratuitous promise to the (general) public.

### 16.3 On violence.

When we speak of violence exercised for completion of a legal transaction, first and foremost, a distinction must be made between **physical violence** and **violence as an unjust threat performed to psychologically force a person to issue a declaration/statement that they otherwise would not issue** (or to behave in a way they otherwise would not behave).

That's because in the first case there is voidity of the legal transaction of the case, completed due of physical violence, whereas in the second case the legal transaction of the case can “only” be subjected to avoidance.

Under violence as governed by art. 1434 ICC and ff. ones, the threatened party is placed before an alternative: to complete the legal transaction of the case or to meet the threatened evil. If he/she chooses the second option, then the contract is a voidable one.

## **ARTICOLO 1434 CC**

### **Violenza**

“[I]. *La violenza è causa di annullamento del contratto, anche se esercitata da un terzo*”.

## **ARTICLE 1434 ICC**

### **Violence**

“[I]. Violence can cause avoidance of a contract even when it is exercised by a third party”.

Accordingly, violence is relevant even if it has been put in place by a third party.

The, as for the characteristics of violence, please see art. 1435 ICC.

## **ARTICOLO 1435 CC**

### **Caratteri della violenza**

“[I]. *La violenza deve essere di tal natura da far impressione sopra una persona sensata e da farle temere di esporre sé o i suoi beni a un male ingiusto e notevole. Si ha riguardo, in questa materia, all'età, al sesso e alla condizione delle persone*”.

## **ARTICLE 1435 ICC**

### **Characteristics of violence**

“[I]. Violence must be of such nature to make an impression over a reasonable person and to make her fear of exposing herself or her properties to an unjust and remarkable harm. On this topic, age, sex and general conditions of persons are to be taken into consideration”.

Moreover, violence can be exercised not just against the contracting party of the case (or her properties) but against a third party too, related to said contracting party, or against her properties.

## **ARTICOLO 1436 CC**

### **Violenza diretta contro terzi**

“[I]. *La violenza è causa di annullamento del contratto anche quando il male minacciato riguarda la persona o i beni del coniuge del contraente o di un discendente o ascendente di lui.*

[II]. *Se il male minacciato riguarda altre persone, l'annullamento del contratto è rimesso alla prudente valutazione delle circostanze da parte del giudice*”.

## ARTICLE 1436 ICC

### Violence directed against third parties

*“[I]. Violence can cause avoidance of a contract even when the threatened harm concerns the spouse of one of the contracting parties, or a descendant or an ascendant of her, or their properties.*

*“[II]. If the threatened harm concerns other persons, then avoidance of the contract of the case is left to the prudent assessment of the circumstances of the case performed by the judge”.*

Now, as for peculiar kinds of threat and behaviours, please see artt. 1437 and 1438 ICC.

## ARTICOLO 1437 CC

### Timore riverenziale

*“[I]. Il solo timore riverenziale non è causa di annullamento del contratto”.*

## ARTICLE 1437 ICC

### Awe

*“[I]. Awe alone cannot be a reason for avoidance of a contract”.*

## ARTICOLO 1438 CC

### Minaccia di far valere un diritto

*“[I]. La minaccia di far valere un diritto può essere causa di annullamento del contratto solo quando è diretta a conseguire vantaggi ingiusti”.*

## ARTICLE 1438 ICC

### Threat of asserting a right

*“[I]. Threat of asserting a right can cause avoidance of a contract only when it is aimed at obtaining unfair advantages”.*

Here the threat must be unfair. There is certainly a basic injustice when an anti-legal behaviour is threatened: see e.g., the threat of physical violence. But today “sneaky” behaviours are more and more used. Examples:

– a creditor threatens his debtor, taking advantage of his state of financial difficulty, to convince him to enter into a contract for the sale of a piece of land that he wishes he could have

bought from him for a very long time and that the “threatened person” has always refused to sell to him, up to that moment; and

– a creditor threatens his debtor to resort to forced execution (*esecuzione forzata*, under Italian Civil Procedural Code) to obtain issuance of a guarantee.

In the second case, the instrument of the threat is used to obtain something that does not go beyond what it is due; whereas, in the first case, on the contrary, the instrument of the threat is used to obtain something that goes far beyond what it is due.

Accordingly, in the first case the legal transaction can be subjected to avoidance, whereas in the second case it cannot.

#### **16.4 On fraud/wilful misconduct.**

Fraud means deception; a scam; a deceptive artifice; a lie used to mislead a person and determine her to enter into a legal transaction.

Accordingly, a fraudulent behaviour is a malicious/misleading behaviour that is a source of mistake for the counterparty such as to determine her consent.

Hence, even here there is an error/a mistake, which is however induced and therefore different from the spontaneous error referred to in art. 1428 ICC and ff. ones. The protection here is higher, because a malicious behaviour that provokes a non-essential error is also relevant, as for contracts completed for a consideration, along with a malicious behaviour that appears from the deed, as for the contracts completed free of charge.

#### **On silence as a source of fraud.**

Silence can be relevant as a fraudulent behaviour only when it involves an intentional breach of an obligation to disclose a certain situation to the other party. Namely, the obligation to disclose or the duty of information may be imposed by the law or may derive from a mere duty of fairness in negotiations (see art. 1337 ICC). The assessment must be carried out on the basis of the circumstances of the case, and silence, to be legally relevant here, must appear as a case of **unfair reticence** (so-called *dolo omissivo*).

As per above, a fraud/wilful misconduct, to be relevant for the purposes of avoidance, must be such as to mislead, once again (like in case of violence), a reasonable person. In this case, psychological, cultural, and social conditions of the deceived party are to be considered too.

On the contrary, generic boasts (so-called *vanterie*) on the quality of the goods of the case or the services offered are not relevant at all. Here there is a so-called *dolus bonus*.

Now, the rules of law on fraud are artt. 1349 and 1440 ICC.

## ARTICOLO 1439 CC

### Dolo

“[I]. Il dolo è causa di annullamento del contratto quando i raggiri usati da uno dei contraenti sono stati tali che, senza di essi, l'altra parte non avrebbe contrattato.

[II]. Quando i raggiri sono stati usati da un terzo, il contratto è annullabile se essi erano noti al contraente che ne ha tratto vantaggio”.

## ARTICLE 1439 ICC

### Fraud

“[I]. Fraud causes avoidance of a contract when deceptions used by one of the contracting parties were such that the other party would have not negotiated without them.

[II]. When deceptions have been used by a third party, then the contract of the case is a voidable one if the contracting party was aware and has taken advantage of them”.

Here we are dealing with a wilful misconduct decisive for consent: without it there would be no contract.

Also, deceptions performed by either the counterparty or a third party are both relevant, but in the latter case they must also be known to the counterparty so that she profits from them. Otherwise, the law prefers to protect, as a rule of law, reliance on the validity of the contract of the case by the non-deceiving party.

As per above, anyway there could a case of a non-decisive wilful misconduct, or so-called dolo incidente.

## ARTICOLO 1440 CC

### Dolo incidente

“[I]. Se i raggiri non sono stati tali da determinare il consenso, il contratto è valido, benché senza di essi sarebbe stato concluso a condizioni diverse; ma il contraente in mala fede risponde dei danni”.

## ARTICLE 1440 ICC

### Non-decisive fraud

“[I]. If deceptions were not such as to determine consent, then the contract of the case is a valid one, although without them it would have been completed on different terms. Anyway, the contracting party in bad faith is liable for damages”.

Please note that when we deal with a malicious behaviour, a payment of damages is always due, being it a decisive or a non-decisive one. However, in the first case, both avoidance and compensation for damages are available, whereas, in the second case, just compensation for damages is available.

### **16.5 On *rescissione* of contracts.**

Here we are dealing with an institution that is a legal remedy whose subject matter are issues that, once again, are related to the time of completion of the contract of the case and deal with the behaviour of one of the parties exercised before it.

As per above, please note that the remedy labelled *rescissione* (in Italian language) is quite different from the remedy labelled *risoluzione* (still in Italian language), as the latter must be referred to termination of contracts (which is the subject matter we are going to analyse afterwards).

*Rescissione* is strictly related to 2 (two) specific behaviours of one of the contracting parties disclosed in art. 1447 ICC and art. 1448 ICC.

#### **ARTICOLO 1447 CC**

##### **Contratto concluso in istato di pericolo**

*“[I]. Il contratto con cui una parte ha assunto obbligazioni a condizioni inique, per la necessità, nota alla controparte, di salvare sé o altri dal pericolo attuale di un danno grave alla persona, può essere rescisso sulla domanda della parte che si è obbligata.*

*[II]. Il giudice nel pronunciare la rescissione, può, secondo le circostanze, assegnare un equo compenso all'altra parte per l'opera prestata”.*

#### **ARTICLE 1447 ICC**

##### **Contract completed in state of danger**

*“[I]. A contract by way of which a party has taken on obligations under unfair terms, due to a need, known to the other party, to save herself or others from a current danger of a serious harm to the person of the case, it can be subjected to rescissione upon request of the party that has bound herself.*

*[II]. In pronouncing rescissione, according to the circumstances of the case, the judge in charge can assign a fair compensation to the other party for the service performed”.*

## ARTICOLO 1448 CC

### Azione generale di rescissione per lesione

“[I]. Se vi è sproporzione tra la prestazione di una parte e quella dell'altra, e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l'altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto.

[II]. L'azione non è ammissibile se la lesione non eccede la metà del valore che la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto.

[III]. La lesione deve perdurare fino al tempo in cui la domanda è proposta.

[IV]. Non possono essere rescissi per causa di lesione i contratti aleatori.

[V]. Sono salve le disposizioni relative alla rescissione della divisione”.

## ARTICLE 1448 ICC

### General claim for a rescissione due to damage

“[I]. If there is a disproportion between performance of one party and performance of the other, and the disproportion is due to a state of need of one party, the other has taken advantage of which, then the damaged party can make a claim for rescissione of the contract of the case.

[II]. The claim is not admissible if the damage does not exceed half of the value that the service performed or promised by the damaged party had at the time of completion of the contract of the case.

[III]. The damage must last until the claim is made.

[IV]. Contratti aleatori cannot be subjected to rescissione for damage.

[V]. The provisions concerning rescissione of a divisione are unaffected”.

Now, on the statute of limitation for a claim for rescissione, please see art. 1449 ICC.

## ARTICOLO 1449 CC

### Prescrizione

“[I]. L'azione di rescissione si prescrive in un anno dalla conclusione del contratto; ma se il fatto costituisce reato, si applica l'ultimo comma dell'articolo 2947.

[II]. La rescindibilità del contratto non può essere opposta in via di eccezione quando l'azione è prescritta”.

## ARTICLE 1449 ICC

### Time limitation

*“[I]. A claim for rescissione expires in one year from completion of the contract of the case, but if the fact consists in a crime, then last paragraph of article 2947 is to be applied.*

*“[II]. Rescissione of a contract cannot be opposed as an exception when the time to make a claim for it is expired”.*

Then, like it happens in case of claim for avoidance of a contract completed by mistake (see art. 1432 ICC), even here the damaging party can offer a solution to maintain in force the contract of the case: see art. 1450 ICC.

## ARTICOLO 1450 CC

### Offerta di modificazione del contratto

*“[I]. Il contraente contro il quale è domandata la rescissione può evitarla offrendo una modificazione del contratto sufficiente per ricondurlo ad equità”.*

## ARTICLE 1450 ICC

### Offer to amend contract

*“[I]. A contracting party against whom a claim for rescissione has been made can avoid it, by offering an amendment to the contract of the case enough to bring it back to an equitable status”.*

Instead, as for confirmation of a contract subject to *rescissione*, the outcome is the opposite of the one available in case of avoidance (under art. 1444 ICC), as per art. 1451 ICC.

## ARTICOLO 1451 CC

### Inammissibilità della convalida

*“[I]. Il contratto rescindibile non può essere convalidato”.*

## ARTICLE 1451 ICC

### Inadmissibility of a confirmation

*“[I]. A contract subject to rescissione cannot be confirmed”.*

Finally, as for the effects of a judgment of rescissione against third parties, please see art. 1452 ICC.

### **ARTICOLO 1452 CC**

#### **Effetti della rescissione rispetto ai terzi**

“[I]. *La rescissione del contratto non pregiudica i diritti acquistati dai terzi, salvi gli effetti della trascrizione della domanda di rescissione*”.

### **ARTICLE 1452 ICC**

#### **Effects of *rescissione* against third parties**

“[I]. Rescissione of the contract of the case does not affect the rights acquired by third parties, except in case of registration of a claim for rescissione”.

As per above, please note that art. 1452 ICC has the same substantial content of art. 1445 ICC, on avoidance, and, as we shall see, art. 1458 ICC, on termination of contracts for breach. Namely, as for third parties, the outcome of the remedy, once judicially judged to be a due one, is opposable *erga omnes* (against all world) only if a claim for the very same remedy was previously disclosed in the competent registry of the case (as for properties subject to registration). Otherwise, reliance of third-party buyers for a consideration without knowledge of existence of the issue of the case must prevail.

## **16.6 On missing performance of contracts.**

Now, a contract has been completed, but still there can be legal issues related to its own execution.

In fact, once the contract of the case has been completed, the programs originally planned by the contracting parties could be troubled by new facts, which they could even affect the financial balance behind said contract.

### **Case 1.**

In contracts providing for corresponding services, each party plans to receive performance of the service of the case due to her.

However, various reasons, ranging from debtor’s bad will up to *force majeure*, can prevent either the exact execution of the contract of the case or receipt of the performance due by the counterparty.

### Case 2.

Each party relies on a certain *ratio* of value between the service that she has committed to perform and the consideration that she is entitled to.

This *ratio* may undergo modifications due to monetary devaluations, changes in costs, and other financial phenomena.

### Case 3.

Each party plans to use the service received to carry out, on a customary basis, her own additional program (for example, a person buys a house to live there, rather than to rent it or tear it down and rebuild another house, *et cetera*).

In this case too, sudden unexpected events may prevent implementation of that further program, for the achievement of which the legal transaction of the case was originally set up.

As per above, let's examine these three cases.

### **Analysis of case 1: one of the services to be performed is not performed.**

The rule is that if the non-execution of the case or, to say it better, the breach of contract is due to fault of the debtor of the service of the case or, in any case, to a reason for which said debtor has to answer for, then the other party may, at his own choice, ask for (specific) performance (meaning performance in nature), if it is still possible, or termination of the contract of the case, and, in both cases, ask for payment of damages too.

On the other hand, if the non-performance of the service of the case is due to reasons for which the debtor does not have to answer for, then he has not to pay for damages and remains bound to perform said service only if, and up to the extent that, it is still a possible one. If performance has become impossible, then he is released.

An issue: does a contracting party that has been freed from her obligations due to a supervening impossibility of his own performance retain the right to ask for her consideration?

Obviously, if the impossibility is ascribable to the other party, then the consideration due by the latter party remains due; but what if, on the other hand, the impossibility cannot be ascribed to anyone of the contracting parties? Here, denying the right to the consideration of the case would mean sharing between both parties the harmful consequences of the impossibility of performance (in other words, the debtor of the service that has become impossible would lose his consideration and the creditor would only lose the profit that he meant to achieve throughout the contract of the case). Whereas, on the other hand, to admit that a freed debtor retains his right to the consideration of the case would mean to put all damages on creditor's shoulders.

Accordingly, to try and allocate all risks in a proper way, the law distinguishes between the case in which the reason behind the impossibility of the case works in the sphere of the debtor, and that in which, instead, it works in the sphere of the creditor.

In the first case, a freed debtor generally loses his right to his consideration, and thus has to suffer a part of the damages of the case.

In the second case, on the contrary, his consideration is still due by the other contracting party that, accordingly, must bear the entire damages.

An example: a musician (violinist) signs a contract and agrees on holding a concert in a theatre in a certain city on a certain day.

If the concert does not take place because the violinist refuses to play, then he loses his right to his consideration and must pay all damages suffered by the organization of the concert for failure to sell tickets and possibly even for refund of all tickets already sold.

Then, if the concert does not take place because the violinist becomes ill a few days before the concert and fails to recover in good time, then he loses his right to his consideration. However, not being at fault, he does not owe any payment of damages to the other party. The damages are thus shared between both parties.

Finally, if the concert does not take place because the theatre has burned down, all damages are to be borne by the organization of the concert, which will have to pay the violinist his own fee and will find itself having lost, jointly with this expense, all the other expenses paid, in addition to the missing profit for the initiative of the case. In this case, in fact, the impossibility of the performance did not occur in the sphere of the violinist (who could have easily played), but in that of the organization of the concert, which was not able to provide for a different place available for the concert. The fact that the organization was faulty or not is irrelevant.

### **Analysis of case 2: supervening events that alter the *ratio* of value between the corresponding services.**

If the alteration of the case occurs after execution of the corresponding services, then such an event does not create any legal consequence on the contract of the case. In fact, with said execution of the services the relationship between the parties is exhausted and none of them can claim any longer to impose on the other party the harmful consequences of their own subsequent financial events.

If, on the other hand, the *ratio* of value between the corresponding services is altered in an extraordinary way before that one of them has been actually performed, then the law grants a remedy to the party burdened by the excessive supervening onerousness; however, as we will see, only in exceptional circumstances in which said excessive supervening onerousness is due to extraordinary and unforeseeable events.

In this case, the party burdened by the supervening onerousness may ask for termination of the contract of the case, if the other party does not offer a modification such as to restore the original ratio of value.

As per above, please note that in the two cases analysed so far, it is said that the events that have occurred trouble the *causa* of the contract with corresponding services of the case (in fact, an exchange of services is materially missing when one of the two services is not performed, while it is financially troubled when a remarkable modification of the ratio of value between the two performances occurs).

### **Analysis of case 3: supervening events that prevent each contracting party from carrying out their further program.**

We learned that the so-called additional program cannot be the purpose of the contract, but just the personal purpose of one or both of the contracting parties: it is not, therefore, the *causa* of the contract of the case, but its mere **motive** for completion.

We also learned that a motive can be included among the elements of the contract through a condition; if this is not done, then the realization of personal reasons behind a contract are generally irrelevant (there is no reason why a contracting party can charge the other contracting party, even in a partial way, with the risk of failure of its own financial plans, apart from those typical of the contract of the case).

Anyway, an exceptional case is the one in which, despite a draft of an express condition is missing, **the content of the contract was originally determined in such a way that it would not have any financial justification if not admitting that the personal reason of one of the parties was been not only known by the other party, but also placed at the very basis of the contract of the case.** In this case, the **motive** fits into the structure of the contract of the case and is referred to as a *presupposizione*.

An example: the rent of a terrace/balcony to see the passage of the parade for the coronation of the king (please see the so-called *coronation cases* in English private law), or the rent of a terrace/balcony to see the *Palio di Siena*.

The route of the parade changes; the parade or the *palio* is not held. Accordingly, the prerequisite of the contract of the case is frustrated. In English law, they say that here is a *frustration of purpose* (because they don't have the legal concept of *causa*). Under Italian law, as above-mentioned, we speak of incoming miss of the *presupposizione* of the case.

Having said that, please note that if the route was already modified before completion of the contract of the case, then there would be, in fact, an error. Anyway, the error, to be a reason for avoidance of contract, must be an essential one (see art. 1429 ICC) and here the requirement of essentiality would be missing; moreover, it would be an "error" substantially different from a

customary mistake, given that the program of the parade specifically deals with not only the tenant's sphere, but also the sphere of the landlord (no one else would rent "that balcony", if not in view of the parade and in any case never for the price - higher than the ordinary one - agreed on, under the circumstances of the case).

*Ergo*, the contractual terms can already show themselves that the parade was placed by the parties at the very basis of the contract itself.

On the other hand, if the program of the parade was changed after the completion of the contract of the case, we would not be any longer in the field of error, but in the field of a contingency.

Therefore, here, we are in a case similar to the one of the excessive supervening onerousness. However, there is a difference: in a case of an excessive supervening onerousness, the contract retains its meaning, if it is modified so as to restore the balance between the services of the parties. Here, instead, the contract no longer has any utility or justification, as far as the tenant is concerned.

Please note that *presupposizione* is not governed by the law, but the jurisprudence thinks that original or supervening lack of the *presupposto* placed by both parties at the very basis of the contract of the case justifies its own termination.

As per above, let's see now all rules of law, provided for by the Italian Civil Code, on termination of contracts.

## **16.7 On termination of contracts in general.**

In addition to mutual consent of all parties involved (under art. 1372 ICC), a contract can be terminated:

- for breach;
- due to a supervening impossibility;
- due to an excessive supervening onerousness.

Termination of a contract occurs, in general, due to irregularities concerning the legal relationship between performance and counter-performance of the parties of the case (so-called *sinallagma*) and therefore due to reasons that occur after its own completion (whereas the original defects of a contract generally determine its own invalidity or, at last, *rescissione*).

## **16.8 On termination for breach of contract.**

The rules of law are artt. 1453-1462 ICC.

## ARTICOLO 1453 CC

### Risolubilità del contratto per inadempimento

“[I]. Nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno.

[II]. La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione.

[III]. Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione”.

## ARTICLE 1453 ICC

### Termination of a contract for breach

“[I]. In case of contracts providing for mutual counter-performance, when one of the contracting parties does not perform her own obligations, the other party may at her choice demand (specific) performance or termination of the contract of the case, without prejudice, in any case, to payment of damages.

[II]. Termination can also be demanded when a claim has been raised to obtain performance, but performance can no longer be demanded when termination has been requested.

[III]. The breaching party can no longer perform her own obligations from the date of a claim for termination”.

Payment of damages means, here, their payment under the rules on the so-called *interesse positivo*, previously mentioned when we spoke about negotiations, so to distinguish them from the rules on *interesse negativo*<sup>44</sup>.

Anyway, to get termination for breach, something specific is required by the law, namely, the breach must be a relevant one.

## ARTICOLO 1455 CC

### Importanza dell'inadempimento

“[I]. Il contratto non si può risolvere se l'inadempimento di una delle parti ha scarsa importanza, avuto riguardo all'interesse dell'altra”.

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<sup>44</sup> See lecture 12, par. 12.1.

## ARTICLE 1455 ICC

### Importance of a breach

*“[I]. A contract cannot be terminated if the breach of contract performed by one of its parties is of poor importance, considering the interests of the other”.*

Now, please note that the above-mentioned rules of law deal with the so-called **judicial termination**, meaning evaluated, “created” and pronounced by the court of the case, by way of a so-called *sentenza costitutiva*.

Then, there are three cases on **termination at law**, namely, under art. 1454 ICC, art. 1456 ICC, and art. 1457 ICC.

## ARTICOLO 1454 CC

### Diffida ad adempiere

*“[I]. Alla parte inadempiente l'altra può intimare per iscritto di adempiere in un congruo termine, con dichiarazione che, decorso inutilmente detto termine, il contratto s'intenderà senz'altro risoluto.*

*[II]. Il termine non può essere inferiore a quindici giorni, salvo diversa pattuizione delle parti o salvo che, per la natura del contratto o secondo gli usi, risulti congruo un termine minore.*

*[III]. Decorso il termine senza che il contratto sia stato adempiuto, questo è risoluto di diritto”.*

## ARTICLE 1454 ICC

### Notice to perform

*“[I]. The non-breaching party can notify in a written form to the breaching party to perform within a reasonable period of time, with a statement declaring that, after the deadline is elapsed, the contract of the case will certainly be meant to be terminated.*

*[II]. A deadline for performance cannot be shorter than fifteen days, unless otherwise agreed on by the parties, or unless, due to the nature of the contract of the case or according to customs, a shorter term is deemed to be an appropriate one.*

*[III]. Once the deadline is elapsed and the contract of the case is not performed, then the latter is meant to be terminated at law”.*

## ARTICOLO 1456 CC

### Clausola risolutiva espressa

“[I]. I contraenti possono convenire espressamente che il contratto si risolva nel caso che una determinata obbligazione non sia adempiuta secondo le modalità stabilite.

[II]. In questo caso, la risoluzione si verifica di diritto quando la parte interessata dichiara all'altra che intende valersi della clausola risolutiva”.

## ARTICLE 1456 ICC

### Express termination clause

“[I]. Contracting parties may expressly agree on the fact that contract of the case shall be terminated in case that a certain obligation is not performed in the manner approved.

[II]. In this case, termination occurs at law when the interested party declares to the other party that she wants to avail herself of the termination clause”.

## ARTICOLO 1457 CC

### Termine essenziale per una delle parti

“[I]. Se il termine fissato per la prestazione di una delle parti deve considerarsi essenziale nell'interesse dell'altra, questa, salvo patto o uso contrario, se vuole esigerne l'esecuzione nonostante la scadenza del termine, deve darne notizia all'altra parte entro tre giorni.

[II]. In mancanza, il contratto s'intende risolto di diritto anche se non è stata espressamente pattuita la risoluzione”.

## ARTICLE 1457 ICC

### Essential termine for one of the parties

“[I]. If the termine of the case set up for performance by one of the parties is an essential one, in the interests of the other, then, if the latter wants to demand performance despite expiration of said termine, she must notify it to the other party, within three days, unless otherwise agreed on by the parties or except in case of a contrary custom.

[II]. In case of missing notification, then the contract of the case is meant to be terminated at law, even if termination has not been expressly agreed on”.

## On the legal effects/consequences of a termination for breach of contract.

### ARTICOLO 1458 CC

#### Effetti della risoluzione

“[I]. La risoluzione del contratto per inadempimento ha effetto retroattivo tra le parti, salvo il caso di contratti ad esecuzione continuata o periodica, riguardo ai quali l’effetto della risoluzione non si estende alle prestazioni già eseguite.

[II]. La risoluzione, anche se è stata espressamente pattuita, non pregiudica i diritti acquistati dai terzi, salvi gli effetti della trascrizione della domanda di risoluzione”.

### ARTICLE 1458 ICC

#### Effects of termination

“[I]. Termination for breach of contract has retroactive effect amongst the parties, except in case of contracts for a continuous or periodic execution, in respect of which the effects of the termination of the case do not extend to the services already performed.

[II]. Termination, even if it has been expressly agreed on, does not affect the rights acquired by third parties, except in case of registration of a claim for termination”.

As per art. 1458 ICC, please note that, like in case of avoidance (see art. 1445 ICC) and *rescissione* (see art. 1452 ICC), here we talk about a mere **retroattività obbligatoria** against the **retroattività reale** which is applied in case of a condition, under art. 1360 ICC<sup>45</sup>.

Then, as per breach of a multilateral contract, please see art. 1459 ICC.

### ARTICOLO 1459 CC

#### Risoluzione nel contratto plurilaterale

“[I]. Nei contratti indicati dall’articolo 1420 l’inadempimento di una delle parti non importa la risoluzione del contratto rispetto alle altre, salvo che la prestazione mancata debba, secondo le circostanze, considerarsi essenziale”.

### ARTICLE 1459 ICC

#### Termination of multilateral contracts

“[I]. In case of contracts mentioned in article 1420, breach of one of the parties does not mean termination of the contract of the case for the other parties, unless the missing performance must be considered essential under the circumstances of the case”.

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<sup>45</sup> See lecture 15, par. 15.2.

**On the rule *inadimplenti non est adimplendum*.**

This rule basically means that whoever has not fulfilled his own obligations cannot claim for others' breach, under art. 1460 ICC.

**ARTICOLO 1460 CC**

**Eccezione d'inadempimento**

*“[I]. Nei contratti con prestazioni corrispettive, ciascuno dei contraenti può rifiutarsi di adempiere la sua obbligazione, se l'altro non adempie o non offre di adempiere contemporaneamente la propria, salvo che termini diversi per l'adempimento siano stati stabiliti dalle parti o risultino dalla natura del contratto.*

*“[II]. Tuttavia non può rifiutarsi l'esecuzione se, avuto riguardo alle circostanze, il rifiuto è contrario alla buona fede”.*

**ARTICLE 1460 ICC**

**Objection on breach**

*“[I]. In case of contracts providing for mutual counter-performance, each of the contracting parties may refuse to perform her own service if the other party does not perform or offer to perform her own service at the same time, unless different terms for performance have been agreed on by the parties or they are the due outcome of the nature of the contract of the case.*

*“[II]. However, performance cannot be refused, if refusal is against good faith, under the circumstances of the case”.*

Then, art. 1461 ICC deals with a possible change of the financial condition of one the contracting party before performance of her own obligations.

**ARTICOLO 1461 CC**

**Mutamenti nelle condizioni patrimoniali dei contraenti**

*“[I]. Ciascun contraente può sospendere l'esecuzione della prestazione da lui dovuta, se le condizioni patrimoniali dell'altro sono divenute tali da porre in evidente pericolo il conseguimento della controprestazione, salvo che sia prestata idonea garanzia”.*

## ARTICLE 1461 ICC

### Alterations of the financial situation of the contracting parties

*“[I]. Unless an appropriate guarantee is offered, each contracting party can suspend her performance if the financial situation of the other party has become such as to clearly endanger attainment of her consideration”.*

#### **On the clause *solve et repete*.**

This clause actually means: “*pay the service and then, eventually ask for restitution afterwards*”.

## ARTICOLO 1462 CC

### Clausola limitativa della proponibilità di eccezioni

*“[I]. La clausola con cui si stabilisce che una delle parti non può opporre eccezioni al fine di evitare o ritardare la prestazione dovuta, non ha effetto per le eccezioni di nullità, di annullabilità e di rescissione del contratto.*

*[II]. Nei casi in cui la clausola è efficace, il giudice, se riconosce che concorrono gravi motivi, può tuttavia sospendere la condanna, imponendo, se del caso, una cauzione”.*

## ARTICLE 1462 ICC

### Clause limiting exceptions

*“[I]. A clause that establishes that one of the parties cannot raise exceptions so to avoid or delay due performances does not produce any effect against exceptions for voidity, avoidance and termination of the contract of the case.*

*[II]. When the clause is effective, the judge in charge can nevertheless suspend a judgment for payment, imposing, if necessary, a bail, if he recognizes that there are serious grounds for suspension”.*

#### **16.9 On termination of contracts for supervening impossibility.**

The issue here is whether the freed contracting party retains her right to her consideration. As we said: *i*) if the answer is “yes”, then the value of the service that has become impossible is lost, as for the party that has to pay the consideration of the case. Hence, the risk would be borne by the creditor of the service of the case; *ii*) if the answer is “no”, then the risk is borne by the debtor of the service of the case.

Problems related: the risk of the counter-performance of the case (which is different from risks of damages arising from non-performance).

Then, there is also the case of full or partial impossibility of performance.

The Italian rules of law are those provided for by art. 1463-1466 ICC.

On full impossibility, please see art. 1463 ICC.

## **ARTICOLO 1463 CC**

### **Impossibilità totale**

*“[I]. Nei contratti con prestazioni corrispettive, la parte liberata per la sopravvenuta impossibilità della prestazione dovuta non può chiedere la controprestazione, e deve restituire quella che abbia già ricevuta, secondo le norme relative alla ripetizione dell’indebitito”.*

## **ARTICLE 1463 ICC**

### **Full impossibility**

*“[I]. In case of contracts providing for mutual counter-performance, a party freed for supervening impossibility of her due performance cannot ask for her consideration, and she must give back the service that she has already received, in compliance with the rules of law concerning restitution of undue payments”.*

Whereas, on partial impossibility, please see art. 1464 ICC.

## **ARTICOLO 1464 CC**

### **Impossibilità parziale**

*“[I]. Quando la prestazione di una parte è divenuta solo parzialmente impossibile, l’altra parte ha diritto a una corrispondente riduzione della prestazione da essa dovuta, e può anche recedere dal contratto qualora non abbia un interesse apprezzabile all’adempimento parziale”.*

## **ARTICLE 1464 ICC**

### **Partial impossibility**

*“[I]. When performance of one of the parties has become only partially impossible, then the other party is entitled to a corresponding reduction of her due performance, and she can also withdraw from the contract of the case when she has not an appreciable interest in partial performance”.*

Then, as for the actual effects of a missing performance due to supervening impossibility:

## ARTICOLO 1465 CC

### Contratto con effetti traslativi o costitutivi

*“[I]. Nei contratti che trasferiscono la proprietà di una cosa determinata ovvero costituiscono o trasferiscono diritti reali, il perimento della cosa per una causa non imputabile all’alienante non libera l’acquirente dall’obbligo di eseguire la controprestazione, ancorché la cosa non gli sia stata consegnata.*

*[II]. La stessa disposizione si applica nel caso in cui l’effetto traslativo o costitutivo sia differito fino allo scadere di un termine.*

*[III]. Qualora oggetto del trasferimento sia una cosa determinata solo nel genere, l’acquirente non è liberato dall’obbligo di eseguire la controprestazione, se l’alienante ha fatto la consegna o se la cosa è stata individuata.*

*[IV]. L’acquirente è in ogni caso liberato dalla sua obbligazione, se il trasferimento era sottoposto a condizione sospensiva e l’impossibilità è sopravvenuta prima che si verifichi la condizione”.*

## ARTICLE 1465 ICC

### Contracts with transferring or constitutive effects

*“[I]. In case of contracts providing for the transfer of ownership of a certain property or either the creation or the transfer of rights in rem, extinction of the property of the case due to a reason not ascribable to the transferor of the case does not free the transferee from his own obligation to perform his counter-performance, even if the property has not been delivered to him.*

*[II]. The very same provision applies if the effect of transfer or constitution is deferred until expiration of a termine.*

*[III]. If the subject matter of the transfer of the case is a property determined only by genre, then the buyer is not freed from his own obligation to execute his counter-performance if the seller has delivered the property of the case or it has been identified.*

*[IV]. The buyer of the case is in any case freed from his own obligation if the transfer was subject to a condition precedent and the impossibility has supervened before occurrence of the condition”.*

Finally, as for the impossibility concerning one of the parties in multilateral contracts, please see art. 1466 ICC.

## ARTICOLO 1466 CC

### Impossibilità nel contratto plurilaterale

“[I]. *Nei contratti indicati dall’articolo 1420 l’impossibilità della prestazione di una delle parti non importa scioglimento del contratto rispetto alle altre, salvo che la prestazione mancata debba, secondo le circostanze, considerarsi essenziale*”.

## ARTICLE 1466 ICC

### Impossibility in multilateral contracts

“[I]. In case of contracts mentioned in article 1420, impossibility of performance by one of the parties does not mean termination of the contract of the case for the other parties, unless the missing performance must be considered essential under the circumstances of the case”.

### 16.10 On termination of contracts for supervening excessive onerousness.

The rules of law on this topic are artt. 1467-1469 ICC, that distinguish amongst contracts with corresponding services, contracts with obligations due by just one party (under art. 1333 ICC), and contratti *aleatori*.

## ARTICOLO 1467 CC

### Contratto con prestazioni corrispettive

“[I]. *Nei contratti a esecuzione continuata o periodica ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall’articolo 1458.*

[II]. *La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell’alea normale del contratto.*

[III]. *La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare equamente le condizioni del contratto”.*

## ARTICLE 1467 ICC

### Contract with corresponding services

“[I]. In case of contracts for a continuous or periodic performance or for deferred performance, if the performance due by one of the parties has become excessively burdensome due to occurrence of extraordinary and unforeseeable events, then the party that owes said

performance may ask for termination of the contract of the case, with the effects set up by article 1458.

[II]. Termination cannot be asked if the supervening onerousness falls within the customary risks of the contract of the case.

[III]. A party against whom termination is sought can avoid it by offering to fairly amend the terms of the contract of the case”.

## **ARTICOLO 1468 CC**

### **Contratto con obbligazioni di una sola parte**

“[I]. Nell’ipotesi prevista dall’articolo precedente, se si tratta di un contratto nel quale una sola delle parti ha assunto obbligazioni, questa può chiedere una riduzione della sua prestazione ovvero una modificazione nelle modalità di esecuzione, sufficienti per ricondurla ad equità”.

## **ARTICLE 1468 ICC**

### **Contract with obligations due by just one party**

“[I]. In cases governed by the previous article, if the contract of the case is one in which just one party has taken on obligations, then said party can ask for a reduction of her own performance, or a modification on the means of execution, enough to bring it back to equity”.

## **ARTICOLO 1469 CC**

### **Contratto aleatorio**

“[I]. Le norme degli articoli precedenti non si applicano ai contratti aleatori per loro natura o per volontà delle parti”.

## **ARTICLE 1469 ICC**

### **Contratto aleatorio**

“[I]. Provisions of the previous articles do not apply to contratti aleatori by nature or by will of the parties”.

## 17 Lecture 17: on sham, agency and representation in Italian private law.

SUMMARY: 17.1 On sham legal transactions. – 17.2 On agency. – 17.3 On representation.

### 17.1 On sham legal transactions.

The rules of law on sham legal transactions in general are artt. 1414-1417 ICC.

On a general basis, **we speak about a sham legal transaction when declaring party and recipient agree on not wanting any legal effects of it.**

As for unilateral sham legal transactions (e.g., a sham promise to pay), please see art. 1414, par. 3, ICC, below. Anyway, to be subjected to sham, a unilateral legal transaction must consist in a *dichiarazione recettizia*.

On the contrary, as for contractual sham legal transactions, please see art. 1414, parr. 1 and 2, ICC, herein below too.

In all cases, behind the sham (or ostensible) legal transaction of the case (which is a fictitious act that tends to deceive third parties), there is a hidden counter-declaration, that discloses the actual will of the parties.

#### ARTICOLO 1414 CC

##### Effetti della simulazione tra le parti

*“[I]. Il contratto simulato non produce effetto tra le parti.*

*[II]. Se le parti hanno voluto concludere un contratto diverso da quello apparente, ha effetto tra esse il contratto dissimulato, purché ne sussistano i requisiti di sostanza e di forma.*

*[III]. Le precedenti disposizioni si applicano anche agli atti unilaterali destinati a una persona determinata, che siano simulati per accordo tra il dichiarante e il destinatario”.*

#### ARTICLE 1414 ICC

##### Effects of a sham between parties

*“[I]. A sham contract does not produce any effect between its parties.*

*[II]. If parties wished to complete a contract other than the ostensible one, then the disguised contract produces effects between them, provided that all requirements of substance and form are satisfied.*

*[III]. The previous provisions are also to be applied to unilateral legal transactions directed to certain persons that are a sham by agreement between declaring party and recipient”.*

As per above, a sham can be an absolute or a relative one.

A sham is an absolute one when parties pretend to set up a legal transaction, but in reality, they do not want to set up any legal transaction at all (the counter-declaration of the case discloses all of that). An example: A pretends to sell one or more of his own properties to B, to get rid of them, so they cannot be attacked by his own creditors.

On the contrary, a sham is a relative one when parties pretend to set up the legal transaction of the case, but in reality, they want to set up another legal transaction whose content appears from a counter-declaration that identifies, in this very case, a disguised legal transaction (in case of contracts, so-called *contratto dissimulato*, as art. 1414, par. 2, ICC speaks of).

Please note that the difference between the sham legal transaction of the case and the disguised one can refer to:

- a) the nature of the legal transaction of the case (an example, is a disguised gift behind an apparent sale); or
- b) the subject matter of the legal transaction of the case (for example, A declares to sell a certain property to B, whereas in reality A sells Br another property).

Finally, a sham may concern its own persons too. An example: A pretends to sell to B but actually sells to C. In this case all contracting parties (A, B and C) are supposed to join the counter-declaration of the case.

In this very last case, we speak of a fictitious interposition of a person (an *interposizione fittizia di persona*), to be opposed to an actual interposition of a person (*interposizione reale di persona*), like, above all, either an agency without representation, that we shall analyse afterwards or, more briefly, in English legal language, a **nomineeship**. Here, C is called *interponente*; B is called *interposto* (or *nominee*).

On a general basis, there is a negative approach to shams. In fact, they are seen as:

- tools to defraud creditors;
- tools to defraud rights of so-called forced heirs/*legittimari*, in succession law *mortis causa*, under art. 563 ICC and ff. ones (as it can happen in case of a gift disguised behind an apparent sale-purchase agreement);
- tools to defraud tax authorities (the lowest the price of sale is, the less income taxes are to be paid out).

Having said that, there are two theses behind shams:

- a) the thesis of the sham legal transaction of the case as a legal transaction *per se* not wanted by its own parties and therefore void<sup>46</sup> (*teoria della volontà*); and

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<sup>46</sup> As advanced in lecture 15, par. 15.6.

b) the thesis of the sham legal transaction as a legal transaction wanted by its own parties and therefore to be qualified as a valid one, once it is considered jointly with the counter-declaration or the disguised legal transaction of the case (*teoria della dichiarazione*).

Please note that art. 1414, par. 2, ICC raise up the issue of the requirements of substance and form due by the disguised legal transaction of the case in case, above all, of a disguised gift completed behind an ostensible (or a sham) contract of sale.

### **On shams and third parties.**

#### **ARTICOLO 1415 CC**

##### **Effetti della simulazione rispetto ai terzi**

“[I]. *La simulazione non può essere opposta né dalle parti contraenti, né dagli aventi causa o dai creditori del simulato alienante, ai terzi che in buona fede hanno acquistato diritti dal titolare apparente, salvi gli effetti della trascrizione della domanda di simulazione.*

[II]. *I terzi possono far valere la simulazione in confronto delle parti, quando essa pregiudica i loro diritti”.*

#### **ARTICLE 1415 ICC**

##### **Effects of a sham over third parties**

“[I]. A sham cannot be opposed neither by the contracting parties nor by their successors in interests, or by the creditors of the sham transferor, to third parties that have acquired in good faith rights from the ostensible owner, except in case of registration of a claim for sham.

[II]. Third parties can enforce a sham against its own parties, when it affects their own rights”.

General rule: a sham can always be opposed by third parties to its own contracting parties, when it affects their rights (see art. 1415, par. 2, ICC).

An example: a creditor (third party) can always make a claim for sham against a debtor who performed a fictitious transfer of his own assets to a fictitious transferee so not to pay his own debts<sup>47</sup>.

Another example: in case of a double transfer of property, namely, in case A sells a property by sham to one person (B) and actually sells it to another person (C), here, C, as a third party also so-called *avente causa* from A (his/her own *dante causa*), can oppose the sham to A and B.

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<sup>47</sup> On the contrary, if the transfer of the case was actually executed, then the creditor of the case could perform a claim called *azione revocatoria* (or *actio pauliana*), under art. 2901 ICC and ff. ones, against the debtor of the case, if said transfer was performed to prejudice his own rights of creditor.

As per above, please note that here third parties can have an interest either in asserting reality over appearance or in making appearance to prevail over reality, depending on the circumstances of the case.

Therefore, it is necessary to distinguish between:

- third-party transferees, covered by art. 1415, par. 1, ICC; and
- third-party creditors, covered both by art. 1415 ICC and art. 1416 ICC.

## **ARTICOLO 1416 CC**

### **Rapporti con i creditori**

*“[I]. La simulazione non può essere opposta dai contraenti ai creditori del titolare apparente che in buona fede hanno compiuto atti di esecuzione sui beni che furono oggetto del contratto simulato.*

*[II]. I creditori del simulato alienante possono far valere la simulazione che pregiudica i loro diritti, e, nel conflitto con i creditori chirografari del simulato acquirente, sono preferiti a questi, se il loro credito è anteriore all’atto simulato”.*

## **ARTICLE 1416 ICC**

### **Relationships with creditors**

*“[I]. A sham cannot be opposed by its contracting parties to the creditors of an ostensible owner that have carried out in good faith acts of execution over the assets that were the subject matter of the sham contract of the case.*

*[II]. Creditors of a sham transferor can assert the sham of the case that affects their own rights, and, in case of a conflict with the unsecured creditors of a sham transferee, they are preferred to them, if their credit arose before completion of the sham legal transaction of the case”.*

As per above, please see an example on the case referred to in art. 1415, par. 1, ICC: A fictitiously transfers a property to B who takes advantage of the ostensible situation and sells the same property to a third-party C, buyer in good faith.

Here, if ownership’s criterion alone were to be followed, so to recognize the existence of a valid/invalid transfer of rights over the property of the case between A and B, then C could have never bought said property, having negotiated the sale with B *a non domino* (meaning a sale completed with a non-owner).

Anyway, here there is also the issue of the relying third party buyer of the case in good faith. Namely, C has an interest in making the appearance created by the parties of the sham to prevail over reality.

Accordingly, since the appearance was created jointly by A and B, the former (A) has to bear the consequences of his own behaviour.

Therefore, A loses his right of ownership over the property of the case and can eventually “just” make a claim for payment of damages against B; but A cannot recover the property from C<sup>48</sup>.

Please note that, here, in case the subject of matter of the deal is either an immovable property or a movable registered property, as art. 1415, par. 1 ICC explains, the rules of law on trascrizione/registration comply with the rules on sham, as it is always possible to register a claim for sham under art. 2652 ICC.

Another example covered, this time, by both art. 1415, par. 1, ICC, as well as art. 1416, par. 1, ICC: even a creditor of a sham transferee has an interest in making appearance to prevail over reality. Accordingly, the same legal approach of the above-mentioned case is to be applied here too.

Finally, please see the case of a conflict of interests between creditors of a sham transferor and creditors of a sham transferee/ostensible owner, covered by art. 1416, par. 2, ICC.

### **About proof of a sham.**

#### **ARTICOLO 1417 CC**

##### **Prova della simulazione**

*“[I]. La prova per testimoni della simulazione è ammissibile senza limiti, se la domanda è proposta da creditori o da terzi e, qualora sia diretta a far valere l’illiceità del contratto dissimulato, anche se è proposta dalle parti”.*

#### **ARTICLE 1417 ICC**

##### **Proof of a sham**

*“[I]. Evidence by witness of a sham is allowed without any limit when the claim of the case is made by creditors or third parties and, if it is aimed at asserting illegality of a disguised contract, then even if it is performed by the parties”.*

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<sup>48</sup> Please note other cases of sham whose subject matter is different from ownership: *i*) a sham creation of a minor *right in rem*, instead of a transfer of a right of ownership; *ii*) a sham transfer of a *right in personam* and an actual transfer of the same right performed by the sham transferee of the case.

Here the law distinguishes between the case where the claim for sham is performed by third parties, on one side, and the case where the claim for sham is performed by one party against the other, on the other side (generally speaking, the so-called *simulato alienante* or sham transferor of the case against the so-called *simulato acquirente* or sham transferee of the case).

When the claim of the case is a claim between the parties of the sham of the case, then artt. 2721-2726 ICC on proof by witness come into play too, and accordingly, particularly relevant here are articles 2722 ICC, 2724 ICC and 2725 ICC<sup>49</sup>.

### **Articolo 2722 CC**

#### **Patti aggiunti o contrari al contenuto di un documento**

*“[I]. La prova per testimoni non è ammessa se ha per oggetto patti aggiunti o contrari al contenuto di un documento, per i quali si alleggi che la stipulazione è stata anteriore o contemporanea”.*

### **ARTICLE 2722 ICC**

#### **Agreements added to or contrary to the content of a document**

*“[I]. Evidence by witness is not allowed if it has as its own subject matter agreements added to or contrary to the content of a document for which it has been declared that their completion was preceding or contemporary to the one of the documents themselves”.*

### **Articolo 2724 CC**

#### **Eccezioni al divieto della prova testimoniale**

*“[I]. La prova per testimoni è ammessa in ogni caso:*

*1) quando vi è un principio di prova per iscritto: questo è costituito da qualsiasi scritto, proveniente dalla persona contro la quale è diretta la domanda o dal suo rappresentante, che faccia apparire verosimile il fatto allegato;*

*2) quando il contraente è stato nell'impossibilità morale o materiale di procurarsi una prova scritta;*

*3) quando il contraente ha senza sua colpa perduto il documento che gli forniva la prova”.*

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<sup>49</sup> Please remember here that the means of proof, ruled in artt. 2967-2739 ICC, are to be distinguished in documents (as, above all, *atto pubblico*, private written document and certified private written document), witness, confession (see artt. 2730-2735 ICC), oath (see artt. 2736-2739 ICC), and, finally, *presunzioni* (artt. 2727-2729 ICC). And we must also remember that when witness proof is not allowed, then *presunzioni* are not allowed too (see art. 2729, par. 2, ICC).

## ARTICLE 2724 ICC

### Exceptions to the prohibition on evidence by witness

“[I]. Evidence by witness is allowed in any case:

1) when there is a principle of proof in writing: it consists in any writing, coming from the person against whom the request is directed to, or from his representative, which makes the alleged fact appear to be a possible one;

2) when the contracting party of the case was in a moral or material status of impossibility to ask for a written proof;

3) when the contracting party of the case has lost without fault the document that granted her proof”.

## Articolo 2725 CC

### Atti per i quali è richiesta la prova per iscritto o la forma scritta

“[I]. Quando, secondo la legge o la volontà delle parti, un contratto deve essere provato per iscritto, la prova per testimoni è ammessa soltanto nel caso indicato dal n. 3 dell’articolo precedente.

[II]. La stessa regola si applica nei casi in cui la forma scritta è richiesta sotto pena di nullità”.

## ARTICLE 2725 ICC

### Acts for which a proof by writing or a written form is due

“[I]. When, according to the law or the will of the parties, a contract must be proved in writing, proof by witness is allowed only in the case mentioned in n. 3 of the previous article.

[II]. The same rule applies when the written form is due under penalty of voidity”.

The above-mentioned provision is particularly important when we are dealing, once again, with immovable property or registered movable properties, as art. 1350 ICC (which requires a written form, under penalty of voidity) is to be applied, in case of transfer of *rights in rem* over said properties.

All of the above, with the attached limitations on the means of proof, as disclosed by the joint application of art. 2725, par. 2, ICC and art. 2724, n. 3, ICC.

## 17.2 On agency.

The rules of law on agency (*mandato*) are artt. 1703-1741 ICC.

## ARTICOLO 1703 CC

### Nozione

“[I]. Il mandato è il contratto col quale una parte si obbliga a compiere uno o più atti giuridici per conto dell'altra”.

## ARTICLE 1703 ICC

### Definition

“[I]. An agency is a contract according to which one party undertakes to perform one or more legal acts on behalf of the other”.

As already mentioned<sup>50</sup>, from art. 1703 ICC, jointly with 1704 ICC, arises a distinction between:

- an agency where the agent acts just on behalf of the principal of the case; and
- an agency where the agent acts both in name and on behalf of the principal of the case.

## ARTICOLO 1704 CC

### Mandato con rappresentanza

“[I]. Se al mandatario è stato conferito il potere di agire in nome del mandante, si applicano anche le norme del capo VI del titolo II di questo libro”.

## ARTICLE 1704 ICC

### Agency with representation

“[I]. If an agent has the power to act in name of the principal of the case, then the provisions of Chapter VI of Title II of this book are also to be applied”.

As per above, we'll see the rules of law on representation afterwards. Now, let's talk about agency without representation, and its rules of law.

## ARTICOLO 1705 CC

### Mandato senza rappresentanza

“[I]. Il mandatario che agisce in proprio nome acquista i diritti e assume gli obblighi derivanti dagli atti compiuti con i terzi, anche se questi hanno avuto conoscenza del mandato.

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<sup>50</sup> See particularly lecture 12, par. 12.2.

*[II]. I terzi non hanno alcun rapporto col mandante. Tuttavia il mandante, sostituendosi al mandatario, può esercitare i diritti di credito derivanti dall'esecuzione del mandato, salvo che ciò possa pregiudicare i diritti attribuiti al mandatario dalle disposizioni degli articoli che seguono”.*

## ARTICLE 1705 ICC

### Agency without representation

*“[I]. An agent that acts in his own name acquires the rights and takes on the obligations arising from the acts performed with third parties, even if they were aware of the agency of the case.*

*[II]. Third parties have no relationship with the principal of the case. However, a principal, replacing his agent, can exercise all rights in personam arising from execution of the agency of the case, unless this may prejudice the rights granted to the agent by the provisions of the following articles”.*

An agency without representation is a tool often used by a person who does not want to disclose herself to the third party of the case and therefore puts someone else between herself and said third party; and that's the reason why an agency without representation is also labelled as a case of *interposizione reale di persona*, compared to a sham concerning persons, as a case of *interposizione fittizia di persona*<sup>51</sup>.

Hence, an agency is a legal scheme that can be used to achieve the same outcome of a contract for a person to be appointed (under art. 1401-1405 ICC) too<sup>52</sup>.

Now, issues relevant here are the following ones:

- the agent of the case acquires all rights and takes on all obligations that are related to (or arise from) performance of all legal acts called in to be performed on behalf of the principal;
- the very same agent has a future obligation to transfer to his own principal all rights of the case acquired from the third party;
- there is an obligation, pending against the principal of the case, to refund his agent all the expenses paid, as well as to provide him with the means necessary for performance of his obligations due against third parties of the case.

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<sup>51</sup> See above par. 17.1.

<sup>52</sup> See again lecture 12, par. 12.2.

## **ARTICOLO 1706 CC**

### **Acquisti del mandatario**

*“[I]. Il mandante può rivendicare le cose mobili acquistate per suo conto dal mandatario che ha agito in nome proprio, salvi i diritti acquistati dai terzi per effetto del possesso di buona fede.*

*[II]. Se le cose acquistate dal mandatario sono beni immobili o beni mobili iscritti in pubblici registri, il mandatario è obbligato a ritrasferirle al mandante. In caso d’inadempimento, si osservano le norme relative all’esecuzione dell’obbligo di contrarre”.*

## **ARTICLE 1706 ICC**

### **Acquisitions performed by an agent**

*“[I]. A principal can claim all movable properties acquired on his own behalf by the agent that acted in his own name, except in case of rights acquired by third parties through possession in good faith.*

*[II]. If the properties acquired by the agent of the case are immovable properties or movable properties registered in public registries, then the agent himself is obliged to transfer them back to his own principal. In case of breach, the rules relating to performance of an obligation to complete a contract are to be observed”.*

Accordingly, art. 2932 ICC (that we saw analysing preliminary agreements<sup>53</sup>) is to be applied here too.

### **About the separation of funds in case of an agency<sup>54</sup>.**

Please note that separation of funds is quite important when we must deal with management of properties on behalf of third parties. Accordingly, it is important here too. Art. 1707 ICC deals with separation of funds in case of agencies.

## **ARTICOLO 1707 CC**

### **Creditori del mandatario**

*“[I]. I creditori del mandatario non possono far valere le loro ragioni sui beni che, in esecuzione del mandato, il mandatario ha acquistati in nome proprio, purché, trattandosi di beni mobili o di crediti, il mandato risulti da scrittura avente data certa anteriore al*

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<sup>53</sup> See lecture 13, par. 13.1.

<sup>54</sup> Please note that we have already spoken about separation of funds in lecture 6, on legal persons, and in particular in par. 6.2, when we were talking about full financial autonomy (against partial financial autonomy).

*pignoramento, ovvero, trattandosi di beni immobili o di beni mobili iscritti in pubblici registri, sia anteriore al pignoramento la trascrizione dell'atto di ritrasferimento o della domanda giudiziale diretta a conseguirlo”.*

## ARTICLE 1707 ICC

### Creditors of an agent

*“[I]. Creditors of an agent cannot assert their rights over the properties that, in execution of an agency, the agent of the case has acquired in his own name, provided that, in case either of movable properties or credits, the agency of the case appears from a written document with a certain date that precedes an attachment over the very same properties or credits or, in case of immovable property or movable property registered in public registries, registration of a deed of retransfer or of a judicial claim aimed at obtaining it precedes the abovementioned attachment”.*

Accordingly, joining art. 1706 ICC with art. 1707 ICC, as far as immovable properties are concerned, there is a double transfer, and a registration/*trascrizione* of a judicial claim, pursuant to art. 2652 ICC, is needed here too, for the principal to perform a valid claim for specific performance under art. 2932 ICC, in case of breach of contract by the agent of the case.

### On the form of agency agreements.

The basic rule: no particular forms are due. However, a few interpreters think that a written form is due, if the agency of the case is to be referred to a contract that requires a written form *ad substantiam*, as, *exempli gratia*, in case of an agency to buy an immovable property<sup>55</sup>.

### About the duty of care due by agents.

## ARTICOLO 1710 CC

### Diligenza del mandatario

*“[I]. Il mandatario è tenuto a eseguire il mandato con la diligenza del buon padre di famiglia; ma se il mandato è gratuito, la responsabilità per colpa è valutata con minor rigore.*

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<sup>55</sup> Anyway, please also see **Cassazione civile, sez. III, 02/09/2013, n. 20052**: *“In ossequio al principio di libertà delle forme, il mandato senza rappresentanza per l’acquisto di beni immobili non necessita della forma scritta, che occorre soltanto per gli atti, come la procura, che costituiscono presupposto per la realizzazione dell’effetto reale del trasferimento della proprietà”* (“**In compliance with the principle of freedom of forms, an agency without representation for the purchase of an immovable property does not require the written form, which is necessary only for acts, such as the power of attorney, which constitute a prerequisite for the realization of the real effect of the transfer of the property**”).

[II]. *Il mandatario è tenuto a rendere note al mandante le circostanze sopravvenute che possono determinare la revoca o la modificazione del mandato*".

## **ARTICLE 1710 ICC**

### **Care due by an agent**

*"[I]. An agent is required to carry out the agency of the case with the diligence of a good family man; but if the agency of the case is free of charge, then liability for fault is assessed less strictly.*

*[II]. An agent is required to notify his principal about all circumstances that may involve revocation or modification of the agency of the case*".

As per above, basically, an agency is a contract completed *intuitu personae* (meaning, in substance, in compliance with a proper choice of the agent of the case). Accordingly, the task can be revoked by the principal, and the contract ends when either the agent or the principal dies.

## **ARTICOLO 1722 CC**

### **Cause di estinzione**

*"[I]. Il mandato si estingue:*

*1) per la scadenza del termine o per il compimento, da parte del mandatario, dell'affare per il quale è stato conferito;*

*2) per revoca da parte del mandante;*

*3) per rinuncia del mandatario;*

*4) per la morte, l'interdizione o l'inabilitazione del mandante o del mandatario. Tuttavia il mandato che ha per oggetto il compimento di atti relativi all'esercizio di un'impresa non si estingue, se l'esercizio dell'impresa è continuato, salvo il diritto di recesso delle parti o degli eredi*".

## **ARTICLE 1722 ICC**

### **Reasons for termination**

*"[I]. An agency ends:*

*1) due to expiration of its own term of duration or for completion, by the agent of the case, of the business for which he was appointed to;*

*2) by revocation by the principal of the case;*

*3) by renunciation by the agent of the case;*

4) for death, interdizione or inabilitazione of the principal or the agent of the case. However, an agency that has as its own subject matter performance of acts related to the exercise of a business does not terminate, if the business goes on, except in case of exercise of a right of withdrawal by the parties or by their heirs”.

Again, art. 1723 ICC confirms the revocation of the contract by the principal, unless it has been signed on behalf of third parties too.

### **ARTICOLO 1723 CC**

#### **Revocabilità del mandato**

“[I]. *Il mandante può revocare il mandato; ma, se era stata pattuita l’irrevocabilità, risponde dei danni, salvo che ricorra una giusta causa.*

[II]. *Il mandato conferito anche nell’interesse del mandatario o di terzi non si estingue per revoca da parte del mandante, salvo che sia diversamente stabilito o ricorra una giusta causa di revoca; non si estingue per la morte o per la sopravvenuta incapacità del mandante”.*

### **ARTICLE 1723 ICC**

#### **Revocability of an agency**

“[I]. A principal can revoke an agency, but if irrevocability was agreed on by the parties, then he is liable for damages, unless there is a justified reason.

[II]. An agency granted also either in the interest of the agent of the case or a third party does not terminate due to revocation by the principal, unless otherwise agreed on or if there is a justified reason for revocation. It does not terminate due to death or incapacity of the principal of the case”.

Finally, we learned that an agency can be agreed on to be performed, by the agent of the case, against a consideration or free of charge.

Accordingly, differences arise in terms of liability, and as far as revocation of an onerous agency is concerned, the following provision must be considered too:

### **ARTICOLO 1725 CC**

#### **Revoca del mandato oneroso**

“[I]. *La revoca del mandato oneroso, conferito per un tempo determinato o per un determinato affare, obbliga il mandante a risarcire i danni, se è fatta prima della scadenza del termine o del compimento dell’affare, salvo che ricorra una giusta causa.*

[II]. *Se il mandato è a tempo indeterminato, la revoca obbliga il mandante al risarcimento, qualora non sia dato un congruo preavviso, salvo che ricorra una giusta causa*".

#### **ARTICLE 1725 ICC**

##### **Revocation of an onerous agency**

*"[I]. Revocation of an onerous agency, granted for a certain period of time or for a certain business, binds the principal of the case to pay for damages, if it has been performed before expiration of the term agreed on or before completion of the business, unless there is a justified reason.*

*[II]. If the agency of the case is for an indefinite period of time, then revocation binds the principal to pay for damages, if an adequate notice was not given, except in case of a justified reason*".

#### **17.3 On representation.**

Representation is an institution according to which the will related to a certain legal transaction is formed and declared by a person (so-called *rappresentante*/representative) but the effects of the legal transaction of the case are produced against a different person (so-called *rappresentato*/represented person). See art. 1388 ICC, as for contracts.

#### **ARTICOLO 1388 CC**

##### **Contratto concluso dal rappresentante**

*"[I]. Il contratto concluso dal rappresentante in nome e nell'interesse del rappresentato, nei limiti delle facoltà conferitegli, produce direttamente effetto nei confronti del rappresentato*".

#### **ARTICLE 1388 ICC**

##### **Contract completed by a representative**

*"[I]. A contract completed by a representative in name and on behalf of a represented person, within the boundaries of the powers granted to him, produces its own effects directly against the represented person of the case*".

#### **On the sources of representation.**

#### **ARTICOLO 1387 CC**

##### **Fonti della rappresentanza**

*"[I]. Il potere di rappresentanza è conferito dalla legge ovvero dall'interessato*".

## ARTICLE 1387 ICC

### Sources of representation

“[I]. The power of representation is granted by law or by an interested party”.

Accordingly, a representation can be:

– a **voluntary one**, and therefore to raise up from a mutual agreement of the parties of the case; or

– **set up by the law**, as it happens in case of persons qualified as legal representatives of persons unable to act, such as minors, *interdetti*, *inabilitati*, and so on<sup>56</sup>.

As per above, representation is admissible in the field of contracts and, more generally, legal transactions *inter vivos* with a patrimonial content (within the limits set up for gifts under art. 777 ICC and art. 778 ICC).

On the contrary, it is not admissible in the field of legal transactions *mortis causa* (see e.g., the will) and in the field of family law, as here we are dealing mostly with so-called *atti personalissimi*. A peculiar exception (due to the fact that the Civil Code was enacted in 1942, during II World War) is the one concerning marriage performed by proxy (or power of attorney) by military personnel in time of war (see art. 111 ICC).

Representation is ordinarily granted in the interest of the represented person of the case, and therefore, as a rule of law, the representative can be revoked at any time. However, there are cases in which a representation can also be conferred in the interest of the representative of the case or even a third party.

Examples:

1) **transfer of assets to creditors;**

## ARTICOLO 1977 CC

### Nozione

“[I]. *La cessione dei beni ai creditori è il contratto col quale il debitore incarica i suoi creditori o alcuni di essi di liquidare tutte o alcune sue attività e di ripartirne tra loro il ricavato in soddisfacimento dei loro crediti*”.

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<sup>56</sup> As we saw in lectures 4 and 5, on physical persons.

## ARTICLE 1977 ICC

### Definition

*“[I]. A transfer of assets to creditors is a contract according to which a debtor appoints all his creditors or some of them to pay off all or some of his own assets and to distribute their proceeds among them, so to satisfy their credits”.*

Within this policy, please note that a debtor in general can also grant to his sole creditor of the case a power of attorney (which we are going to analyse afterwards) still to pay off one or more of his own properties and to satisfy himself with the proceeds of sale.

**2) irrevocable agency** (under art. 1723, par. 2, ICC);

## ARTICOLO 1723 CC

### Revocabilità del mandato

*“[I]. Il mandante può revocare il mandato; ma, se era stata pattuita l’irrevocabilità, risponde dei danni, salvo che ricorra una giusta causa.*

*[II]. Il mandato conferito anche nell’interesse del mandatario o di terzi non si estingue per revoca da parte del mandante, salvo che sia diversamente stabilito o ricorra una giusta causa di revoca; non si estingue per la morte o per la sopravvenuta incapacità del mandante”.*

## ARTICLE 1723 ICC

### Revocability of an agency

*“[I]. A principal can revoke an agency, but if irrevocability was agreed on by the parties, then he is liable for damages, unless there is a justified reason.*

*[II]. An agency granted also either in the interest of the agent of the case or a third party does not terminate due to revocation by the principal, unless otherwise agreed on or if there is a justified reason for revocation. It does not terminate due to death or incapacity of the principal of the case”.*

A case within paragraph 2 is the one dealing with the release of a power of attorney issued by a principal, *vis-a-vis* a debatable debt due to a third party, to a representative so to deal with the possible payment of the entire or partial debt of the case on behalf of the principal.

**3) trustee in bankruptcy/curatore fallimentare**, as this figure is a legal representative that acts on behalf of all creditors of the bankrupt person of the case.

### **On the distinction between a representative and a *nuncius*.**

A representative has a decision-making power: he declares his own will, within the boundaries of the instructions received from the represented person of the case.

On the contrary, a *nuncius* is just a person in charge of transmitting a declaration issued from others: he has no decision-making power. Here we are in the area of the well-known expression “*an ambassador does not bear punishment*”.

### **About managerial interposition (or indirect representation).**

We speak of managerial interposition when we are in presence of either an agency without representation or a management of the affairs of others, so-called *gestione di affari in nome altrui*, under art. 2028 ICC and ff. ones.

### **About *agenti* and business brokers.**

Please note that these figures, in common parlance, are all qualified “*sales representatives*”, but they are persons who “act” only on behalf of others (the entrepreneur of the case) and do not, as a rule of law, sign/complete the contracts whose completion they promote (looking for customers, persuading customers and collecting orders).

Accordingly, the rules of law on the contract of *agenzia* are contained in art. 1742 ICC and ff. ones (business brokers are governed in accordance with these rules of law).

Now, let’s go back to the sources of representation.

As per above, there is also the case of the managers acting as representatives of the legal person of the case (such as a company, an association or a foundation). Here we are dealing with a peculiar case of legal representatives whose power of representation arises both from law and appointment to the corporate office executed by the members of the legal entity of the case.

Finally, please note that we deal with representation, then there is a power of attorney (or proxy) always involved (there is no power of attorney in case of an agency without representation).

Accordingly, we must understand what a power of attorney is, and we must analyse the rules of law on it.

### **On power of attorney.**

A power of attorney is a unilateral legal transaction (which is also a *dichiarazione recettizia*) according to which a person (so-called *rappresentato*, or represented person, of the case) grants to others (so-called *rappresentante*, hereinafter representative) the power to represent her.

A power of attorney finds his reason in the *inter partes* legal relationship between *rappresentato* and representative (so so-called *rappporto di base*).

Examples of *rapporto di base*:

- as for a legal representation: being a parent (see the case of the parental authority); being trustees in bankruptcy; and
- as for a voluntary representation: a contract of employment (if the employer gives the employee the power to carry out legal transactions/contracts in his own name); a partnership agreement; an agency agreement (if we are talking about agency with representation).

Please note that the power of attorney (that discloses to third parties the so-called *rapporto di procura*) must always be distinguished from the source of *rapporto di base*.

On a general basis, in fact the rules of law to be applied to the legal relationship representative-represented person are different from those to be applied to a power of attorney. *Exempli gratia*, in case of employment, the power of attorney of the case could be revoked, but the employer-employee legal relationship could still go on<sup>57</sup>.

A power of attorney, like all legal transactions (which are not *negozi astratti*), must have a *causa*; namely, it finds its *causa* in its own *rapporto di base* (such as the above-mentioned contract of employment).

Then, a power of attorney grants to the representative of the case powers, but does not impose, per se, obligations: therefore, a power of attorney does not need a formal acceptance, despite of being a *dichiarazione recettizia*.

Moreover, a power of attorney can be:

- a special one, if it is issued for performance of one or more certain business; or
- a general one, if it deals with all business of the principal of the case.

Again, a power of attorney can provide for (and often does provide for) limits to the power granted to the representative of the case, with all legal consequences related to that. An example: if a power of attorney allows the representative of the case to sell only at a price higher than a threshold set by his/her represented person (e.g., for no less than 100.000,00 euros), then the sale completed at a lower price does not bind the *rappresentato*. See art. 1398 ICC, mentioned when we talked about the legal concept of *facoltà*<sup>58</sup>.

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<sup>57</sup> Nonetheless, they are obviously legal relationships strictly related one to the other, as the termination of a *rapporto di base* usually involves the termination of the *rapporto di procura* too (see the case of a dismissal).

<sup>58</sup> See lecture 3, par. 3.5.

## ARTICOLO 1398 CC

### Rappresentanza senza potere

“[I]. *Colui che ha contrattato come rappresentante senza averne i poteri o eccedendo i limiti delle facoltà conferitegli, è responsabile del danno che il terzo contraente ha sofferto per avere confidato senza sua colpa nella validità del contratto*”.

## ARTICLE 1398 ICC

### Representation without power

“[I]. Anyone who has contracted as a representative without having the powers or exceeding the boundaries of the facoltà conferred on him is liable for the damages that the third party has suffered for having, without fault, relied on the validity of the contract of the case”.

Legal consequences: the contract completed by the so-called *falsus procurator* (false representative), due to the two reasons mentioned in art. 1398 ICC, is an ineffective one: it does not bind either the representative (obviously, because he declared to the third party of the case that he/she was going to act in the name and on behalf of others) or the represented person, and grants to the third party of the case a right to payment of damages for having relied without fault on the validity of the contract.

However, the law provides for a possible ratification of the very same contract, under art. 1399 ICC.

## ARTICOLO 1399 CC

### Ratifica

“[I]. *Nell'ipotesi prevista dall'articolo precedente, il contratto può essere ratificato dall'interessato, con la osservanza delle forme prescritte per la conclusione di esso.*

[II]. *La ratifica ha effetto retroattivo, ma sono salvi i diritti dei terzi.*

[III]. *Il terzo e colui che ha contrattato come rappresentante possono d'accordo sciogliere il contratto prima della ratifica.*

[IV]. *Il terzo contraente può invitare l'interessato a pronunziarsi sulla ratifica assegnandogli un termine, scaduto il quale, nel silenzio, la ratifica s'intende negata.*

[V]. *La facoltà di ratifica si trasmette agli eredi*”.

## ARTICLE 1399 ICC

### Ratification

*[I]. In the case mentioned in the previous article, the contract of the case can be ratified by the interested party in compliance with the form due for its own completion.*

*[II]. Ratification has retroactive effect, but rights of third parties are unaffected.*

*[III]. Third party and alleged representative may agree on terminating the contract of the case before its ratification.*

*[IV]. Third contracting party may invite the interested party of the case to decide on ratification by assigning her a deadline, after which, in case of silence, ratification is meant to be denied.*

*[V]. Power of ratification is transferred to heirs".*

Then, as for the form of a power of attorney, please see art. 1392 ICC.

## ARTICOLO 1392 CC

### Forma della procura

*"[I]. La procura non ha effetto se non è conferita con le forme prescritte per il contratto che il rappresentante deve concludere".*

## ARTICLE 1392 ICC

### Form of a power of attorney

*"[I]. A power of attorney does not produce any effect if it is not granted with the forms due for the contract that the representative of the case must complete".*

On the contract, as for the *rapporto di base*, please see, once again, in case of agency, paragraph 17.2 (when dealing with the form of agency agreements) and the judgment of *Corte di Cassazione* mentioned over there.

As for cases of implied power of attorney, please remember the case of a salesclerk, or a bartender.

Then, a power of attorney can terminate:

- i) due to expiration of its own period of time;*
- ii) for termination of its own *rapporto di base*;*
- iii) for death, *interdizione* or *inabilitazione* of the representative of the case;*
- iv) due to resignation performed by the representative of the case;*

v) basically, due to revocation performed by the *rappresentato* (if it has been granted in his own interest);

vi) basically, due to death, *interdizione* or *inabilitazione* of the *rappresentato* of the case (see art. 1722 ICC);

vii) basically, due to bankruptcy of the person represented.

Revocation is a unilateral legal transaction that does not require any peculiar form.

Accordingly, there can be:

- a tacit/**silent revocation** (performed by way of determining behaviour, e.g., by way of appointment of another representative for the very same business – see art. 1724 ICC); or
- an **express revocation**.

### **On amendments to, and revocation of, a power of attorney.**

#### **ARTICOLO 1396 CC**

##### **Modificazione ed estinzione della procura**

*“[I]. Le modificazioni e la revoca della procura devono essere portate a conoscenza dei terzi con mezzi idonei. In mancanza, esse non sono opponibili ai terzi, se non si prova che questi le conoscevano al momento della conclusione del contratto.*

*[II]. Le altre cause di estinzione del potere di rappresentanza conferito dall'interessato non sono opponibili ai terzi che le hanno senza colpa ignorate”.*

#### **ARTICLE 1396 ICC**

##### **Amendments and termination of a power of attorney**

*“[I]. Amendments and revocation of a power of attorney must be brought to the attention of third parties with suitable means. In case of failure, they are not opposable to said third parties, unless it is proved that they were aware of them at the time of completion of the contract of the case.*

*[II]. Other reasons for termination of a power of representation granted by an interested party cannot be opposed to third parties who have ignored them without fault”.*

Rationale of the provision: protection of reliance of third parties that ignore the modification or revocation of the power of attorney of the case and continue to negotiate with the representative previously appointed.

In the above-mentioned case, anyway, the represented person of the case can make a claim against the representative for damages for abuse of appearance.

Please note that protection of reliance of third parties is even greater in the field of corporate law, as art. 2384 ICC explains.

### **ARTICOLO 2384 CC**

#### **Poteri di rappresentanza**

*“[I]. Il potere di rappresentanza attribuito agli amministratori dallo statuto o dalla deliberazione di nomina è generale.*

*[II]. Le limitazioni ai poteri degli amministratori che risultano dallo statuto o da una decisione degli organi competenti non sono opponibili ai terzi, anche se pubblicate, salvo che si provi che questi abbiano intenzionalmente agito a danno della società”.*

### **ARTICLE 2384 ICC**

#### **Power of representation**

*“[I]. The power of representation granted to directors by the articles of association or by a resolution of appointment is a general one.*

*[II]. Limitations to powers of directors that are disclosed in articles of association or are set up by way of a decision of the competent internal bodies cannot be opposed to third parties, even if they are published, unless it is proved that they have intentionally acted to the detriment of the company of the case”.*

Rationale: third parties do not have to check out every time the competent companies register so to understand that someone that was appointed director is actually empowered to perform or not a certain legal transaction; it is preferred that the harmful consequences of a director’s behaviour are suffered by the company of the case rather than third parties.

#### **About so-called *contemplatio domini* or *spendita del nome* (namely, disclosure of the name of the *rappresentato*).**

The representative must act in the name of the represented person of the case and therefore disclose that the legal effects of the legal transaction of the case will not be produced against him/her, but against the represented person.

An express declaration is not due, but it is necessary that the disclosure of the name of the *rappresentato* of the case is at least a certain and an unambiguous one, according to the circumstances of the case. Otherwise, the contract, if completed, is not completed in the name of others. It is meant to be completed in representative’s own name.

Anyway, it is not even due that the represented person of the case is to be identified by name (see e.g., the case of contracts completed by employees during exercise of a business activity). Accordingly, please see art. 1393 ICC.

## ARTICOLO 1393 CC

### Giustificazione dei poteri del rappresentante

*“[I]. Il terzo che contratta col rappresentante può sempre esigere che questi giustifichi i suoi poteri e, se la rappresentanza risulta da un atto scritto, che gliene dia una copia da lui firmata”.*

## ARTICLE 1393 ICC

### Justification of representatives' powers

*“[I]. A third party that negotiates with a representative can always ask for the latter to justify his own powers and, if the representation of the case is disclosed in a written document, to give her a copy signed by him”.*

### **About vices of will, and other relevant personal situations, in case of a representation.**

First and foremost, legal capacity and capacity to act are involved here.

The appointed representative makes a declaration, but the effects are produced against the represented person.

Ergo, as far as the possibility to become the holder of a certain right is concerned, what really counts here is the represented person and no one else. If he cannot buy directly – see e.g., art. 1471 ICC – then he cannot buy/purchase even by representation.

On the other hand, as far as the process of formation of will is concerned, the figure of the representative is generally the relevant one, because he/she has an autonomous will of his/her own, different from the one of the represented person of the case, even if the two wills basically coincide one with the other, under the circumstances of the case.

Anyway, there may be elements of the legal transaction of the case that are predetermined by the *rappresentato*.

An example to explain all these situations.

The represented person has chosen the property of the case and has allowed the representative to fully negotiate the price.

If the will of the representative is viced, e.g., as for the price, due to fraud by the seller of the case, then representative's personal position is relevant here.

On the contrary, if the represented person has chosen, e.g., the piece of land to be bought and has mistakenly thought that it was a buildable one, due to a general deception put in place by the seller of the case, then his/her position can be relevant.

As per all above, please see artt. 1389-1390 ICC.

### **ARTICOLO 1389 CC**

#### **Capacità del rappresentante e del rappresentato**

*“[I]. Quando la rappresentanza è conferita dall’interessato, per la validità del contratto concluso dal rappresentante basta che questi abbia la capacità di intendere e di volere, avuto riguardo alla natura e al contenuto del contratto stesso, sempre che sia legalmente capace il rappresentato.*

*[II]. In ogni caso, per la validità del contratto concluso dal rappresentante è necessario che il contratto non sia vietato al rappresentato”.*

### **ARTICLE 1389 ICC**

#### **Capacity of representative and represented person**

*“[I]. When representation has been conferred by an interested party, for the contract completed by the representative to be a valid one, it is enough that the latter has the capacity of understanding and willing, having regard to nature and content of the contract itself, provided that the represented person is legally capable.*

*[II]. In any case, for the contract completed by the representative to be a valid one, the contract itself must not be prohibited to the represented person of the case”.*

### **ARTICOLO 1390 CC**

#### **Vizi della volontà**

*“[I]. Il contratto è annullabile se è viziata la volontà del rappresentante. Quando però il vizio riguarda elementi predeterminati dal rappresentato, il contratto è annullabile solo se era viziata la volontà di questo”.*

### **ARTICLE 1390 ICC**

#### **Vices of will**

*“[I]. A contract can be avoided if the will of the representative of the case is impaired. However, when the impairment concerns elements predetermined by the represented person of the case, then the contract can be avoided only if his own will was impaired”.*

## ARTICOLO 1391 CC

### Stati soggettivi rilevanti

“[I]. *Nei casi in cui è rilevante lo stato di buona o di mala fede, di scienza o d'ignoranza di determinate circostanze, si ha riguardo alla persona del rappresentante, salvo che si tratti di elementi predeterminati dal rappresentato.*

[II]. *In nessun caso il rappresentato che è in mala fede può giovare dello stato d'ignoranza o di buona fede del rappresentante”.*

## ARTICLE 1391 ICC

### Relevant personal states

“[I]. When a state either of good or bad faith or knowledge or ignorance of certain circumstances is the relevant one, then this state must be referred to the person of the representative of the case, except in case of elements predetermined by the represented person of the case.

[II]. Anyway, in no case can a represented person who is in bad faith can be advantaged by a state of ignorance or good faith of the representative of the case”.

**On conflicts of interests, and contracts completed by representatives with themselves.**

## ARTICOLO 1394 CC

### Conflitto d'interessi

“[I]. *Il contratto concluso dal rappresentante in conflitto d'interessi col rappresentato può essere annullato su domanda del rappresentato, se il conflitto era conosciuto o riconoscibile dal terzo”.*

## ARTICLE 1394 ICC

### Conflict of interests

“[I]. A contract completed by a representative in conflict of interests with his own represented person can be avoided at request of said represented person, if the conflict of interests was known or recognizable by the third party of the case”.

## ARTICOLO 1395 CC

### Contratto con sé stesso

“[I]. È annullabile il contratto che il rappresentante conclude con sé stesso, in proprio o come rappresentante di un'altra parte, a meno che il rappresentato lo abbia autorizzato specificatamente ovvero il contenuto del contratto sia determinato in modo da escludere la possibilità di conflitto d'interessi.

[II]. L'impugnazione può essere proposta soltanto dal rappresentato”.

## ARTICLE 1395 ICC

### Contracts completed with ourselves

“[I]. A contract completed by a representative with himself, in his own name or acting as representative of another party, is a voidable one, unless the represented person of the case has specifically authorized it, or the content of said contract has been determined in such a way as to exclude the possibility of a conflict of interests.

[II]. The claim can be performed by the sole represented person”.

### About so-called *falsus procurator* (representative without or exceeding powers).

Again, as we saw when we were dealing with the rules of law on power of attorney, please see artt. 1398 ICC and 1399 ICC.

## ARTICOLO 1398 CC

### Rappresentanza senza potere

“[I]. Colui che ha contrattato come rappresentante senza averne i poteri o eccedendo i limiti delle facoltà conferitegli, è responsabile del danno che il terzo contraente ha sofferto per avere confidato senza sua colpa nella validità del contratto”.

## ARTICLE 1398 ICC

### Representation without power

“[I]. Anyone who has contracted as a representative without having the powers or exceeding the boundaries of the facoltà conferred on him is liable for the damages that the third party has suffered for having, without fault, relied on the validity of the contract of the case”.

## ARTICOLO 1399 CC

### Ratifica

“[I]. Nell'ipotesi prevista dall'articolo precedente, il contratto può essere ratificato dall'interessato, con la osservanza delle forme prescritte per la conclusione di esso.

[II]. La ratifica ha effetto retroattivo, ma sono salvi i diritti dei terzi.

[III]. Il terzo e colui che ha contrattato come rappresentante possono d'accordo sciogliere il contratto prima della ratifica.

[IV]. Il terzo contraente può invitare l'interessato a pronunziarsi sulla ratifica assegnandogli un termine, scaduto il quale, nel silenzio, la ratifica s'intende negata.

[V]. La facoltà di ratifica si trasmette agli eredi”.

## ARTICLE 1399 ICC

### Ratification

“[I]. In the case mentioned in the previous article, the contract of the case can be ratified by the interested party in compliance with the form due for its own completion.

[II]. Ratification has retroactive effect, but rights of third parties are unaffected.

[III]. Third party and alleged representative may agree on terminating the contract of the case before its ratification.

[IV]. Third contracting party may invite the interested party of the case to decide on ratification by assigning her a deadline, after which, in case of silence, ratification is meant to be denied.

[V]. Power of ratification is transferred to heirs”.

Cases covered here are those concerning:

- excess of powers; or
- lack of powers.

The contract completed by the *falsus procurator* of the case is valid per se but **ineffective**, meaning not binding neither the representative nor the represented person.

Then, ratification is a legal instrument that has a purpose similar to the one of a power of attorney; it is also a unilateral legal transaction, meant to be directed to the third party of the case instead of the representative. It has retroactive effect amongst the parties (so-called *retroattività obbligatoria*).



## 18 Lecture 18: on the law of obligations in general.

SUMMARY: 18.1 Introduction. – 18.2 On payment. – 18.3 On partial and full payment. – 18.4 On payment by third parties. – 18.5 On other means to pay-off obligations: *compensazione* (offset). – 18.6 On *confusione*. – 18.7 On *novazione*. – 18.8 On *remissione del debito*. – 18.9 On supervening impossibility. – 18.10 On assignment of credits.

### 18.1 Introduction.

In lectures 8 and 9 we spoke about the distinction between *rights in rem* and *rights in personam*, we mentioned that the latter kind of rights refers to the law on obligations in general, and we both said that the subject matter of an obligation is to be subjected to economic evaluation (see art. 1174 ICC)<sup>59</sup> and introduced the sources of obligations in Italian private law (see art. 1173 ICC)<sup>60</sup>, where contracts (analysed so far) are, actually, one of these sources<sup>61</sup>.

Now, let's see the most important rules of law on obligations in general.

### 18.2 On payment.

Payment means performance of the service due, whatever its nature. Accordingly, payment means fulfilment, even if the word payment is mostly used, in common parlance, in relation to sole monetary obligations.

Now, please note that art. 1176 ICC states that a debtor, in performing his/her own service/obligations, must act under the common care of so-called *buon padre di famiglia* (good family man).

#### ARTICOLO 1176 CC

#### Diligenza nell'adempimento

“[I]. Nell'adempiere l'obbligazione il debitore deve usare la diligenza del buon padre di famiglia.

[II]. Nell'adempimento delle obbligazioni inerenti all'esercizio di un'attività professionale, la diligenza deve valutarsi con riguardo alla natura dell'attività esercitata”.

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<sup>59</sup> See lecture 9, par. 9.1.

<sup>60</sup> See lecture 9, par. 9.2.

<sup>61</sup> Please remember that we also mentioned that debtor and creditor must behave in good faith (see art. 1175 ICC, still in lecture 9, par. 9.1).

## ARTICLE 1176 ICC

### Diligence in payment

*“[I]. In fulfilling the obligation, the debtor must use the diligence of a good family man.  
[II]. In fulfilling obligations inherent in the exercise of a professional activity, diligence must be assessed with regard to the nature of the activity carried out”.*

Then, an act of payment/fulfilment is a material act.

Therefore, it is not a legal transaction.

*Ergo*, a payment executed by a debtor incapable to act cannot be challenged; see art. 1191 ICC.

## ARTICOLO 1191 CC

### Pagamento eseguito da un incapace

*“[I]. Il debitore che ha eseguito la prestazione dovuta non può impugnare il pagamento a causa della propria incapacità”.*

## ARTICLE 1191 ICC

### Payment made by a person incapable to act

*“[I]. A debtor who has performed the owed service cannot challenge the payment due to his own incapacity to act”.*

If a service is due, then the will of the debtor is irrelevant.

Moreover, the obligation of payment is personal: ergo, it must be carried out personally by the debtor of the case or by his own “auxiliary members of staff” (see e.g., the case of a debtor who pays through his own bank account). Anyway, a payment by way of auxiliary members of staff is not possible when the service of the case is a very personal one (see e.g., the case of a painter who must paint a picture by order).

Again, as for the purposes of payments, the rule of law is that not even the will of the creditor of the case is important. However, if the creditor of the case is still a person incapable to act, then there is a risk that he could impoverish himself. Therefore, a payment, in case of an incapable creditor, must be made to his legal representative (in order to free the debtor).

See art. 1190 ICC, as a special rule of law (*lex specialis*), in compliance with art. 1988 ICC, as a general rule of law (*lex generalis*).

## ARTICOLO 1190 CC

### Pagamento al creditore incapace

“[I]. Il pagamento fatto al creditore incapace di riceverlo non libera il debitore, se questi non prova che ciò che fu pagato è stato rivolto a vantaggio dell'incapace”.

## ARTICLE 1190 ICC

### Payment to a creditor incapable to act

“[I]. A payment made to a creditor incapable of receiving it does not free the debtor of the case, if he cannot prove that payment was performed to the advantage of the incapable person of the case”.

## ARTICOLO 1188 CC

### Destinatario del pagamento

“[I]. Il pagamento deve essere fatto al creditore o al suo rappresentante, ovvero alla persona indicata dal creditore o autorizzata dalla legge o dal giudice a riceverlo.

[II]. Il pagamento fatto a chi non era legittimato a riceverlo libera il debitore, se il creditore lo ratifica o se ne ha approfittato”.

## ARTICLE 1188 ICC

### Beneficiary of a payment

“[I]. A payment must be made either to the creditor of the case or his representative, or otherwise to the person appointed by the creditor, or authorized either by the law or by a judge to receive it.

[II]. A payment made to someone who was not entitled to receive it frees the debtor only if the creditor of the case ratifies it or has taken advantage of it”.

An exception to art. 1188 ICC is the case of the alleged/ostensible creditor, under art. 1189 ICC.

## ARTICOLO 1189 CC

### Pagamento al creditore apparente

“[I]. Il debitore che esegue il pagamento a chi appare legittimato a riceverlo in base a circostanze univoche, è liberato se prova di essere stato in buona fede.

[II]. *Chi ha ricevuto il pagamento è tenuto alla restituzione verso il vero creditore, secondo le regole stabilite per la ripetizione dell'indebito*".

## ARTICLE 1189 ICC

### Payment to an ostensible creditor

*"[I]. A debtor who pays someone who appears to be entitled to receive the payment of the case due to unambiguous circumstances is freed, if he proves that he was in good faith.*

*[II]. Whoever has received a payment must return it to the proper creditor, according to the rules of law on restitution of undue payments"*.

Examples on the topic: 1) a payment performed to an alleged heir; 2) a payment performed to a person wrongly appointed by the creditor; 3) a payment to the ostensible representative of the case (a person who appears to be a bartender behind a bar).

### 18.3 On partial and full payment.

Every payment must be fully executed. Every creditor, unless otherwise agreed on, can always refuse partial payment, even if the service to be performed is a divisible one, without incurring in so-called *mora del creditore* (creditor's breach in receiving) under art. 1206 ICC and ff. ones.

## ARTICOLO 1181 CC

### Adempimento parziale

*"[I]. Il creditore può rifiutare un adempimento parziale anche se la prestazione è divisibile, salvo che la legge o gli usi dispongano diversamente"*.

## ARTICLE 1181 ICC

### Partial payment

*"[I]. Unless law or customs provide otherwise, creditors can refuse partial payments, even if the performance of the case is a divisible one"*.

Exceptions: check and promissory note (see the laws on them).

As we said, a debtor must exactly perform the service due.

*Ergo*, a debtor cannot be thought to be freed, in case of performance of a different service executed without consent of the creditor of the case, even if the service is financially equal or even more valuable of the service due. See art. 1197 ICC.

## ARTICOLO 1197 CC

### Prestazione in luogo dell'adempimento

“[I]. Il debitore non può liberarsi eseguendo una prestazione diversa da quella dovuta, anche se di valore uguale o maggiore, salvo che il creditore consenta. In questo caso l'obbligazione si estingue quando la diversa prestazione è eseguita.

[II]. Se la prestazione consiste nel trasferimento della proprietà o di un altro diritto, il debitore è tenuto alla garanzia per l'evizione e per i vizi della cosa secondo le norme della vendita, salvo che il creditore preferisca esigere la prestazione originaria e il risarcimento del danno”.

## ARTICLE 1197 ICC

### Performance of a different service

“[I]. Unless his creditor agrees on it, a debtor cannot free himself by performing a service different from the one due, even if it is of equal or even greater value. In the first case, the obligation is paid-off when the different service is performed.

[II]. If performance consists in a transfer of ownership or another right, then the debtor of the case must guarantee his creditor against evizione<sup>62</sup> and for defects of the thing of the case according to the rules of law on sale, unless the creditor prefers to ask for original performance and payment of damages”.

Art. 1197 ICC covers the case of the so-called *datio in solutum*.

Finally, as for place and time for payment, please see art. 1182 ICC<sup>63</sup> and art. 1183 ICC, and as for the case of more payments due by the same debtor to the same creditor see also art. 1193 ICC.

Instead, as for payments of debts consisting in both capital and interests, please see art. 1194 ICC.

## ARTICOLO 1194 CC

### Imputazione del pagamento agli interessi

“[I]. Il debitore non può imputare il pagamento al capitale, piuttosto che agli interessi e alle spese, senza il consenso del creditore.

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<sup>62</sup> The word cannot be translated, as eviction means, in English private law, *sfratto* (namely, a remedy strictly related to a rent agreement), when *evizione* means, under Italian private law, a more general institution covering partial or full loss of every kind of right, meaning either a *right in rem* or a *right in personam*.

<sup>63</sup> Already mentioned in lecture 10, par. 10.4.

*[II]. Il pagamento fatto in conto di capitale e d'interessi deve essere imputato prima agli interessi”.*

## **ARTICLE 1194 ICC**

### **Allocation of payments on interest**

*“[I]. Without consent of his creditor, a debtor cannot allocate a payment to principal rather than interest and expenses.*

*[II]. A payment made as per principal and interest must be firstly charged to interest”.*

The abovementioned provision is basically the reason why loans are mostly signed with repayment of interests at first, and capital afterwards.

Finally, in case of an agreed *termine* for the payment of the case, please go back to artt. 1184-1186 ICC, analysed in lecture 15, par. 15.3.

### **18.4 On payment by third parties.**

Different reasons can be behind a payment executed by a third party rather than the debtor of the case. See e.g., the case of a performance executed so to provide for an indirect gift, or a payment executed *solvendi causa*, or completed for a gratuitous purpose (different from making a gift), and so on.

Obviously, once the payment is performed, the legal relationship between debtor and third-party payor is governed by their will or their previous engagements. Otherwise, the rules of law on unjustified enrichment can be applied.

Rule of law on payment by third parties: a debtor cannot dismiss a performance executed by a third party, as the law thinks that interests concerning execution of debtors-creditors legal relationships must prevail; the creditor of the case can only refuse performance of a personal service. See art. 1180 ICC.

## **ARTICOLO 1180 CC**

### **Adempimento del terzo**

*“[I]. L'obbligazione può essere adempiuta da un terzo, anche contro la volontà del creditore, se questi non ha interesse a che il debitore esegua personalmente la prestazione.*

*[II]. Tuttavia il creditore può rifiutare l'adempimento offertogli dal terzo, se il debitore gli ha manifestato la sua opposizione”.*

## ARTICLE 1180 ICC

### Performance by third parties

“[I]. If the creditor of the case has no interest in debtor’s personal performance of the service due, then the obligation can be paid-off by a third party, even against the will of said creditor.

[II]. However, a creditor can dismiss a performance offered by a third party if the debtor of the case has disclosed his own opposition to him”.

Please note that we said that a payment executed by a debtor is not a legal transaction. As for third parties, however, it is different, because third parties are not bound to payment, per se.

Accordingly, a third-party payment must be justified by a *causa* and her willingness to provide for payment; if her will is flawed, then the payment of the case is an invalid one. See art. 2033 ICC<sup>64</sup> and art. 2036 ICC.

### **On payment by a third party, with following personal subrogation.**

A third party can pay and subrogate/substitute/replace herself to the creditor of the case.

Cases: co-debtorship, *fideiussione* (under art. 1936 ICC and ff. ones), *et cetera*.

Here, a so-called right of recourse (*diritto di regresso*) arises on behalf of the third-party payor of the case.

## ARTICOLO 1299 CC

### Regresso tra condebitori

“[I]. Il debitore in solido che ha pagato l’intero debito può ripetere dai condebitori soltanto la parte di ciascuno di essi.

[II]. Se uno di questi è insolvente, la perdita si ripartisce per contributo tra gli altri condebitori, compreso quello che ha fatto il pagamento.

[III]. La stessa norma si applica qualora sia insolvente il condebitore nel cui esclusivo interesse l’obbligazione era stata assunta”.

## ARTICLE 1299 ICC

### Right of recourse amongst co-debtors

“[I]. A joint-and-several debtor who has paid the entire debt may only ask to the remaining co-debtors to pay him the part of the debt due by each of them.

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<sup>64</sup> Examined in lecture 9, par. 9.1.

*[II]. If one of them is insolvent, then the loss is shared pro quota amongst the other co-debtors, including the one that has performed payment.*

*[III]. The same rule applies if the co-debtor in whose exclusive interest the obligation was originally taken on is an insolvent one”.*

Now, personal subrogation can be a legal or a voluntary one.

**On legal (personal) subrogation<sup>65</sup>.**

## **ARTICOLO 1203 CC**

### **Surrogazione legale**

*“[I]. La surrogazione ha luogo di diritto nei seguenti casi:*

*1) a vantaggio di chi, essendo creditore, ancorché chirografario, paga un altro creditore che ha diritto di essergli preferito in ragione dei suoi privilegi, del suo pegno o delle sue ipoteche;*

*2) a vantaggio dell’acquirente di un immobile che, fino alla concorrenza del prezzo di acquisto, paga uno o più creditori a favore dei quali l’immobile è ipotecato;*

*3) a vantaggio di colui che, essendo tenuto con altri o per altri al pagamento del debito, aveva interesse di soddisfarlo;*

*4) a vantaggio dell’erede con beneficio d’inventario, che paga con danaro proprio i debiti ereditari;*

*5) negli altri casi stabiliti dalla legge”.*

## **ARTICLE 1203 ICC**

### **Subrogation at law**

*“[I]. Subrogation takes place at law in the following cases:*

*1) to the advantage of every person that, being a creditor, even an unsecured one, pays another creditor that has the right to be preferred by reason of a privilegio, a pledge or a mortgage of his own;*

*2) to the advantage of a buyer of an immovable property that, up to the amount of the purchase price, pays one or more creditors that are mortgagees of a mortgaged property;*

*3) for the advantage of every person that, being bound to pay the debt of the case along with others or on behalf of others, had an interest in paying said debt;*

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<sup>65</sup> As we must distinguish personal subrogation, mentioned above, from real subrogation, where the subject matter of subrogation are properties/rights over properties.

4) *to the advantage of an heir subjected to beneficio d'inventario who pays the debts of the inheritance of the case with his own money;*

5) *in other remaining cases set up by the law*".

### **On voluntary (personal) subrogation.**

Here, we must distinguish between subrogation for will of the creditor of the case from subrogation for will of the debtor of the case.

## **ARTICOLO 1201 CC**

### **Surrogazione per volontà del creditore**

*"[I]. Il creditore, ricevendo il pagamento da un terzo, può surrogarlo nei propri diritti. La surrogazione deve essere fatta in modo espresso e contemporaneamente al pagamento"*.

## **ARTICLE 1201 ICC**

### **Subrogation by creditor's will**

*"[I]. A creditor, when receives payment from a third party, can subrogate him in his own rights. Subrogation must be made in an express way and at the same time of the payment of the case"*.

## **ARTICOLO 1202 CC**

### **Surrogazione per volontà del debitore**

*"[I]. Il debitore, che prende a mutuo una somma di danaro o altra cosa fungibile al fine di pagare il debito, può surrogare il mutuante nei diritti del creditore, anche senza il consenso di questo.*

*[II]. La surrogazione ha effetto quando concorrono le seguenti condizioni:*

- 1) *che il mutuo e la quietanza risultino da atto avente data certa;*
- 2) *che nell'atto di mutuo sia indicata espressamente la specifica destinazione della somma mutuata;*
- 3) *che nella quietanza si menzioni la dichiarazione del debitore circa la provenienza della somma impiegata nel pagamento. Sulla richiesta del debitore, il creditore non può rifiutarsi di inserire nella quietanza tale dichiarazione"*.

## ARTICLE 1202 ICC

### Subrogation by debtor's will

“[I]. A debtor that agrees on a loan of a sum of money or other fungible things so to pay a debt can subrogate the lender in the rights of the creditor of the case, even without creditor's consent.

[II]. Subrogation takes effect when all following terms are satisfied:

- 1) loan and receipt are disclosed in a deed with a certain date;
- 2) specific destination of the loaned sum is expressly mentioned in the deed of loan;
- 3) debtor's declaration concerning origin of the sum used for payment is mentioned in the receipt. Upon debtor's request, the creditor of the case cannot refuse to insert said declaration in the receipt of the case”.

### 18.5 On other means to pay-off obligations: *compensazione* (offset).

*Compensazione*/offset is one of the means to pay-off obligations, different from payment, ruled by the Italian civil code (along with *confusione*, *novazione*, *remissione (del debito)* and *impossibilità sopravvenuta* non due to liability of the debtor of the case), namely, in art. 1230 ICC and ff. ones.

*Compensazione*/offset is a means to pay-off two reciprocal debts (covered by artt. 1241-1252 ICC).

An example: A owes B 10,000 euros and B owes A 3,000 euros. A *compensazione*/an offset can be agreed on, here, by the parties. Accordingly, A will pay B 7,000 euros.

Rationale: to simplify things; to avoid unnecessary activities. Offset is a form of preferential satisfaction of a credit (see the law on bankruptcy).

There are three kinds of offset available in Italian private law, namely legal offset, judicial offset and voluntary offset.

## ARTICOLO 1243 CC

### Compensazione legale e giudiziale

“[I]. La compensazione si verifica solo tra due debiti che hanno per oggetto una somma di danaro o una quantità di cose fungibili dello stesso genere e che sono ugualmente liquidi ed esigibili.

[II]. Se il debito opposto in compensazione non è liquido ma è di facile e pronta liquidazione, il giudice può dichiarare la compensazione per la parte del debito che riconosce

*esistente, e può anche sospendere la condanna per il credito liquido fino all'accertamento del credito opposto in compensazione”.*

#### **ARTICLE 1243 ICC**

##### **Legal and judicial offset**

*“[I]. An offset can occur only between two debts which have as their subject matter either a sum of money or a quantity of fungible things of the same kind that are also equally liquid and payable ones.*

*[II]. If the debt of the case opposed under offset is not a liquid one, but it can be easily and promptly liquidated, then the judge can declare the offset as for the part of the debt that he recognizes to be an existent one, and he can also suspend the judgment concerning payment of the liquid credit of the case until verification of the credit opposed under offset”.*

#### **ARTICOLO 1246 CC**

##### **Casi in cui la compensazione non si verifica**

*“[I]. La compensazione si verifica qualunque sia il titolo dell'uno o dell'altro debito, eccettuati i casi:*

- 1) di credito per la restituzione di cose di cui il proprietario sia stato ingiustamente spogliato;*
- 2) di credito per la restituzione di cose depositate o date in comodato;*
- 3) di credito dichiarato impignorabile;*
- 4) di rinuncia alla compensazione fatta preventivamente dal debitore;*
- 5) di divieto stabilito dalla legge”.*

#### **ARTICLE 1246 ICC**

##### **Cases where an offset cannot occur**

*“[I]. Offset occurs regardless of the legal reason behind one or the other debt of the case, except in cases of:*

- 1) credits for restitution of things unjustly dispossessed to their owner;*
- 2) credits for restitution of things deposited or subject to a gratuitous bailment;*
- 3) credits declared not subject to attachment;*
- 4) waivers to offset made in advance by the debtors of the case;*
- 5) prohibitions established by the law”.*

**ARTICOLO 1252 CC**  
**Compensazione volontaria**

“[I]. *Per volontà delle parti può aver luogo compensazione anche se non ricorrono le condizioni previste dagli articoli precedenti.*

[II]. *Le parti possono anche stabilire preventivamente le condizioni di tale compensazione”.*

**ARTICLE 1252 ICC**  
**Voluntary offset**

“[I]. An offset can take place by will of the parties even if the terms set out in the previous articles are not satisfied.

[II]. Parties may also agree in advance on the terms for such an offset”.

Here, a distinction arises between proper offset and improper offset, depending on the fact that the two opposing credits comes out either from different/autonomous legal relationships or not.

If the reciprocal credits arise from the same legal relationship, then an improper offset takes place. See e.g., the case of a settlement of a relationship between an *agente* and his *preponente*: here commissions and expenses can be due to the first person, whereas sums collected on behalf of the *preponente* can be due to the second one.

**18.6 On *confusione*.**

It's a means to pay-off obligations too, governed by art. 1253 ICC. It occurs when the quality of debtor and creditor of a certain person match each other.

**ARTICOLO 1253 CC**  
**Effetti della *confusione***

“[I]. *Quando le qualità di creditore e di debitore si riuniscono nella stessa persona, l'obbligazione si estingue, e i terzi che hanno prestato garanzia per il debitore sono liberati”.*

**ARTICLE 1253 ICC**  
**(Legal) effects of a *confusione***

“[I]. When the qualities of creditor and debtor meet in the very same person, then the obligation of the case is paid-off, and third parties that granted a guarantee on behalf of the debtor of the case are freed”.

## 18.7 On *novazione*.

With *novazione* an obligation is extinguished/paid-off by way of its substitution with a new one.

Namely, per se, a *novazione* can be:

– **a subjective one**, when a new debtor replaces the original debtor, or a new creditor replaces the original creditor. It can be carried out throughout a *delegazione*, an *espromissione* or an *accollo*, when one of the original relationships (*rappporto di provvista* or *rappporto di valuta*) is extinguished<sup>66</sup>; or

– **an objective one**, where the difference lies in the subject matter or the legal transaction of the case.

Examples of an **objective *novazione* (*novazione oggettiva*)**:

1) goods instead of money. This is a case like the one that we saw dealing with performance of a different service under art. 1197 ICC. The difference between a *datio in solutum* and a *novazione oggettiva* consists in an immediate payment with extinction of the obligation in case of a *datio in solutum*, against/versus a future payment in case of *novazione* (due to the birth of a new debtor-creditor relationship);

2) when the sum due for payment of a price for sale is left in the hands of the debtor of the case as a loan (*ergo*, the debt for payment of the sale price is replaced by a loan debt).

### ARTICOLO 1230 CC

#### Novazione oggettiva

“[I]. *L’obbligazione si estingue quando le parti sostituiscono all’obbligazione originaria una nuova obbligazione con oggetto o titolo diverso.*

[II]. *La volontà di estinguere l’obbligazione precedente deve risultare in modo non equivoco”.*

### ARTICLE 1230 ICC

#### Objective *novazione*

“[I]. An obligation is extinguished when its own parties replace the original obligation with a new one with a different subject matter or a different legal transaction behind it.

[II]. The willingness to pay-off the previous obligation must be unequivocal”.

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<sup>66</sup> Please note that we already analysed *delegazione*, *espromissione* and *accollo* in lecture 10, par. 10.6, when we were dealing with the different kinds of legal transactions available in the Italian private law.

Please note that the desire to pay-off an obligation by way of *novazione oggettiva* must be clear, whereas some behaviours do not mean *novazione* at all (see e.g., art. 1231 ICC and art. 1232 ICC).

#### **ARTICOLO 1231 CC**

##### **Modalità che non importano novazione**

“[I]. *Il rilascio di un documento o la sua rinnovazione, l'apposizione o l'eliminazione di un termine e ogni altra modificazione accessoria dell'obbligazione non producono novazione*”.

#### **ARTICLE 1231 ICC**

##### **Activities not involving *novazione***

“[I]. Issuance of a document or its own renewal, or either attachment or deletion of a term, or every other accessorial amendment made to an obligation, do not involve a *novazione*”.

#### **ARTICOLO 1232 CC**

##### **Privilegi, pegno e ipoteche**

“[I]. *I privilegi, il pegno e le ipoteche del credito originario si estinguono, se le parti non convengono espressamente di mantenerli per il nuovo credito*”.

#### **ARTICLE 1232 ICC**

##### ***Privilegi, pledges and mortgages***

“[I]. *Privilegi, pledges and mortgages related to an original credit are meant to be extinguished if the parties of the case do not expressly agree on keeping them in case of a new credit*”.

The willingness of extinction must be an unequivocal one, obviously, because a new credit arises from a new legal transaction.

However, the *causa* of the new credit finds its reason in the extinction of the original credit. Accordingly, if the original obligation did not exist, then *novazione* does not produce any legal effect. Moreover, if the original legal transaction was a voidable one, then the new obligation is a valid one only if it has been agreed on with full awareness of the reason for avoidance.

#### **ARTICOLO 1234 CC**

##### **Inefficacia della novazione**

“[I]. *La novazione è senza effetto, se non esisteva l'obbligazione originaria.*”

[II]. *Qualora l'obbligazione originaria derivi da un titolo annullabile, la novazione è valida se il debitore ha assunto validamente il nuovo debito conoscendo il vizio del titolo originario*".

## ARTICLE 1234 ICC

### Ineffectiveness of a *novazione*

*"[I]. A novazione does not produce any effect if the original obligation did not exist.*

*[II]. If the original obligation arises from a voidable legal transaction, then the novazione of the case is a valid one if the debtor has validly taken on the new debt being aware of the vices of the original legal transaction"*.

### 18.8 On *remissione del debito*.

We already spoke about it, still, in lecture 10, par. 10.6 (when we were dealing with the different kinds of legal transactions available in the Italian private law, namely the ones that need acceptance or non-refusal by the beneficiary of the case, even when they are free of charge). Anyway, it is governed by art. 1236-1240 ICC, dealing respectively with both an express declaration of *remissione* (under art. 1236 ICC) and a tacit/implicit one (under art. 1237 ICC), in compliance with the general correspondence between declarations and (determining) behaviours.

## ARTICOLO 1236 CC

### Dichiarazione di *remissione del debito*

*"[I]. La dichiarazione del creditore di rimettere il debito estingue l'obbligazione quando è comunicata al debitore, salvo che questi dichiari in un congruo termine di non volerne profittare"*.

## ARTICLE 1236 ICC

### Declaration of *remissione del debito*

*"[I]. Creditor's declaration to remit the debt extinguishes the obligation when it is notified to the debtor, if the latter does not declare that he does not want to profit from it within a reasonable period of time"*.

## ARTICOLO 1237 CC

### Restituzione volontaria del titolo

“[I]. *La restituzione volontaria del titolo originale del credito, fatta dal creditore al debitore, costituisce prova della liberazione anche rispetto ai condebitori in solido.*

*[II]. Se il titolo del credito è in forma pubblica, la consegna volontaria della copia spedita in forma esecutiva fa presumere la liberazione, salva la prova contraria”.*

## ARTICLE 1237 ICC

### Voluntary restitution of the title

“[I]. Voluntary restitution of the original title of credit, made by creditor to debtor, constitutes proof of release even on behalf of joint and several debtors.

*[II]. If the title of credit is in a public form, then voluntary delivery of a copy sent in enforceable form leads to presumption of release, except in case of evidence of the contrary”.*

### 18.9 On supervening impossibility.

Supervening impossibility to pay a debt (pending against the debtor of the case) is also a means to pay-off obligations<sup>67</sup>.

Anyway, incidentally speaking, please note that, when the payment of a debt is perfectly possible, art. 1218 ICC comes into play, first and foremost, to provide for compensation for damages, in case of breach of obligation.

## ARTICOLO 1218 CC

### Responsabilità del debitore

“[I]. *Il debitore che non esegue esattamente la prestazione dovuta è tenuto al risarcimento del danno, se non prova che l'inadempimento o il ritardo è stato determinato da impossibilità della prestazione derivante da causa a lui non imputabile”.*

## ARTICLE 1218 ICC

### Liability of the debtor

“[I]. The debtor who does not perform exactly the performance due is required to pay compensation for damages, if he does not prove that the non-fulfilment or delay was caused by the impossibility of the performance deriving from reasons not ascribable to him”.

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<sup>67</sup> Please see the expression *supervening impossibility* as reason for termination of contracts too, in contract law, under artt. 1463-1466 ICC (examined in lecture 16, par. 16.9).

As per above, on the contrary, is the obligation cannot be performed, due to impossibility, then art. 1256 ICC takes care of this situation, distinguishing between temporary and permanent impossibility.

## ARTICOLO 1256 CC

### Impossibilità definitiva e impossibilità temporanea

*“[I]. La obbligazione si estingue quando, per una causa non imputabile al debitore, la prestazione diventa impossibile.*

*[II]. Se l'impossibilità è solo temporanea, il debitore, finché essa perdura, non è responsabile del ritardo nell'adempimento. Tuttavia l'obbligazione si estingue se l'impossibilità perdura fino a quando, in relazione al titolo dell'obbligazione o alla natura dell'oggetto, il debitore non può più essere ritenuto obbligato a eseguire la prestazione ovvero il creditore non ha più interesse a conseguirla”.*

## ARTICLE 1256 ICC

### Permanent and temporary impossibility

*“[I]. An obligation expires when its own performance becomes an impossible one due to a reason not ascribable to the debtor of the case.*

*[II]. If the impossibility of the case is just a temporary one, then the debtor is not liable for delay in performance, as long as said impossibility goes on. However, an obligation is extinguished if the impossibility persists, until, in relation to the source of the obligation of the case or the nature of its subject matter, the debtor of the case can no longer be considered to be bound to perform the service or his creditor has no longer an interest in obtaining it”.*

Then, again, on **partial** and **full impossibility**, please see art. 1258 ICC.

## ARTICOLO 1258 CC

### Impossibilità parziale

*“[I]. Se la prestazione è divenuta impossibile solo in parte, il debitore si libera dall'obbligazione eseguendo la prestazione per la parte che è rimasta possibile.*

*[II]. La stessa disposizione si applica quando, essendo dovuta una cosa determinata, questa ha subito un deterioramento, o quando residua alcunché dal perimento totale della cosa”.*

## ARTICLE 1258 ICC

### Partial impossibility

*“[I]. If performance has become impossible just in part, then the debtor is freed from obligation by performing the service due as for its part remained partially possible.*

*[II]. The same provision applies when, being a certain thing due, it has suffered a deterioration, or when something is still surviving out of total perishing of the thing of the case”.*

### 18.10 On assignment of credits.

We previously mentioned that an assignment of a contract is legally different from an assignment of a credit because the rules of law are different, particularly as for acceptance by the debtor/assigned person of the case<sup>68</sup>.

**Please also remember that, talking about contracts, all parties of a contract are debtor and creditor at the same time, depending on the service due under the circumstances of the case.**

Now, having said that, like any other property (with a patrimonial content), even a credit can be transferred, particularly via contract. Thus, for example, a credit can be sold or assigned as a guarantee or transferred to pay a debt or gifted or assigned to a company to acquire the position of partner or member/shareholder of the company of the case. In all these cases there is, technically speaking, an assignment of credit.

As for an assignment of credit to be a valid one, please note that an agreement between original creditor (the assignor of the case) and the transferee of the credit (the assignee of the case) is enough; here, in fact, there is no need of consent by the debtor of the case (the debtor assigned), because, on a general basis, who is the final beneficiary of the payment of his own debt is fully irrelevant to a debtor. Whereas, as we said, when it comes to contracts, assignment of a contract always needs consent by the assigned party (see art. 1406 ICC).

Now, the rules of law on assignment of credits are artt. 1260-1267 ICC.

## ARTICOLO 1260 CC

### Cedibilità dei crediti

*“[I]. Il creditore può trasferire a titolo oneroso o gratuito il suo credito, anche senza il consenso del debitore, purché il credito non abbia carattere strettamente personale o il trasferimento non sia vietato dalla legge.*

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<sup>68</sup> See lecture 13, par. 13.4.

[II]. *Le parti possono escludere la cedibilità del credito; ma il patto non è opponibile al cessionario, se non si prova che egli lo conosceva al tempo della cessione*".

## ARTICLE 1260 ICC

### Assignability of credits

"[I]. A creditor can transfer his own credit for a consideration or free of charge, even without debtor's consent, provided that the credit of the case is not a strictly personal one or the transfer is not prohibited by law.

[II]. Parties can exclude assignability of the credit of the case, but their agreement is not opposable to the assignee, unless it is proved that he was aware of it at the time of assignment".

As per above, anyway there are credits that cannot be assigned, as it happens, at first, in case of alimony (see art. 447 ICC), as a credit to alimony is a strictly personal kind of credit.

Then, other cases on prohibition to assign credits are those mentioned in art. 1261 ICC.

## ARTICOLO 1261 CC

### Divieti di cessione

*"[I]. I magistrati dell'ordine giudiziario, i funzionari delle cancellerie e segreterie giudiziarie, gli ufficiali giudiziari, gli avvocati, i procuratori, i patrocinatori e i notai non possono, neppure per interposta persona, rendersi cessionari di diritti sui quali è sorta contestazione davanti l'autorità giudiziaria di cui fanno parte o nella cui giurisdizione esercitano le loro funzioni, sotto pena di nullità e dei danni.*

*[II]. La disposizione del comma precedente non si applica alle cessioni di azioni ereditarie tra coeredi, né a quelle fatte in pagamento di debiti o per difesa di beni posseduti dal cessionario"*.

## ARTICLE 1261 ICC

### Prohibitions on assignment

"[I]. Judges of the judiciary, officials of clerical offices and judicial secretariats, bailiffs, lawyers, prosecutors, agents and notaries cannot, not even through a third party, become assignees of rights over which a dispute has arisen before the judicial authority to which they belong, or in whose jurisdiction they exercise their functions, under penalty of nullity and damages.

*[II]. The provision of the preceding paragraph does not apply neither to the transfer of inheritance claims amongst co-heirs nor to those made for payment of debts or for defence of assets owned by the transferee of the case”.*

Having said that, a credit, even when it has been assigned, retains all its characteristics, as well as its so-called *accessori* (accessorial qualities).

Thus, if we are dealing with a privileged kind of credit, it remains a privileged one even after its own assignment; again, if the credit to be transferred was backed up by personal or real guarantees, then these guarantees are transferred to the transferee of the case too.

### **ARTICOLO 1263 CC**

#### **Accessori del credito**

*“[I]. Per effetto della cessione, il credito è trasferito al cessionario con i privilegi, con le garanzie personali e reali e con gli altri accessori.*

*[II]. Il cedente non può trasferire al cessionario, senza il consenso del costituente, il possesso della cosa ricevuta in pegno; in caso di dissenso, il cedente rimane custode del pegno”.*

### **ARTICLE 1263 ICC**

#### **Credit accessories**

*“[I]. As a result of an assignment, the credit of the case is transferred to the assignee with its own privileges, with its personal and real guarantees, and with other accessories.*

*[II]. An assignor cannot transfer to his assignee, without consent of the pledgor, possession of a property received under pledge; in case of dissent, the assignor of the case remains custodian of the pledged property”.*

Then, as for the legal consequences/effects of an assignment, against the assigned debtor of the case, please see art. 1264 ICC.

### **ARTICOLO 1264 CC**

#### **Efficacia della cessione riguardo al debitore ceduto**

*“[I]. La cessione ha effetto nei confronti del debitore ceduto quando questi l’ha accettata o quando gli è stata notificata.*

[II]. Tuttavia, anche prima della notificazione, il debitore che paga al cedente non è liberato, se il cessionario prova che il debitore medesimo era a conoscenza dell'avvenuta cessione”.

#### ARTICLE 1264 ICC

##### Effectiveness of an assignment against the assigned debtor

“[I]. An assignment takes effect against the assigned debtor of the case when he has accepted it or when it has been notified to him.

[II]. However, even before notification, a debtor who pays the assignor of the case is not freed if the assignee proves that the same debtor was aware of the occurred assignment”.

Moreover, in case of a conflict of interests arising from more assignments, see art. 1265 ICC.

#### ARTICOLO 1265 CC

##### Efficacia della cessione riguardo ai terzi

“[I]. Se il medesimo credito ha formato oggetto di più cessioni a persone diverse, prevale la cessione notificata per prima al debitore, o quella che è stata prima accettata dal debitore con atto di data certa, ancorché essa sia di data posteriore.

[II]. La stessa norma si osserva quando il credito ha formato oggetto di costituzione di usufrutto o di pegno”.

#### ARTICLE 1265 ICC

##### Effectiveness of an assignment against third parties

“[I]. If the same credit has been the subject matter of several assignments to different persons, then the assignment firstly notified to the debtor prevails, or otherwise the one that was firstly accepted by the debtor with an act of certain date, even if it is of a later date.

[II]. The same rule is observed when the credit has been the subject matter of a right of usufruct or a right of pledge”<sup>69</sup>.

Again, as for the duties of guarantee due by the assignor of the case (against the assignee of the case), please see art. 1266 ICC.

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<sup>69</sup> Please note that we dealt with this provision even in lecture 12, par. 12.5, when we were comparing double transfers of various legal positions in general (like, in particular, ownership or other *rights in rem* over immovable properties or movable properties, and other *rights in personam*).

## ARTICOLO 1266 CC

### Obbligo di garanzia del cedente

“[I]. Quando la cessione è a titolo oneroso, il cedente è tenuto a garantire l’esistenza del credito al tempo della cessione. La garanzia può essere esclusa per patto, ma il cedente resta sempre obbligato per il fatto proprio.

[II]. Se la cessione è a titolo gratuito, la garanzia è dovuta solo nei casi e nei limiti in cui la legge pone a carico del donante la garanzia per l’evizione”.

## ARTICLE 1266 ICC

### Obligation of guarantee due by the assignor

“[I]. When an assignment is executed for a consideration, then the assignor of the case must guarantee the existence of the assigned credit at the time of its own assignment. The guarantee can be excluded by agreement, but the assignor of the case is always bound for his own activities.

[II]. If the assignment of the case is free of charge, then the guarantee is due only when the law asks for the guarantee for evizione against donors, and within its own limits”.

So, here, art. 797 ICC becomes relevant too.

## ARTICOLO 797 CC

### Garanzia per evizione

“[I]. Il donante è tenuto a garanzia verso il donatario, per l’evizione che questi può soffrire delle cose donate, nei casi seguenti:

- 1) se ha espressamente promesso la garanzia;
- 2) se l’evizione dipende dal dolo o dal fatto personale di lui;
- 3) se si tratta di donazione che impone oneri al donatario, o di donazione remuneratoria, nei quali casi la garanzia è dovuta fino alla concorrenza dell’ammontare degli oneri o dell’entità delle prestazioni ricevute dal donante”.

## ARTICLE 797 ICC

### Guarantee from evizione

“[I]. A donor must guarantee his donee in case of an evizione that the latter could suffer over the gifted properties, in the following cases:

- 1) if he has expressly promised said guarantee;

- 2) *if the evizione of case depends on his wilful misconduct or a personal fact of his own;*
- 3) *in case of a gift providing for onuses against the donee of the case or in case of a donazione remunerativa, where the guarantee is due up to the amount of said onuses or the amount of the services received by the donor of the case”.*

Finally, as for the distinction between a *cessione pro soluto* (an assignment where the assignor of the case does not guarantee for payment by his assigned debtor) and a *cessione pro solvendo* (an assignment where, on the contrary, the assignor of the case guarantees for payment by his assigned debtor), please see art. 1267 ICC.

## ARTICOLO 1267 CC

### Garanzia della solvenza del debitore

*“[I]. Il cedente non risponde della solvenza del debitore, salvo che ne abbia assunto la garanzia. In questo caso egli risponde nei limiti di quanto ha ricevuto; deve inoltre corrispondere gli interessi, rimborsare le spese della cessione e quelle che il cessionario abbia sopportate per escutere il debitore, e risarcire il danno. Ogni patto diretto ad aggravare la responsabilità del cedente è senza effetto.*

*[II]. Quando il cedente ha garantito la solvenza del debitore, la garanzia cessa, se la mancata realizzazione del credito per insolvenza del debitore è dipesa da negligenza del cessionario nell’iniziare o nel proseguire le istanze contro il debitore stesso”.*

## ARTICLE 1267 ICC

### Guarantee on debtor’s solvency

*“[I]. Unless he has granted a guarantee about it, an assignor is not liable for solvency of his own debtor. In this case he is liable within the limits of what he has received. Then he must pay interests, refund the costs of transfer and those that the transferee has incurred in enforcing the debtor of the case, and pay for damages. Any agreement aimed at aggravating assignor’s liability does not produce any effect.*

*[II]. When an assignor has guaranteed solvency of the debtor of the case, then the guarantee ceases if non-payment of the credit of the case arising from debtor’s insolvency is due to assignee’s negligence in making or continuing claims against said debtor”.*

Having said that, before ending the analyses of the various means of payment of obligations, we must outline that another technique to provide for payment of one or more obligations is the one that deals with succession on debtor’s (legal) position (so-called *successione nel debito*).

This is something that can occur:

- *mortis causa*, namely, by succession law, in case of heirs, who are universal successors in interests of the *de cuius*/deceased person of the case (as just heirs, and not legatees/*legatari*, must pay all debts left unpaid by the deceased person of the case), or
- *inter vivos*, meaning by way of a legal transaction completed by and between living persons.

As per above, an *inter vivos* succession in a debt can occur, only and exclusively with consent of the creditor of the case, alone or jointly with other legal relationships related to it (as it happens in case of transfer of a business, namely a *cessione d'azienda*); and as far as cases on a single succession in debt are concerned, they can be arranged, if the creditor of the case is ready to free the original debtor, via:

- *delegazione* (governed by artt. 1268-1271 ICC);
- *espromissione* (governed by art. 1272 ICC); or
- *accollo* (governed by artt. 1273 ICC);

namely, once again, the three institutions already mentioned in lecture 10, par. 10.6 (as well as in this lecture, in par. 18.7, when we were talking about *novazione*).

In fact, as already mentioned in lecture 10, if the creditor of the case is not ready to free the original debtor, then the abovementioned three legal transactions only add a new debtor to the original one.

## 19 Lecture 19: on *rights in rem* of guarantee, possession and *usucapione*.

SUMMARY: 19.1 On *rights in rem* of guarantee. – 19.2 On possession. – 19.3 On *usucapione*.

### 19.1 On *rights in rem* of guarantee.

Rights in rem of guarantee are rights over things which grant to their holders a power of preferential disposition on the financial value of said things. Their purpose is to guarantee satisfaction of a right of credit, on a preferential basis.

Rights in rem of guarantee available in the Italian legal system are:

- *pegno* or pledge, governed by artt. 2784-2807 ICC; and
- *ipoteca* or mortgage, governed by artt. 2808-2899 ICC<sup>70</sup>.

They can be granted over different properties, basically, movable properties, as for pledge, and immovable properties, as for mortgage.

Then, a characteristic that pledge and mortgage share each other is the fact that they can be both created either over properties of the debtor of the case or over properties of a third-party guarantor (so-called third-party pledgor/mortgagor, who guarantees a debt of another person). Please see about it, as for pledge, art. 2784 ICC<sup>71</sup>.

### ARTICOLO 2784 CC

#### Nozione

“[I]. *Il pegno è costituito a garanzia dell’obbligazione dal debitore o da un terzo per il debitore.*

[II]. *Possono essere dati in pegno i beni mobili, le universalità di mobili, i crediti e altri diritti aventi per oggetto beni mobili”.*

### ARTICLE 2784 ICC

#### Definition

“[I]. A pledge is created to guarantee an obligation of the debtor of the case by the debtor himself or by a third party on behalf of the debtor.

[II]. Movable properties, universalità di mobili, credits and other rights over movable properties can be pledged”.

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<sup>70</sup> Please note that here the translation of the word *pegno* into pledge and the word *ipoteca* into mortgage, even if it is a good one, it is not meant to be performed in a technical way, as pledge and mortgage, which are similar to *pegno* and *ipoteca*, are still legal institutions that have peculiar characteristics under English private law, not transferrable in the Italian private law, and vice versa.

<sup>71</sup> On mortgage, please see art. 2808, par. 2, ICC, which will be mentioned afterwards.

Then, again, pledge and mortgage are both means to get a preferential power of disposition over the financial value of the properties subject to guarantee, because they both grant to the unsatisfied creditor of the case a right to claim for a forced execution over said properties, so to obtain satisfaction of his own right of credit over the very same properties before any other ordinary/customary creditor (so-called *creditore chirografario*), according to art. 2741, par. 2, ICC<sup>72</sup>.

## ARTICOLO 2741 CC

### Concorso dei creditori e cause di prelazione

*“[I]. I creditori hanno eguale diritto di essere soddisfatti sui beni del debitore, salve le cause legittime di prelazione.*

*[II]. Sono cause legittime di prelazione i privilegi, il pegno e le ipoteche”.*

## ARTICLE 2741 ICC

### Contest amongst creditors and rights of pre-emption

*“[I]. All creditors have an equal right to be satisfied over debtor’s properties, except in case of existence of a legitimate right of pre-emption.*

*[II]. Privilegi<sup>73</sup>, pledges and mortgages are legitimate rights of pre-emption”.*

Now, more specifically, as for pledge as a right of pre-emption, please see art. 2787 ICC.

## ARTICOLO 2787 CC

### Prelazione del creditore pignoratizio

*“[I]. Il creditore ha diritto di farsi pagare con prelazione sulla cosa ricevuta in pegno.*

*[II]. La prelazione non si può far valere se la cosa data in pegno non è rimasta in possesso del creditore o presso il terzo designato dalle parti.*

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<sup>72</sup> Please remember that art. 2741 ICC comes into play when the principle of debtor’s financial liability (namely, art. 2470 ICC) comes into play too, before it. See articolo 2740 CC (**Responsabilità patrimoniale**): *“[I]. Il debitore risponde dell’adempimento delle obbligazioni con tutti i suoi beni presenti e futuri. [II]. Le limitazioni della responsabilità non sono ammesse se non nei casi stabiliti dalla legge”.* Article 2740 ICC (**Financial liability**): *“[I]. The debtor is liable for fulfilment of his obligations with all his present and future assets. [II]. Limitations of liability are not allowed, except in the cases provided for by the law”.*

<sup>73</sup> Please note that the word lien can be qualified, in the English private law, as a good term to translate, on a general basis, the Italian word *privilegio*. Anyway, once again a lien is a peculiar kind of *privilegio*, mostly related to personal properties over there (which are properties not entirely equivalent to movable properties), and therefore it is better not to translate herein, once again, the Italian word *privilegio*.

[III]. *Quando il credito garantito eccede la somma di 2,58 euro, la prelazione non ha luogo se il pegno non risulta da scrittura con data certa, la quale contenga sufficiente indicazione del credito e della cosa.*

[IV]. *Se però il pegno risulta da polizza o da altra scrittura di enti che, debitamente autorizzati, compiono professionalmente operazioni di credito su pegno, la data della scrittura può essere accertata con ogni mezzo di prova”.*

## **ARTICLE 2787 ICC**

### **Right of pre-emption of a pledgee**

“[I]. A creditor has a right to be paid on a pre-emptive basis over the property received on pledge.

[II]. The right of pre-emption cannot be asserted if the pledged thing has not remained in possession of the creditor of the case or in the hands of a third party appointed by the parties<sup>74</sup>.

[III]. *When the guaranteed credit exceeds the amount of 2.58 euros, then the right of pre-emption does not take place if the pledge does not appear from a written document with a certain date which mentions credit as well as pledged property.*

[IV]. *However, if the pledge appears from an insurance policy or from another written document issued by entities that, duly authorized, professionally carry out credit transactions on pledges, then the date of the writing can be ascertained by any means of proof”.*

Still, on mortgage as a right of pre-emption, please see art. 2808 ICC.

## **ARTICOLO 2808 CC**

### **Costituzione ed effetti dell’ipoteca**

“[I]. *L’ipoteca attribuisce al creditore il diritto di espropriare, anche in confronto del terzo acquirente, i beni vincolati a garanzia del suo credito e di essere soddisfatto con preferenza sul prezzo ricavato dall’espropriazione.*

[II]. *L’ipoteca può avere per oggetto beni del debitore o di un terzo e si costituisce mediante iscrizione nei registri immobiliari.*

[III]. *L’ipoteca è legale, giudiziale o volontaria”.*

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<sup>74</sup> Namely, debtor and creditor.

## ARTICLE 2808 ICC

### Creation and effects of a mortgage

“[I]. A mortgage gives the creditor of the case a right to expropriate, even against third-party acquirers, all the assets bound to guarantee the payment of his own credit, and to be satisfied with preference over the price obtained from expropriation.

[II]. A mortgage may have as its own subject matter debtor’s assets or third-parties’ assets, and it is created via its own registration in the competent land registry of the case.

[III]. A mortgage can be a legal, a judicial or a voluntary one”.

As per above, please remember that pledge and mortgage, being rights in rem, are opposable erga omnes (against all world), and accordingly, as art. 2808, par. 1, ICC makes quite clear, they grant to their holders a right of tracing exercisable against every third-party transferee of the case<sup>75</sup>.

Please also note that pledge and mortgage are guarantees according to which the debtor of the case grants to their holders a right to be preferred erga omnes, but over the sole properties which are the subject matter of these rights. On the contrary, to make a comparison, in case of a fideiussione (which is governed by art. 1936 ICC and ff. ones), being it a personal right of guarantee, it grants to the creditor of the case a right to claim for payment of the credit of the case, even if not in a preferred way, against all properties of the fideiussore/guarantor of the case, in accordance with the general principle of public policy on debtor’s liability, namely, once again, art. 2740 ICC.

Now, both pledge and mortgage, as rights in rem, must be recognizable too.

Accordingly, a pledge is created only when the debtor or the third-party guarantor of the case is dispossessed, by delivery of the pledged thing to the creditor of the case or another person appointed ad hoc (see art. 2786 ICC, herein below, jointly with, above, art. 2787 ICC), whereas a mortgage is created only when it is registered in the competent registry (see above art. 2808, par. 2, ICC).

## ARTICOLO 2786 CC

### Costituzione

“[I]. Il pegno si costituisce con la consegna al creditore della cosa o del documento che conferisce l’esclusiva disponibilità della cosa.

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<sup>75</sup> See on the topic, lecture 9, par. 9.5.

[II]. *La cosa o il documento possono essere anche consegnati a un terzo designato dalle parti o possono essere posti in custodia di entrambe, in modo che il costituente sia nell'impossibilità di disporne senza la cooperazione del creditore*".

## ARTICLE 2786 ICC

### Creation

"[I]. A pledge is created when either the property or the document that grants exclusive availability over it is delivered to the creditor of the case.

[II]. *Property or document can also be delivered to a third party appointed by the parties or they can be both placed in joint custody, so that its own creator cannot dispose of one of them without cooperation of the creditor*".

Another common characteristic of pledge and mortgage is that they are so-called **accessorial rights** (*in rem*). Accordingly, they do not exist if the guaranteed credit does not exist, and they extinguish themselves once the credit of the case has been extinguished.

See art. 2794, par. 1, ICC, as for pledge, and art. 2878, n. 3, ICC, as for mortgage.

## ARTICOLO 2794 CC

### Restituzione della cosa

*"[I]. Colui che ha costituito il pegno non può esigerne la restituzione, se non sono stati interamente pagati il capitale e gli interessi e non sono state rimborsate le spese relative al debito e al pegno.*

[II]. *Se il pegno è stato costituito dal debitore e questi ha verso lo stesso creditore un altro debito sorto dopo la costituzione del pegno e scaduto prima che sia pagato il debito anteriore, il creditore ha soltanto il diritto di ritenzione a garanzia del nuovo credito*".

## ARTICLE 2794 ICC

### Restitution of the thing

"[I]. The person who has created a pledge cannot demand restitution of the pledged property, if principal and interest have not been fully paid, and expenses related to debt and pledge have not been reimbursed too.

[II]. *If the pledge of the case was created by the debtor, and the debtor himself has another debt pending against the same creditor that arose after creation of the pledge and expired before payment of the previous debt, then the creditor of the case has just a right of retention, so to be guaranteed for the payment of the new credit*".

## ARTICOLO 2878 CC

### Cause di estinzione

“[I]. *L'ipoteca si estingue:*

- 1) *con la cancellazione dell'iscrizione;*
- 2) *con la mancata rinnovazione dell'iscrizione entro il termine indicato dall'articolo 2847;*
- 3) *con l'estinguersi dell'obbligazione;*
- 4) *col perimento del bene ipotecato, salvo quanto è stabilito dall'articolo 2742;*
- 5) *con la rinunzia del creditore;*
- 6) *con lo spirare del termine a cui l'ipoteca è stata limitata o col verificarsi della condizione risolutiva;*
- 7) *con la pronunzia del provvedimento che trasferisce all'acquirente il diritto espropriato e ordina la cancellazione delle ipoteche”.*

## ARTICLE 2878 ICC

### Grounds for extinction

“[I]. A mortgage is extinguished:

- 1) *upon cancellation of the registration of the case;*
- 2) *in case of failure to renew the registration within the termine mentioned in article 2847;*
- 3) once the obligation of the case is extinguished;
- 4) *in case of death of the mortgaged property, save for reasons established by article 2742;*
- 5) *upon renunciation by the creditor of the case;*
- 6) *once the termine according to which the mortgage was issued is expired, or upon occurrence of the condition subsequent of the case;*
- 7) *upon issuance of a judgment that transfers the expropriated right to the buyer of the case and orders cancellation of the mortgage of the case”.*

Moreover, another quite peculiar characteristic of pledge and mortgage, otherwise not generally available in our legal system, is so-called surrogazione reale dei beni (real subrogation), that is available in limited circumstances, namely under art. 2742 ICC.

## ARTICOLO 2742 CC

### Surrogazione dell'indennità alla cosa

*“[I]. Se le cose soggette a privilegio, pegno o ipoteca sono perite o deteriorate, le somme dovute dagli assicuratori per indennità della perdita o del deterioramento sono vincolate al pagamento dei crediti privilegiati, pignoratizi o ipotecari, secondo il loro grado, eccetto che le medesime vengano impiegate a riparare la perdita o il deterioramento. L'autorità giudiziaria può, su istanza degli interessati, disporre le opportune cautele per assicurare l'impiego delle somme nel ripristino o nella riparazione della cosa.*

*[II]. Gli assicuratori sono liberati qualora paghino dopo trenta giorni dalla perdita o dal deterioramento, senza che sia stata fatta opposizione. Quando però si tratta di immobili su cui gravano iscrizioni, gli assicuratori non sono liberati se non dopo che è decorso senza opposizione il termine di trenta giorni dalla notificazione ai creditori iscritti del fatto che ha dato luogo alla perdita o al deterioramento.*

*[III]. Sono del pari vincolate al pagamento dei crediti suddetti le somme dovute per causa di servitù coattive o di comunione forzosa o di espropriazione per pubblico interesse, osservate, per quest'ultima, le disposizioni della legge speciale”.*

## ARTICLE 2742 ICC

### Subrogation of an indemnity to the thing of the case

*“[I]. If things subjected to privilegio, pledge or mortgage are dead or they have been deteriorated, then the sums due by the insurers for compensation either of loss or deterioration are bound to the payment of the privileged, pledged or mortgaged credits, according to their own degree, except in case they are used to repair loss or deterioration. At request of an interested party, then the competent judicial authority may arrange for the appropriate precautions to be set up, so to ensure that the sums are used to restore or repair the thing of the case.*

*[II]. If no opposition has been made, then insurers are freed, once they pay after thirty days from loss or deterioration. However, when it comes to immovable properties over which registrations are pending, then insurers are not freed until a term of thirty days starting from notification to the registered creditors of the fact that gave rise to the loss or deterioration has been elapsed, without any opposition.*

*[III]. The sums due to be paid by reason of mandatory easements or forced communion or expropriation for public interest are also bound to the payment of the aforementioned credits, as for the last one, once the provisions contained in special laws are observed too”.*

In any case, if the thing of the case dies, or deteriorates so to become insufficient to guarantee payment of the creditor of the case, then the creditor himself/herself can ask either for a suitable guarantee to be given to him/her over other assets or for an immediate payment of his credit. Please see art. 2743 ICC.

### **ARTICOLO 2743 CC**

#### **Diminuzione della garanzia**

“[I]. *Qualora la cosa data in pegno o sottoposta a ipoteca perisca o si deteriori, anche per caso fortuito, in modo da essere insufficiente alla sicurezza del creditore, questi può chiedere che gli sia prestata idonea garanzia su altri beni e, in mancanza, può chiedere l'immediato pagamento del suo credito*”.

### **ARTICLE 2743 ICC**

#### **Decrease of a guarantee**

“[I]. In case the property subject to pledge or mortgage dies or deteriorates, even by chance, so to become insufficient to guarantee certainty about payment of the creditor of the case, then the creditor can ask for a suitable guarantee to be given to him over other assets and, failing that, he can ask for an immediate payment of his own credit”.

Now, please remember that when we talk about pledge and mortgage, art. 2744 ICC, which we have already seen in previous lectures<sup>76</sup>, on prohibition of the so-called *patto commissorio* comes into play too (along with its own rationale).

### **ARTICOLO 2744 CC**

#### **Divieto del patto commissorio**

“[I]. *È nullo il patto col quale si conviene che, in mancanza del pagamento del credito nel termine fissato, la proprietà della cosa ipotecata o data in pegno passi al creditore. Il patto è nullo anche se posteriore alla costituzione dell'ipoteca o del pegno*”.

### **ARTICLE 2744 ICC**

#### **Prohibition of foreclosure agreements (*pactum commissorium*)**

“[I]. Any covenant according to which its parties agree that, in case of failure of payment of the credit of the case within the time limit agreed on by them, ownership of the mortgaged or

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<sup>76</sup> Namely, lecture 2, par. 2.7 (when we were dealing with the interpretation of the law, and particularly the analogical interpretation), lecture 3, par. 3.1 (on *divieto di autotutela*), and lecture 14, par. 14.3 (on *negozio indiretto*).

pledged property is transferred to the creditor of the case, it is a void agreement. The agreement is void even when it is completed after creation of the mortgage or the pledge of the case".

As for the obligations due by the parties pending the right of guarantee of the case, apart from the customary obligation to behave in good faith, in case of mortgage, the creditor/mortgagee can also ask for the necessary precautions for maintenance of the properties of the case to be performed. Please see art. 2813 ICC.

### ARTICOLO 2813 CC

#### Pericolo di danno alle cose ipotecate

*"[I]. Qualora il debitore o un terzo compia atti da cui possa derivare il perimento o il deterioramento dei beni ipotecati, il creditore può domandare all'autorità giudiziaria che ordini la cessazione di tali atti o disponga le cautele necessarie per evitare il pregiudizio della sua garanzia"*.

### ARTICLE 2813 ICC

#### Danger of damage to mortgaged properties

*"[I]. If the debtor or a third party performs acts that can lead to death or deterioration of the mortgaged properties, then the creditor can ask to the judicial authority to order termination of such acts or to take the necessary precautions to avoid prejudice to its own guarantee"*.

Please note that this guarantee is not necessary, in case of pledge, as the protection of the pledgee of the case is a protection in re ipsa, as it arises from the delivery of the pledged property in his own hands (or in the hand of a third party still chosen by him too).

On the other hand, in case of pledge, a duty of custody arises against the creditor, along with its costs, due to dispossession of the debtor (see art. 2790 ICC). Moreover, the creditor cannot use the pledged property without consent of the debtor (see art. 2792 ICC).

Finally, as for the subject matter of a pledge, please note that every movable property can be subjected to a pledge, meaning even a right of credit, along with an instrument of credit too (see above, art. 2784, par. 2, ICC). Whereas, as for the subject matter of a mortgage, please see art. 2810 ICC.

## ARTICOLO 2810 CC

### Oggetto dell'ipoteca

“[I]. Sono capaci d'ipoteca:

- 1) i beni immobili che sono in commercio con le loro pertinenze;
- 2) l'usufrutto dei beni stessi;
- 3) il diritto di superficie;
- 4) il diritto dell'enfiteuta e quello del concedente sul fondo enfiteutico.

[II]. Sono anche capaci d'ipoteca le rendite dello Stato nel modo determinato dalle leggi relative al debito pubblico, e inoltre le navi, gli aeromobili e gli autoveicoli, secondo le leggi che li riguardano.

[III]. Sono considerati ipoteche i privilegi iscritti sugli autoveicoli a norma della legge speciale”.

## ARTICLE 2810 ICC

### Subject matter of a mortgage

“[I]. They can be mortgaged:

- 1) immovable properties available on the market, along with their appurtenances;
- 2) a right of usufruct over the same properties;
- 3) a right of superficie;
- 4) the right of an enfiteuta, along with the right of its grantor, over the fondo enfiteutico of the case.

[II]. State revenues can also be mortgaged, under the policies governed by the laws relating to public debt, along with ships, aircrafts and motor vehicles, under the laws that deal with them.

[III]. Privilegi registered against motor vehicles in accordance with their special laws are to be considered as mortgages too”.

### 19.2 On possession.

In common parlance the word possession is often used as a synonym of the word ownership (meaning, owner and possessor are quite interchanged one with other).

Anyway, pursuant to art. 1140 of the Italian Civil Code, possession is not a right, as ownership (above all).

## ARTICOLO 1140 CC

### Possesso

“[I]. Il possesso è il potere sulla cosa che si manifesta in un’attività corrispondente all’esercizio della proprietà o di altro diritto reale.

[II]. Si può possedere direttamente o per mezzo di altra persona, che ha la detenzione della cosa”.

## ARTICLE 1140 ICC

### Possession

“[I]. Possession is a de facto power over things that discloses itself throughout an activity that resembles the exercise of a right of ownership or another right in rem.

[II]. Everyone can possess directly or through another person, who has detenzione of the property of the case”.

As per above, in most cases, possession and ownership meet in the same person, but sometimes they can be split up, and accordingly their distinction is fully unveiled.

An example: the case of a theft. The robbed person retains ownership of the stolen property, but loses possession of it, which passes to the thief of the case. The thief, as possessor, has a *de facto* power over the stolen thing and acts as an owner, without having a right of ownership.

Now, possession can be exercised:

- using the thing of the case directly;
- keeping the thing available, even without using it, on a practical basis, under the circumstances of the case;
- using said thing through third parties (such as employees);
- granting enjoyment of the thing of the case to third parties.

In all these cases the above-mentioned thing remains available to its own owner.

In last case, even when he/she gives the property to the third party of the case (free of charge or against a consideration), the owner continues to take out benefits from the thing itself.

An example: an owner/landlord who rents the apartment of the case to a tenant is entitled to the civil fruits arising from the thing, which is the subject matter of the rent agreement, in form of rent fees. *Ergo*, the owner/landlord has possession of such thing; the tenant has *detenzione* over the same thing.

Then, a possession can be a **legitimate** or an **illegitimate** one.

A case of legitimate possession is, obviously, possession of the owner. Under the circumstances, *de facto* situation and legal situation match each other.

On the contrary, a missing match can occur, *exempli gratia*:

- in case of loss of a thing;
- in case of theft;
- in the case of possession over inheritance properties acquired on the basis of a will that turn out to be a null and void will afterwards;
- in case of a void sale-purchase agreement.

In all these cases there is an **illegitimate possession**, which, again, under the circumstances, can be a **illegitimate possession in good or bad faith**, depending on whether the possessor is unaware of infringing rights of others or not.

Please note that here good faith (unlike what happens in the law on obligations and contracts, pursuant to articles 1175 ICC, 1337 ICC, 1362 ICC, and 1375 ICC) is to be seen in a subjective way, under art. 1147 ICC.

#### **ARTICOLO 1147 CC**

##### **Possesso di buona fede**

“[I]. È possessore di buona fede chi possiede ignorando di ledere l'altrui diritto.

[II]. La buona fede non giova se la ignoranza dipende da colpa grave.

[III]. La buona fede è presunta e basta che vi sia stata al tempo dell'acquisto”.

#### **ARTICLE 1147 ICC**

##### **Possession in good faith**

“[I]. A possessor in good faith is everyone who possesses while ignoring that he is infringing rights of others.

[II]. Good faith is not helpful if ignorance depends on gross negligence.

[III]. Good faith is presumed, and it has to exist at the time of the acquisition of the case”.

Then, we speak of **full possession** when the exercise of the *de facto* power of the case resembles the exercise of a right of ownership.

Whereas we speak of **minor possession** when the exercise of the *de facto* power of the case resembles the exercise of a *right in rem* other than ownership.

Examples of minor possession: whoever is the owner of the so-called *fondo dominante*, and has the right that e.g., an electricity line passes through the land of another person, exercises a minor possession over the power-line easement of the case too.

Please note that even in case of minor possession, we can have a (minor) possession in good faith or bad faith.

Then, a possession can be an **immediate** one or an **indirect** one.

It is immediate when the possessor of the case has a direct/immediate material relationship with the thing of the case.

On the contrary, it is an indirect one, when it is exercised in those situations where there is another person involved, so-called *detentore*, who has the immediate material relationship with the thing of the case, so to use it or to perform a service on behalf of the possessor of the case.

Thus, a distinction arises here between **qualified *detenzione*** (examples: *detenzione* of a tenant/rentee in case of a rent agreement; or a *comodatario*, in case of a *comodato*/bailment; or an *affittuario*, in case of an *affitto di fondo rustico*) and ***detenzione* for reasons of service** (examples: an employee; a *depositario*, in case of a deposit; a *tutore, et cetera*).

In all these cases, a check of the title/legal transaction according to which possession or *detenzione* stands out is the very means to ascertain whether we can talk of possession rather than *detenzione*, as well as to learn whether the first one is related to a minor *right in rem* or not (please think about the case when either a right of usufruct or a negative easement has been granted to).

Now, please note that possession is presumed in those who exercise the *de facto* power of the case, unless it can be proved that they have started to exercise said power as mere *detentori*.

## ARTICOLO 1141 CC

### Mutamento della *detenzione* in possesso

*“[I]. Si presume il possesso in colui che esercita il potere di fatto, quando non si prova che ha cominciato a esercitarlo semplicemente come *detenzione*.”*

*“[II]. Se alcuno ha cominciato ad avere la *detenzione*, non può acquistare il possesso finché il titolo non venga a essere mutato per causa proveniente da un terzo o in forza di opposizione da lui fatta contro il possessore. Ciò vale anche per i successori a titolo universale”.*

## ARTICLE 1141 ICC

### Change of a *detenzione* into possession

*“[I]. Possession is presumed in those who exercise the de facto power of the case, when it is not proved that they have begun to exercise it simply as *detenzione*.”*

*“[II]. If someone has started by having *detenzione*, then he cannot acquire possession until the title is changed by way of a reason outcoming from a third party or by virtue of an act of*

opposition made by him against the possessor of the case. This provision applies to successors in interests mortis causa a titolo universale too".

Accordingly, a passage from the legal status of *detentore* to the legal status of *possessore* (so-called *interversione del possesso*) requires an act of rebellion or an external intervention. The mere change of mind (of the *detentore* of the case) is not enough at all.

Then, acts of tolerance are not enough to acquire possession too, as art. 1144 ICC makes quite clear.

## ARTICOLO 1144 CC

### Atti di tolleranza

"[I]. *Gli atti compiuti con l'altrui tolleranza non possono servire di fondamento all'acquisto del possesso*".

## ARTICLE 1144 ICC

### Acts of tolerance

"[I]. Acts performed by mere tolerance of other persons cannot grant acquisition of possession".

### **On the legal consequences of possession.**

Being a possessor, either a legitimate one or an illegitimate one, grants to the holder of the possession of the case quite a few advantages, namely:

- first of all, possessory protection. Anyone who has been stripped of possession or harassed in its own exercise can perform a claim to obtain reinstatement in possession or termination of the harassment of the case. Then, a possessor can also personally defend himself/herself when there are grounds for self-defence<sup>77</sup>;

- a possessor, being a defendant in court (against, e.g., a claim performed by a plaintiff in defence of ownership), does not have to prove his own possession, according to art. 2697 ICC (on the general burden of proof). The owner must prove his right of ownership;

- possession allows for certain rights to be acquired. This is the case of *usucapione*, which grants acquisition of the *right in rem* of the case out of possession over the thing of the case exercised for a certain period of time. This is also the case of the rule of law so-called *possesso vale titolo*, governed by art. 1153 ICC, herein below detailed;

- possessors acquire civil fruits produced by the thing of the case. See art. 1148 ICC.

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<sup>77</sup> Please see the example mentioned in lecture 3, par. 3.1.

## ARTICOLO 1148 CC

### Acquisto dei frutti

“[I]. Il possessore di buona fede fa suoi i frutti naturali separati fino al giorno della domanda giudiziale e i frutti civili maturati fino allo stesso giorno. Egli, fino alla restituzione della cosa, risponde verso il rivendicante dei frutti percepiti dopo la domanda giudiziale e di quelli che avrebbe potuto percepire dopo tale data, usando la diligenza di un buon padre di famiglia”.

## ARTICLE 1148 ICC

### Acquisition of fruits

“[I]. A possessor in good faith acquires separated natural fruits until the day of the judicial claim of the case, as well as the civil fruits matured until the very same day. Until the property is returned, he is liable against the claimant for the fruits received after the judicial claim and for those that he could have received after that date using the diligence of a good family man”.

As per above, instead, on the so-called rule *possesso vale titolo* (“possession means a right in rem over the (movable) property of the case”), under art. 1153 ICC and ff. ones, please remember that art. 1153 ICC can be qualified as a back-up rule for the transfer of ownership and other rights in rem over movable properties in general<sup>78</sup>.

## ARTICOLO 1153 CC

### Effetti dell’acquisto del possesso

“[I]. Colui al quale sono alienati beni mobili da parte di chi non ne è proprietario, ne acquista la proprietà mediante il possesso, purché sia in buona fede al momento della consegna e sussista un titolo idoneo al trasferimento della proprietà.

[II]. La proprietà si acquista libera da diritti altrui sulla cosa, se questi non risultano dal titolo e vi è la buona fede dell’acquirente.

[III]. Nello stesso modo si acquistano i diritti di usufrutto, di uso e di pegno”.

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<sup>78</sup> See lecture 12, par. 12.5.

## ARTICLE 1153 ICC

### Effects/consequences of an acquisition of possession

*“[I]. Anyone to whom a movable property is alienated/transferred by someone who is not its own owner, acquires ownership through possession, provided that he is in good faith at the time of delivery and a suitable title for the transfer of ownership is available.*

*[II]. Ownership is acquired free from the rights of other persons over the thing, if they cannot be perceived from the title and the acquirer/transferee is in good faith.*

*[III]. Rights of usufruct, right of use and pledge are acquired/transferred in the same way”.*

Then, in case of double alienation of non-registered movable properties, please also remember art. 1155 ICC.

## ARTICOLO 1155 CC

### Acquisto di buona fede e precedente alienazione ad altri

*“[I]. Se taluno con successivi contratti aliena a più persone un bene mobile, quella tra esse che ne ha acquistato in buona fede il possesso è preferita alle altre, anche se il suo titolo è di data posteriore”.*

## ARTICLE 1155 ICC

### Acquisition in good faith and previous transfer to others

*“[I]. If someone alienates/transfers a movable property with successive contracts to more than one person, then the one who has acquired possession in good faith is preferred to the others, even if her own title has a later date”.*

On the contrary, in case of *universalità di mobili* (like an *azienda*) and other movable properties registered in public registries, please see art. 1156 ICC.

## ARTICOLO 1156 CC

### Universalità di mobili e mobili iscritti in pubblici registri

*“[I]. Le disposizioni degli articoli precedenti non si applicano alle universalità di mobili e ai beni mobili iscritti in pubblici registri”.*

## ARTICLE 1156 ICC

### ***Universalità di mobili and movables registered in public registries***

*“[I]. Provisions of the previous articles are not applicable to universalità di mobili and movable properties registered in public registries”.*

#### **On claims for defence of possession.**

Please note that coverage of possession precedes, in the Italian legal system, even coverage of ownership itself. That's due to a few reasons, like: *i)* to prohibit self-defence; *ii)* to grant peace amongst citizens; *iii)* because ownership and possession match each other in most cases; and *iv)* because possession is often exercised inside an organized reality (let's think about a property which is fundamental to exercise an entrepreneurial activity; in this case to defend possession means to defend the entrepreneurial activity itself too).

Now, as for the claims to defend possession, they are the following ones:

## ARTICOLO 1168 CC

### **Azione di reintegrazione**

*“[I]. Chi è stato violentemente od occultamente spogliato del possesso può, entro l'anno dal sofferto spoglio, chiedere contro l'autore di esso la reintegrazione del possesso medesimo.*

*[II]. L'azione è concessa altresì a chi ha la detenzione della cosa, tranne il caso che l'abbia per ragioni di servizio o di ospitalità.*

*[III]. Se lo spoglio è clandestino, il termine per chiedere la reintegrazione decorre dal giorno della scoperta dello spoglio.*

*[IV]. La reintegrazione deve ordinarsi dal giudice sulla semplice notorietà del fatto, senza dilazione”.*

## ARTICLE 1168 ICC

### **Claim for reinstatement**

*“[I]. Everyone who has been violently or occultly stripped of possession can, within one year starting from the suffered strip, demand reinstatement of possession against the stripper of the case.*

*[II]. The claim is also granted to those who are detentori of the thing of the case, except when detenzione is based on service or hospitality.*

*[III]. If the act of strip is a concealed one, then the deadline to ask for reinstatement runs from the day of discovery of the strip of the case.*

*[IV]. Reinstatement must be ordered by judges under simple knowledge of the facts of the case, without any delay”.*

Accordingly, power to perform a claim for reinstatement is granted both to possessors and *detentori* (apart from *detentori* by reason of service or hospitality)<sup>79</sup>.

Then, alongside claim for reinstatement, there is also claim for maintenance, governed by art. 1170 ICC.

## **ARTICOLO 1170 CC**

### **Azione di manutenzione**

*“[I]. Chi è stato molestato nel possesso di un immobile, di un diritto reale sopra un immobile o di un’universalità di mobili può, entro l’anno dalla turbativa, chiedere la manutenzione del possesso medesimo.*

*[II]. L’azione è data se il possesso dura da oltre un anno, continuo e non interrotto, e non è stato acquistato violentemente o clandestinamente. Qualora il possesso sia stato acquistato in modo violento o clandestino, l’azione può nondimeno esercitarsi, decorso un anno dal giorno in cui la violenza o la clandestinità è cessata.*

*[III]. Anche colui che ha subito uno spoglio non violento o clandestino può chiedere di essere rimesso nel possesso, se ricorrono le condizioni indicate dal comma precedente”.*

## **ARTICLE 1170 ICC**

### **Claim for maintenance**

*“[I]. Everyone who has been harassed while being in possession of an immovable property, a right in rem over an immovable property or an universalità di mobili, can claim for maintenance of the possession itself, within a year starting from the day of the rigging of the case.*

*[II]. The claim is granted if said possession has been continuously and uninterruptedly lasting for more than one year, and it has not been violently or secretly acquired. If the possession of the case has been acquired in a violent or in a concealed way, then the claim can*

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<sup>79</sup> As per above, please also note that, under art. 1169 ICC, reinstatement can also be demanded against everyone who is in possession of a certain thing by virtue of an acquisition via a transfer completed with knowledge of the strip of the case. See articolo 1169 CC (**Reintegrazione contro l’acquirente consapevole dello spoglio**): *“[I]. La reintegrazione si può domandare anche contro chi è nel possesso in virtù di un acquisto a titolo particolare, fatto con la conoscenza dell’avvenuto spoglio”*; article 1169 ICC (**Reinstatement against transferees aware of the strip**): *“[I]. Reinstatement can also be demanded against everyone who is in possession by virtue of an acquisition via transfer completed with knowledge of the strip of the case”*.

nevertheless be exercised, if one year has gone by from the day of termination of violence or concealment.

[III]. Even those who have undergone a non-violent or a clandestine strip can ask to be reinstated in possession, if the terms mentioned in the previous paragraph are satisfied”.

Accordingly, power to act for maintenance is granted just to possessors and the subject matter of the claim are the sole properties mentioned in paragraph 1.

Finally, two other remedies, governed by art. 1171 ICC and art. 1171 ICC, are available to possessors, jointly with owners, namely, claim for so-called *denuncia di nuova opera* and claim for so-called *denuncia di danno temuto*.

### **ARTICOLO 1171 CC**

#### **Denuncia di nuova opera**

*“[I]. Il proprietario, il titolare di altro diritto reale di godimento o il possessore, il quale ha ragione di temere che da una nuova opera, da altri intrapresa sul proprio come sull'altrui fondo, sia per derivare danno alla cosa che forma l'oggetto del suo diritto o del suo possesso, può denunciare all'autorità giudiziaria la nuova opera, purché questa non sia terminata e non sia trascorso un anno dal suo inizio.*

*[II]. L'autorità giudiziaria, presa sommaria cognizione del fatto, può vietare la continuazione dell'opera, ovvero permetterla, ordinando le opportune cautele: nel primo caso, per il risarcimento del danno prodotto dalla sospensione dell'opera, qualora le opposizioni al suo proseguimento risultino infondate nella decisione del merito; nel secondo caso, per la demolizione o riduzione dell'opera e per il risarcimento del danno che possa soffrirne il denunciante, se questi ottiene sentenza favorevole, nonostante la permessa continuazione”.*

### **ARTICLE 1171 ICC**

#### **Denunciation of a new work**

*“[I]. Owners, holders of other rights in rem of enjoyment or possessors who have reason to fear that a new work, undertaken by others on their own land or on lands of others, can raise a damage over the thing that is the subject matter of their right or possession, they can denounce the new work of the case to a judicial authority, provided that it is not finished, and a year has not passed since its own beginning.*

*[II]. The judicial authority, being briefly aware of the fact, can prohibit continuation of the work, or allow it, ordering appropriate precautions: in the first case, as for the payment of damages due by suspension of the work, if the objections to its continuation are declared*

*unfounded in the judgment on the merits; in the second case, as for the demolition or reduction of the work and for the payment of the damages that the complainant may suffer, if he obtains a favourable judgment, despite the allowed continuation”.*

## **ARTICOLO 1172 CC**

### **Denuncia di danno temuto**

*“[I]. Il proprietario, il titolare di altro diritto reale di godimento o il possessore, il quale ha ragione di temere che da qualsiasi edificio, albero o altra cosa sovrasti pericolo di un danno grave e prossimo alla cosa che forma l’oggetto del suo diritto o del suo possesso, può denunciare il fatto all’autorità giudiziaria e ottenere, secondo le circostanze, che si provveda per ovviare al pericolo.*

*[II]. L’autorità giudiziaria, qualora ne sia il caso, dispone idonea garanzia per i danni eventuali”.*

## **ARTICLE 1172 ICC**

### **Denunciation of a feared damage**

*“[I]. Owners, holders of other rights in rem of enjoyment or possessors who have reason to fear that a serious and close damage to the thing that is the subject matter of their right or possession can occur from any building, tree or other thing, they can denounce the fact to the judicial authority and obtain, according to the circumstances of the case, that a decision is taken so to cover said danger.*

*[II]. The judicial authority, if it is the case, provides for a suitable guarantee to cover any damage of the case”.*

### **19.3 On usucapione.**

*Usucapione (or prescrizione acquisitiva<sup>80</sup>) is an institution governed by the law that puts an end to a disconnection, lingering over time, between a certain *right in rem* and a *de facto* situation pending over the very same property which is the subject matter of the *right in rem* of the case.*

*It is a means for an original acquisition of the right of ownership, or another *right in rem* of enjoyment, due to a continuous possession extended over time, and for this very reason it is governed, unlike the other means of original acquisition of ownership (that we saw in lecture 8, par. 8.4), within the rules of law set up for possession.*

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<sup>80</sup> This is an alternative label used, *exempli gratia*, in Swiss private law, to define *usucapione* over there.

Reasons that justify the rules of law on *usucapione* are the following ones:

1) first of all, if a dissociation between possession and right could last for an unlimited period of time, then damages to, *exempli gratia*, a right of ownership, could be asserted, by the owner/injured party of the case, even quite a long time after occurrence of the damaging event. However, the State has no interest in favouring this kind of protection, because the chance that disputes could arise even after a long period of time from occurrence of a damaging event would create situations of unbearable uncertainty. Let's think, for example, to a person who is interested in buying an immovable property: to avoid being exposed to future claims, said person has to be sure that his/her seller is the actual owner of the property subject to sale-purchase. Anyway, such a confirmation, theoretically speaking, should in its own turn involve the confirmation that also the transferor of the seller was an actual owner at the time, and so on, up to an original acquisition, sometimes occurred decades before. The rules of law on *usucapione* help to solve this issue: if possession of the transferor of the case (combined, if necessary, with possession of his/her own transferors) has lasted more than a certain number of years, due by law to acquire ownership by *usucapione*, then the right of the transferor of the interest of the case is qualified as a certain one, and therefore the prospective buyer can buy the property without risks;

2) again, the organizational value of possession grows and consolidates over time; and after a certain number of years, it acquires such a value as to prevail over the reasons of an owner who possibly remains inactive. On the other hand, it must be said that every owner is covered by the fact that the time necessary to perform an *usucapione* cannot begin to run as long as there are some *de facto* situations, expressly governed by the law, that prevent others from asserting their right of ownership, or in any case make more difficult for them to assert it. Examples of these *de facto* situations are, above all, pendency of a marriage (between spouses) or a relationship of parental authority (between parents and persons subjected to it), under joint application of art. 1165 ICC and art. 2941 ICC (or art. 2942 ICC).

## **ARTICOLO 1165 CC**

### **Applicazione di norme sulla prescrizione**

“[I]. *Le disposizioni generali sulla prescrizione, quelle relative alle cause di sospensione e d'interruzione e al computo dei termini si osservano, in quanto applicabili, rispetto all'usucapione*”.

## ARTICLE 1165 ICC

### Application of the rules on *prescrizione*

*“[I]. As long as they are applicable to it, general provisions on prescrizione, along with those relating to existence of grounds for suspension, interruption and determination of terms of time, are to be observed even in case of usucapione”.*

## ARTICOLO 2941 CC

### Sospensione per rapporti tra le parti

*“[I]. La prescrizione rimane sospesa:*

- 1) tra i coniugi;*
- 2) tra chi esercita la responsabilità genitoriale di cui all'articolo 316 o i poteri a essa inerenti e le persone che vi sono sottoposte;*
- 3) tra il tutore e il minore o l'interdetto soggetti alla tutela, finché non sia stato reso e approvato il conto finale, salvo quanto è disposto dall'articolo 387 per le azioni relative alla tutela;*
- 4) tra il curatore e il minore emancipato o l'inabilitato;*
- 5) tra l'erede e l'eredità accettata con beneficio d'inventario;*
- 6) tra le persone i cui beni sono sottoposti per legge o per provvedimento del giudice alla amministrazione altrui e quelle da cui l'amministrazione è esercitata, finché non sia stato reso e approvato definitivamente il conto;*
- 7) tra le persone giuridiche e i loro amministratori, finché sono in carica, per le azioni di responsabilità contro di essi;*
- 8) tra il debitore che ha dolosamente occultato l'esistenza del debito e il creditore, finché il dolo non sia stato scoperto”.*

## ARTICLE 2941 ICC

### Suspension due to relationships amongst parties

*“[I]. Prescrizione is suspended:*

- 1) between spouses;*
- 2) between those who exercise the parental authority referred to in article 316 or the powers inherent to it and the persons who are subjected to it;*
- 3) between a tutore/guardian and either a minor or an interdetto subjected to tutela, until the final report has been made and approved, except in cases provided for by article 387 on claims for tutela;*

- 4) between a curatore and the minore emancipato or inabilitato of the case;
- 5) between an heir and inheritance accepted by him with beneficio di inventario;
- 6) between persons whose assets are subjected to administration of others by law or by an order of a judge and those by whom their administration is exercised, until the final report has been definitely made and approved;
- 7) between legal persons and their directors, as long as they are in office, for claims of liability to be performed against them;
- 8) between a debtor who wilfully concealed the existence of the debt of the case and his creditor, until the wilful misconduct of the case has been discovered”.

#### **ARTICOLO 2942 CC**

##### **Sospensione per la condizione del titolare**

“[I]. *La prescrizione rimane sospesa:*

- 1) *contro i minori non emancipati e gli interdetti per infermità di mente, per il tempo in cui non hanno rappresentante legale e per sei mesi successivi alla nomina del medesimo o alla cessazione dell'incapacità;*
- 2) *in tempo di guerra, contro i militari in servizio e gli appartenenti alle forze armate dello Stato e contro coloro che si trovano per ragioni di servizio al seguito delle forze stesse, per il tempo indicato dalle disposizioni delle leggi di guerra”.*

#### **ARTICLE 2942 ICC**

##### **Suspension due to the status of the holder of the case**

“[I]. *Prescrizione is suspended:*

- 1) *against minori non emancipati and interdetti for mental illness, as for the period of time they have no legal representatives and for six months after their appointment or from termination of the status of incapacity;*
- 2) *in time of war, against soldiers in service and members of the armed forces of the State, and against those who are following the forces themselves, due to reasons of service, for the time mentioned in the rules of law on war”.*

Again, following the same path, please also see art. 1163 ICC.

## ARTICOLO 1163 CC

### Vizi del possesso

“[I]. *Il possesso acquistato in modo violento o clandestino non giova per l’usucapione se non dal momento in cui la violenza o la clandestinità è cessata*”.

## ARTICLE 1163 ICC

### Vices concerning possession

“[I]. Possession acquired in a violent or concealed way is not useful for usucapione, until violence or concealment is over”.

As per above, on the contrary, on a practical basis, if someone exercises a *de facto* power over a certain property, in a fully disclosed way, against, e.g., an owner of the very same property who does not care about it, and accordingly does not prevent the factual behaviour of the former person, then the law allows said person to eventually acquire, after expiration of a certain period of time, ownership of the property of the case in an original way (please remember, not in a derivate way).

### **On customary *usucapione* and short-term *usucapione*.**

Please note that due to one of the reasons mentioned above (namely the exigency to fulfil a need of certainty on legal traffics in general), even a possession exercised in bad faith (or not in good faith) can eventually lead to *usucapione*.

Anyway, *usucapione*, as we have seen, is provided for also to protect interests consolidated over time. However, in this situation it’s clear that the possession of the case must be a possession in good faith, so to protect consolidated interests.

For these reasons, the law provides for two different terms of usucapione, namely a customary usucapione (so-called *usucapione ordinaria*) and a short-term usucapione (or *usucapione abbreviata*).

### **On customary *usucapione* over immovable properties.**

Here the time needed for *usucapione* is related to the first above-mentioned reason.

## ARTICOLO 1158 CC

### Usucapione dei beni immobili e dei diritti reali immobiliari

“[I]. *La proprietà dei beni immobili e gli altri diritti reali di godimento sui beni medesimi si acquistano in virtù del possesso continuato per venti anni*”.

## ARTICLE 1158 ICC

### **Usucapione over immovable properties and over *rights in rem* on immovables**

“[I]. Ownership of immovable properties and other rights in rem of enjoyment over the same properties can be acquired by virtue of a continuous possession lasting for twenty years”.

**On short-term usucapione over immovable properties.**

## ARTICOLO 1159 CC

### **Usucapione decennale**

“[I]. Colui che acquista in buona fede da chi non è proprietario un immobile, in forza di un titolo che sia idoneo a trasferire la proprietà e che sia stato debitamente trascritto, ne compie l’usucapione in suo favore col decorso di dieci anni dalla data della trascrizione.

[II]. La stessa disposizione si applica nel caso di acquisto degli altri diritti reali di godimento sopra un immobile”.

## ARTICLE 1159 ICC

### **Ten-year usucapione**

“[I]. Everyone who acquires a property in good faith from someone who is not its own owner, by virtue of a legal transaction that is able to provide for a transfer of ownership and it has been duly registered, acquires usucapione in his own behalf upon expiration of ten years starting from date of registration.

[II]. The same provision applies in case of acquisition of other rights in rem of enjoyment over immovable properties”.

This rule is the counterpart of art. 1153 ICC, on movable properties.

Then, the law provides also for a shorter term of years in case of small rural lands, under art. 1159-bis ICC. In this case, 15 years are required as for customary *usucapione*, and 5 years, as for short-term *usucapione*.

**On customary and short-term usucapione over movable properties.**

Then, as far as movable properties (not registered in public registries) are concerned, please see art. 1161 ICC.

## ARTICOLO 1161 CC

### Usucapione dei beni mobili

“[I]. *In mancanza di titolo idoneo, la proprietà dei beni mobili e gli altri diritti reali di godimento sui beni medesimi si acquistano in virtù del possesso continuato per dieci anni, qualora il possesso sia stato acquistato in buona fede.*

[II]. *Se il possessore è di mala fede, l’usucapione si compie con il decorso di venti anni”.*

## ARTICLE 1161 ICC

### Usucapione over movable properties

“[I]. *In absence of a suitable title, then ownership of movable properties and other rights in rem of enjoyment over the same properties are acquired by virtue of a continuous possession lasting for ten years, if possession was originally acquired in good faith.*

[II]. *If the possessor of the case is a possessor in bad faith, then usucapione takes place after twenty years”.*

Moreover, as for movable properties registered in public registries, please see art. 1162 ICC.

## ARTICOLO 1162 CC

### Usucapione di beni mobili iscritti in pubblici registri

“[I]. *Colui che acquista in buona fede da chi non è proprietario un bene mobile iscritto in pubblici registri, in forza di un titolo che sia idoneo a trasferire la proprietà e che sia stato debitamente trascritto, ne compie in suo favore l’usucapione col decorso di tre anni dalla data della trascrizione.*

[II]. *Se non concorrono le condizioni previste dal comma precedente, l’usucapione si compie col decorso di dieci anni.*

[III]. *Le stesse disposizioni si applicano nel caso di acquisto degli altri diritti reali di godimento”.*

## ARTICLE 1162 ICC

### Usucapione over movable properties registered in public registries

“[I]. *Everyone who buys a movable property registered in a public register in good faith from a non-owner, by virtue of a title that is able to provide for a transfer of ownership and it has been duly registered, acquires usucapione in his own behalf upon expiration of three years starting from date of registration.*

*[II]. If the terms provided for in the previous paragraph are not satisfied, then usucapione takes place after ten years.*

*[III]. The same provision applies in case of acquisition of other rights in rem of enjoyment”.*

Instead, as for *usucapione* of an *universalità di mobili*, like, once again, an *azienda*, please see art. 1160 ICC.

## **ARTICOLO 1160 CC**

### **Usucapione delle universalità di mobili**

*“[I]. L’usucapione di un’universalità di mobili o di diritti reali di godimento sopra la medesima si compie in virtù del possesso continuato per venti anni.*

*[II]. Nel caso di acquisto in buona fede da chi non è proprietario, in forza di titolo idoneo, l’usucapione si compie con il decorso di dieci anni”.*

## **ARTICLE 1160 ICC**

### **Usucapione over universalità di mobili**

*“[I]. Usucapione of an universalità di mobili or rights in rem of enjoyment over the same property takes place by virtue of a continuous possession lasting for twenty years.*

*[II]. In case of acquisition in good faith from a non-owner, occurred by virtue of completion of a suitable legal transaction, then usucapione takes place after ten years”.*

### **On possession’s requirements (needed to fulfil an *usucapione*).**

First of all, as for the so-called *dies a quo* (namely, the day of acquisition of a valid possession useful to eventually finalize the acquisition of the right of the case by way of *usucapione*), please see art. 1163 ICC.

## **ARTICOLO 1163 CC**

### **Vizi del possesso**

*“[I]. Il possesso acquistato in modo violento o clandestino non giova per l’usucapione se non dal momento in cui la violenza o la clandestinità è cessata”.*

## **ARTICLE 1163 ICC**

### **Vices concerning possession**

*“[I]. Possession acquired in a violent or concealed way is not useful for usucapione, until violence or concealment is over”.*

Then, as for easements (as peculiar *rights in rem* of enjoyment over properties of others, analysed in lecture 8, par. 8.11), it must be said that they can be acquired by *usucapione* only when they are apparent ones, under art. 1061 ICC.

As per above, again, depending on the type of easement of the case, appearance must be disclosed either on the *fondo servente* (as it happens in case of *usucapione* of an easement of passage) or on the *fondo dominante* of the case (as it happens in case of *usucapione* of an easement of view).

Still, please note that for the purposes of determining the time necessary to acquire the *right in rem* of the case by way of *usucapione*, it is not due to possess said right personally for all the entire period of time needed for an acquisition via *usucapione*, as art. 1146 ICC states out.

### **ARTICOLO 1146 CC**

#### **Successione nel possesso. Accessione del possesso**

“[I]. *Il possesso continua nell’erede con effetto dall’apertura della successione.*

[II]. *Il successore a titolo particolare può unire al proprio possesso quello del suo autore per goderne gli effetti”.*

### **ARTICLE 1146 ICC**

#### **Succession in possession. Access to possession**

“[I]. Possession continues in the heir, with effects starting from the day of opening of the succession mortis causa of the case.

[II]. A successor in interests mortis causa a titolo particolare can combine his own possession with the one of his own transferor, to enjoy its own effects”.

Then, a pending *de-facto* regime useful for *usucapione* could be suspended or interrupted.

Suspension means a temporary stop of the time needed to acquire by *usucapione*, but it does not mean deletion of the time already gone by.

On the contrary, interruption means deletion of the time for *usucapione* already gone by.

Suspension occurs under particular circumstances strictly provided for by the law; interruption may arise from a judicial claim performed by the right holder against the possessor of the case (as it happens in case of a claim for *rei vindicatio*) or from recognition of another’s right executed by the possessor of the case.

Then, as for interruption, there is also the case provided for by art. 1167 ICC.

## ARTICOLO 1167 CC

### Interruzione dell'usucapione per perdita di possesso

“[I]. L'usucapione è interrotta quando il possessore è stato privato del possesso per oltre un anno.

[II]. L'interruzione si ha come non avvenuta se è stata proposta l'azione diretta a recuperare il possesso e questo è stato recuperato”.

## ARTICLE 1167 ICC

### Interruption of *usucapione* for loss of possession

“[I]. Usucapione is interrupted when the possessor of the case has been deprived of possession for more than one year.

[II]. Interruption is considered as not happened if a claim to recover possession has been made and possession has been regained”.

Then, as for the proof on the time going by, please see art. 1142 ICC.

## ARTICOLO 1142 CC

### Presunzione di possesso intermedio

“[I]. Il possessore attuale che ha posseduto in tempo più remoto si presume che abbia posseduto anche nel tempo intermedio”.

## ARTICLE 1142 ICC

### Presumption of intermediate possession

“[I]. The current possessor who has possessed in the earliest time is presumed to have also possessed in the time in-between”.

Accordingly, here the provision provides a so-called presumption *iuris tantum*.

Finally, on *interversione del possesso* strictly related to *usucapione*, please see art. 1164 ICC (which is also a *lex specialis* that *derogat legi generali*, namely art. 1141, par. 2, ICC, on possession).

## ARTICOLO 1164 CC

### **Interversione del possesso**

“[I]. *Chi ha il possesso corrispondente all’esercizio di un diritto reale su cosa altrui non può usucapire la proprietà della cosa stessa, se il titolo del suo possesso non è mutato per causa proveniente da un terzo o in forza di opposizione da lui fatta contro il diritto del proprietario. Il tempo necessario per l’usucapione decorre dalla data in cui il titolo del possesso è stato mutato*”.

## ARTICLE 1164 ICC

### **Interversione of possession**

“[I]. Whoever has a possession that match with the exercise of a right in rem over a property of someone else cannot complete usucapione of a right of ownership over the same property if the title of his possession has not changed by way of a reason outcoming from a third party or by virtue of an act of opposition made by him against the right of the owner of the case. The time needed for usucapione starts from the date when the title of possession is changed”.



Italian university students are constantly attending more and more courses in English language, which is undoubtedly a universal language (namely, the new *lingua franca*) that helps people to be easily connected in a globalised world, like the one we are currently living into.

Moreover, sometimes even Italian professionals need to understand the proper way to translate their technical domestic concepts to duly communicate them to their international counterparts, under the circumstances of the case.

Having said that, as far as law is concerned, due to the peculiarities of each legal system, to handle and teach a course of law able to provide for an efficient translation of all instruments typical to the legal system of the case, and to evaluate at the same time which instruments can be translated and which ones they cannot be translated, it is not an easy task at all.

As per above, this handbook, which is a collection of lectures on Italian private law designed for Italian and Erasmus/foreign university students attending courses in English, tries and offer a path to help laymen and professionals in achieving such a difficult task, within the area of private law, and accordingly built up a bridge to link international people in a broader way, even from a legal point of view, as challenging as it can still be, these very days.

Therefore, to properly aim at such a purpose, all along the book, every provision of the Italian Civil Code mentioned therein will be reported both in Italian and in English language, so to help all readers to understand the technical Italian private-law concept of the case in a more prompt and immediate way.

Then, on the basis of the major distinction that arises, in terms of private comparative law, between so-called civil law systems (like the Italian one, under the circumstances) and so-called common law systems (like the English one, first of all), the label used to define the legal instrument of the case mentioned therein shall take into account even said distinction.

All the above, to hopefully achieve a step towards a stronger connection amongst current and future international practitioners in private law, even inside a worldwide reality where a common private law cannot yet be reached at mere European level.

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He is also professor in Business Law, a course where he teaches different ways to approach and handle various business activities, depending on the perspective of the entrepreneur of the case, from a comparative-private-law point of view.

Accordingly, he has published many essays on Italian private law instruments (within the areas of contract law, property law, and law of succession), as well as on trusts and fiduciary agreements, which are his major academic interests too.