

Requirements of Contracts in a comparative perspective

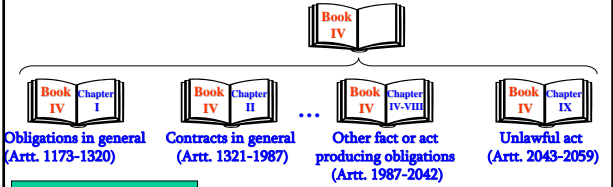
1. The Italian Law of Obligations
2. Codice civile ↔ BGB ↔ Common Law
3. Requirements of a contract in a comparative perspective
4. Agreement in a comparative perspective

The Italian Law of Obligations Obligations (Artt. 1173-2059)



Art. 1173 Civil Code (CC) - Sources of obligations

Obligations derive from contract, from an unlawful act or from any other appropriate fact or act to produce them in conformity with the legal system.



The notion of contract

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

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

Art. 1321 CC - Definition
A contract is the agreement between two or more parties to constitute, regulate or extinguish a legal relationship having economic content.

Under Italian Law a gift is also a contract ↔ Under Anglo-American Law a contract must include **consideration** (a payment, financial or otherwise)
Some contracts do not depend upon exchange (enforceable unilateral gratuitous promise)

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

Art. 1323 CC - Laws of contract
All contracts are subject to general regulations of contracts even if they are not of the type specifically provided for by law.

Art. 1324 CC - Regulations applicable to one-sided actions
Unless otherwise provided for by law, contract regulations are observed, insofar as they are compatible, for unilateral acts between living persons having an economic content.

Unilateral acts: power of attorney (proxy), promise to the public etc.
Mistake
Not applicable to wills
Not applicable to the recognition of natural (illegitimate) child

In Germany: Rechtsgeschäft ⇒ A **declaration of will** is fundamental (will, marriage, recognition of illegitimate child, power of attorney, promise to the public, etc.)
Schuldrecht Allgemeiner Teil

In Italy: notion of contract (two-sided declaration of will, having economic content)
Law of contract is applicable to unilateral acts ... having economic content
"Dei contratti in generale"

In Common Law (England + USA): Contracts with inherent payment (financial or other) In the *Uniform Commercial Code*: **contract = sale**

Contracts with inherent payment (financial or other) (contratti a prestazioni corrispettive) ↔ **Contracts with no implied payment** (contratti a titolo gratuito)
Contract ↔ **Contratto**
Some contracts do not depend upon exchange (enforceable unilateral gratuitous promise)

Requirements
If a contract lacks any **one** requirement, it is **void**

Art. 1325 CC - Requirements
"The **requirements** for a contract are:
1.) **agreement** between parties;
2.) **causa**: ⇒ socio-economic function of the contract
3.) **subject matter**;
4.) **form**, when prescribed by law on pain of being void."

Art. 1108 Code civil
"Quatre conditions sont essentielles pour la validité d'un convention:
- Le **consentement** de la partie qui s'oblige;
- Sa **capacité** de contracter;
- Un **objet certain** qui forme la matière de l'engagement;
- Une **cause licite** dans l'obligation."

Art. 1108 Code civil
"Four requirements are essential in order to have a valid agreement:
- The **consent** of the party obliging themselves;
- Their **capacity** to enter into a contract;
- A particular **subject-matter** which is the subject of the commitment;
- A lawful **causa** of the obligation."

Agreement
Offer is sent on 25.2
Offer reaches the other party on 28.2
Acceptance is sent on 2.3 → **Mail-box rule (Common law)**

~~Offer is withdrawn on 3.3 *~~
Withdrawal of offer reaches offeree on 4.3 → **Principle of reception (Germany)**


Acceptance received on 5.3 → **Principle of cognition (Italy)**

~~Withdrawal of offer reaches offeree on 6.3~~
~~Offer is withdrawn on 7.3 **~~
The offeror, arriving home, receives notice of the acceptance on 8.3 → **Principle of cognition (Italy)**

⇒ Is there a contract?
Art. 1326, paragraph 1, CC - Entering into the contract
"The contract is entered into at the moment when the offeror receives notice of acceptance by the other party."
It falls under the broader **scope of encouraging circulation of goods**

Art. 1335 CC - Presumption of notice **Restrictive interpretation**
 The offer, the acceptance and their revocation ... are considered to be known by the receiver at the moment when they reach the receiver's premises, unless the receiver proves their impossibility of their knowledge through no fault of their own."

Principle of cognition \cong principle of reception


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

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


The rule is based: **Posting = Delivery**

The postal rule is subject to some limitations:


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

An offer can be **withdrawn** by the **offeror** at any time before it has been accepted. 
 To be effective the **withdrawal** must be drawn to the attention of **offeree** and, for this purpose, the **postal rule** – **obviously** – does **not apply**, so that the **revocation only takes effect** when it actually reaches the other party.

Knowledge by the **offeree** of the **withdrawal** of the offer \gg **Posting** of the **acceptance** by the **offeree**



Art. 1328, § 1, CC - Revocation of offer and of acceptance
 "The offer can be revoked up until the time when the contract is entered into."

Art. 1328, § 1, CC - Revocation of offer and of acceptance
 The acceptance can be revoked up until the time when the **offeror** has knowledge of the acceptance. 

Art. 1329 CC - Irrevocable offer
 "If the offering party undertakes to keep the offer fixed for a certain time, revocation has no effect."

Advantage of the Italian solution:


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

Advantage of the English solution:


Preventing speculation at the offeree's expense


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

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

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

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

Art. 1328, § 1, CC - Revocation of offer and of acceptance
 "The offer can be revoked up until the time when the contract is entered into." 

II-4:202: Revocation of offer 

(1) An offer may be revoked if the revocation reaches the offeree **before the offeree has dispatched an acceptance** or, in cases of acceptance by conduct, before the contract has been concluded.


(2) ...

(3) However, a revocation of an offer is ineffective if:


- (a) the offer indicates that it is irrevocable;
- (b) the offer states a fixed time for its acceptance; or
- (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.


(4) ...

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

The **"mirror image"** rule of contractual formation is applied. 
 According to this rule, the court must be able to find in the documents which passed between the parties a clear and unequivocal offer which is matched or **"mirrored"** by an equally clear and unequivocal acceptance.

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

Art. 1326, paragraph 5, CC - Entering into the contract
 "An acceptance which does not match all the terms of the offer amounts to a **new offer**." 

II-4:101: Requirements for the conclusion of a contract 

A contract is concluded, without any further requirement, if the parties:

- (a) intend to enter into a binding legal relationship or bring about some other legal effect; and
- (b) reach a **sufficient agreement**.


II-4:103: Sufficient agreement

(1) **Agreement is sufficient** if:

- (a) the terms of the contract have been sufficiently defined by the parties for the contract to be given effect; or
- (b) the terms of the contract, or the rights and obligations of the parties under it, can be otherwise sufficiently determined for the contract to be given effect.

(2) If one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

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

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

However the **offeror** who wishes to state that he will **not** be bound only if the offer is accepted in a particular way must **use clear words** to achieve this purpose.

Art. 1328, paragraph 4, CC - Revocation of offer and of acceptance
 "When the **offeror** prescribes a specific method of performance, acceptance does not have any effect unless the terms are complied with." 