Contract and Negotiation

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The draft is dedicated to the study of the role of private autonomy in the contractual field; Roman law did not yet know a general category of contract, which has been developed over the last two or three centuries within the school of natural law; in later times in the German area an even more general and abstract figure has been established, namely the legal shop, which has been adopted by the German civil code, but not also by the Italian code of 1942; nevertheless, the figure of the legal shop has also taken root in Italy at the level of doctrine and jurisprudence.

Keywords: contract, private autonomy, legal shop

LEGAL NEGOTIATION AND CONTRACT

In accordance with the well-known concept developed by 19th century German pandectists, the contract would be[1] no more than a particular type of legal transaction[2]. Specifically, this would be a bilateral legal transaction, consisting of two reciprocal declarations, the proposal and the acceptance, mutually binding in relation to each other.

The general theory of the legal transaction, and in particular the attempt to integrate the different cases, such as the contract, the marriage, the will, and so on, in order to achieve more and more vast and all-encompassing concepts, is part of a dogmatic approach of law that was typical of nineteenth century German pandectists. In the same way that a general theory of the contract was developed from the different usual contractual figures, the advocates of the legal transaction hoped that it would be possible to add the various traditional negotiating figures, such as the contract, the marriage, the will, etc., as closely as possible. Under this perspective, any act, unilateral or plurilateral, involving the will of the party, aimed at producing a certain legal effect, constitutes a legal transaction[3].

This method was also adopted in Italy, especially in the first half of the twentieth century, when Italian doctrine appeared particularly receptive to the German legal world[4]; although the Italian Civil Code of 1942 was drawn up when the influence of German dogmatics had reached its peak in Italy, it did not include such a general type. The Civil Code of 1942, unlike the German Civil Code, provided neither a general part nor a general theory of the will manifestation and the legal negotiation.

The fourth book dedicated to bonds and contracts focuses on the type of the contract. Under these conditions, however, the rules of the contract also constitute a fundamental point of reference for unilateral acts. Unless otherwise provided for by law, the rules governing contracts shall be observed, insofar as they are compatible, in the case of acts between living persons having a patrimonial nature (art. 1324 c.c.).

Although the Italian legislator did not transpose the general concept of the legal negotiation, it played for many years a central role in the dogmatic structures elaborated by the doctrine[5]. In more recent times,

however, the importance of the concept has diminished. In fact, in doctrine there is a growing conviction about the futility of creating all-inclusive concepts or categories, when the concrete discipline of the various institutes does not allow such extensive generalizations. For example, it would be completely pointless to develop a general theory of defects of consent, including contract, marriage, and will, since the concrete discipline of defects of consent is different depending on whether it is contract, marriage, or will.

PRIVATE AUTONOMY

One of the cornerstones of the contemporary notion of contract within the framework of the western legal tradition is private autonomy[6]. Autonomy means that the individual is free to negotiate and not to negotiate, to freely determine the nature of the contract, as well as to conclude any type of agreement, even if it is not expressly contemplated by the legislator (art. 1322, paragraph 2, Civil Code). Obviously, private autonomy is limited by the fact that the agreement reached by private individuals must not be in conflict with the general interest and must not harm third parties.

The golden century of private autonomy was definitely the nineteenth century, when voluntarism was prevailing, and there was a widespread conviction that the system should not in any way hinder the free expression of private initiative, even in contractual matters; except for the limit of illegality, understood as contrary to the law, public order and morality.

Will is the primary cause of law; this statement sums up the philosophical belief of the nineteenth century. The State, the law, the legal act were thought to be immediately descended from the will's autonomy[7]. Later, in the twentieth century, throughout the industrialized western world there was a strong expansion of binding legislation, aimed at placing increasingly pressing limits on private autonomy[8]. In some cases, it was a matter of measures aimed at controlling the nature of the contract itself, imposing the replacement of clauses in contrast with the legislative dictate (art. 1339 Civil Code), imperious prices, [9]or even the integration of the contract (art. 1374 Civil Code)[10]. In other cases, the imposition of the obligation to conclude the contract itself (Article 2597 of Civil Code).

Obviously, the measures restricting private autonomy adopted in the former Soviet Union were even more massive, where economic planning had practically excluded any freedom with regard to determining the nature of the contract; except possibly for aspects that were entirely incidental[11]. The price, as well as the quantity and quality of the goods to be produced by the different State enterprises was already predetermined at plan level, as were the other enterprises with which contracts were to be concluded for the purchase of raw materials and semi-finished products, and for the sale of finished products. The former socialist area, however, has always constituted a separate discourse. Since the end of the 1980s, however, the break-up of the former Soviet Union has accelerated the process of transition from the plan to the market, and the resulting trend back into the Western legal tradition.

Although there has never been a planning and state interference in the economy similar to that typical of the Western legal systems in Eastern Europe, there has been a widespread talk in doctrine about a crisis of private autonomy; almost as if the major state dirigisme typical of the twentieth century had resulted in the loss of the contractual freedom of private citizens.

Indeed, between imposed contracts, imperious prices, illegality, automatic substitution of clauses, and integration of the contract it would seem that very little of the full contractual freedom typical of the nineteenth century still remains. In fact, although the controls and limits on private autonomy have certainly increased, it does not look as if the phenomenon in question has led to a loss of private autonomy. Rather, it was an attempt by the legislator to separate the good from the bad, i.e. the lawful manifestations of private autonomy from illicit ones.

Private autonomy and freedom of contract is in principle an asset, provided that it does not interfere with the general interest or cause any damage to third parties. Private autonomy, like business competition, and any other right, meets limits beyond which it means committing an abuse. In this perspective, the limiting interventions of the legislator that took place during the twentieth century have not only had the function of putting the institution in crisis, but also of circumscribing its field of

operation; making a distinction in particular between the lawful forms of exercise of private autonomy compared to illicit ones.

UNILATERAL ACTS

A distinction should be made between contracts and unilateral acts, which consist in the declaration of will by a single party. Unilateral acts are the deed of foundation (art. 14 c.c.), procurement (art. 1387 c.c.), unilateral promises (art. 1987 c.c.), and so forth.

Unilateral acts, unlike contracts, are not regulated in general terms by the legislator, but only with reference to individual cases. Art. 1324 c.c. however, establishes that the rules governing contracts are to be observed, mutatis mutandis, for unilateral acts between living persons having a patrimonial nature[12]. In addition, the case-law has made it clear that the extension refers only to the rules governing the contract in the substantive sense and not also to those which provide for limitations regarding proof[13].

They must therefore be unilateral acts: a) between living persons, with the exclusion of death proceedings, such as wills; and b) with property nature, with the exclusion of unilateral acts with non-asset nature, such as the recognition of a natural child.

Therefore, the rules governing the interpretation of the contract will be applicable in the first place to unilateral acts between living persons having a patrimonial nature; those on form, which in principle is free, unless otherwise prescribed by law; those on invalidity, nullity and voidability, and so forth. The art. 1334 of the Italian Civil Code further specifies that unilateral acts shall be effective as soon as they become known to the person for whom they are intended. It is therefore not enough to issue them, but they need to be known to the recipient.

ENDNOTES

1. OSTI, *Contratto, NDI,* IV, Torino 1938, 36; ALLARA, *La teoria generale del contratto,* 2° ed., Torino 1955; MESSINEO, *Contratto (dir. priv.), ED,* IX, Milano 1961, 784; GROSSI, *Sulla natura del contratto, Quaderni fiorentini per la storia del pensiero giuridico moderno,* Milano 1986, vol. XV, 609; CENDON, (Cur.), *I contratti in generale,* Torino 2000; ALPA-BESSONE (Cur.), *I contratti in generale,* Torino 1991; P. GALLO, *Trattato del contratto,* 3 voll., Torino 2010; ID., *Trattato di diritto civile,* V, *Il contratto,* Torino 2017; E. GABRIELLI, *La nozione di contratto (Appunti su contratto, negozio giuridico e autonomia privata), GI,* 2018, 2780-2818.
2. VASSALLI, *Sommario delle lezioni sulla teoria dei negozi giuridici,* Roma 1934; STOLFI, *Teoria del negozio giuridico,* Padova 1947, ristampa inalterata 1961, il quale asserisce che è tuttora saldo il dogma dell'autonomia della volontà, XIII, anche se ammette che ora vi sono più eccezioni al dogma della volontà di un tempo, XXVIII; in senso marcatamente dichiarazionistico: Betti, *Teoria generale del negozio giuridico*, Torino 1950; R. SCOGNAMIGLIO, *Contributo alla teoria del negozio giuridico,* Napoli 1950, con recensione di CARRESI, *RTPC,* 1952, 482; CALASSO, *Il negozio giuridico: lezioni di storia del diritto italiano,* 2° ed., Milano 1959; CARIOTA FERRARA, *Il negozio giuridico nel diritto privato italiano,* Napoli s.d.; GALGANO, *Il negozio giuridico,* Milano 1988; SCALISI, *La teoria del negozio giuridico a cento anni dal BGB, RDC,* 1998, I, 535; FALZEA, *L'atto negoziale nel sistema dei comportamenti giuridici, RDC,* 1996, I, 1; SACCO, *Negozio giuridico, Dig. sez. civ.,* Agg., Torino 2014, 452.
3. STOLFI, *op. cit.,* 1 ss, defines the legal transaction as "the declaration of will by one or more parties which seeks to obtain a legal effect".
4. Sacco, *Negozio giuridico (Circolazione del)*, in *Digesto*, IV ed., sez. civ., vol. XII, Torino 1995, 86; sul negozio giuridico utili riferimenti anche in G.B. FERRI, *Causa e tipo nella teoria del negozio giuridico,* Milano 1966, 3 ss, 7, 13 ss; ID., *Negozio giuridico, Dig. sez. civ.,* XII, Torino 1995, 76; IRTI, *Itinerari del negozio giuridico, Quaderni fiorentini per la storia del pensiero giuridico moderno,* I, 1973, 229; C. SCOGNAMIGLIO, *Interpretazione del contratto e interessi dei contraenti,* Padova 1992, 3 ss, 23 nota 31, 48 ss; SCALISI, *La teoria del negozio giuridico a cento anni dal BGB, RDC,* 1998, I, 535; ID., *Il negozio giuridico tra scienza e diritto positivo,* Milano 1998.

5. Il concetto di negozio giuridico compare spesso altresì a livello di legislazione speciale, nonché di giurisprudenza: si veda sul punto l'accurata indagine di FERRERO, *Sul negozio giuridico,* in *Scritti* Cattaneo, Milano 2002, vol. II, 1005.
6. CARRESI, *Autonomia privata nei contratti e negli atti giuridici, RDC,* 1957, I, 265; DI MAJO, *Libertà contrattuale e dintorni, Riv. crit. dir. priv.,* 1995, 9; CALO', *Il ritorno della volontà, Bioetica, nuovi diritti e autonomia privata,* Milano 1999; GRISI, *L'autonomia privata. Diritto dei contratti e disciplina costituzionale dell'economia,* Milano 1999; SOMMA, *Autonomia privata e struttura del consenso contrattuale,* Milano 2000; ID., *Autonomia privata, RDC,* 2000, II, 597; ID., *Il diritto fascista dei contratti: raffronto con il modello nazional socialista, Riv. crit. dir. priv.,* 2000; ID., *Giustizia sociale nel diritto europeo dei contratti, Riv. crit. dr. priv.,* 2005, 75-97; PERLINGIERI (Cur.), *Autonomia negoziale e autonomia contrattuale,* Napoli 2014; PALERMO, *L'autonomia negoziale,* 3° ed., Torino 2015; DELFINI, *Autonomia privata e contratto: tra sinallagma genetico e sinallagma funzionale,* 2° ed., Torino 2017. Per alcuni profili storici: MACARIO, *Ideologia e dogmatica nella civilistica degli anni settanta: il dibattito su autonomia privata e libertà contrattuale, Studi,* LIPARI, Milano 2008, II, 1491-1577; MACARIO, LOBUONO, *Il diritto civile nel pensiero dei giuristi,* Padova 2010.
7. Beudant, *Le droit individuel et l'Etat*, Paris 1891.
8. BENATTI, *Quello che resta dell'autonomia dei privati,* in *Studi in onore di Antonio Gambaro,* Milano 2017, II, 1409-1421.
9. Gobbo, *Il controllo dei prezzi industriali in Italia*, Bologna 1982; Cass., 22 dicembre 1994, n. 11032, in *GC*, 1995, I, 1237.
10. Rodotà, *Le fonti di integrazione del contratto*, Milano 1969.
11. Ajani, *Diritto dell'europa orientale*, Torino 1996.
12. IRTI, *Per una lettura dell'art. 1324 c.c.,* in *RDC,* 1994, I, 559.
13. T. Lucca, 6 luglio 2018, n. 1095.