



LEGAL SYSTEM
Module 1:
PRIVATE LAW
HANDOUT

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Written by Olivia Roccavilla



This handout has been written by students with no intention to substitute the University official materials. Its purpose is to be an instrument useful to the exam preparation, but it does not give a total knowledge about the program of the course it is related to, as the materials of the university website or professors.

Introduction

To understand examples, you have to identify yourself with the situation – what would you do?

e.g. Paul gets into an Art center and buys a painting for \$5000 but asks to leave it there and pick it up later. Bill later asks to purchase the painting for \$30,000. What would the seller do? Sell to Bill. The seller agrees and gives the painting to Bill. Bill bumps into Paul – who gets to keep the painting? Note -- neither Paul nor Bill is to blame, only the seller.

Movable property (e.g. the painting) does not require a written contract to transfer property. There is no requirement to physically transfer the property for the ownership to change. The payment does not have to have occurred; a binding agreement is sufficient. However, by the “effects of acquisition of possession”, as long as the buyer is in good faith, the movable is delivered to him and there is an appropriate title for the transfer of ownership, Bill becomes the owner by way of possession.

N.B. the solution provided by the legal systems always promotes the “**easy circulation of wealth**” as an interest to be protected by the law. Speed up circulation of goods and economic activity!!!

The first civil code, called the “Code Napoleon” dates back to 1800. At the time the ambition of the legal system was to have one book which overrules all situations of interactions between consumers. There are now 25 codes in Italy with approximately 3000 articles.

Chapter 1: The Legal System

Rules and Norms

The purpose of rules/norms is to direct humans to adopt a certain pattern of behavior in order for them to become “normal”.

A rule is a statement that DIRECTS human conduct. It may stipulate that particular conduct is compulsory (duty to act), prohibited or lawful (permitted). Different types of rules exist:

- a. Personal: seeks to regulate conduct of a specific person or group
- b. Factual: covers one or more factually specified situations
- c. General: directs whoever may find himself in a specified situation
- d. Abstract: covers any situation that repeats the one envisioned

All of the above may appear under the form of LAWS; personal/factual (instructing a debtor to pay a certain amount of money to a debtor) or general/factual (road laws attainting to an entire group: drivers).

More specifically, however, a **rule of law** refers to “higher rules” prescribing general and abstract fashion what conduct is permissible or required in a situation envisioned by the legal provision.

Sanctions allow the enforcement (norm-sanction) of legal provisions and the effectiveness of conduct (norm-precept). The law makes a distinction between civil sanctions (e.g. compensation for damages), criminal sanctions (e.g. imprisonment) and administrative sanctions (e.g. fine).

Applying the Legal Rule

According to our upbringing we can generally distinguish between rules of courtesy and laws. However, in many cases it is difficult to draw the line; for instance, are human rights a law or a moral?

According to an anthropologist discovering the law for a primitive society, a legal rule is a rule that, if violated, would be sanctioned by the use of force on a person. However, in a modern and more sophisticated legal system the use of force is replaced by other sanctions. It can be noted that sanctions exist even for "rules of courtesy" (shame, embarrassment), hence encouraging their enforcement in society.

Following a similar principle is the application of the rules and laws on behalf of the court. In a primitive society the court was free to choose to apply laws however they wanted. But, with the development of society courts have had to gain impartiality (decrease discrimination). A court now develops a reputation based on "judicial precedents" (coherence of their rulings).

Sources of law

A **Source of law** is defined as the fact or act from which the law originates. Sources include:

- a. **Written and unwritten sources:** unwritten sources include customs, but generally laws are written in the respective texts
- b. **Case law:** once a court makes a decision on a case, it creates a precedent based on which other rulings will be made)
- c. **Legislation:** means through which an authority draws up a text containing legal rules.
 - These may take the form of acts or statutory instruments (subordinate laws e.g. decrees, regulations).
 - The legislative process varies in each system; in the Italian Legal System there is a list of things which may be sources of law (outlined in [Art. 1](#)).
 - Only the Camera dei Deputati and Senato della Repubblica have the power to legislate.
 - Since rules exist that govern the "creation of laws", these have to be legitimized by a higher source. To avoid an infinite cycle, the legal system essentially affirms its own credibility from its own establishment.

The Legal System

A **legal system** can be described as a complexity of legal rules that make a uniform and orderly set, paving the way for the organization of society. What is "legal" is only what the system has defined as such and are rules which come from traceable sources.

A plurality of legal systems exists; according to which perspective you consider, only the respective domestic law is applicable and the other stand as mere facts (e.g. in Italy – Italian Law applies).

Closed legal systems are those which draw a clear distinction between codification powers (legislative power) and judicial power (power to decide over disputes); in such cases the court may not render a decision to a new binding legal rule. A fully closed system is unattainable (different interpretations to legal provisions). Laws are worded to allow courts to evaluate the facts in question in light of relevant circumstances.

Sources of Italian Law

The Italian Constitution (since 1948) is the **primary source of law** in Italy. It lays down the fundamental rights and duties towards the Republic and towards society.

According to Art. 1 CC, the other sources of Italian law are:

1. **Ordinary law**
 - Statutes or acts of Parliament
 - Legislative decrees and decree laws (solely in situations of extraordinary necessity and urgency) – must have a specific objective, a limited period of time and have guiding principles and standards fixed by the Parliament.
 - Regional laws and laws of autonomous provinces (Trento and Bolzano) - On any issue not under the jurisdiction of the state.
 - Referendums - A referendum may not introduce new laws only repeal existing ones (must be admitted by Constitutional Court).

Procedure to Law Approval

- i. Approval by the Parliament (Chamber of Deputies + Senate of the Republic)
 - ii. Promulgation of the law by the President of the Republic
 - iii. Publication in the Official Gazette: takes effect in general 15 days after ("vacation legis") ==> objective of public notice, statute is presumed known
2. Domestic Regulations – known as delegate or subordinate legislation. May be issued by council Ministers, ministries, regions, provinces, municipalities or "watchdog agencies" (e.g. Bank of Italy).
 3. Customs – Lowest source of law. It is the only "non-written" source of law in civil law countries. You can be penalized for not abiding by a custom.

Two features must be present to form a custom:

- a. A determined conduct must be repeated in time and shared by the members of a distinct community
- b. The conviction that the conduct corresponds to a duty under the law (act as if it were a law)

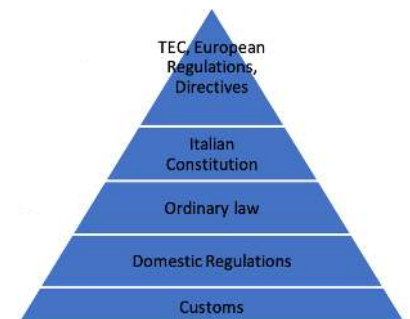
A distinction between customs in areas not regulated by other sources of law (Praeter legem) and where they are explicitly referred to by higher sources of law (Secundum legem).

Resolving disputes between sources of law

- Hierarchy of sources applies i.e. A source of higher rank prevails over a lower one
- When of equal rank, a newer source prevails over the previous (=presumption of implicit repeal)

Since Italy is also a member of the European Union, it also comprises the following sources of law:

1. Treaty of the European Community (TEC)
2. Regulations (distinguished from domestic regulations)
3. Directives (Legislative act that sets out goal that EU countries must achieve)



Fundamental Principles of European Law

According to the [Principle of Precedence](#) of European Law, European law is superior to the national laws of Member States (i.e. European Union Sources prevail over ordinary domestic law, domestic regulations and customs)

- Enshrined by the European Court of Justice (ECJ)
- If domestic law is contrary to the European Provision, it loses its binding force
- The precedence of European Law is absolute; the ECJ has ruled that even constitutions are subject to the precedence principle.
- The ECJ is responsible for ensuring compliance to the precedence principle by imposing penalties on member states who infringe this rule
- If countries have doubts as to the correct interpretation of EU law, they must immediately suspend the application of law and submit the case to the ECJ for the [preliminary ruling procedure](#).

The [Principle of direct effect](#) enables individuals to immediately invoke a European provision before a national or European court. The ECJ has defined certain conditions for the European legal act to be immediately applicable:

- The direct effect applies to both relationship between individuals or individuals and a EU member state.
 - o Vertical Direct Effect is of consequence in relations between individuals and the EU member state.
 - o Horizontal Direct Effect is of consequence in relations between individuals.
- According to the type of act concerned, the ECJ accepts either full direct effect (horizontal and vertical) or a partial direct effect (confined to vertical)
- The Direct Effect applies to primary legislation provided that obligations laid down in European Law are precise, clear and unconditional and that they do not call for additional measures (either domestic or European).
- The Direct Effect also applies to secondary legislation – always for regulations, and for directives only a vertical effect (partial direct effect)

Lawmakers, courts and legal literature

The Italian Legal System abides by the [principle of separation of powers](#), making a clear distinction between [lawmakers](#) and [courts](#) (the former may make laws but not enforce them, while the latter may enforce but not create them).

Lower courts are bound to the judgement of the Corte di Cassazione (previous judgements are disregarded) it being of overriding power and authority.

Legal scholars may influence the course of the legal system (indirectly), by publishing legal literature (provide their opinion on the interpretation of statutory provisions) although they cannot directly enforce them.

Repeal of Laws

Law may be repealed in the case of

1. Upon express statement of lawmakers ([express repeal](#))
2. Upon the incompatibility with new provisions and previous ones (new provision contradicts a previous one) ([implicit repeal](#))
3. Where the new law applies to the entirety of subject matter ruled by the previous law ([implicit repeal](#))

When a certain conduct which violates the law becomes a social pattern, then social conditions dictate that the law should not be enforced on account of **obsolescence**. This does not mean that it will be removed from official statutes, simply will not be enforced.

The **principle of non-retroactivity** suggests that a law can only be applied to an act that occurs after the law was adopted (i.e. the law applies to FUTURE incidents only).

- Interim provisions may be adopted to simplify the transition from one law to another

Private International Law

Private international law refers to the part of law that is administered between private persons of different countries. It defines the criteria to determine which national law to apply in case of a dispute.

The will of the parties

- Within obligations flowing from **contract**, parties are free to decide the national law they want to be applied. (Applicable in all of Europe)
- In absence of decision, the law applicable is that of the country where the party under obligation to discharge the "characteristic performance" resides (e.g. Delivery or execution of the product).
- **N.B.** only applies to "international contract" – between two foreigners, foreigner and local, or between two locals but to be performed abroad (e.g. sale abroad).

Private International Law establishes that –

1. National Law is to be applied for:

- Italian Law applies when the defendant is domiciled/resident of Italy (or place of headquarters in case of legal entities).
- **Legal capacity of individuals** is governed by their national law e.g. In Ghana majority age is 17.5, so in Italy a Ghanaian citizen gains capacity to act at 17.5.
- **Personal relations between spouses** are governed by the national law common to them. If they are of different citizenships, they apply the law of where their matrimonial life is predominantly located.
- **Succession** is governed by the law of the person whose inheritance is involved. Such person is entitled to make a declaration to apply law of state of where he/she resides. e.g. If a Frenchman living in Italy for 30 years passes away, he can choose to apply Italian or French law to the division of his assets.

Example Radmacher and Granatino (2010). Married in 1998, wife had assets estimated at 100million£. She was German, he was French. Lived primary in England. Prenuptial agreements are not legally binding in England. For it to be valid, certain requirements must be met. Since the requirements were met it was ruled out in agreement with prenuptial agreement.

2. Law of the Place is to be applied for:

- **Possession, ownership and other rights in property** are governed by the law of the state where the property is located.
- **Criminal acts** will be judged by the law of the place where the wrongful act has occurred.
- **Tort Liability** is governed by the law of the state where the unlawful act occurred.
- **For the distribution of goods/services** the law of the place where the good was to be delivered applies.

Chapter 2: The Enforcement of Legal Rules

Structure of Legal Provisions

Art. 2 CC – Majority of age

Majority is fixed at 18. Gives access to capacity to perform an act for which no other age is required.

Art. 1498, subsection 2, CC – Payment of price

In absence of accord and no customs, payment just be made at time of delivery, in exchange for delivery.

Art. 2034 CC – Compensation for an unlawful act

Any deliberate or culpable act causes unjust damage to others and obliger person who committed act to compensate for damage.

Deduction: If somebody inflicts unfair justice to others, then the person must compensate for the damage inflicted.

For each single occurrence (referred to as “base situation”) (if...) the rule of law sets out the specific “legal effect” (then...); usually defines a conduct as lawful, compulsory or prohibited

The main characteristic of the legal rule is that it’s general and abstract: dictates a certain conduct valid for any number of situations → Logical scheme underpinning rule of law is invariable.

- **Complex-base situations:** when the base-situation comprises several distinct factual elements, all of which are necessary.
- Usually, in the case of complex-base situations, the relevant facts do not occur simultaneously, but sequentially and over a period of time.
- To decide which law must be applied, the court must interpret the **language and wording of the law** as well as the **material facts**.

Statutes and Rules

- **Article:** in the Italian Legal System (ILS) it is the lowest level of division in the main body of a statutory provision.
- Numbered in ascending order; Subdivided into paragraphs (or commi)
- Often, more than one article is required to infer the conduct prescribed.

The Civil Code is divided into Books, which are in turn divided into Titles, Headings and Sections. This allows to easily track articles and relate them to other statutory provisions.

The Interpretation of Statutory Provisions

- The meaning of Statutory Provisions depends on; the meaning the words take on every day (literal meaning), the use legislators put to them (legal meaning) and the changing social background where the rule is applied (evolutive meaning).
- **Interpretation:** Refers to the process by which a certain rule takes on a particular meaning
- “**identifying the meaning**” is necessarily limited to the interpretations that fall within the bounds of what is consistent with the text being interpreted (obviously can have more meanings, but we choose the most relevant according to context); and should be done according to non-arbitrary criteria (reasonable criteria).

Art. 12 CC – In the application of the law, one may not attribute to it a meaning different from that resulting from the manifest meaning of the words according to their connection.

A law that tells you how to interpret Statutory Provisions; Essentially tells you to focus on the meaning of the word in the specific context of the law

1. **Literal Interpretation** – To a single word corresponds a single “proper meaning”, although realistically that isn’t true; the meaning of the word depends on the given context.
2. **Teleological Interpretation** – The interpretation of words contained in a legal rule should be consistent with the aim of the rule itself (the intended prescribed conduct).
3. **Systematic Interpretation** – The parts should be consistent with the whole; the different words are interconnect
4. **Extensive interpretation** – reaches out beyond literal sense

Art. 3 Constitution – All citizens have equal social dignity and are equal under the law, regardless of sex, race, language, religion, political creed, personal and social level.

- Does Art. 3 also apply to foreigners? What is considered “citizen” → Applies to everyone!

5. **Restrictive interpretation** – (opp. to extensive) application of provision is stricter than literal sense

Art.2054, paragraph 3, CC – Circulation of vehicles

The owner of the vehicle has equal liability with the driver, if the former cannot prove that the transit of the vehicle occurred against his/her will.

Literal interpretation – not open to different interpretations e.g. **Art. 2 CC – Age of Majority**

- Mistrust of courts towards the genuineness of the statement of the owner who claims to have denied his friend permission to borrow car.
- In order to ensure uniformity in juridical interpretation the litigants may resort to the Corte di Cassazione whose judgement contribute to the harmonization of different interpretations.
- However, we must also consider the work of legal scholars, reflecting deeper changes in social life, which eventually find its way into the legal system

Analogy

- If base situation is not envisioned by law (no law exists); it is necessary to find a similar rule of law to be applied (Must find another similar situation by analogy and apply same rule)
- N.B. there must be a GAP in the legal system to have recourse to analogy!!
- Main difficulty of recourse to analogy is determining the extent of “similarity”

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. <i>Identify gap in the legal system</i> 2. Determine the specific purpose of the provision | <ol style="list-style-type: none"> 3. Does it apply to the case? 4. Refer to a similar provision – recourse to analogy |
|---|--|

Art. 1783, 1, CC – Responsibility for things brought into hotels

Hotel keepers are liable for any deterioration in loss or theft of things taken into hotels by guests.

- Liability provided by this article is limited to value of what has been deteriorated/lost/stolen, up to an equivalent of one hundred times the price of rental of the accommodation/day.
- This provision is applied by RECOURSE TO ANALOGY to *camping sites*, although diff. situations. BUT it depends.

- a. If the aim of the law was to compensate hotel guest who suffered a loss as a consequence of theft (for something that was presumably lost); this does not apply to a campsite.
- b. If the aim of the law was to ensure that whoever is away from home has a safe repository for things carried with them: no diff. between hotel and campsite.

Extensive Interpretation vs. Analogy

Where to extensive interpretation and interpretation by analogy converge and diverge?

- Both are founded on ratio legis... however, case ruled by EI is subsumed under the provision applying thereto; having recourse to analogy presupposes the law falls short (i.e. no direct provision applicable). Literal meaning of provision is critical!
- Extensive interpretation is only admissible if the case only falls under one provision which you want to interpret extensively. The case must therefore "subsume" under the provision.

Art. 2052 CC – Damage caused by animals

The owner of a **quadruped**, or one who makes use of it, for the period of such is liable for damage caused by the quadruped, regardless of whether the quadruped was in his custody or strayed or escaped unless they prove that the damage was the result of a fortuitous event.

- So what if the damage is caused by an ostrich? The law cannot be interpreted extensively because there is no way that Ostrich can be "subsumed" as a quadruped.
- ∴ There is recourse to analogy; it is assumed that the law aims to cover all damage caused by "animals".

Restrictions of the recourse to analogy:

- **Criminal provision** (*Nulla poena sine lege*); purpose of protection of the individual; no legal sanction can be applied to a person unless it is explicitly stated by law.
- **Extraordinary provisions** (presumption of *eadem ratio ceases*); refers to provisions that derogate from the general principles i.e. "no persons may take the law into his own hands"

Art. 2756 CC – Claims for services and expenses in connect with conservation and improvement

[The creator] for services and expenses in connection with the conservation and improvement of movable property has privilege on such property

- If immovable property is being improved (e.g. fixing a car), the garage has the right to retain the property until the service is paid for. ("right to retain property")
- This law goes against the general principle of "no person can take the law into his own hands" and is therefore considered an "extraordinary provision".
- Extensive interpretation is also inadmissible in this case; (i.e. does not apply to "immovable" as it cannot be subsumed under "movable" property).

The General Principles of the Legal System

General Principles = binding rules that make up the body of law.

More so than recourse to analogy, the general principles make up for possible deficiencies in the legal system by guiding courts in their decisions.

However, they may be distinguished from rules with a broader tenor known as "general clauses" e.g. the duty to perform according to "good faith" (fairness). The general clauses lay down the standard of conduct which the court will have to apply to a specific case.

Chapter 3: Legal Facts and “Acts”

The Concept of a Legal Fact and Act

A *legal rule* determines a *legal effect* to a “Legal Fact”. A fact is said to be “legal” when its occurrence falls under the legal rule.

“**Facts**” are proper occurrences vs. “**Acts**” are human conducts (human behaviors which are carried out knowingly and voluntarily).

- Facts: Birth (Art. 1) or Death (Art. 149)
- Acts: A contract (Art. 1321) or marriage (Art. 84)

- *Legal Acts* therefore produce correlative *rights* and *duties*.

- A distinction can be drawn between “mere acts” and “legal acts”:
- The particularity of “mere acts” is that the law ignores whether they have been committed willfully or voluntarily or even knowingly or unknowingly; the legal effects occur regardless of the intent of the person adopting the behavior.

- A further distinction is drawn between a person *solely adopting a certain conduct* and adopting the conduct *with the intention of pursuing certain effects*.
- e.g. if the *will* of both husband and wife to become married does not exist, the contractual marriage will not occur.

- A LAWFUL act is when a legal rule recognizes it as permissible
- An UNLAWFUL act is when it is in breach of the legal rule and falls subject to sanction.

Unlawful acts

The court must compare the conduct, considered as a fact, to the rule that forbids it, so as to assess whether such conduct violates the rule, following the rules of interpretation.

In **Criminal Law**, no crime is committed where no law provides for it. Criminal law also prohibits recourse to analogy.

In Private Law, the facts or issues are often assessed with reference to the aim pursued by the legislator (i.e. the safeguarding of determined interests), rather than the “omission of duties” (failure to follow prescribed human conduct)

Hence, it is necessary to determine whether the unlawful act goes against interests protected by the rule.

Types of unlawful acts:

- a. Criminal wrongs – go against the public interest, entail “criminal sanctions”
- b. Administrative wrongs – violate rules established in general interest of the community
- c. Civil wrongs – On one hand, unlawful acts breach a specific rule and are grievous to interests protected by the rule that was breached. On the other hand, a civil wrong is a conduct which:
 - i. Is directly grievous to a particular interest protected by law
 - ii. Causes damage to the aggrieved party

Civil wrongs entail civil liability, i.e. the duty to compensate for the damage inflicted.

The class of private wrongs falls into two categories:

- Contractual Wrongs: A “debtor” (he who fails to perform the obligation) harms the interests of the “creditor” (his contractual partner). The debtor is therefore under obligation to amend the damages caused.
- Non-contractual Wrong (or tort): The principle that “anyone who causes wrongful injury, either intentionally or negligently, is liable for damages”.

The Concept of “Legal Act” in the Civil Code

- The term “act” may take on different meanings according to the context; may refer to “behavior”, “action”, “practice” or even “wrongs”.
- “Act” may also have a narrower definition; the “capacity to act” refers to “the capacity to carry out all acts”
- “Legal Acts” means allowing the person to further their own interest, thereby exercising “autonomy”. This autonomy is relative and not absolute within the realm of private law.
- Written acts refer to the writing of the terms of a legal act: such document is also referred to as an “act”.

Validity and Effectiveness of the “Legal Acts”

In order for a specific act to come under the law, it has to coincide with the base situation envisioned by the law.

Torts

In the case of a tort, such coincidence triggers the obligation by the wrongdoer to compensate for the damage inflicted. However, it must first be established that

Art. 2043 CC – Tort Law

In the case of tort, the wrongdoer must compensate for the damage inflicted, given that:

1. The act was either intentional or culpable/negligent
2. The wrongdoer was legally competent
3. The injury was a direct and immediate consequence of the act
4. The injury is “unjust” (i.e. a violation of the law)

- Refer to the “essential requirements of a contract” (agreement, subject-matter, form and causa) to ensure the validity of a contract.
- **N.B** the validity of the contract does not entail the enforceability of the “act” itself; a contract may be valid and still be (temporarily) ineffective. In such cases, the provisions are subject to a contingent “condition” e.g. the contract will take effect only after a future date.
- Where the “act” does not meet all the requisites of the law, it will not generate the legal effects: it is invalid. A distinction can be drawn between voidability and annulment of a contract (ref Chapter 13).

Chapter 4: Persons

Legal Persons and the Capacity to Act

- Who is entitled to rights and duties? (is a child entitled to the assets of the parents?)
- Who may be vested in rights and duties? (can a child sell the shares?)

“Persons” are 1) vested with rights and duties and 2) can enter into legal relationships. The degree of authority and freedom to act within a legal system varies.

Legal Capacity

Art. 1 CC – Legal Capacity (Capacità giuridica)

Entitlement to rights and duties (corresponding to the notion of legal person). Originates at birth.

- Legal capacity is lodged indistinctly in all human beings as it originates at birth.
- **Viability**: aptitude to continue to live. No requisite for legal capacity!
- ∴ You can draft testamentary dispositions in favor of children-to-be or even unconceived persons as long as they are conceived by person living at time of disposition (i.e. grandfather can draft that grandchildren will receive part of will, as long as son (father) is alive. If the person does not have children, then the will is invalidated, and normal law applied.

Legal capacity is lodged in the person at birth – why is this so important? e.g. Father passed away, mother passes away at birth If child is still-born, all estate goes to relatives of Mother; if child is born, he inherits everything; once the child passes away, all of the estate goes to relatives of the child (so of Father and Mother).

- To avoid this speculation **“Presumption of simultaneous death”** = if two persons die in the same circumstances, it is presumed they died in the same moment.
- Legal capacity ends solely upon death.
 - a. Notion of “civil death” no longer exists in the Italian Legal system (i.e. a person condemned to imprisonment is no longer subject to deprivation of legal capacity). **Art 22. CC** “No person may be deprived, for political motives, of his legal capacity”
 - b. Difficult to define **Death** (Italy) = “irreversible cessation of all brain functions”

The identification of a natural person is closely related to his domicile and of their residence.

Art. 2 CC – Capacity to act (Capacità di agire)

Entitlement of legal person to fulfil acts under the law (i.e. rights to exercise rights and duties).

- The legal system presumes (*iuris et de iure*) that an individual under 18 does not have the physical and mental ability to assess the substantial implications of his/her actions.
- ^It is assumed that once you turn 18, you understand the responsibility of capacity to act.
- **Legal fiction** = it is of no importance to the legal system if there is a brilliant 17-year-old able to assess responsibility of actions.

N.B. Not all contracts entered into by a minor are voidable. A minor with sufficient ability to understand may perform valid legal acts in the name of and in the interest of a person who has the capacity to act i.e. acting as the “agent”.

Legal Incapacities

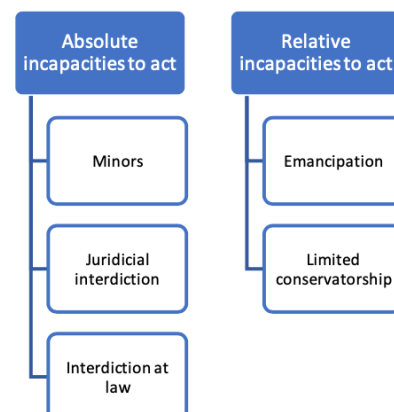
- Contract is VOIDABLE if an individual with NO capacity to act enters into a contract.
- Annulment of contracts exist to PROTECT the contractual party with no capacity to act!
- The contract is valid and binding until the court annuls it!

Incapacities to act: the persons lacking capacity to act may not validly perform any act under the law

- A **legal representative** is appointed to make up for the incapacity to act (or, if the representatives are unfit/unavailable, a guardian).

ABSOLUTE INCAPACITY TO ACT

- **Juridical interdiction:** "Persons routinely impaired in their mental ability" - no capacity to act
 - Objective of **protection** - the aim of such laws is to PROTECT the individual
 - Can be revoked (e.g. if a person has a brain tumor and then is cured)
 - Must be issued by court - request submitted by relatives
 - Person may not marry, draw up a will or vote
- **Interdiction at law:** Persons condemned to 5+ years in prison have no capacity to act
 - Objective of **sanction** (in addition to prison time)
 - Loose right to manage their own assets, until released from prison
 - Person may still marry, draw up will and vote



RELATIVE INCAPACITY TO ACT

- **Emancipation:** granting (for "serious reasons") the capacity to act (a minor has to be judged sufficiently mature to be emancipated, able to recognize the implications of legal acts)
- **Limited conservatorship:** appointed a conservatee to care for their assets in the case of *Habitual mental impairment* (insufficient for juridical interdiction)
 - Habitual use of alcohol or drugs
 - Excessive profligacy
 - Blind or deaf-mute at birth, if not supported by adequate education
- Acts of NORMAL administration may be validly fulfilled - EXTRAORDINARY administration no (e.g. no need for consent to live in an apartment, but cannot transform it into a hotel)
- Only in the case of extraordinary administrations can a person with relative incapacity to act seek annulment of contract (purpose of PROTECTION)
- In the case where an extraordinary administration must be performed a guardian/conservator (curatore) is appointed, whose decision supports that of the person unable to act, he provides assistance. The guardian must express consent to the envisioned transaction.



"Support Administration" supersedes the distinction between general and partial incapacities to act; a person who finds themselves in a partial/temporary impossibility to provide for their own interests may be assisted by an "administrator supporting them", appointed by the competent court. This is more flexible than the incapacities provided for by law.

Natural Incapacity

- Applies when a person lacks the ability to fully assess the legal implications of his statement (e.g. under the influence of alcohol)
- Natural incapacity is a cause for annulment of any legal act performed provided that
 - a. The natural incapacity existed at the time the legal act was performed
 - b. In the case of a **unilateral act** (only one declaration of will, no agreement/contract), it is "seriously prejudicial" to the person who did not have the capacity to understand/intent.
 - c. In the case of a contract, the other party acted in bad faith (i.e. he knew the other was lacking ability to understand and intend).

N.B. Requirement of "bad faith" is not needed in case of incapacities provided for by law

The aim of these provisions is to protect the party in GOOD FAITH → reliance in validity of contract is protected → objective of promoting circulation of goods

Capacity to act of legal entities

At law, the entitlement to rights and duties is not solely vested in natural persons (legal capacity), but also in collective entities (**artificial persons** i.e. associations, foundations and companies).

Legal persons, contrarily to collective entities, have a "**legal personality**" essentially meaning the structure/entity; degree of "liability" or the company (separation between assets and liabilities of the entity and of the shareholders/members)

Legal Persons:

A. *Registered Associations*

- **Association**: Collective organization pursuing a **non-profit** objective (diff. to company).
- Usually, members pay a fee to pursue the objective of the association but may NOT recover the fees paid and have no rights over the assets of the association.
- The most important associations are political parties and trade unions
- **Registered associations**: Becomes distinct legal entity, so associations and its assets are liable for the actions (not a director).

B. *Foundations*

- **Foundation**: May be set up by unilateral act. Founder(s) must direct a proportion of the money to a useful public objective (**non-profit**), which may not be modified by the foundation. A foundation does not exist unless duly registered.

C. *Capital Companies (società di capitali)*

- Includes: Stock Companies, Limited Stock Partnerships, Limited Liability Company
- Have the status of a legal entity i.e. limited liability equal to the (capital) investment made
- There exists an established board of directors and shareholders
- Generally, there are no restrictions in the transfer of stakes.
- Personal features become irrelevant participation is objectified Attracting small investors (Requires: person who holds the shares is *immaterial* to the trading itself) (i.e. stock trading allows investors to buy and sell shares at any time without consequences to liability)

Collective Entities:

D. *Non-Registered Associations*

- If an appointed director, in charge of representing the association, spends all the association's reserve fund (fondo comune) without consent, who is liable? (**Art. 38 CC**)
The person who acted on behalf of the association is subject to joint liability for its debts.

E. *Committees*

F. *Partnership Companies (società di persone)*

- Includes: Simple Companies and Company in collective name
- Each partner is a "director" subject to joint and unlimited liability (Art. 2740 CC)
- Stakes may not be transferred without the consent of other partners.
- Exception is a so-called "Simple limited company" where there are two types of partners: general partners (unlimited liability) and limited partners (liability restricted to their fixed contributions in the partnership).

Chapter 5: The Legal Language about “Properties”

The Concept of “Properties” under the Civil Code

- **Properties** are “things that can form the subject matter of rights” (Art. 810 CC)
- When we say “things” we only refer to ‘material’ objects (cannot be character traits); whatever is empirically verifiable and quantifiable. In this sense, only relatively scarce things are considered property (for example, the sun and air are relatively infinite and thus unquantifiable).
- Furthermore, only things that “can form the subject matter of rights” can be property.

BUT it is admitted that a “thing” may be **intangible** (for example properties subject to copyright). This is a peculiar form of ownership referred to as “intellectual property”.

Furthermore, under **Art. 813 CC** – the rules applicable to “movable” things are applicable to “all rights that do not concern immovable things”, for example the right to receive a certain service. Thus, the concept of properties shifts to refer to the **RIGHT** themselves (more so than the subject matter). Hence, two complementary definitions may delineate the concept of a “thing”

- i. **Art. 810 CC** – “property is any UTILITY that may be subject to rights”
- ii. **Art. 813 CC** – “property is any RIGHT that has an economic utility as its subject”

More legal than economic definition: “property is any interest protected by law”.

Movable and Immovable Properties

Art. 812, P1, CC - Immovable Property

Immovable property refers to anything affixed to the ground for a permanent or temporary purpose and everything in general that is artificially or by nature incorporated into the ground.

Movable property: anything that isn’t “immovable” (i.e. not a house).

- Laws regulating transfer of rights for movable property, aim to be rapid and simple.
- The high value of some movables does not modify the rule/exempt such transactions. As a general rule.
- There are no public registers for tracking the rights on movables i.e. they do not require written contract to transfer the property!

Replaceable and irreplaceable; consumable and non-consumable things

- Mass produced and serial things are considered **replaceable** inasmuch as each single manufactured item bears the same features and characteristics of other items.
- By contrast, a piece of ancient furniture bought at an antique shop is **irreplaceable**.
- However, the classification of a thing as **replaceable** or irreplaceable depends on the perception of the item by the parties involved (e.g. even if it is a “serial” item it may be of sentimental value and thus considered irreplaceable)
- Why does this matter? In the case of destruction of an irreplaceable thing, implies impossibility to carry out performance (impossibility to replace the object under due law).
- Money is essentially also a “thing” although it is the economic measure of all other things.

A further distinction is made between **consumable** and **non-consumable** things. This is of importance because the gratuitous loan for the use of a “thing” generally refers to non-consumable things.

Relations Between “Things”

Appurtenance defines some “thing” which is destined permanently to the service or ornament of the former (there exists in such case a principal and a secondary thing i.e. the appurtenance).

With reference to movable and immovable things, letter boxes, hedges, garages are appurtenant to the houses they belong to. Therefore, any transaction concerning a principal thing is inclusive of its appurtenances unless explicitly stated otherwise. However, the things remain distinct and can thus be subject to different transactions.

Appurtenance ≠ Compound components: With reference to **compound things**, all components are essential for its integrity (whereas the principal maintains its own identity even without appurtenances).

The Human Body

- The boundaries of a “thing” stretch when it comes to the fundamental emotions or sentiments for human life. Therefore, traditional or religious objects do not follow the general rules governing acquisition and right of ownership.
- The human body has even more detailed and complex rules: while a person cannot dispose of his own body nor should violate mandatory rules, public policy or morals; he is the owner of detachable parts of his own body. However, blood (and likewise corpses) cannot be sold for money (only donated).

Natural and Civil Fruits

- **Natural Fruits** derive directly from the thing, with or without human intervention (e.g. agricultural products, animals, woods, products of mines). In other words, natural fruits are, for a period of time, part of the integral thing. As such fruits may be subject to transactions BEFORE the separation from the integral part occurs, one can dispose of them as “future movable things”.
- **Civil fruits** are the compensation received by a person from another for the enjoyment of a thing. In such cases, no separation occurs.

Public and Private “Things”

- **Art 42 Const.** “Ownership shall be public or private. Economic assets (means of production) may belong to the State, to public bodies or private persons”.
- This distinction is extremely important at an operational level since different legal rules apply to the circulation of public and private property.
- All public property must be:
 - a. Owned by the state or by other public bodies
 - b. Destined for public utility or for public service.
- Private property may also have a public utility. Hence, property of artistic, historic and archeological interest may be private but is nonetheless subject to special laws.

Chapter 6: The Protection of Rights

“Protection of Rights” is the title of the Sixth Book of the Civil Code; it contains instruments aimed at protecting and enforcing legal situations (prevent disputes and render predictable their resolution). Such instruments include public records, statute of limitation and expiration.

Public Records

- Lawmakers aim at ensuring certainty of legal situations.
- In private law, many legal proceedings concern the CIRCULATION OF WEALTH; to ensure efficiency of circulation, the legal status and facts must be clear and certain.
- Legal Knowledge is the concept that legal facts must be publicized to ensure people are aware of them.
- Publication serves the purpose of:
 - o To make public a certain fact or act so that no person can claim their ignorance.
 - o To inform third parties of a transaction has been concluded (& make it irreversible)
- The forms of registration of legal acts vary according to their nature but they all serve the same purpose; entrench rights and duties preventing disputes/facilitate their resolution.

Evidence

Proof and Evidence

- Note: “proof” is the outcome of “evidence” (material assertion of a fact). Evidence doesn’t always lead to proof.
- The law aims to protect the interests of natural and legal persons, but they must also look after their own interests as they pursue relations
- Parties must seek the enforcement of their own rights (initiate legal action).
- The plaintiff and the defendant also bear the burden of seeking their own evidence.

- In juridical proceedings the **plaintiff** bears the burden of proof (prove facts upon which the right is based).
- The **defendant** has to prove the facts that extinguish or limit the rights asserted by the plaintiff.
- **Legal presumptions** are the statutory provisions that introduce exceptions to the general rule.

- **Evidence** = The elements of proof used for the establishment of a fact
- Evidence is material to the resolution of court cases as it allows to reduce the degree of uncertainty of a fact.
- In the case of criminal law, substantial evidence is required to pass a sentence.
- **Documentary evidence**: any document holding or preserving record of the occurrence of a fact/act (film, written document, tape or computer data). The court holds the discretionary power to evaluate relevance of the evidence (extent to which it can be considered “proof”)
- **Legal evidence**: includes notarial deeds, public statements, authenticated documents, confessions, declarations under oath – such evidence must be held truthful and cannot be questioned in court.

Testimony

- Testimony by witness (i.e. persons who have direct knowledge of the fact/issue) is a cardinal form of evidence but may not always be admissible.
- There are reasons to suspect biases in testimonials arising from personal relationships or misunderstandings (false impressions).

- The court holds the discretionary power to decide on the admissibility of testimony.
- However, laws exist that limit the admissibility of testimonials:
 - o Some contracts (e.g. settlement agreements and insurance contracts) must be proved in writing. Only in the case of loss/destruction without fault of the document makes testimony admissible.
 - o Testimony is always admissible for disputes over national contracts for the sale of goods.

Confessions and Oath

- A **confession** is "the statement made by one party of the truth of facts unfavorable to him or favorable to the other party"
- A confession is not effective unless coming from the person who has the capacity to dispose of the right to which the case related.
- A confession is either **judicial** (made in court) or **extra-judicial** both are legal evidence but extra-judicial must be proved.
- A confession cannot be revoked unless it is proved by mistaken facts or under influence
- In criminal proceedings the court is not bound by confessions given a confession of guilt the defendant can still be proven "innocent".

- An oath (or assertion as fact as truthful) is a last resort; it is used when insufficient available evidence to establish a fact.
- A "**decisory oath**" is when a party cannot prove his right, they can petition the counter-part to make statement under oath = partial/final resolution of the case.
- Refusal to make statement under oath means the court will take the opponents evidence as truthful and judge the case accordingly (choice not to defend yourself to avoid making it worse).
- The request may be referred back to the original petitioner: he must take the oath or lose the case.
- A petition for oath CANNOT be submitted:
 - o If the case concerns rights which cannot be disposed of by the party
 - o On a wrongful act
 - o On a contract which requires written form for validity
 - o To deny a fact which has occurred in the presence of a public official
- A statement under oath is legal evidence; consider it as corresponding to the truth
- **Perjury** (lying under oath) is a criminal offence

Presumptions

- A **presumption** is the reasoning that allows to discover an unknown fact starting from a known (proven).
- Presumptions help the court in the establishment of a fact; proven facts allow other facts to be inferred (presumed).
- **Simple-presumptions** are, for example, given the force of braking and length of tire tracks to establish the speed at which a person was driving.
- Courts must always act with caution and only admit simple-presumptions when they are "serious, precise and concurring".
- Presumptions are admissible only when testimony is admissible (cases above) and cannot effectively be used to discharge the burden of proof (rather aid the assessment of evidence).
- **Legal-presumptions** relieve the party from offering any evidence, presuming a fact to have occurred (even with no evidence).

- Legal presumptions are ABSOLUTE (**luris et de iure**: no evidence to the contrary).

Certainty of Rights and Lapse of Time

Limitation

Art. 2934 CC – Limitation of actions

All rights are extinguished by way of limitation whenever the person holding the right fails to exercise it within the time prescribed by law.

Why does a limit of time exist?

- The certainty of legal relations is deteriorated when a right is not exercised.
- Legal system disfavors inactivity (priorities person who wants to be freed from old obligation)
- Time limits are mandatory. Interested parties cannot negotiate the time limits set forth in statutory provisions (until it expires).
- Limitations do NOT apply to:
 - i. Inalienable rights (e.g. personal rights for example to marital and family status)
 - ii. Other rights (e.g. claim to voidability or nullity of a contract)

The limitation of time is subject to the following rules:

- Lapse of time: inactivity is correlated to a potential activity (time starts running on the date the right can be enforced)
- Suspension: temporary suspension of a limitation for which the period of time is stopped. This may occur due to the condition of certain persons or the relationship between parties.
- Interruption: from the moment an action is brought for redress by the holder of a right.
- Time-limit: when rights are extinguished by limitation after the lapse of ten years.
- Short limitations exist for a variety of cases e.g. compensation for damages. In such cases the time limit is 10 years.
- Presumptive limitation applies in day-to-day or occasional transactions where parties are bound orally rather than in writing. In these cases the time limits range from 6 months to 3 years.

Forfeiture

- Forfeiture is the debarment from action by failure to observe the time-limit within which the law/provision lays down that a certain act must be formed.
- A certain act has to be carried out in a (relatively short) amount of time to ensure **certainty**.
- Rules to interruption or suspension of limitation are inapplicable.

Litigation

Legal Standing

- Having a “right” means a person holds the power of imposing correlative duties on others.
- The law enables a person to seek **action** (enforcement/claim of a right in court).
- Hence it is important to understand procedural rules (how to resolve dispute) as well as substantive rules (rights and duties).
- Not everyone can submit a plead. “In order to bring an action to a court of law, it is necessary to have an interest therein” (**Art. 100 CC**); more specifically, an interest under the protection of law.

Qualified and collective interests

- Legal action is not meant solely for the protection of rights.
- Sometimes the court grants a person with a “qualified interest” to bring an action to court.
- The legal relationship between “interest” and “legal standing” is controversial with respect to the protection of rights of [collective/diffuse interest](#) (of a plurality of people).
- In Italy a petition or “popular action” can be presented to the Antitrust Authority.

Elements of Civil Procedure

- The Italian system consists of two courts: ordinary and administrative jurisdiction.
- [Ordinary jurisdiction](#) is administered by career judges who have competence for civil and criminal matters.
- [Administrative jurisdiction](#) ascertains whether an administrative body was incompetent (no power to do what it did), exceeded its powers or violated a law.
- The plaintiff seeks to obtain judgement in his favor, but defendant may also file a counter-claim or admit his liability.
- Steps of legal action:
 1. The court must determine whether the claims made have ground by verifying the facts and evidence.
 2. Court issues a judgement enforcing decision through [coercive proceedings](#).
 3. If the parties are unsatisfied with the rulings they can appeal to a higher court. The courts of first instance are called [Tribunals](#) and the [Justices of Peace](#) (cases limited economic value). The court of second instance “[Court of Appeal](#)”. The third instance is the “[Corte di Cassazione](#)” (this court only holds the power of question of law and not question of fact i.e. cannot revise the facts).
- Coercive proceedings can be initiated on the group of other written: **judgement, injunctions, bills of exchange and public deeds**. The party has 10 days to comply otherwise the ruling will be enforced upon them.

Arbitration

- Drawbacks of bringing cases to court: long and slow! Make take years to resolve.
- [Arbitration](#) may be used as an alternative dispute resolution mechanism if the parties retain the court proceeding to be biased.
- [Arbitrators](#) are called upon to judge/decide a disputed issue between parties (out of court!).
- The final decision is referred to as [arbitral award](#) and has same effects as judgement.
- Arbitration may take on the nature of a NEGOTIATION and settlement agreement.
- Arbitration may either be “[statutory](#)” (according to law) or “[equitable](#)” (according to equity).

Chapter 7: The Constitution and the Law

Before examining the branches of private law in detail, it was important to understand the legal terminology (as we have done in the previous chapters).

The **Constitution of the Italian Republic** is a major source of guidance and inspiration; it not only lays down the structure and workings of the State but provides guidance for conduct in societal life.

The Constitution lays down the rights and duties of citizens (personal rights and freedom), the ethical and social relations (family, school, art), economic relations (ownership, enterprise, labor) and political relations (constituents, defense).

Constitutional Rights

Art. 2 Constitution

The Republic recognizes and guarantees human rights, as an individual and in the social groups where he expresses his personality, and it demands the fulfillment of the unalterable duties of political, economic and social solidarity.

- The early definitions of rights and persons help define the relationships between the **state** and its **citizens**. This relationship hinges on the "primacy" of a person and aims to focus on the protection of fundamental rights vested in the person as an individual and a member of a society.
- The enumeration of rights also covers social rights as there is a totalitarian bond between the State and Society – and conversely a libertarian relationship between individuals and the State.

The Economic Constitution

- The Constitution is concerned with underlining set of rules for fundamental aspects of the economy: ownership, enterprise, labor etc.
- After WWII when Italy was drafting the Constitution, the different political parties (liberals, Catholics, socialists, communists) were sharply divided over basic questions about the State's role in the economy. However, they were all united by the same aspiration to re-establish the Italian State after the war.
- Italian communists (very prominent) took inspiration from the Soviet approach, while liberals were more lenient towards the so-called "laissez-faire".
- For this reason, the Constitution shows some inconsistencies and contradictions.
- This being too controversial for their personal agenda, lawmakers decided to go about their business with only a superficial concern for the broader picture of the Constitution.
- While according to Art. 41 "private economic enterprise is free", the constitution ultimately names the State as the key player and referee of the economic game; they set the rules!
- This clearly distorts the rules of the market as State-owned business (unlike some Privately-owned companies that are priced out and forced to close down) enjoy unlimited resources and produce with disregard towards cost efficiency (less incentive for productivity).
- The Constitution was thus responsible for placing large swaths under control of the state, "insulating" them from the laws of the market.

Private Ownership

- The Constitution of 1948 (like others before it) recognize a series of INVIOLEABLE rights present in the right of (private) ownership. However, this is not stated as a "fundamental right" and leaves room to interpretation: the lawmakers can maneuver it.

- We cannot know how far the lawmaker can go imposing *limitations* of private acquisition of property: their main aim is to make it "accessible to all".

European Treaties

- When Italy became a member of the EU, its sovereignty had to adjust to a broader statutory framework ("supra-national entity").
- The concept of a social market economy encouraged by the EU is based on "the principle of an open market economy with free competition".
- This ignores economies based on self-sufficiency or autarchy and promotes a market untouched by national boundaries (free movement of persons, services and capital).
- The purpose of the EU is to ensure that all members attain to FREE and FAIR competition.
- To ensure this, the EU binds member states to a policy of market deregulation and liberalization to break up monopolies and reduce subsidies. Furthermore, it binds them to a social policy aimed at promoting workers' rights (to regulate the effects of a free-market economy).

A Three-Pronged System

- Originally, private law was solely concerned with affirming the ownership of material things.
- The underlying concept of "the right of ownership" is that of an **absolute right**, preventing anyone other than the owner with interfering with the enjoyment of the thing.
- Thereafter, the emphasis shifted to the "law of obligations", which gained prominence over time.
- In the 20th century, private law finally moved its confines beyond areas of economics to encompass the fundamental interests of persons. The law moved to affirm the private relations between persons as a respect of inalienable rights (freedom, dignity, health and privacy).

Chapter 8: The Right of Ownership and other Rights in Property

The Right of Ownership

Art 832 CC – Right of ownership

The owner has the right to enjoy and dispose of things in a full and exclusive way within the limits of and observing the obligations established by law.

- a. **Enjoyment:** direct (collecting fruits yielded) or indirectly (collecting dues paid from someone else who pays to enjoy it)
- b. **Disposal:** legal enjoyment (sell, destroy, lend) i.e. modify the legal status of the property
- c. **Fullness:** the right of ownership is carried to the point of permitting the owner to destroy a commodity which he owns (permitted to do anything that is not prohibited...)
- d. **Exclusivity:** the right of the owner to exclude anyone else from the enjoyment of the thing.
- e. **Limits and obligations:** the rights are limited by law i.e. the law applies a “brake” to what the owner may do (e.g. The owner cannot perform “emulative acts” i.e. cause annoyance or harm others with their property OR Action of revendication (below)).

Art. 948 CC, subsection 1 – Action of revendication

The owner can recover the thing from whoever has possession of it or is holding it, and can prosecute the action even if that person, after the complaints, has ceased to possess the thing.

Property may be owned by **legal persons** as well as **collective entities**; in this case the rights of individuals are far removed from rights over the individual property (e.g. an owner of a stock is not an owner of the building of a company).

The new economy (well beyond the industrial age) has led to the dematerialization of wealth (importance of “intangible” assets). This meant that the concept of “property” had to adapt to immaterial values. In that sense, the very concept of rights of ownerships is questioned; how can we dispose of immaterial property?

Ownership of Land

- Rights governing ownership of immovable property is important in economy.
- Since land ownership also affects neighbours/surrounding community, laws relating to “land ownership are subject to specific rules in the public interest” (**Art. 845 CC**).
- Land law concerns two things: **relationships between neighbours** and **urban planning**
- Rights vested in land ownership concern all the subsoil as well as the air above it BUT the owner cannot oppose activities of third parties in these two areas.
- Acquisition of ownership generally requires a transfer of title, through contract or succession. Both of these are modes of acquiring ownership by **derivative title** (i.e. the party to whom ownership is transferred in in the same legal position of transferring the right).

Other Rights in Property

- These rights in property facilitate either enjoyment or security.
- **Mortgages and pledges** are granted by the owner of a movable/immovable to offer security to a creditor.
- **Mortgages** include superficies (building lease), emphyteusis (long lease), usufruct, use (exclusively collect fruits), habitation (right to inhabit in a house) and Praedial servitudes.
- **Limited rights in property** are a fragmentation of ownership; subtraction of particular rights from the bundle granted to third parties (do not hold all the rights of ownership)

Art. 981, paragraph 1, CC – Content of the right of usufruct

The usufructuary has the right to the thing (receive its fruits) but must have regard to its economic destination.

Usufruct

- The main obligation of the usufructuary is thus to respect and preserve the economic substance and function of the good.
- **i.e.** If you usufruct an apartment, you are responsible for maintaining it and not transform it into a hotel without the consent of the original owner. However, you are allowed to rent it and collect the payments.
- A right of usufruct may be for a limited time or until death
- **Bare ownership** refers to the sale of a part of ownership (not the “full” ownership). i.e. he wants the next owner to grant him right of *usufruct* at the time of transfer of ownership. The bare owner also holds the right to be returned the good at the end of the usufruct period. Either way, after 30 years, the bare right of ownership becomes full and complete again.
- **N.B.** One who has possession (*usufructuary*) cannot acquire ownership of it by usucaption!

Main obligations of the usufructuary:

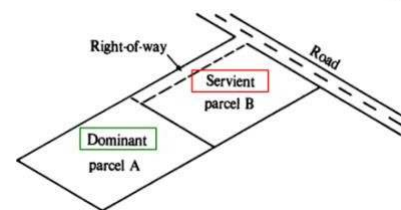
- Return the thing upon expiration of the usufruct
- Exercise an ordinary (standard) due diligence in the enjoyment of the thing
- Draft an inventory at their expense and give suitable security
- Pay expenses related to the custody, management and maintenance of the thing (the owner covers extraordinary repairs)
- Pay taxes and any other obligations related to revenues from the thing

Art. 1027 CC – Content of right

A predial servitude consists of a burden imposed on a land [Servient] for the utility of the other land [Dominant] belonging to a different owner.

Predial servitudes

- Relations between owners of adjacent pieces of land are subject to certain rights and duties.
- A **servitude** consists of a burden imposed on land for the utility of another land belonging to a dif. Owner.
- **e.g.** A servitude consisting in a *right of way* allows the owner of the Dominant land to walk over the servient piece of land next to it, that of the neighbours.
- **Dominant land:** The piece of land which benefits from the establishment of a servitude.
- **Servient land:** The land subject to the servitude *i.e.* on which the burden is imposed.
- General principles applicable to servitudes:
 - a) *Nemini res sua servit:* A servitude is a property interest on somebody else’s land *i.e.* they bind the LAND not the OWNERS (if the owner of the servient land sells it, the servitude will remain on the land, binding the purchaser).
 - b) Servitudes will have to be exercised “civiliter” by creating the minimal burden on the servient land.
 - c) *In faciendo consistere nequit:* Servitudes cannot consist in an obligation of doing something by the owner of the servient land. **e.g.** If the owner of the servient land is under a duty to carry out maintenance works, the latter is not the content of servitude.
 - d) *Praedia vicini essere debent:* The pieces of land must be “relatively” close to each other



- Servitudes can be compulsory or voluntarily constituted:

Art. 1051 CC – Compulsory right of way

The owner whose land is surrounded by others' land and who does not have access to the public way [...] has right to obtain a right of way over neighboring land.

- Other compulsory servitudes are the right of water and right of way to power lines)
- Servitudes can also be constituted by USUCAPTION or by "destination by the head of a family" (i.e. if the land is successional divided between two heirs).
- The judicial decision of a servitude establishes the conditions and determines the **indemnity** due to the owner of the servient land (equivalent to the damage caused by the servitude)
- The servitude can consist of a right to *use* or *not to use* one's own land. Hence, a distinction is drawn between:

<p>Affirmative Servitudes = servitudes entitling the owner of the dominant land to a "direct" use of the servient land. e.g. right of way; right to collect water etc.</p>	<p>Negative Servitudes = consist of an obligation NOT to do by the owner of the servient land e.g. servitude to not build</p>
<p>Continuous Servitudes In order to exercise them, no action whatsoever has to be taken e.g. servitude to not build</p>	<p>Discontinuous Servitudes An active conduct by the holder of the servitude is necessary e.g. right of way; right to collect water etc.</p>
<p>Apparent Servitudes Apparent and permanent "infrastructure" is necessary in order to exercise the servitude e.g. right of way; right to collect water etc.</p>	<p>Non-apparent Servitudes No apparent and permanent "infrastructure" is necessary in order to exercise the servitude e.g. servitude to not build</p>

- The servitude ceases to exist by way of **mergers** (servient and dominant land united by one person) or by **limitation** (if the servitude is not exercised for a continuous period of 20 years)
 - both of these situations may be reversible.

Common Ownership

- Two or more persons may have common ownership. Common ownership may be:
 - o Voluntary (e.g. purchase something together or agree to join land)
 - o Incidental (e.g. land is inherited)
 - o Forced (e.g. owners of two floors of a building are common owners of land)
- Unless stated otherwise, things purchased as a married couple are common.
- Generally, the legal system doesn't encourage common ownership as it is an obstacle to speedy circulation of wealth. Hence:

Art. 1111 CC – Dissolution of common ownership

Each participant can always demand dissolution of common ownership (regardless of his share). The agreement to remain in common ownership for a period of no more than 10 years is valid. If it was stipulated for a greater period, it is reduced to ten years.

Art. 1110 CC – Shares of participants

The shares of participants in common ownership are presumed to be equal (unless stated otherwise).

Chapter 9: Possession

- **N.B.** Ownership ≠ Possession (= acting like the owner, having power over an object irrespective of whether he is entitled/not to have such power)

Art. 1140 CC - Possession

- Possession is such power over a thing as is expressed in an activity corresponding to the exercise of ownership or other limiter right in property.
- One can possess directly or through another person who retains the thing.

- Depends on "acting" as the owner of an object. You can possess an object irrespective of whether you have material availability of the thing or not (e.g. owner of an apartment).
- Possession can also be acting as though you are vested with limited rights in property; hence, possession is *vested* in ownership, in usufruct, in servitude etc.
- **Detention:** A person may possess through another person who retains the thing (the "detainer"). This person does not act in a way as though to exercise right of ownership (e.g. he pays rent so he is clearly not "possessing" the thing). Detention may have negative connotations as though holding something unlawfully.

Acquiring the Right of Ownership

Although normally the owner and the possessor are the same person, this is not always the case. For example, a thief is a possessor although he has no right of ownership over the thing (not the owner).

Possession means title of ownership (*possesso vale titolo*), as long as requirements met:

Art. 1153 CC – Effects of acquisition of possession

Any person to whom movables are transferred by another person who is not the owner, becomes the owner by way of possession, provided he/she is in good faith at the time of transfer, the movable is delivered and there is an appropriate title for transfer of ownership.

- Good faith – No knowledge of infringement of right of the other person
- Physical retention – Transfers of the movable
- Title to purchase – has entered into contract that transfers right of ownership

N.B. Does not apply to IMMOVABLE property (real estate), registered movables (motor vehicles, ships, planes) (since it is easy to verify if the seller is the owner or not) and universality of movables (since it will not directly promote circulation of wealth i.e. aim of legal system).

Art. 816, paragraph 1, CC – Universality of Movables

Universality of movables refers to a plurality of things, belonging to the same person and having a unitary destination (e.g. a collection of coins or stamps) (N.B. A ≠ universality of movables; universality of things!)

The aim of this provision is to promote the circulation of wealth by protecting the prospective purchaser (consumer), allow buyers to enter into transactions freely without being scared of the consequences due to other's infringement of rights.

The right of usufruct, the right of use and pledge are acquired in the same way!

Prescription (Usucaption)

- **Usucaption:** Acquisition of ownership (of a movable or immovable), by *original title*, through continued and uninterrupted possession over a pre-determined period.
- Justification of acquisition through usucaption: CIRCULATION OF WEALTH!
 - o By affirming the *situation of fact* (possession) over a period of time as *situation at law* (ownership), the legal system pays tribute to need for certainty.
 - o Rule promotes active use of resources rather than property lying dormant.
- *Ordinary term* for right of ownership is **20 years** (immovables)
10 years real estate, 3 years registered movables (if requirements met: good faith, duly registered and appropriate title), 10 years movables (if requirements met: good faith and delivery).
- Possession by means of *clandestine* actions do not account as usucaption.
- **All** limited rights in property may be acquired by way of usucaption (e.g. servitudes)
- Usucaption is a form of **possession by accession** i.e. the successor may add his period of possession to the possession conveyed.
 - e.g. If I acquire a house from a person who is not the legitimate owner of the house, after 20 years of "possession" I acquire it by usucaption. I do not have to own it for 20 years consecutively, as long as 20 years have passed since the misappropriate sale (cumulated!).

Presumptions that assist possession

- 1) **Art. 1142 CC - Presumption of intermediate possession:** If a person can prove that he was in possession 20 years ago, and is currently in possession, it is assumed that he is was in possession in the intermediate time period.
- 2) **Art 1141 CC** - The person who actually has material availability over the thing is presumed to be the possessor (rather than detainer).

Action for Recovery of Possession

Art. 1168 CC – Action for Recovery of possession

A person who is violently or secretly stripped of possession can sue the taker for recovery of

- The law protects possession against any violent or secret deprivation.
- This provision is NOT valid if you forcefully "revendicate" the thing by violently stripping the thief and reclaiming possession of your belonging.

Art. 948, subsection 1, CC – Action of revendication

The owner cannot recover the thing from whoever has possession of it, and can prosecute the action even if that person, after the complaint, has ceased to possess or to hold the thing.

- Only the state has the monopoly to use force – this aims to prevent individuals from having "recourse to arms" i.e. take law into their own hands (which is a criminal offense itself!)
- Rather than deciding immediately which parties has right to hold/not the thing, the legal system orders a temporary restoration of possession (restitution of the thing to the person who has been violently stripped of it).

Two ways of acquiring right of ownership:

- a. By ORIGINAL TITLE - independently of the previous owner (*occupation, found movables, usucapion*)

Art. 923 CC - Things capable of occupation

Movable things that are not owned by anyone can be acquired by occupation. These would be abandoned things and animals that are hunter or fished.

Art. 927 CC - Found Movables (\neq abandoned things)

Whoever finds a movable thing must return it to the owner/ or to the mayor. If, after one year from advertisement of found thing, the owner has not come forward, the finder acquires it.

- b. By DERIVATIVE TITLE - dependent on the previous owner (*contract, succession*)
- If it turns out the person who sold you the thing was not the owner, you are consequently not the owner by derivative title.
 - **Possession by succession** is when possession continues to the heir after decease.

Chapter 10: The Law of Obligations

The term **obligation** refers to a relationship between a creditor and a debtor, who is under a duty to carry out a certain performance (either give, deliver, do or refrain from doing something).

Art. 1173 CC – Sources of Obligations

Obligations arise from contracts, unlawful acts, or any other acts or facts which are capable of producing obligations under the law.

- **Contract:** If Bill buys a certain thing (= contract of the sale), the obligation arises from the purchaser to pay the price.
- **Unlawful act:** Following a road accident caused by Paul's failure to obey a road sign, the obligation arises to compensate for the damage caused. (No formal agreement since it is not premeditated)
- **Any other act:** If Bill promises to pay 1000\$ reward to whoever finds his dog, his obligation arises (a "promise to the public").

Art. 1174 CC – Patrimonial nature of performance

The performance constituting the object of the obligation shall be economically valuable and shall correspond to an interest, even if not patrimonial, of the creditor.

- **Economically valuable:** the requirement limits the application of the law of obligations: it does not apply to rights and duties within family law (e.g. marriage).
- **Interests of the creditor:** Tom buys a ticket to go clubbing; his interest is not patrimonial though there is an obligation to allow him into the club.

The obligation is characterized by an imbalance which is always to the advantage of the creditor:

- a. Active subject = **creditor** = "weak" position (weak bargaining power)
- b. Passive subject = **debtor** = "strong" position (strong bargaining power)

Both the creditor and the debtor must act in GOOD FAITH! If the requirement of good faith is not met, this can be considered "abuse of the right of the creditor", hence the performance may not be held actionable.

Obligations imply a "liability" – in the sense that, if the duty is not met, the creditor may bring an action against the debtor's property.

Performance and Non-Performance

Due (or exact) performance refers to the exact fulfillment of the obligation.

Exact performance is achieved when the performance of a debtor matches the **due performance** under all aspects (negotiated in the creation of a contract):

- o *Method of performance* (can be changed/replaced if creditor agrees)
- o *Place of performance* (if performance is delivery of a thing)
- o *Time of performance*
- o *Person carrying out performance* (if the act is carried out by someone other than debtor e.g. family/friend – only matters if it affects the interest of the creditor)
- o *Person benefiting from performance.*

When carrying out the obligation, the debtor must act with the **diligence** of a good "pater familias" (i.e. behaving in conformity to what is commonly held as being right and proper). **Due diligence** thus refers to the respect of rules of an article set down by law.

- In some cases due diligence is enough e.g. in the case of “**best-effort obligations**”, like lawyers do not necessarily have to win the case but must put best effort. In such cases, performance tends to coincide with the due diligence regardless of achievements.
- In other cases, due diligence is not enough, the creditor requires exact performance – “**obligations of result**” (missing result makes debtor subject to liability).
- Due diligence is a means of measuring the “effort” of the debtor in performing the obligation. However, if there is difficulty to achieve the result, but sufficient due diligence has been met, the debtor can request a revision of contract (ref. chapter 18).

Non-performance: mismatch between performance carried out and the due performance.

- A debtor who does not carry out exact performance is liable for the non-fulfillment of the obligation (unless he can prove it was due to an impossibility of performance for causes not imputable to him).
- The impossibility must be **objective** (not dependent on situation of debtor) and **absolute** (no chance that the performance could actually be carried out). The debtor must thus prove the existence of a cause external to him (*unforeseeable circumstances, force majeure, or act of authority*).

To obtain satisfaction of his interests, a creditor may ask the court for a **coercive enforcement of performance**.

- In the case of performance being payment of sum, the creditor may obtain what is owed to him by placing property of the debtor up for sale.
- In the case of the “delivery” of a thing, the creditor can obtain *forced delivery*.

Default of the creditor: when the debtor cannot carry out performance due to failure of the creditor.

Default of the creditor has the following effects:

- o Creditor bears risk of impossibility of performance (cause not imputable to debtor)
- o Creditor’s interests are no longer due
- o Creditor is liable for damages deriving from his default (e.g. expenses of custody of the thing which the debtor was supposed to give to creditor).

How far down the chain of outcomes caused by the non-performance, may the liability of the debtor extend?

- **Compensation for damages** is limited to the damage that could have been predicted at the time the obligation was undertaken (unless the non-performance was intentional!).
- Concept of causation is complex and open to controversy... cannot directly link the cause of all future events to the single case of non-performance (may have been due to other factors)
- **Adequate causation:** the debtor is only liable for *immediate* and *direct* consequences of nonperformance.
- Determination of “damage” caused is difficult – hence, if the damages (e.g. loss of profits due to non-performance) cannot be determined **exactly**, they are liquidated by the court.

Factors which allow the termination of obligation (other than the completed performance):

- Novation: parties substitute the original obligation with a new one
- Declaration of acquittance: waiver of the debt
- Set-off
- Merger: qualities of debtor and creditor are united as one person
- Supervening impossibility: provided it is objective and absolute.

Particular Cases of Obligations

The debtor may be under duty to carry out a **plurality of performances** (one being the primary performance, and the others being secondary).

- For example, delivery of a thing implies safeguarding it until delivery.
- In some cases, the debtor may be obliged to carry out either performance, **alternative obligations**. The alternative obligation is discharged by the carrying out of the other.
- In other cases, they may be **elective obligations**: when the debtor is granted the right to discharge a particular obligation, by carrying out a different performance.

An obligation may involve a **plurality of persons** (several debtors or creditors)

- In the case where several debtors are bound to the same performance: The obligation may give rise to **"in solido"** liability i.e. joint and several liabilities (if each debtor can render performance in its entirety) unless the law states otherwise. Contrarily, limited liability exists if each debtor is in a distinct position from other debtor.
- In the case where the obligation is for the benefit of several creditors: the obligation is **"in solido"** if each creditor has the right to demand for the performance of the entire obligation. If the obligation is not **"in solido"**, each creditor may only demand satisfaction of his share.
- **Indivisible obligations** are governed by **"in solido"** norms; where the object is a thing/act which is not divisible.

Transfer of Rights

The relationship between the debtor and creditor is founded on existence of a **source**. This source may be, for example, a contract or a shared ownership of a "thing" (e.g. apartment). The obligation to pay expenses takes on two features:

- o Ambulatory obligation (moves from one person to the other)
- o Related to right of ownership
- Circulation of Credit: Since the rights of creditor may be viewed as part of legal relationship between debtor/creditor, or simply as creditor's assets, the creditor can assign his claim (change of creditor) **without the consent of the debtor** (unless it is a personal performance).
- Circulation of Debt: The identity of the debtor is important. Hence, the substitution of the original debtor with another **debtor requires the acceptance of the creditor**. The new debtor is referred to as an "auxiliary". The debtor remains liable for any negligent act of his auxiliaries.

Chapter 11: The Law of Contract

Art. 1321 CC - Contract

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

- A **contract** is any agreement modulating relationships with economic content is a contract. It is a means by which persons are mutually bound by pledging their word.
- Hence, marriage is not a contract as personal relationships prevail over economic ones.
- The law has singled out essential requirements for a contract i.e. without which the contract would be null. These include **agreement, causa, subject-matter** and **form**.
- Interesting to consider that notions differ in different countries; in Italy a gift is considered a contract while Anglo-American law has the requirement of "consideration" (payment).

The effects of contract

- Contracts shape all aspects of economic life, setting reciprocal rights/obligations of persons involved in transactions.
- Contracts produce two different categories of effects (or may produce both):
 - o Generate obligations
 - o Transfer ownership or establish other (limited) rights in property.
- The contract is a legal "act" with regards to the situation arising from it (obligations).
- By definition an **agreement** refers to a "concurrence of consents"; the expression of the wills of the parties can be expressed as words, gestures and conduct. Hence, the agreement is the meeting of two statements/expressions.

Plurality of parties and interest

- A contract is distinguished from a **unilateral act** i.e. acts generating obligations which originate from the will of a single individual. The same contract regulations apply to unilateral acts (having patrimonial content).
- This originates the concept of "**parties**" to a contract (sides of the contractual agreement) and hence differing **centers of interest**.
- A contract is intended to reconcile distinct interests of two (or more) parties (although not necessarily conflicting).
- Hence, a "balance" or protection of both parties is necessary.

Good Faith

- Good faith must guide the conduct of parties in initiating, withdrawing from and entering into contracts.
- The law places each party under the duty to inform the other for any reason of invalidity.
- **Pre-contractual liability**: A conduct contrary to good faith gives rise to liability for damages suffered by other party.
- Good faith also guides the *interpretation of contracts* and the basis of how disputes are resolved.

Contractual Autonomy and its Limits

- **Contractual autonomy** is the translation of a fundamental value underlying so-called "economic liberalism".
- Essentially, people are free to elect the economic ends they wish to pursue: Everyone is the best judge of his/her interests!

- In other words, the state may not intervene and oblige people to channel their wealth.

Art. 1322 CC – Contractual Autonomy

Parties are free to determine the contents of the contract within the limits set down by law. Parties are also free to enter contracts of the type that are not specifically provided for by law so long as they are directed towards interests deserving of protection according to law.

- Three main evolving changes in contractual autonomy over time can be observed:
 - o Protection of specified interests, prevailing over “free market”: economic freedom is lessened when it comes to issues of high importance (e.g. urban development).
 - o Protection of free competition: provided by antitrust rules (limit control of market).
 - o Protection of “weaker” parties.
- Also aim to reduce asymmetric information (unlawful to omit information in contracts)

The Binding Force of Contracts

- Contractual autonomy implies that every person may dispose of his interests at limits set down by law. Also, no person may dispose of the interests of a party in contract without the former's consent.
- Not even an economic advantage may be forced upon another person without consent. Therefore, a gift is in itself a unilateral act unless it is ACCEPTED by the other person.
- Fundamental feature of freedom is decision to enter or not into a contract. However, this does not apply if there is a [duty to stipulate a contract](#). Duties may arise either in law (*legal obligations*) or precedent contracts obliging themselves to enter into “final” contract (*voluntary obligations*).

Typical and Atypical Contracts

- [Typical contracts](#) are contracts regulated by the legal system (must have requirements etc.)
- [Atypical contracts](#) are contracts not previously provided for by legal system, so long as such contracts pursue interests worthy of protection.
- Essentially, atypical contracts are “new” types of contracts. For instance, before being regulated by legal system, leasing was an “atypical” contract.
- [Mixed contracts](#) combine features of separate and distinct “typical” contracts.
- Atypical contracts as well as *any* contract are subject to general rules of contracts.

Chapter 12: The Essential Elements of a Contract

Any contract must have all four of these elements stated. The absence, unlawfulness or defectiveness of any of these elements renders the contract void.

The Agreement

Essential element since the essence of a contract is to enforce what has been mutually agreed upon.

The agreement can be split into two aspects:

- a. Parties to the contract - must be vested with capacity to act
- b. Expression of will - expression may take on several shapes or forms which may be explicit (spoken, written, emails, declaration in front of a notary) or implicit (gestures). What matters is the *objective* significance of the conduct carried out.

The Entering into Contract

Rules governing WHEN a contract is entered into are based on a simple framework of **offer** (manifestation of will by which the offeror offers to the other party to enter into contract) and **acceptance** (acceptance by the offeree to enter into contract).

- o Common Law (England) follows the "Mailbox rule" (contract is entered into on the date the acceptance of the offer is sent)
- o **Italy** follows the "**principle of cognition**" meaning that the contract is entered into at the moment when the offeror receives the notice of acceptance by the other party.
- o This ties into the "**principle of reception**" meaning that if the offeror can prove that it was impossible for him, through no fault of his own, to receive notice of the acceptance, the contract is officially entered into at the moment of reception.

Art. 1326, paragraph 1, CC - Entering into the contract

The contract is entered into at the moment when the offeror receives notice of the acceptance by the other party (Principle of cognition).

Art. 1335 CC - Presumption of notice

The offer, the acceptance and his revocation... are considered to be known by the receiver at the moment when they reach his address, unless he proves his impossibility through no fault of his own.

For the offer to be considered such it must contain all the essential elements of a contract. Otherwise, it is simply considered an invitation to negotiate.

Revocation

The offeror may revoke his offer before the contract is entered into (before he receives notice of acceptance). However, if the offeree has begun performance in good faith (before he receives notice of revocation), the offeror is liable for the damages caused to him.

- An **irrevocable offer** occurs when the offering party agrees to keep the offer fixed for a certain period of time ("this offer is valid until Monday). Thus, revocation has no effect.

Acceptance

- In order for a contract to be concluded, the acceptance must match the offer (i.e. all terms of the original offer have been accepted).
- Where the offeror prescribes a specific form of acceptance (e.g. in writing), acceptance is

- ineffective if in a different form.
- An expression of will is required for acceptance (silence ≠ acceptance)

Preliminary Contracts

Parties may wish to bind themselves to ensure that the transaction takes place, although there are still some terms of the contract to be discussed. In this case, they may enter into a [preliminary contract](#). The parties are legally bound by this contract (all effects take place in the case of non-performance).

Causa (socio-economic function)

The idea underpinning the notion of a causa is that every transfer of wealth must be directed towards interests deserving of protection according to law. ([Art. 1322 CC](#))

- The presence of a *causa* encourages the circulation of wealth through the protection of the interests of parties (interests deserving protection).
- The *causa* is conferred by the intention to enrich the recipient (*spirito di libertà*). Hence, under Italian law a gift is a contract because it is intended to enrich the recipient.

*e.g. If a small business grants, with no consideration, a patent which it holds to a large company to which it is a supplier, the contract is void because there is no causa. Why? There is no sale, there is no exchange, it is not a gift (since there is no intention to **enrich** the recipient).*

- **N.B.** A promise of payment doesn't give rise to an obligation, since there is no causa.
- A causa is **unlawful** when it is contrary to mandatory rules, public policy or morals. An unlawful causa leads to the nullity of contract.
- The causa is also unlawful when it constitutes means for circumventing the application of a mandatory rule ("[contract in the fraud of law](#)").

Subject matter

The subject matter of a contract must be possible, lawful and determined or determinable.

- **Possible:** a contract providing an obligation to carry out a performance that is not physically/legally possible is not binding (e.g. transfer of future property, something which is not already your property).
- **Lawful:** A contract is unlawful when the subject matter is contrary to mandatory rules, public policy or morals.
- **Determined or determinable:** contracts must explicitly define the performance due (e.g. in the case of a sale, if the price is not agreed upon, it must be determinable by other means such as market prices, share quotations etc.)

Form

[Freedom of form](#): unless the legal system provides otherwise, no written form requirements apply.

Types of written form requirements:

- 1) [Simple written form](#) = (or private writing) it has to be signed (only requirement, irrespective of any content) – for transfer of rights of ownership
- 2) [Written form with authenticated signatures](#) (signatures must be authenticated by an authorized person, generally the notary. His role is to confirm that the signatures are written by the individuals) – for entry into the Land Register.
- 3) [Written form with authenticated content](#) = its content is authenticated (the authorized person ascertains the content of the document corresponds with the will by the declarants by reading the entire document to them out loud... may take days!)

A [public deed](#) is required for a gift (of significant value) stating that the donor will release the immovable property to the donee.

Functions of the form requirements

- Evidentiary function (prove that the agreement has been entered into)
- Cautionary function (it acts as a check against inconsiderate action)
- Channeling function (formalities provide a simple and external test of enforceability)

Evidence in writing

Rather than having a written form requirement, some contracts can simply be evidenced in writing. In case of absence of evidence in writing, the contract is still valid but in the case of dispute, proof by witness is not admissible.

Where there is a requirement of written form, a cheque or down payment are not enough, since the essential contractual elements are not met (e.g. reciprocal will).

A different rule applies where there is a requirement of evidenced in writing. In this case, some written memorandum is sufficient to meet the requirement. For example, although an insurance tag does not indicate the essential elements of a contract, it meets the requirement of "evidenced in writing" hence it is binding.

Chapter 13: Validity of a Contract

- If a contract is **invalid**, then it has neither a **binding force** nor **legal effectiveness** (which valid contracts have). A contract is invalid when it has not been formed in conformity with statutory provisions.
- An invalid contract may be **null** (subject to nullity and therefore void) or **voidable** (subject to annulment).
- **Ineffectiveness** is a CONSEQUENCE of invalidity. Valid contracts may also be ineffective if the performance has been postponed to a future time.

Nullity (void)

- Nullity of contract presupposes a violation or breach of **general** interests.
- Nullity of contract is **absolute** (it may be claimed by anyone who has interest in the contract)
- The absence of one of the essential elements of contract leads to nullity. Hence, unlawful contracts are also void.
- **Action of nullity**: right to take the initiative to file a petition seeking the nullity of contract.
- Nullity of contract must be found **of its own motion** (i.e. irrespective of any petition that the litigants were to have filed).
 - o If the parties don't seek nullity, the court, presented with a void contract, must point out its nullity (i.e. declare the nullity of contract of its own motion), since it presupposes a collective interest.

Limitations of Nullity

The action of nullity is not subject to any limitations except for the effects of usucaption and the limitation of actions for restitution:

1. If you refer to ownership you need to make sure there has been no usucaption, it will amount to a statement of principle without any substantive effects. Even though the initial contract was void, the usucaption acquired ownership through usucaption.
2. You cannot file an action of nullity after 10 years after the transaction has occurred.

A void contract can produce the effects of a different contract whenever the parties would have concluded such contract if they had known of the nullity. In such case the contract must be converted and must contain all elements (requirements) of a valid contract.

A void contract **cannot** be **validated** (i.e. when the parties decide to keep the contract even though it is null), since the court must, of its own motion, declare the nullity in the collective interest.

Annulment (voidable)

- Annulment of contract presupposes a violation or break of **specific** interests. It is therefore up to the party to decide whether to exercise the right of seeking annulment.
- Voidability is **relative** (may only be demanded by persons in whose interests it is established by law)
- Contracts concluded by a party lacking the capacity to act are voidable.
- Contracts are also voidable when one party incurred a "**defect of consent**" (*mistake, moral violence or malice*):
 - o **Mistake**: false representation of reality. A mistake is a cause for annulment when it is **essential** and **recognizable** by the other party.
 - **Essential**: concerns nature or object of contract, its identity, identity of one of the parties or if it is considered a principal reason for entering into contract.

- Recognizable: where it would have been detected by a person by normal diligence.
 - A mistake in *calculation* does not lead to annulment, only a correction of contract.
 - Moral Violence: a threat to enter into contract. Contract is voidable if the threat were to coerce the reasonable ability of a natural persons making him fear for his integrity or property. An objective assessment must be made with regards to the age, sex and condition of the person threatened. A threat leads to a voidable contract solely if the contract is aimed at obtaining unjust profits (ref. chapter 20).
 - Malice: Malice is ground for annulment where a deception used by one of the parties is such that, without it, the other party would not have entered into contract.
- **Action for annulment:** right to take the initiative to ask for annulment of contract.
 - If the parties don't seek an annulment, the court, presented with a voidable contract, cannot point out its voidability (that is, annul the contract *of its own motion*). Hence, a voidable contract will produce effects unless a court declares its annulment.

Limitations of Annulment

The action of annulment is subject to a limitation period of 5 years (within entering into contract).

- For minors, the five years for voidability start from the time he reaches the age of majority

A voidable contract can be **validated**, as the parties are free to waive their rights and courts must remain, by definition, impartial. This required the party entitled to issue a declaration.

Chapter 14: Standard Trade Terms and Unfair Terms

Standard Trade Terms

A large number of contracts not subject to priori negotiations are concluded daily. They involve not only minor transactions but also relevant business dealings. In all of these dealings, **standard trade terms** are used i.e. terms drafted in advance by one party and are instated to be applied to a plurality of contracts. This is done to promote the easy circulation of wealth (quick transactions).

Art. 1341, P 1, CC – Standard Trade Terms

Standard trade terms are only effective, if at the time of entering into the contract, the other party **knew or should have known** them according to **ordinary diligence**.

- The person is self-responsible, as he acknowledges the terms provided by the other party and accepts them.
- **e.g.** When you go to open a bank account, when you take a train that requires the payment of a supplement (e.g. high speed), when you leave your car at a carpark with blue lines (Italy) you are expected to know the terms according to ordinary diligence.

This is an extraordinary provision as it essentially goes against the very nature of a contract as the standard trade terms become part of the contract even if the other party has not given his contractual consent to them (contractual consent is taken for granted if the party could be aware of the terms by ordinary diligence).

The principle of *ignorantia legis non excusat* (“ignorance of the law is no excuse”) applies to standard trade terms.

- A person who is unaware of a law may not escape liability for violating the law simply because he was not aware of it.

This article clearly advantages the party setting down the terms. Hence, in an attempt to “rebalance” the parties, **Art. 1341 P2** states the limitations of liability, power of withdrawing from a contract or suspending its performance, restrictions to contractual freedom, etc. are ineffective unless specifically approved in writing (signed by party).

- In other words, certain terms which require further obligations must be approved in writing (principle of “knowing by diligence” does not apply)

The short-comings of Art. 1341

The system for protecting the other party laid down by the law, clearly **does not work** because it is based on the unrealistic assumption that the other party reads the STT. In reality, approval in writing becomes a mere formality (normally sign without reading).

Parties do this because the cost of obtaining the necessary information about the terms, commence negotiations and reach an agreement (transaction costs) would be out of proportion to the advantage gained.

Users of the standard trade terms which take advantage of this “weakness” go against objective good faith. This is essentially the aim of the “European directive of unfair terms”.

BUT, in the case of a double signature (you sign twice), you confirm a “substantial check” so the contract is valid anyways (even if it is against consumer code).

Let us consider a vacuum cleaner. At the moment when it is sold to you, you sign a term which says that, should there be a fault in the machine, you take responsibility for bringing the faulty machine back to the shop (rather than having an employee come collect it). The repair is free since a fault of machinery results in a non-performance of contract.

The purchaser can:

1. Sign the contract without reading the STT set down by the other party
2. Read and assess the STT and possibly seek change

Which is the most economically rational choice?

1. In terms of opportunity cost (OC), assuming that the time needed to take the broken vacuum to the nearest retailer is 15 minutes, the OC = 4\$ (including transport costs). The probability of the vacuum breaking is 1:100. If the vacuum is bought without the STT being read the current OC is 0.04\$. A failure to abide by the terms results in a penalty.
2. If the contract is read, and the terms are discussed, the OC is now at 4.00\$ (considering the amount of time it takes you to read, understand and negotiate the contract)!

Therefore, agreeing to the contract even without reading it, is ECONOMICALLY RATIONAL.

The drafter of the contract knows option 1 is advantageous to the customer so they make a contract that is unilaterally for the benefit of the drafter. Furthermore, this is also economically advantageous to them, as the OC of collecting each faulty vacuum cleaner is 4\$. Considering the number of vacuum cleaners sold, they also save a considerable amount of money.

European Directive of Unfair terms

To prevent "exploitation" inherent in STT, the European Parliament issued a Directive on unfair terms in consumer contract.

- The European Directive must be implemented in each country, but each country can choose how to adapt it to their own legal system: Germany added it directly into their Civil Code, while France and Italy created a "Consumer Code" (a separate book for these rules).

Art. 3 – Consumer Code

Courts are granted the power to invalidate any contractual term drafted in advance which causes "a significant imbalance in the parties rights and obligations to the detriment of the consumer".

This article is only applicable to contracts between "consumers" and "businesses", where the terms have been drafted in advance (unilaterally) by the business (not just ANY contract!).

- A **consumer** is a natural person who acts for the purposes which are outside his business.
- A **business** is any natural or legal person who is acting for purposes related to his trade, business or profession.
- Hence, a term cannot be considered unfair if it occurs in a contract between two businesses or two consumers. *Why?* The aim of the consumer code is to protect the consumer!

Art. 34, p4, Consumer Code – Assessment of the unfairness of terms

Terms or parts of terms which have been individually negotiated are not unfair.

Terms which are not considered unfair

- Essentially, if you discuss the terms of the contract, you aren't being "tricked" by the system and you lose the protection granted to you by the system.

This article is of fundamental importance as it

- a. Confirms protection granted to consumers is not related to their "inherent weakness"
- b. Reconciled protection of consumers with the basic principle of contractual autonomy which implies that parties are free to determine the contents of the contracts

Following this same reasoning, finding out the subject of a contract does not require excessive transaction costs so it would be wrong to protect the consumer (he cannot claim he didn't know).

Art. 34, p3, Consumer Code – Terms reproducing legal provisions

Terms that reproduce legal provisions or implementation of principles contained in the international conventions which all Member States of the EU are parties, *are not unfair*.

- Terms that reproduce legal provisions are not unfair, since the term in question isn't one that has been drafted in advance by a business to unilaterally benefit the drafter.
- Legal provisions cannot be considered unfair, as it would, *de facto*, deny the impartial function of the law.

The Nullity of Unfair Terms

TERMS considered unfair to the pursuant are void, the remaining the CONTRACT is still binding.

Why? Advantageous to the consumer who generally does not want the whole contract not to be binding, rather than the unfair term.

Art. 36, p3, Consumer Code – Nullity of protection

The nullity will have effect solely for the benefit of the consumer. A court will have to state the nullity of its own motion.

This law is important as it is an expression of "nullity of protection" i.e. that nullity may be claimed solely by consumer.

"Blacklist" of terms that are void even if they have been negotiated ([Art 36, P2 Consumer Code](#))

1. Terms which exempt from or limit liability of the business in case of death or damage to a person resulting from an action on part of business (*e.g. Sailboat rental removing liability in case of someone getting hurt on the trip*).
2. Terms which exclude or limit the claims of the consumer in case of non-performance.
3. Terms which provide for the consumer's total acceptance of terms they could not have learned before entering into the contract.

The Consumer Code also contains a list of terms that are presumed unfair unless proven otherwise: "Grey-list", consists of 20 terms

The Effective Protection of Consumers

The regulation of unfair terms aims at protecting the consumers. The European legislature is concerned that the Directive is effectively applied. Hence,

Art. 36, p5, Consumer Code – Nullity of protection

Any term providing for the application to the contract of provisions of a non-EU-member country is void whenever it results in the non-application of the provisions of this title provided that the contract has a **closer connection** with the territory of any EU-member country.

The Consumer Code prevents businesses from inserting a term into contract according to which the law of a non-EU Member is applicable, by rendering such provisions void.

- "Closer connection" means that, realistically, this can only be done when the contract is made with a non-EU country (*e.g. contract between Italy & Brazil – can apply Brazilian law*).

To speed up the effective implementation of consumer protection, unfair terms are absolute, meaning that other business can sue a business for unfair use of STT (since their interest is that unfair terms create unfair competition in between businesses) ([Art. 37 Consumer Code](#))

Standard Trade Terms and Unfair Terms

Art. 1341 CC on Standard Trade Terms and the European Directive (consumer code) have different background and different (although sometimes overlapping) aims. For this reason, a STT cannot be:

- a. Neither a "one-sided" term with regards to Art. 1341, nor an unfair term.
- b. A "one-sided" term with regards to Art. 1341, but not an unfair term.
- c. An unfair term, but not a "one-sided" term with regards to Art. 1341.
- d. Both a "one-sided" term with regards to Art. 1341 and an unfair term.

<u>Italian "Standard Trade Terms" (Art. 1341 CC)</u>	<u>"Unfair Terms" European Directive</u>
No restriction on the subjective scope of application	Applies solely to contractual relationships between businesses and consumers
Objective scope of application is only to standard trade terms.	Applies also contracts that have been unilaterally drafted in advance for individual use
Formal check (double signature)	The Article for "unfair terms" provides for a court scrutiny of the terms which is not solely formal (i.e. double signature) but extends to a substantial check !

Art. 1372 CC - Force of Law

A contract has the force of law between the parties. It cannot be dissolved except by mutual consent or for a cause permitted by the law.

Chapter 15: The Binding Force of Contract

The Right of Withdrawal

- Although the force of law states that no party can “withdraw” from contracts, a [right of withdrawal](#) may be granted by law or by an agreement between parties
- The right of withdrawal may be *limited* or based on the existence of a *justified motive*.
- “Free” right to withdrawal does not require any justification.
- In other cases, the right of withdrawal may be granted by way of *cooling off period* (limited right) e.g. 30 day returns policy for clothing items normally.
- The free right of withdrawal is granted to all *distance contracts* entered into by consumers (e.g. door to door sales, mail order catalogues, telematic contracts with online signatures).
- The right of withdrawal can be executed as long as the performance has not been concluded
- In some cases, the failure to withdraw implies an **automatic renewal** of contract.
- A down payment may be used as compensation for withdrawal.

Contracts transferring ownership or other limited rights in property

- In contracts providing the transfer of the right of ownership, the transfer occurs by the agreement between parties ([principle of mutual consent](#))
- The execution of performance or the transfer procedure are NOT necessary.

Interpretation of contract

- Interpretation means to attribute meaning.
- In interpreting contracts, courts search for the “common intent of parties” (within the limited meaning of the words) – the aim is not to go beyond and search what the parties wanted to say ([subjective interpretation](#)), only what is stated in the words of the contract ([objective interpretation](#)).
- A contract must be interpreted according to good faith, according to the [principle of reliance](#) (party entering into contract can rely on the fact that his words will be interpreted according to good faith)
- Interpretation must not lend exclusive meaning to the LITTEAL meaning of words but must search their connections/context (relation to other clauses).
- Should the meaning of the contract remain obscure, it will be interpreted in the way this makes it less burdensome to the debtor.

Incomplete Contracts

- Sometimes overly complete, detailed and formal contracts and impracticable, sometimes they just contain the essential elements.
- [Integration](#) of the contract is the process by which, on the basis of the agreement, completes its contents and determines its effects.
- The first step of integration is interpretation (classifying the agreement)
- [Art. 1374 CC](#) binds the parties not only to what the contract expressly provides, but to the consequences deriving from it by law or according to usage and equity.
- The law refers to these forms to integrate the contract.

Third Parties

- As a general rule, a contract does not affect third parties (not legally binding to third parties) except in cases provided for by law.
- However, carrying out a performance may affect third parties.
- A contract in the favor of third parties is valid where they have an interest in it (e.g. in the case of life insurance or inheritance, a third party nominated has an interest to receive the person's heritage). Acceptance by the beneficiary is not necessary

Contingent Conditions

- A **contingent condition** designates a future event on whose occurrence triggers the beginning of a contractual obligation or its termination.
- A contract to which an unlawful condition is attached, is void.
- A condition is help impossible where it prevents the contract from ever taking effect.
- A condition is described as **merely potestative** when the event foreseen depends on the simple will of one of the parties (e.g. I will sell my house if I get out of bed with my left leg first). Contracts based on merely potestative conditions are void.
- A person transferring a right subject to a condition shall act in good faith in order to safeguard the interests of the other party.
 - o A sanction applies if the person does not act in good faith, called "**constructive fulfillment**".

Agency and Representation

- Although most contracts are negotiated by the parties themselves, some may be concluded by representatives on behalf of the parties.
- The power of representation is conferred by law (**legal representation**) or by the principal (**voluntary representation**).

The power of attorney: the act by which the power of representation is granted to an agent. A unilateral act directed to third parties. A power of attorney as no effect unless it is conferred within the prescribed formalities. It may be conferred explicitly or implicitly.

A contract entered into by an agent with the following conditions, has a direct legal effect on the principal

- a. If the agent acts *in the name* of the principal
- b. If the agent acts *in the interests* of the principal
- c. If the agent acts *within the limits* conferred to him

Otherwise, the legal effects attain to the agent.

Sham Contracts (simulation)

Sham contracts: Parties may enter into contracts but then agree that the obligations shall not be performed. In other words, their will and their declarations may be deliberately divergent. The sham contracts have no effect between parties.

e.g. According to the land register the ownership of a property belongs to somebody else, but the transfer never actually occurs.

If the parties wanted to enter into a contract different from the apparent contract (i.e. relative sham), the genuine contract has effect as long as the requirements are met.

Third parties can plead simulation against the contracting parties when their interests are compromised by the sham contract. In the case of disputes, the interests of creditors are preferred.

Indirect use of contract

In order to obtain a certain economic result, contracts are sometimes used in a “strategic way” by having recourse to [indirect use of contracts](#). These are not sham contracts as they correspond to the interests pursued by parties.

A special case is offered by [fiducia](#) (fiduciary agreement) ≠ Trust!

- A trust property or a trust fund are protected against the claims of creditors.
- Trust properties are when a trustee holds the property in trust for the benefit of another party (beneficiary).

The [Fiduciary agreement](#) is a **contract** where a person transfers the ownership of one asset to another person, named the **fiduciary**, who will be in charge to exercise ownership rights on his behalf and re-transfer the asset to a named person at the end of the **contract**.

Chapter 16: Termination of Contract

A contract may be terminated:

- a. By performance (by completing the act)
- b. By mutual consent or for a cause permitted by law
- c. By breach, supervening impossibility or excessive onerousness

A contract which is “flawless” at the time it is entered into, can prove to have an anomaly in the way it works for the following reasons.

N.B. Dissolution ≠ Annulment

- *Annulment/Nullity* an anomaly that exists AT THE TIME of entering into the contract
- *Dissolution* exists when the anomaly occurs at the time of carrying out of the performance.

Dissolution for breach (or non-performance) of contract

Dissolution for non-performance: One of the parties does not fulfil his obligations

The INNOCENT party can seek Judicial Dissolution to either:

- i. Seek the fulfillment (in the case of non-fulfillment)/enforcement of the contract
 - ii. Seek the dissolution of contract
- In both cases, the party can still seek compensation for the damage.

Art. 1455 CC – Importance of Breach

A contract cannot be dissolved if the breach by one of the parties has slight importance, having regard to the interests of the other.

- A contract cannot be dissolved unless the breach (the “anomaly”) is of significant importance.
- This follows the general principle of acting in “Good Faith” or Fairness – it would not be fair to dissolve an entire contract because of a slight breach.
- In this case, the innocent party may seek compensation for damages, but you cannot dissolve the contract.
- **e.g.** If the contract is the building a house, and everything is perfect but missing door handles.

Alternatively, the contract can be dissolved “out of court” (without filing an action):

- a. “Notice to perform” (**Art. 1454 CC**) – failure to carry out the performance within the deadline will result in the dissolution of a contract. This period cannot be less than 15 days
→ *Automatic Dissolution*
- b. “Explicit dissolution clause” (**Art. 1456 CC**) – The parties can agree that the contract will be dissolved if a specific obligation is not performed. This gives real importance to an otherwise unimportant non-fulfillment pursuant. **e.g.** If the contract entails a clause saying, “if there is failure to complete all door handles, the innocent party can seek dissolution of contract”.
→ *A Declaration to dissolve is needed*
- c. “Time essential to one party” (**Art. 1457**) – This requirement can be *tacitly* inferred
→ **A Declaration NOT to dissolve is needed** (the contract is automatically dissolved unless the innocent party issues a statement within THREE days NOT to dissolve).

Dissolution for Supervening Impossibility

Dissolution for Supervening Impossibility: Supervening impossibility relieves the debtor from performance, provided the impossibility is due to a cause not imputable to him. He must restore that which he has already received.

Art. 1463 CC – Total Impossibility

In contracts for mutual counter performance, the party released by supervening impossibility of the performance due cannot demand performance by the other party.

→ **Automatic dissolution** (no activity required by court).

In the case of **partial impossibility** (only one part of the performance has become impossible) or **temporary impossibility** the other party must reduce the obligations OR may withdraw from the contract if he is not interested in partial performance (seek dissolution).

Art. 1465 CC – Contract with translativo or constitutive effects

In contracts which transfer ownership of a specified thing or constitute or transfer property interests, destruction of the thing by a cause not imputable to the transferor does not release the transferee from the obligation of performance, even though the thing was not handed over to

- For transfer of ownership of a thing where it is destroyed by a cause imputable to transferor, it does not release the “purchaser” from paying for the thing (he has to pay even if the house catches fire before it is handed over to him!).

Dissolution for Excessive Onerousness

Dissolution for Supervening Excessive Onerousness: One of the parties does not fulfil his obligations because performance became excessively onerous because of the occurrence of extraordinary and unpredictable events.

N.B. In the writing of a contract, the different autonomous parties are required to think about future changes in the circumstances which may prevent the conclusion of performance. Excessively onerous means really extraordinary situations. Dissolution cannot be demanded if the excessive onerousness is part of the normal risk written in contract.

Dissolution of contract may be requested only by the party who OWES the performance.

Art. 1467, P1, CC – Contract for mutual counter performances

In contracts with continuous or periodic performance, if the performance of one party becomes excessively onerous because of the occurrence of extraordinary unpredictable events, the party who owes that performance may seek dissolution of contract.

- **e.g.** War in Israel when it was impossible to cross Suez Canal, it is “excessively onerous” to have to travel all the way around Africa so the party can request dissolution of contract. An increased cost by 9% of interests does not count as “onerous”, 50% does.

Art. 1469 CC – Aleatory Contracts (= Wagering Contracts)

Dissolution for supervening onerousness does not apply to aleatory contracts.

- **Aleatory contracts:** type of contract for mutual counter performance, where the amount of at least one of the parties’ performance is not determined at the moment of entering the contract, since it depends on the occurrence of “external” events.

Rescission of Contract

If one of the parties feels a contract is « unfair » after concluding it, there is little the law can do as it belongs to the risk of entering into transactions. However, where the economic imbalance occurs from **exploitation of the state of danger** (the party entered into contract, knowing the unfair conditions, to save herself from imminent personal danger), the contract may be rescinded (**rescission for state of danger**). The act of rescission has a ONE-year limitation period from the conclusion of contract.

Chapter 20: Causes of Preference and Securities

Sixth book of CC dedicated to liability, grounds for preference, preservation of property and security; designed to ensure **protection of rights** of a creditor seeking satisfaction from a debtor. They are not to be seen as coercive tools but rather integral part of the contract.

Unlimited Liability

Art. 2741 CC – Principle of unlimited liability

The debtor is liable for the fulfillment of his obligations with all his present and future property.

Limitations upon such liability are not allowed unless stated for by law.

Art. 2740, P2, CC – Equal protection of creditors

Each creditor has equal rights to satisfaction except when there are lawful causes of preference allowed by law (see below).

Limited Liability

Exceptions to unlimited liability (above)

The estate of a deceased is distinct from that of the heir (hence the heir is under obligation to pay back debts inherited only to the extent covered by the property of the estate i.e. without being liable for debts exceeding the property of the deceased. A similar rule applies to the liability of the spouse in the case of bankruptcy.

Segregation of property: Alternatively, individuals may set up **separate legal entities** to conduct business, providing them with limited liability (even though the company may have a single shareholder; themselves).

Securities

Securities encompass the creditor's means of enforcement of the obligation.

Distinction drawn between **personal surety** and **collateral**:

- **Personal surety** (surety bonds, guarantees) is when a third party enters into pre-existing relationship as a **guarantor** of the exact performance of the debtor's obligation. The guarantor's property becomes collateral to the creditor.
- In the case of **collateral**, the creditor is vested with the power to seize and sell specific assets of the debtor. This applies even to rights of ownerships that have been transferred onto others in the meantime (provided the granting of a mortgage is recorded in landregister).

Causes for preference

1. Privileges

- **Privileges** grant preferential treatment of certain creditors.
- Privileges can be **general** (can be exercised upon all movable property of the debtor) or **special** (upon specified movable or immovable)
- Creditors whose claims are assisted by a privilege are called "**preferred creditors**"
- A **general** privilege cannot be exercised in derogation of a third parties' rights on movable property while a **specified** privilege on movable property prevails over rights acquired by third parties after the establishment of such privilege (e.g. if a house is bought AFTER it is subject to specified privilege but not general)
- Creditors assisted by privilege enjoy preferential treatment compared to mortgage creditors

Privileged granted to the Italian Tax Authorities

- Claims of Italian Tax authorities are assisted by a plurality of privileges
- Besides distinguishing between special/general, it is important to distinguish:
 - o Privileged assisting *direct* taxes vs. *indirect* taxes (paid directly to tax authorities or to intermediaries)
 - o Privileges on *movable* property vs. *immovable* property (civil fruits generated by immovable property are a form of movables so they can be burdened with both general/specific privileges)

2. *The Pledge*

- A **pledge** is established by the *pledgor* giving to the *pledgee* (or an agreed upon third party) the “thing” to be pledged or a document conferring him exclusive power to dispose of such thing.
- This preference cannot be enforced if the “thing” is not of the pledgor's property (contrast to privilege).
- Creditors whose claims are assisted by a pledge are called “**secured creditors**”
- Priority over other creditors is only allowed if a written document and “secure date” exists.
- The pledgee under duty to safeguard the “thing” is liable for loss/damage and may not use it without the consent of the pledgor.
- The pledgor is required to reimburse the expenses for safeguarding the thing (costs of keeping it)

3. *The Mortgage*

- A **mortgage** gives the creditor right to seize the property to secure his claim and priority over other creditors in the payment of his claim.
- Mortgages can be placed on the property of the debtor or a third party and is established by registration in the Land Register (where the immovable is located). If it is granted by a private deed, the signature must be authenticated, and a copy submitted to the register.
- They can be established by law, by court order or agreed upon by the parties.
- Creditors whose claims are assisted by a mortgage are called “**secured creditors**”.
- A mortgage can be established over: Immovables with appurtenances, right of usufruct, right of superficies (lease), right of emphyteutic tenant, state bonds, modes of transport (vessels, cars, motorbikes).
- A mortgage covers improvements to the property unless provided otherwise.
- Regarding expiration dates, the mortgage cannot be placed on a third party who has confirmed the purchase of the immovable before registration (the second mortgage).
- Mortgages are extinguished by:
 - o Cancellation of registration
 - o Failure to renew registration at the end of the time limit
 - o Extinguishment of the obligations of the debtor
 - o Destruction of the property
 - o Renunciation on behalf of the creditor
 - o By court order

Protection of the rights of the creditor

Right of the creditor to obtain satisfaction from all the property of the debtor, does not automatically create collateral security on the property. The debtor retains full power to dispose of his property (i.e. sell).

The creditor is entitled to protection whenever the debtor puts his property at risk (by neglecting to exercise his rights or concealing the property from the creditor)

The remedies for the protection of the rights of creditors are:

1. Subrogation

- Subrogation refers to the fact that a creditor may “exercise the rights and actions which would be available to his debtor against third parties” where the debtor fails to exercise such actions.
- Admitted only with reference to rights having economic content

2. Claw-back action

- In Italian “azione revocatoria”
- Even when a claim is subject to a term or condition, a creditor may demand that the attempted disposal of the debtor’s property be declared ineffective with regard to him.
- May not be filed when debtor fails to exercise his rights; only when the debtor does with a view of altering his property (to make satisfaction of creditors more difficult)
- Requirements to successfully file claw-back action:
 - o The debtor is aware of prejudice towards rights of creditors of filing act
 - o The third party which whom the debtor entered into transaction (e.g. sold the house to) was aware of such prejudice
- The limitation period of ordinary claw-back action is 5 years

3. Attachment of property

- Petition seeking attachment of the debtor’s property may be filed by a creditor where there is a valid ground to fear loss of satisfaction to his claim
- Attachment prevents transfer of property and any other act aimed at modifying its status.
- If the debtor removes/damages attached property he is subject to criminal sanctions.

Chapter 21: General Principles of Tort Law

In life many occasions arise in which actions of one person, detracts the interests of another. Ensuring that the rights of one person do not impinge on rights of another is one main concern of private law. However, it is very complex to determine the extent of liability and the value associated to compensation of damages (e.g. in the case of injury is it equal to the medical expenses or more?)

The issue of fair compensation is addressed with reference to the concept of “unjust damage”. In the case of injury, one must contemplate on the negligent or intentional nature of conduct. The causation of the wrongdoer must also be assessed.

Tortious liability

Liability for damages (**compensation**) arises primarily from committing a **civil wrong (tort)** defined as an act injurious to an interest protected by law.

There is a clear distinction between *civil wrong* (tort) and **unlawful act** (which pertain to the non-performance of an obligation causing damage to the creditor). In the case of tort, the liability does not arise from a pre-existing relation.

Tort proceedings are different from criminal proceedings (remedy/compensation vs. punishment).

Art. 2043 CC – Civil Wrongs

A civil wrong is any intentional or negligent fact causing unjust damage to others.

Compensation for damages may be claimed provided that: the conduct was intentional or negligent, the damage is unjust, there is causation (intentional/negligent conduct to cause unjust damage).

Strict liability is liability regardless of intentional/negligent conduct e.g. parents/guardians liable for their children, employers liable for damages of their employees, liability for damage by animals.

Injury and Damage

“**Damage**” defines wrongdoings, although it is more generally understood as a material loss, injury or non-satisfaction of needs (physical, economic or mental). At law, the term is defined by *prejudice or loss resulting from injury to an interest*. This may be *patrimonial* or *non-patrimonial*.

The award for damages must cover both losses sustained and the lost profit (insofar as they are direct and immediate consequences of the wrongdoing).

Remedies

The aim of tort law is to restore, wherever possible, the injured party to the position before the act. Remedies hence include:

- Monetary damage (amounting to the value of loss suffered)
 - o Loss sustained and lost profits resting on causation
 - o Equitable liquidation of damages by the court (if they cannot be calculated exactly)
 - o **Contributory negligence** i.e. the reduction of the compensation for the damage whenever the creditor has contributed to the damage.
- Restitution to original position (restoring position he would be in if the tort act had not occurred)

In the case of tort liability the law whereby “compensation is limited to the damages that could be predicted before the act was carried out” does NOT apply.

Chapter 22: The Liability of producers for Defective Products

Introduced in Italy by *Decree of President of the Republic* in 1988 – statutory provisions ruling for producer liability for defective products have been transformed into Consumer Code. Consumer code also provides specific rules which relate liability of producer (and whoever places products on the market) obligations of control and inform to guarantee the safety of products.

The person suffering a prejudice may seek compensation of damages only to the **producer** (manufacturer of movables or service provided or their intermediaries). **Intermediaries** refers to any person intervening in manufacturing the finished product. Hence, **supplier** of any raw material and **producer** of component are **jointly and severally liable** with producer.

If the supplier is located outside the EU, the producer is responsible for checking the damage of the raw materials provided, and he solely becomes liable for defectiveness (to avoid filing lawsuits outside EU).

The standing to sue the producer

Standing to sue producer for defectiveness is granted to users suffering injuries, or prejudice to their property, as well as bystanders (injury or loss to property irrespective of contractual relation).

In the case of damage to property, producer liability only applies where the products are used for private purposes. In the case of personal injury applies to consumers AND non-consumers.

The recoverable damages

Recoverable damages are related both to death/personal injuries as well as destruction of property (provided that is intended for private use, hence primarily by injured person).

NO liability arises in reference to **economic damage** i.e. related to missing availability or use of product (e.g. defective vehicle, had to rent another).

The burden of proof

The person suffering personal injury/destruction of property must **PROVE** the damage or defect, while the producer will provide facts that might exclude his liability. In other words, the injured person does not have to discharge the burden of proof.

The liability of the producer is defined as **strict** as it is grounded on the criterion of “imputation” rather than “fault”. Hence, the victims will have to prove A) the defect B) the damage C) the causation between damage and defect.

Causes of exclusion of liability

- a. The producer did not put the product into circulation
- b. The defect which caused the damage did not exist at the time the product was circulated
- c. The defect is due to compliance of the product with mandatory regulations
- d. The state of scientific/technical knowledge at the time the product was circulated was insufficient to determine its possible defect
- e. In the case of supplier of a component, the defect is attributable to how the component was implemented into product (not the component alone)

Relationship between consumer code and other statutory provisions

The rulings of the Consumer Code do not limit any rights granted by other statutory provisions. Rights granted depend on whether the victim purchased the product from producer or reseller.

In the case where victim purchased product from re-seller:

The victim may file a lawsuit against both producer and re-seller grounded either on Consumer Code for defective products or Civil Code for tortious liability, depending on the burden of proof to be discharged or on the time that has passed (The liability for defectiveness of products has an expiration date of 5 years).

In the case where victim purchased product from producer:

They may file a claim against the producer grounded either on Consumer or Civil code (same as above). Additionally, the victim may file an action based on the rights of the purchaser in sale-purchase agreements granting him the right to seek compensation for damages to property besides personal injury.

Chapter 27: Family Law

Family does not have to be sanctioned by religious marriage; it depends solely on a discernible pattern of stability. The law has different interpretations for the word "family"

- In the constitution, family refers solely to spouses and their children
- Family enterprise encompasses 3rd rank (uncles, aunts, nephews and nieces and in laws) as well as 2nd rank (brother and sisters).
- With regards to succession, "family" reaches to the 6th rank.
- The law also distinguished between *legitimate family* (marriage) and *de facto family* (cohabitation).

Constitutional Principles

- The constitution recognizes the "rights of the legitimate family as natural community founded upon matrimony" and states that "marriage is founded upon moral and law equality between spouses" to "ensure family unity".
- Children born out of wedlock are granted full legal and social protection consistent with the rights granted to members of a legitimate family (same for all children).
- The constitution also lays down duties of the State for the protection of *maternity* and *infancy*.

Family relations: spouses, relatives, in-laws

The word **family** designates all persons who qualify as spouses or relatives: **spouses** arise from marriage and cease upon dissolution of marriage; **relatives** are all persons descending from common ancestor.

- Distinguish between *direct line* (descending from one another) and *collateral line* (between persons descending from common ancestor)

Rank: Direct line embraces as many ranks as there are generations. In collateral lineage, rank corresponds to number of generations moving upwards from a parent back to common ancestor and down to other parents (e.g. brothers are in 2nd rank, cousins are 4th rank etc.). At law, legal implications on kinship end with sixth rank.

Rank or lineage have legal implications: Spouses or relatives have legal implications with regards to matrimony, succession rights and alimony.

Spouses and relatives generate ties of **affinity** (in-laws). Affinity also carries legal implications with regards to matrimony, succession rights and alimony.

The notion of marriage in the Civil Code

- Marriage is referred to as a "**pure act**" (free from any contingent conditions or terms).
- Where the ceremony has been officiated, any provision attached to the matrimony is null at all (while marriage is valid).
- In Italian law, marriage is a voluntary act and is thus protected by provisions designated to ensure the decision is free. A promise of marriage is hence not binding.

Family property regime

Marriage has legal implications with regard to patrimonial situation of spouses, the notion of **family property regime**. This regime has recently been amended to provide for better *equality* of spouses.

In 1975, the concept of "common property" was introduced. The rule applies unless the spouses provide otherwise (state individual property of assets). **Common property** is that which is acquired

during the course of marriage. *Inheritance, compensation for damages, INCOME*, and some other items are to be considered Personal Property even though they were acquired during marriage.

If the income has not been consumed, the remains qualify as common residue at the time of dissolution of marriage.

Spouses may choose to agree upon “separation of assets” whereby the assets acquired during their marriage remain under sole ownership.

Separation and Divorce

Until 1970 marriage was insoluble, the law only provided for separation (mitigation of rights and duties between spouses). Before 1975, separation was contingent on the “culpability” of one of the spouses.

However, divorce is seen as a “last resort”: intermediate phase qualified as personal separation

- Legal separation (prerequisite for spouses seeking divorce) may be *consensual or juridical*.
- Consensual separation requires the accord of the spouses on matters respecting assets and children in custody.
- Juridical separation is granted by the court upon petition by one of the spouses, whereby a situation has occurred to render marriage intolerable.

The court also plays the role of ensuring interests of the weaker spouse and children are protected.

De facto separation may always occur as a mutual decision made by the spouses. However, where one spouse leaves without the other’s consent, their material support is suspended.

Divorce may be granted only where it is “ascertained that spiritual and material union between spouses may not be continued or re-established”, or when legal separation has run its fixed period of time.

- If it is based on consensual separation divorce may be granted after 6 months of physical separation from the time the spouses appear before court.
- If it is based on juridical separation, the waiting period is 12 months.
- Hence, divorce is also granted where one spouse has been arrested for more than 15 years or convicted for prostitution/assault of the other spouse or children.

To achieve divorce, spouses may bypass the Tribunal by a procedure called “assisted negotiation”, ending in an agreement between parties. The agreement must be approved considering the best interest of the children. It is also possible to divorce in municipality offices in the absence of minors.

Filiation

Until 2012 a distinction was drawn between legitimate and natural children (born in/out of wedlock), although they have now been cancelled. All children have equal privileges and equal parental responsibilities over them. Children have the right to:

- a. Be maintained, educated and instructed by his/her parents with due respect to their abilities, natural inclinations and aspirations
- b. To be raised in a family and maintain a meaningful relationship with relatives
- c. To be listened to in all matters/procedures concerning them, above 12 years of age (or earlier if capable of discernment)
- d. The child, in turn, must respect his parents and contribute, according to ability and income, to maintenance of the family with which he lives.

A child is considered to be conceived during marriage if born within 300 days of the separation.

Recognition of a Child

- The recognition of a child produces effect towards the parent that made such recognition, and their relatives.
- The act of recognition is unilateral (though it may be jointly made by both parents).
- This statement is used to draw up the birth certificate.
- Where the child is born out of incest, recognition is not allowed, except in the case of good faith.

Paternity

The husband is presumed to be the father of a child born during marriage. Hence, at the time of completing the birth certificate, he does not need to expressly state he is the father. However, it is possible to contest paternity.

Civil Partnerships

- In 2016, civil partnerships between same-sex persons as a specific social formation were introduced into the Italian legal system.
- Only two full age, same sex persons may enter into a civil partnership which is composed of declarations of will in front of a civil servant.
- Civil partnerships have similar rights and duties to marriage.
- However, a mere *de facto separation* can take place (provisions on divorce regarding financial consequences of separation, apply to dissolution of civil partnerships).

De Facto Partnerships

- De facto partnerships may be entered into both by same-sex or opposite sex couples.
- Couples living in a "marriage like relationship" can be considered domestic partners.
- If they wish to formalize the partnership, one member must declare the will to establish joint residence by the Registry Office (ufficio anagrafe).
- Very limited rights but: for example grants right to visit partner in hospital or prison. No inheritance rights in the case of death.

Medically assisted procreation

- Approved by the Italian parliament in 2004, where medically assisted procreation is **only** allowed to *help solve reproductive problems* (arising from sterility or infertility).
- Main concern is protection of the child born from this technique.
- Initially, restrictions were in place regarding same-sex couples and marriage. Changed in 2009! What no longer exists:
 - i. Prohibition of embryo cryopreservation
 - ii. Heterologous fecundation
 - iii. Limitation to access assisted procreation by infertile couples (granted also to fertile couples who are affected by viral diseases)
 - iv. Ban to produce more than three embryos and freeze the excess.

Chapter 28: Succession Upon Death

The property of a deceased is subject to **succession** (must pass on to his survivors). The law of succession is based on two fundamental principles:

- i. **Testamentary capacity**: Persons are free to make wills (= testamentary succession)
- ii. Families are entitled to inheritance of wealth (= legitimate succession = heirs at law)

Succession is **governed by law** when there is no will (when a person dies *intestate*).

However, even in the presence of a will, the law governs that certain persons are entitled to shares of the estate (**forced inheritance**). Such persons are the spouse, sons and daughters, parents and grandparents. This is governed by the principle of maintaining public peace. Heirs may accept or renounce inheritance. The law recognizes the *subordination* of legitimate succession to succession by will.

The testator can appoint an alternative heir in the case where the first refuses the estate. Only an ordinary substitution is admitted (not a fiduciary one).

Courts may determine that a will was drawn for the sole purpose of **disinheriting** an heir at law. In which case it is invalid.

Effects of death

- As the physical person passes away, the legal rights and duties with which he is vested cease to exist.
- Death generates legal effects: personal ties are dissolved (marriage) and certain rights may not be succeeded (right of usufruct). More importantly, all property of the deceased must be passed by succession.
- The law lays down the principle of **prohibition of succession agreements** to safeguard free decision of the testator. Joint wills are also prohibited.

Inheritance and Legacy

- The entire patrimony of the deceased is subject to succession; hence it qualifies as a **universality at law**.
- Since succession/inheritance is succession under universal title, the heir succeeds the entire relations generated at law.
- The patrimony of the deceased becomes the patrimony of the heir. He therefore runs the risk of being liable for debts of the deceased.
- Certain objects, named **legacies**, may be detached from the estate and bequeathed separately.
- Acceptance of inheritance can be either 1) *Express* (statement in front of a notary) or 2) *Tacit* (the successor acts as the owner).

Persons entitled to a reserved portion

The spouse (or divorcee), biological children and ascendant persons (in the absence of issue) are protected by law, which provided that a part of the estate is reserved to them (**non-disposable**)

- The non-disposable part is known as **legitimate portion**, and the persons as **persons entitled**
- The spouse is entitled to inhabit the "family residence" and use the furniture contained

In the case where the due share of a rightful heir has been harmed by dispositions of the deceased (will), the heir may file a petition seeking re-appointment. The beneficiary must either return the objects, or he gets a monetary compensation.

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