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The limits of the consensual principle and the structure of a contract of obligation in Italian civil law

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Abstract:

The Italian legal system belongs to the so-called Roman family of legal systems. However the characteristic distinction between a contract and an agreement applied in French civil law has not been adopted by the Italian legal system. The originality of the Italian concept of a contract manifests itself in how, without borrowing from either the French Civil Code or the German Civil Code, the definition of a contract in Article 1321 of the Italian Civil Code is dogmatically cohesive (has plain and concise textual meaning), specifying both the nature and the legal effects arising from the formation of a contract. The Italian Civil Code generally identifies a contract with an understanding (*consensus*) of the parties concluded for the so-called legal cause of the contract, which is understood as the socio-economic function of it. The regulation of contracts under Article 1324 of the Italian Civil Code extends to other legal transactions, notably unilateral transactions, with the proviso that they must be *inter-vivos* and their subject matters must pertain to economic relationships. The paper focuses on the limits of the principle of contractual consensualism in Italian law. The principle generally refers to the agreement (*consensus*) as the general underlying legal condition for the validity of any contract. The principle has a significant impact on the legal effects of a potential *ex-post* collapse of the contract due to its invalidity in the case of the conveyance of either personal or real property ownership.

Keywords: consideration (*causa*), contract of obligation, conveyance of property, principle of consensualism, bailments, real contracts, systematization of civil law

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1. Introductory remarks

As opposed to German law, Italian law does not define a contract as a bilateral transaction under the Civil Code.[2] In principle, however, a contract of obligation is defined as a bilateral legal transaction by Italian scholars in civil law.[3] The notion of a legal transaction has also been the matter of extensive studies in Italian scholarship, from Vittorio Scialoja's theories, through the teachings of Emil Betti, to later authors.[4] Here, it needs to be noted that the Italian system of civil law is recognized as a member of the so-called Roman family of legal systems [Roman legal tradition].[5] The redaction of Italy's first Civil Code, of 1865, was particularly inspired by solutions taken from the French Civil Code.[6] It adopted consensualism as a general principle, as well as the principle of legal transactions having the effect of obligation or disposition, and the general principle of causality [roughly comparable to consideration in common law]. However, the definition of a contract included in Article 1098 of the 1865 Civil Code[7] was not a simple copy from Article 1101 of the French Code. The Italian Civil Code defined the contract not by reference to an agreement as an instrument but to the parties' agreement, i.e. their mutual consensus.

However, French law's characteristic distinction between a contract and an agreement has not been adopted by the Italian legal system. Moreover, both the essence and the scope of the notion of a contract differed in the two systems; in French law, the identifying quality of a contract was the intention to establish obligations between the parties, whereas Italian law saw the distinctive feature of a contract of obligation in its economic character [i.e. referring to property]. Emphasis was put not as much on the relationship between the contract and the parties' obligations as between the contract of obligation and the legal effects triggered by its formation. In principle, one can distinguish two types of such effects: (i) proximate effects, i.e. the formation, modification or expiry of a legal relationship, here to be understood as a relationship of obligation; and (ii) remote effects, in the form of disposal of ownership or some other right. This is because the Italian Civil Code implemented the principle, formulated by Robert Pothier and reflected by the French Civil Code, that a contract of obligation triggered dispositive effects, as well, doing so *uno actu*. However, on the Civil Code level, Italian law adopts the systematic classification proper to classical Roman law and along with it the unitary notion of a legal transaction.[8]

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2 G. Osti stwierdza, że: „Ora è evidente che identificando il contratto col negozio giuridico bilaterale in gerere non si attribuiva importanza alcuna alla natura, che può essere molto varia...", G. Osti, hasło „Contratto" [w:] A. Azara i E Eula (red.), *Novissimo Digesto Italiano*, Torino 1968, t. IV, s. 468.

3 Taki stan rzeczy częściowo wynika z wpływu pandektystyki na niektórych przedstawicieli włoskiej doktryny prawa cywilnego. W szczególności wpływ ten widoczny jest w pracach V. Scialoi; por. K. Zweigert, H.Kőtz, *An Introduction to Comparative Law*, T. Weir (tłum.), Oxford 1998, s. 105.

4 V. Scialoia, *Negozi giuridici (Corso di lezioni del 1892–1893)*, Roma 1933; E. Betti, *Teoria generalle del negozio giuridico*, [w:] F. Vassali (red.), *Trattato di diritto civile*, Torino 1950, s. 52, gdzie definiuje on czynność prawną jako: „Atto con cui il signolo regola da sè i propri interessi nei rapporti con altri"; L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano*, Napoli b.d., s. 57-60; F. Santoro Passarelli, *Dottrine generali del diritto civile*, Napoli, 1966, s. 125.

5 Por. Zweigert.

6 Dalej jako: k.c.fr.

7 Dalej jako: k.c.wł.

8 Należy zauważyć, że wyodrębniona przez Labeona kategoria *actum* nie odpowiada pojęciu czynności prawnej, ale pojęciu aktu prawnego. Akt prawny jest typem zdarzenia prawnego charakteryzującym się tym, że jego istotę stanowi działanie ludzkie o charakterze wolitywnym (por. E. Betti, hasło „Atti giuridici" [w:] A. Azara i E Eula (red.), *Novissimo Digesto Italiano*, Torino 1968, t. 1, s. 1505). Pojęcie czynności prawnej, przynajmniej w doktrynie włoskiej, uważa się za węższe, gdyż poza wolitywnym charakterem wymaga ono jeszcze działania ukierunkowanego na osiągnięcie określonego celu w postaci wywołania skutków prawnych (*finalità*). Tak F. Santoro Passarelli, *Dottrine generali del diritto civile*, Napoli 1966, s. 125. Na znaczenie pojęcia aktu prawnego zwraca także uwagę. A. Cataudella, *I contratti – parte generale*, Torino 2000, s. 2-5.

2. The notion of a contract of obligation in the Italian Civil Code of 1942

In the 1942 codification of Italian civil law the provisions relating to the definition of the legal nature of a contract known from Article 1125 of the 1865 Code was somewhat altered. First of all, the drafters retained from Article 1125 of the 1865 Code the concept of a contract of obligation as an understanding between the parties with the intention of creating specific legal effects. Nonetheless, more attention was paid to the description of the legal effects arising from contract formation. In this context, Article 1321 of the Italian Civil Code speaks of an understanding of two or more parties concluded for the purpose of formation, modification or extinguishment of a legal relationship of economic nature [i.e. referring to property], and thus the scope of the notion of contract was narrowed down somewhat in the 1942 Code.[9]

The originality of the concept of a contract in Italian law manifests itself in how, without copying solutions from either the French or the German Civil Code, the definition of a contract in Article 1321 of the Italian code is dogmatically cohesive, defining both the nature and the legal effects arising from the formation of a contract.

The substantial difference from French law consists in how Italian law does not identify a contract of obligation with an understanding between the parties. Furthermore, the relationship between a contract of obligation and the parties' obligation or obligations is described differently. At some point, an eminent Italian scholar of Roman law, Giuseppe Grosso, remarked that the difference between the French-law notion of contract and that of a contract of obligation in Italian law proceeded largely from the divergent paths of reception of solutions formulated by classical Roman jurists.

Italian scholarship sometimes emphasizes the links between the Italian Civil Code's notion of a contract of obligation and the opinion of Pedius, quoted by Ulpian in the Digests (D.2.14.1.3), whereby the relationship between a contract of obligation and an understanding can be defined as *habere in se conventionem* — the notion of a contract of obligation includes in itself an element of the parties' understanding.[10] In turn, the definition of a contract in Article 1101 of the French Civil Code makes a direct borrowing not from the classical concept of a contract but from Justinian, identifying a contract with the parties' understanding (*esse conventionem*) arising from contract formation.[11]

This difference is all the more clear against the context of the solution adopted in Article 1325 of the Italian Civil Code, which stipulates four grounds of validity of a contract of obligation: (i) the parties' understanding; (ii) the legal cause (*causa*); (iii) the existence of the object of the contract; (iv) compliance with the requirement of form where a statute makes one on pain of nullity.[12] The language of Article 1325 of the Italian Civil Code must be considered together with Article 1376 of the Code, establishing the principle of double effect of contracts of obligation by prescribing that

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9 Art. 1321 k.c.wł.: „Il contratto è l'accordo di due o più parti per constituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale".

10 G. Grosso, *La conception du contrat dans le droit romain et son influence dans les droits modernes*, [w:] H. Kupiszewski, W.Wołodkiewicz (red.), *Le Droit romain et sa réception en Europe. Les actes du colloque organisé par la Faculté de droit et d'administration de l'Université Varsovie en collaboration avec l'Accademia Nazionale dei Lincei le 8-10 octobre 1973*, Warszawa 1978, s. 96. Podobnie uważa F. Gallo, który podkreśla wpływ teorii Labeona na wyrażoną w art. 1321 k.c.wł. definicję kontraktu. Por. F. Gallo, *Eredità di giuristi romani in materia contrattuale*, 55 *SDHI,* s. 187-188

11 G. Grosso, *op.cit*., s. 97.

12 Art. 1325 k.c.wł.: „I requisiti del contrato sono: 1) l'accordo delle parti, 2) la causa, 3)l'oggetto, 4) la forma, quandorisultache è prescritta dalla legge sotto pene di nullità".

contracts having as their object (*ogetto* within the meaning of Article 1325(3) of the Italian Civil Code) the transfer of the ownership of a thing specified as to identity [*res in specie*], establishment or a transfer of a different real [i.e. *in-rem*] right, or transfer of some other right, from the very beginning have also a dispositive effect. The transfer of ownership or other right is effected by the parties' understanding (consent) expressed in a form consistent with the law.[13] This solution substantially corresponds to the French system for the conveyance of *in-rem* rights[14].

3. The relationship between the structure of a contract of obligation and the notion of a legal transaction

Similarly to how Roman jurists, especially in Justinian's period, construed the notion of a legal transaction around stipulation, though without making it into a separate category among other contracts or — more broadly — sources of obligation, the drafters of the Italian codification made the fully conscious decision to abandon the German way of defining the legal transaction as a separate notion and regulating it in the general part of the civil code.[15] At the same time, it can be argued that the difference between Italian and German law on this matter is in fact the difference between two approaches to the sources of Roman law — the Pandectist and the classical school of interpretation. For although the notion of a legal transaction is the subject of interest to Italian scholars and features as a prominent category in civil law, the Italian regulation method is diametrically opposite to the method of the German drafters. The relationship between a contract of obligation and a legal transaction is such that a contract of obligation is taken as the typical, basic category of legal transactions, whereas provisions dealing with contracts are applied *per analogiam* to other types of legal transactions.[16] Italian scholars note one more principal difference between the Italian and the German codification. In German law, in line with the classification proposed by Friedrich Carl von Savigny, the notion of a contract includes all bilateral legal transactions, irrespective of whatever their nature might be.[17] Thus, a contract is a far more general category applicable not only within the law of obligations but also in property, inheritance and family law.

The Italian solution is the exact opposite of the above — Italian civil law recognizes contracts not in all civil-law relationships but only those relating to property, as can be seen from the very definition of a contract provided in Article 1321 of the Italian Civil Code. On this account, the Italian definition of a contract of obligation as a bilateral legal transaction is rather imprecise. For it contains two equally important features or elements: (i) the *ex-consensu* character, which means that a contract of obligation is, in principle, defined as a legal transaction of which the legal effects stem from the parties' understanding; and (ii) the legal effects of the formation of a contract of obligation refer exclusively to the economic sphere.

Italian law gives a somewhat peculiar form to the relationship between the obligation effects and the disposition effects of a contract of obligation. This is because for the validity of the

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13 Art. 1376 k.c.wł.: „Nei contratti che hanno per oggeto il transferimento della proprietà di una cosa determinata, la constituzione o il transferimento di un diritto reale ovvero il transferimento di un altro diritto, la proprietà o il diritto si transmettono e si acquistano per effeto del consenso delle parti legittimamente manifestato".

14 Por. art. 711, art. 938, art. 1138, art. 1583 k.c.fr.

15 Por. Sprawozdanie z prac Komisji Kodyfikacyjnej *Relazione del Guardasigilli al. Codice Civile (G.U. 04.04.1942)* nr 604, gdzie jako motyw odrzucenia systematyki pandektystycznej wymieniono szacunek dla włoskiej tradycji prawnej.

16 Por. art. 1324 k.c.wł.: „Salvo diverse disposizioni di legge, le norme che regolano i contratti si osservano, in quanto compatibili, per glli atti unilaterali tra vivi aventi contenuto patrimoniale".

17 Na temat wpływu F.C. von Savigny'ego na doktrynę włoską, por. F. Ranieri, *Savigny's Einfluß auf die zeitgenőssische italanische Rechtwissentschaft*, [w:] 8 *Ius Commune* (1979), s. 192–219.

dispositive effects Article 1376 of the Italian Civil Code requires the fulfilment of a condition referred to as *condictio iuris*, in the form of the existence — as at the time of the making of the property transfer arising from the dispositive legal transaction intended to convey a right — of the parties' understanding expressed in a manner consistent with the law, which, according to the generally accepted interpretation, means the satisfaction of all conditions required by mandatory provisions of the law (*ius cogens*) for the validity of the obligation contract. As regards the validity of the obligation contract, such a *ius-cogens* provision is found especially in Article 1325 of the Italian Civil Code, listing four general conditions: (i) the parties' understanding, (ii) the object, (iii) legal cause, and (iv) statutorily required form, if any. Moreover, the fulfilment of these four conditions also requires the fulfilment of detailed conditions. For example, in order to be valid, the parties' understanding must be suitably expressed, in line with the procedure for contract formation prescribed by the Civil Code. Hence, the Article 1321 definition of a contract of obligation is not sufficient for the reconstruction of the normative meaning under Italian law. It defines a contract of obligation as the parties' understanding giving rise to specified legal effects. Those effects are specified by Article 1376. Furthermore, it must be noted that the identification of the contract of obligation with the parties' understanding, manifested by the language of Article 1321 of the Italian Civil Code, is not sufficient for the formulation of any hypothetical autonomous category being the contract of obligation in that meaning as an institution of civil law with two essential characteristics — its bilateral and at Article 1321, in turn, identifies the contract of obligation not with all the elements but only with the parties' understanding, which appears to impose an excessively narrow interpretation of the term. Moreover, a serious logical problem comes to surface: How can a contract of obligation, interpreted in line with Article 1321 of the Civil Code as an understanding of the parties, be composed of the elements found on the list in Article 1325, first of which is precisely the understanding of the parties. This prompts the conclusion that the understanding of the parties is a notion with two meanings in Italian Civil law — now a synonym for 'contract of obligation', now one of the four elements of a contract. The same problem also affects the remaining elements — *causa*, object and form. The question arises whether they are different 'aspects' of a contract of obligation on the legal plane, or are they the constituent elements of a contract of obligation of which the absence makes the contract a nullity, because in accordance with Article 1418 of the Civil Code the failure of any of the elements listed by Article 1325 triggers *ex-tunc* (*ab-initio*) invalidity by operation of the law.[18] Further complicating the situation is the fact that the most characteristic quality of a contract of obligation — its bilaterality — is subject to at least one exception, in the so-called, 'contract of obligation made with oneself,' (*il contratto con se stesso*), regulated by Article 1395 of the Civil Code. Under that article, a contract made by oneself as attorney for another or with one's own attorney as the counterparty may be either invalidated or convalidated. According to some writers, such a contract of obligation fails to meet Article 1321 and Article 1395's condition of the *consensus* of the parties, since one can hardly speak of the existence of two parties. Although such a contract should theoretically attract *ex-tunc* invalidity by operation of the law (cf. Article 1418 of the Civil Code), the Code provides for its nullification (*ex-nunc*) or convalidation, in line with Article 1444 of the Civil Code.[19]

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[18] Art. 1418 k.c.wł.: „Il contratto e nullo quando e contrario a norme imperative, salvo che la legge disponga diversamente. Producono nullita del contratto la mancanza di uno dei requisiti indicati dall'articolo 1325, l'illiceita della causa l'illiceita dei motivi nel caso indicato dall'articolo 1345 e la mancanza nell'oggetto dei requisiti stabiliti dell'articolo 1346. Il contratto e altresi nullo negli altri casi stabiliti dallla legge".

[19] Art. 1444 k.c.wł.: „Il contratto annullabile può essere convalidato dal contraente al. quale spetta l'azione di

A similar problem also afflicts some of the defects of an expression of will, such as error, deceit or coercion, which do not trigger automatic nullity but merely provide the wrong party with a claim for the nullification of the contract (Article 1427 of the Italian Civil Code). Defects of an expression of will, however, are regarded as a situation in which the parties' understanding (*consensus*) did happen but was vitiated (defective).

This is because the defects of an expression of will are extrinsic to the parties' *consensus*. That is not the case of the aforementioned contract with oneself, where the existence of two contracting parties (*la bilateralità*) reaching the consensus is of intrinsic nature. Another problem to point out is the inconsistency of such a situation with Article 1372 of the Civil Code, which formulates the principle of freedom of contract in a similar manner to the French Article 1134.[20] Italian scholars attempt to reconcile this on the basis of so-called interest theory, observing that in the technical legal sense what constitutes a party is not an entity in the legal sense (a natural or legal person) but the so-called 'interest carrier'.[21] In practice, this means that the same person can constitute two separate 'centres of interest' and thus two different parties to a legal relationship.[22]

Moreover, notably, also the other characteristic feature of the contract of obligation under Article 1321 of the Italian Civil Code, viz. the economic nature of the relationships arising from its formation, is not completely self-evident. Among Italian scholars one can find the view that entering into matrimony in accordance with Article 107 of the Civil Code is tantamount with the making of a contract of obligation.[23] This conclusion is prompted already by the literal reading of numerous provisions of Book I of the Italian Civil Code, wherein marriage is referred to as a *contratto*.[24]

Adherents of the contractual view of the nature of marriage under Italian law also emphasize that the notion of a contract of obligation under Article 1321 of the Italian Civil Code does not exhaust its theoretical concept, whereby it is equated with a bilateral legal transaction founded upon the parties' concordant intentions.[25] Simultaneously, they point out that the notion is clearly broader than the definition of a contract of obligation provided in the Italian Civil Code.[26]

Another problem with the delineation of the scope of the notion of a contract of obligation in Italian law is posed by the legal nature of a company (*società*). According to the language of Article 2247 of the Italian Civil Code, the essence of an agreement of association (company-formation agreement) is that two or more people mutually agree to contribute goods or services to a common

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annullamento, mediante un atto che contenga la menzione del contratto e del motivo di annullabilità, e la dichiarazione che s'intende convalidarlo".

20 Art. 1372 k.c.wł.: „Il contratto ha forza di legge tra le parti". Trudno uznać za możliwą do spełnienia dyspozycję tego przepisu w odniesieniu do sytuacji, gdy istnieje w rzeczywistości tylko jedna strona kontraktu.

21 A. Cataudella stwierdza, że „Parte sta ad indicare un centro di riferrimento di interessi, perciò più soggetti- se sono portatori di identici interessi- constituiscono una solo parte mentre un solo soggetto può essere, in casi particolari, punto di riferimento di due distinti centri di interessi, come accade nel contratto con se stesso, regolato dall'art. 1395", A. Cataudella, *I contratti. Parte Generale.* Torino 2000, s. 15.

22 Teorię tę rozwija C. Donisi, stawiając tezę, że dwustronny charakter czynności prawnej nie dotyczy procesu zawierania umowy (kontraktu) ani stanu faktycznego w postaci istnienia dwóch podmiotów, ale odnosi się do „porządku interesów" (*asseto di interessi*). Por. C. Donisi, *Il contratto con se stesso,* Camerino 1982, s. 57-59. Nietrudno zauważyć, że rozwiązanie takie inspirowane jest teorią R. Iheringa.

23 Por. A. Bertola, „Il matrimonio", [w:] G. Grosso, F. Santoro Passarelli (red.), *Trattato di dirito civile,* Milano 1963, s. 12.

24 Por. np. art. 117 k.c.wł.: „Il matrimonio contratto con...", art. 79 k.c.wł.: „La promessa di matrimonio non obbliga a contrarlo".

25 Tak. C. Gangi, *Il matrimonio*, Milano 1953, s. 28.

26 Por. L.Ferri, *Definizione giuridica e significato di contratto. La parola come limite all'arbitrarietà dei concetti giuridici*, [w:] *Studi in onore di Francesco Santoro-Passarelli,* t. 2, Napoli 1972, s. 127. Innym przykładem kontraktów niemających charakteru majątkowego mogą być tzw. czynności dyspozytywne mające za przedmiot części ciała osoby żywej. Czynności takie mogą być dopuszczalne, o ile nie są sprzeczne z prawem, porządkiem publicznym i dobrymi obyczajami oraz nie prowadzą do trwałego uszkodzenia zdrowia (art. 5 k.c. wł. *in contrario*). W tej kwestii por. R. Sacco, G. De Nova, *Il contratto,* t. 1, Torino 1993, s. 25.

economic goal.[27] Among the scholars one can find the view that this construction of a company does not completely fit within the notion of a contract of obligation because, in principle, in this particular relationship one cannot distinguish the parties. That is because the members of a company — its partners or shareholders — aspire to achieve a common goal rather than to reconcile opposed interests, as is the case, for example, with contracts of obligations intended to effect an exchange in the economic sense.[28] In principle, such objections have met with criticism from the majority of scholars in civil law as unwarranted and lacking foundation in the language of the Code, since they were grounded in an excessively narrow interpretation of the notion of a contract of obligation.[29]

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4. Limits of the principle of consensualism — the category of real contracts in Italian law

The problem with the determination of the legal nature of real [from *res* — thing] contracts in the system of civil law,[30] grounded, in line with Article 1321 of the Italian Civil Code, in the principle of consensualism, quite possibly provides the best example of the influence of Roman law on modern Italian law. Numerous scholars in civil law note the lack of a basis for considering this a

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27 Art. 2247 k.c.wł.: „Con il contrato 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".

28 Tak F. Massineo, *Dottrina generale del contratto,* Milano 1948, s. 62.

29 Por. P. Ferro Luzzi, *I contratti associativi,* Milano 1971, s. 70. Sam F. Massineo wycofał się z przedstawionej wcześniej teorii. Por. F. Massineo, *Il contratto in genere*, [w:] A. Cicu i F. Massineo, *Trattato di diritto civile e commerciale*, Milano (1968), t. 1, s. 636.

30 Do kategorii kontraktów realnych zalicza się w prawie włoskim; umowę składu (art. 1548-1551 k.c.wł.), kontrakt estymatoryjny (art. 1556-1558 k.c.wł.), depozyt (art. 1766-1782 k.c.wł.), sekwestr umowny (art. 1798-1802 k.c.wł.), użyczenie (art. 1803-1812 k.c.wł.), pożyczkę (art.1813-1821 k.c.wł.), zastaw na rzeczy ruchomej (art. 2784-2799 k.c.wł.).

separate category of contracts.[31] They emphasize that the shaping of several types of contracts as real contracts is exclusively the product of history.[32] For, in principle, in line with Article 1321 a contract is identified with an understanding between the parties, which provides the basis for the formation of legal relationships whether in the sphere of obligations or with regard to some nominate contracts, including in the real sphere (Article 1376 of the Italian Civil Code). In this context, it would be difficult, from a dogmatic point of view, to justify the existence of contracts for which the legislature, apart from the consensus of the parties and satisfaction of the other requirements listed in Article 1325 of the Italian Civil Code, imposes one more requirement that is the delivery of a thing. This last element does not fall within the scope of the requirements for the validity of contracts enumerated by Article 1325; the delivery [*traditio*] cannot be identified with any of the elements mentioned therein and especially cannot be identified with the form requirement. In order to rationalize and explain the legal nature of this additional element in the form of *traditio*, Italian scholarship has developed several competing models.[33]

In line with the Pandectist view, popularized in Italy by the translated work of Bernhard Windscheid, a real contract is characterized by how the obligation of the party receiving the delivery of a thing consists in being required to return the same thing in an undeteriorated state.[34] However, this arises not from the lender's obligation to deliver but from the delivery [*traditio*] itself. In keeping with the above theory, a real contract has sometimes been referred to as a *contratto di restituzione* czy też *Rückgabevertrag.*[35]

According to another proposal, the essence of a real contract is that of an *ex-consensu* contract but with the added difference that the delivery of the thing is a *condictio iuris.* Carlo Alberto Maschi, by contrast, asserts that the *causa* of a real contract differs substantially from that of an *ex-consensu* contract. In the case of real contracts, the delivery takes place for the purpose of the formation of the contract — *contrahendi causa*; however, *for ex-consensu* contracts it constitutes the performance and is thus *solvendi causa*.[36] At present, the prevailing view in Italian civil-law scholarship is that real contracts are characterized by so-called gradual shaping of their legal effects (*formazione graduale*). Adherents of that theory proceed from the assumption that whereas a real contract is established by the *consensus* of the parties, the legal effects of its formation occur gradually along with the fulfilment of additional requirements. The theory assumes that the delivery is not constitutive to the legal relationship but only perfects it (*perfezzionamiento*).[37] It is not difficult to notice that this view leads to the absorption of real contracts, as a category, by consensual contracts. There is normative basis for it, of course, in Article 1321, as well as Article 1325 of the Civil Code. On the other hand, the theory fails to provide a satisfactory explanation for the sense of the existence of real contracts before they are 'perfected', that is supplemented by the factual act of the delivery of the thing [the *traditio*]. Moreover, it seems that with regard to at least some real contracts the above position cannot hold for other reasons as well. In the case of a loan contract it is noteworthy that Article 1822 of the Italian Civil Code provides for the possibility

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31 Por. np. R. de Rugieroi F. Maroi, *Instituzioni di diritto privato,* Milano-Messina, 1952, t. 2, s. 156; B. Biondi, *Contratto e stipulatio,* Milano 1953, s. 231; G. Osti, hasło „Contratto", [w:] A. Azara i E. Eula (red.), *Novissimo Digesto Italiano*, Torino 1968, t. 4, s. 483-488 i tam wskazana literatura.

32 M. Rotondi stwierdza, że: „l'essere oggindì un contratto reale o consensuale è puramente effeto di tradizione storica", cyt. za C.A. Maschi, *La categoria dei contratti reali. Corso di diritto romano",* Milano 1973, s. 2 przyp. 1.

33 Co do różnych opinii wyrażanych w doktrynie, por. D. Cenni, *La formazione del contratto tra realità e consensualità,* Padova 1998, s. 31 i tam wskazana literatura.

34 Tak. C.A. Maschi, *op.cit.*, s. 4 przyp. 5.

35 Por. F. Massineo, *Manuale di dirito civile e commerciale*, Padova 1959, t. 3, s. 42.

36 C.A. Maschi, *op.cit.*, s. 6-8, 34-35.

37 Por. D. Cenni, *op.cit.*, s. 51-70 i 101-103.

of a unilateral promise of a loan on the part of the lender. The question arises of the sense of this legal institution if we are to accept the view that until the time of delivery of the thing the loan contract is valid but 'imperfect'. What legal effects could such a contract of obligation have, other than those prescribed specifically for the promise of a loan? It would appear that for a solution to this problem we should rather look to the language of Article 1325 of the Italian Civil Code, as well as Article 1376 by analogy. The former lists among the elements necessary for the validity of an *ex-consensu* contract its legal cause (*causa*), which Italian law essentially understands to be the contract's economic or socio-economic function. Accordingly, it must be noted that this understanding of the *causa* in Italian law does not correspond to the French-law concept of the *causa* of an obligation or with the *causa* of accruals under Polish law. In Italian law, the *causa* is not as much the typical cause for which a party undertakes its obligation (such as the *causa obligandi vel acquirendi*) but a cause common to both parties to the contract, and thus the only type of *causa* in Italian law can be *causa contrahendi.* The above is further corroborated by the fact that it would be difficult to find any application for the *causa solvendi* in Italian law. For in accordance with Article 1376 of the Italian Civil Code the conveyance of a right is effected by the parties' *consensus* and thus the formation of a contract of obligation in itself leads to the performance of the contract.[38] In such a system there is no place for a situation in which the formation of a contract could arise from the need to perform an obligation (as is the case in Polish law, with Article 156 of the Civil Code). At the same time, a situation in which a thing is delivered as a result of the conclusion of a real contract cannot be regarded as acting *solvendi causa*. The reason is that the delivery is an action done *contrahendi causa,* i.e. precisely for the purpose of making a contract. Thus, it would seem that the arguments outlined by Carlo Alberto Maschi in respect of the exceptional structure of real contracts find their basis primarily in the fact that real contracts are characterized by the delivery effected not so much for the purpose of performance as for the very formation of a contract. One could also attempt to argue that, in reality, the delivery of a thing constitutes a manner of an expression of will in a special form (within the meaning of Article 1325 of the Italian Civil Code) — a form prescribed in detailed provisions requiring specifically the delivery of the thing in order for the legal effects to arise. Such an interpretation, however, would appear to go far beyond the Italian Civil Code's notion of a contract of obligation (Article 1350). In consequence, the conclusion should be that the category of real contracts, in principle, goes beyond Article 1321's definition of a contract of obligation.

5. Summary

It could seem that the definition of a contract of obligation formulated in Article 1321 of the Italian Civil Code provides the basis for the conclusion that such a contract is a homogeneous institution and that the Italian Civil Code (and especially its Article 1321) formulates a separate, abstract and general category of contracts defeating the so-called contractual nominalism of classical Roman law.[39]

Some scholars in Roman law oppose this homogeneous civilist concept to the concept of contractual nominalism characteristic, in their opinion, of classical Roman law. They emphasize

38 Warto nadmienić, że przepis ten nie odnosi się do kontraktów realnych, które wywołują skutki jedynie na płaszczyźnie zobowiązaniowej.

39 Nominalizm ten miał polegać na istnieniu kilku typów kontraktów, nietworzących jednak jednolitej, wyodrębnionej kategorii technicznoprawnej kontraktu. Zawartość pojęcia nominalizm w odniesieniu do prawa rzymskiego analizuje szczegółowo A. Maffi, *La categoria dei contratti reali*, Milano 1973, s. 46-74.

that Roman law did not follow any such uniform concept, since it had not developed any general theory of a contract of obligation, or contract at all, instead working off of specific types of contracts actionable under the *ius civile*.

Here, even a cursory analysis of the provisions of the Italian Civil Code governing a contract of obligation prompts the question whether such a contract truly represents a homogeneous category in Italian law. The first mention should belong to the doubts among Italian scholars, whether of civil or of Roman law, concerning the category of real contracts on the one hand and the contract of donation on the other hand. Furthermore, in respect of Article 1376 of the Italian Civil Code, which is of fundamental significance from the perspective of legal effects, there is a serious doubt as to whether this provision does not perhaps restrict the notion of a contract of obligation solely to mutual contracts.[40]

On an ending note, as far as Italian law is concerned, it will be expedient to emphasize the originality of the notion of a contract of obligation adopted by the Italian Civil Code. French law, followed by Spanish law, identifies a contract with a contract of obligation. German law regards a contract as a separate category without the autonomous character that it concedes to the notion of legal transaction. Italian law takes an original position, seemingly identifying contracts of obligation with the understanding (*consensus*) of the parties. At the same time, scholars in civil law underscore that a contract of obligation is first of all a legal transaction. Italian Civil Code, extend also to other legal transactions, especially those of unilateral nature, albeit with the proviso that they must be *inter-vivos* and their subject matters must be any relationships of economic nature[41].

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40 Por. C. Argiroffi, *Causa ed effeti reali del contratto*, [w:] L. Vacca (red.), *Causa e contratto nella prospettiva storico-comparatistica*, Torino (1997), s. 504-505.

41 Tak np. darowizna została w prawie włoskim uregulowana w części dotyczącej prawa spadkowego w ks. II, tyt. V, w art. 769-809 k.c.wł.

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