DIFFICULTIES IN ADAPTING THE GENERAL DISCIPLINE OF THE AGREEMENT TO THE PHENOMENON OF THE COMPLETION THROUGH AUTOMATISED SYSTEMS IN THE CIVIL LAW BEFORE AND AFTER THE CODIFICATION OF 1942.

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SUMMARY: 1. Brief considerations about the concept of agreement. – 2. The execution of the contract through the use of automatic machine systems according to the Civil Code of 1865. – 3. Execution of the telematics contract. – 4. Results.

1. Article 1321 of the Italian civil code of 1942, as stated in Article 1098 of the Italian civil code of 1865, expressly defines both agreement and contract. According to this, a contract identifies the whole agreement, so that it constitutes a synecdoche[1], which is a figure of speech in which the name of a part is used to stand for the whole (e.g., "sails" for "ships").

However, the term contract is presented in Article 1325 of the Italian Civil Code among the essential requirements of an agreement, albeit with it has a different meaning[2] since it defines a part of the "agreement" and it does not stand for the whole[3].

The apparent contradiction is a consequence of the normative provisions under Article 1321 of the Italian Civil Code, which the authoritative doctrine[4] has defined as incomplete and vague.

Article 1321 of the Italian Civil Code, together with Article 1098 of the Italian Civil Code of 1865, defines a contract as an agreement between two or more people in order to establish, regulate or terminate a patrimonial legal relationship existing among the parts.

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[1] MONATERI, P.G. *La sineddoche: formule e regole nel diritto delle obbligazioni e dei contratti*, Milano, 1984.

[2] PERFETTI, U., *La conclusione del contratto*, in *Il contratto in generale*, II, Trattato di diritto civile e commerciale. Formerly drafted by Cicu-Messineo-Mengoni, and continued by P. Schlesinger, Milano, 2016, pp. 10 and 11.

[3] CATAUDELLA A., *I contratti, Parte generale*, III ed., Torino, 2009, p. 25 et seq.

[4] ALPA G., *Il contratto in generale*, I, Fonti, teorie, metodi, Civil and Commercial Law Essay. Formerly drafted by Cicu-Messineo-Mengoni, and continued by P. Schlesinger, Milano, 2014, p. 40.

As they laid out the definition of contract, both Codes did not consider the passing of title. Articles 1376 and 1125 of the Italian Civil Code of 1865 expressly recognise the principle of consent to transfer, but such real passing of title or property does not reside within any of those effects nominatively provided for in Article 1321 of the Italian Civil Code.

Therefore, the definition of contractual effects must take in to account the latter.

In the Italian Civil Code of 1865, the omission arose from the difficulty in fully understanding the principle of consent to transfer, since the definition of selling according to Article 1447 stated that "Selling is a contract, therefore one party undertakes to give something and the other party to pay its price" («La vendita è un contratto, per cui uno si obbliga a dare una cosa e l'altro a pagarne il prezzo»); on the other hand, in the Italian Civil Code of 1942, once the principle of consent to transfer was legitimized according to the definition of compravendita included in Article 1470, there was no further reason to persist in making that mistake.

The effects specified in Article 1321 of the Italian Civil Code are incomplete because the effects of the transfer are not mentioned therein.

Additionally, the term «agreement» evokes the concept of consent (*in idem placitumconsensus*) as the arrangement reached between the intentions of the parties; a mutual intention which Article 1362 of the Italian Civil Code establishes as the subject of interpretative research.

If the term «consent» were to be intended in its literal meaning, we would be using a euphemism. In typical exchange contract, such as a purchase agreement, the individual intentions relating to the seller and the purchaser are actually in disagreement.

Consent is nothing other than a kind of compromise between the parties with reference to the initial claims: the party who sells should earn a higher value from the sale, and the party who makes the purchase would like to pay a lesser amount.

Furthermore, upon closer inspection, one could easily doubt that an arrangement reached between the intentions of the parties is an essential element for the valid drafting of the agreement. Authoritative doctrine[5] has effectively illustrated how the formula relating to the blending of intentions is actually a mere artifice, it being impossible for the two intentions to merge into one.

For this purpose, it is possible to illustrate different hypotheses in which an agreement is formed without consent being intended as absolute concurrence of the intentions of the parties.

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[5] SCHLESINGER P., *Complessità del procedimento di formazione del consenso ed unità del negozio contrattuale*, in *Riv. trim. dir. e proc. civ.,* 1964, II, p. 1345 ss.

The first case is the termination of an agreement where one of the parties is in error, which is not essential according to Article 1492 of the Italian Civil Code, or it is not recognisable according to Article 1431 of the Civil Code.

If it is not possible to prove the mistake as essential or recognisable, the agreement opposing the appeal is the result of two objectively convergent intentions[6].

The second case concerns the issue relating to the effectiveness of the withdrawal of the proposal.

In fact, the matter is not in question if one follows the ruling legal theory stating that it is sufficient to only issue the revocation, and not to notify it at the address of the recipient of the proposal.

Therefore, the termination of the contract would be prevented by the change of intentions of the applicant having a certified date regarding the receipt of the acceptance by the recipient of the proposal or its delivery and execution.

However, according to the Italian Court of Cassation (S.C. Di Cassazione) of 16 May 2000 no. 6323[7], and to a minority part of the law doctrine, the withdrawal of the proposal shall be effective only once the recipient of the proposal has made aware of it. According to this other theory, therefore, if the recipient of the proposal has not received the withdrawal at the address they specified, according to Article 1335 of the Italian Civil Code, and if the acceptance of the recipient of the proposal arrives first, the agreement will terminate anyhow, although the co-occurring intention of the applicant is missing due to a radical change of mind.

The third case[8] is based on the general conditions of the contract pursuant to Article 1341 of the Italian Civil Code, which are effective towards the adhering subject who does not set them, even if this party does not acknowledge them although they should have known them using common sense. Here, a part of the contractual regulation relating to the general conditions of the contract (nonrestrictive clauses) becomes binding for the parties even though, since it was actually ignored, it did not lie within the real intentions of the adhering party. The knowledge of the agreement replaces the acknowledgment and effective free will (the doctrine defines it as the privates normative power).

Last but not least, a case which I think should be considered is the void but convertible contract according to former Article 1424 of the Italian Civil Code.

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[6] PERFETTI, U., cited work, p. 14

[7] *With regards to the termination of the agreement, considering the combined provisions according to Articles 1326, 1328, 1334 and 1335 of the Italian Civil Code, the revocation of the proposal, as unilateral juridical act having effective force when received, is not effective when the accepting party receives it after the signing of the contract, that is after the acceptance by the counterparty has been delivered to the address of the proponent.*

[8] Concerning this matter, compare to the acute analyses stated by DEL PRATO *E., Requisiti del contratto*, *Art. 1325*, in *Comm. Civil Code* founded by Schlesinger P., managed by Businelli F. D., Milano, 2013, p. 45 et seq.

Considering the school-example of the grandfather who leaves to his grandchild, through a private agreement, the five years usufruct of a property near the University, which the heir must attend to obtain a degree, it is possible to configure the substantial conversion into a valid loan for use agreement «if, considering the purposal undertaken by the parties, it shall be considered that they would have pursed it if they had been aware of the nullity».

Therefore, the null contract the parties actually agreed on does not produce any effects, but the one they could have agreed on if they had known the grounds for nullity.

The above-mentioned discipline concerning the withdrawal of the proposal, and in light of the related discipline of the withdrawal of the acceptance, highlights how the relevant codes (the discipline) regarding the execution of the contract are linked to the idea that the legislator took into account the contract execution model through formal letter.

This being the normative frame, it is easy to understand how problematic[9] the adjustment of the regulations through automatic procedure could be, but not to the extent of considering the discipline stated in the Civil Code as completely outdated.

In the hypotheses of a legal transaction executed through computerised information systems, therefore, an agreement is not missing: it is formed through new methods od drafting a contract and charging consent, which are expressed through actions like the downloading[10].

2. In his dissertation, published in 1901[11], Antonio Cicu analised in great details the execution of contract through automatic machine systems. The Author based his research on the so-called "automatic transaction", where the automatic machine represents the mechanical tool through which the service is carried out via an action to be performed by the subject who wants the service to be done, and which is usually a coin to be inserted in a specific slot existing on the machine, where, on the outside, are specified both the proposed work (object transmission or service performance) and the action to be effected in order to carry out the proposed service. The gesture of throwing the coin being the representation of the action, which manifests the subject's intention of obtaining the result of purchasing the property or the service advertised by the machine, was recognised as a legal transaction by the doctrine.

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[9] On this topic, please refer to: NAZZARO A. C., *Riflessioni sulla conclusione del contratto telematico*, in *Inf. e dir.*, 2010, p. 13.

[10] Italian doctrine has been focusing on the telematic execution of the agreement for quite a long time now. Concerning this matter, refer to GAMBINO A., L'accordo telematico, Milano, 1997.

[11] CICU A., *Gli automi nel diritto privato*, in *Filangieri*, 1901, p. 561 ss., essay quoted in full in *Scritti minori di Antonio Cicu*, II, *Successioni e donazione – Studi vari*, Milano, 1965, p. 287 et seq.

Examining the doctrine existing at the time of drafting his essay, Cicu highlights some theories which are important to relate, albeit briefly, in order to underline the attention and effort under consideration in the analysis of such particular case.

Therefore, an early approach located the automatic transaction in the field of the real rights, by virtue of an analogy with the institution of the *jactus missilium*, which was considered by the Romans as the theory of *traditio in incertam personam*[12]. Cicu, after disputing this last reconstruction, judging it more likely that the *jactu missilium* would be considered a theory of *derelictio* in Roman Law, stigmatised the impossibility of considering it possible to take the analogy with such institution, existing the need for the completion of automatic transaction of a consideration fulfilled by the party interested in the property or service, and consisting of the payment of a certain amount.

Therefore, in his analysis, Cicu identifies that the beginning of an automatic legal transaction lies in the exposition in public by the owner of the automatic machine[13]. If such data appeared to be unquestionable, on the other hand, the setting of the legal nature of such deed was.

Three different reconstructions were presented: the first one identified in that case an invitation to offer; the second one a public promise; and the third one, which was the prevailing option, a good and proper contractual offer.

It could not be an invitation to offer, since the exposition of the automatic machine made it immediately possible to execute the contract, since the recipient of the proposal was not required to do any other activity but to insert the coin in the slot, since the object of the service and the conditions relating to the transfer were clearly laid out outside the machine.

According to Cicu, neither was it possible to accept the theory recognising in the exposition a public promise, since the latter would have lead to make the subject displaying undergo an immediate binding obligation before the offeree inserts the coin and before this was identified.

If that was the case, the existing mandatory obligation would have led the interpreter to deny the owner of the automatic machine the power to withdraw or modify the goods displayed in the automatic machine itself.

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[12] Concerning this matter, from a historical perspective, refer to SEGNALINI S., "Contrahere" senza "Consentire"? Il punto di vista dello storico, in Riv. Dir. Rom., X, 2010, p. 1 et seq.
For further considerations in a comparative perspective refer to MARINI G., *Promessa ed affidamento nel Diritto dei contratti*, Napoli, 1995, p. 25 et seq., especially for the evaluation of the idea of the contract as a promise p. 101 et seq. In the same direction refer to FRIED C., *Contracts as a promise. A theory of contractual obligation*, Harvard University Press, 1981, p. 40 et seq.

[13] CICU A., *cited work*, p. 291.

Thus, the only remaining feasable option was the configuration of the particular case concerning the true and real contract offer, and specifically, according to the famous Author, an offer *in incertam personam*[14] or, if preferred, a public offer. In this case the subject of the offeree, although unspecified at the moment of the exposition of the machine, would be determined at the moment of the *jactus pecuniae.* Therefore, it seems clear that for the subject exposing the automatic machine, the offeree subject was unimportant, since the only required consideration was the disbursement of the *tantundem*.

Through a refined discussion, Cicu drew an accurate distinction between the offer *in incertam personam* and the offers *in incertas personas*, depending on whether it was a public offer, the execution of a single contract or the execution of more agreements.

In case of an automatic transaction, according to such reconstruction, it would have been a case of a plurality of public offers, assuming the presence of the requirements of the completeness of the proposal/offer, and unimportance of the identity of the offeree. However, the latter would have been identified in accordance with the acceptance.

Through the *jactus pecuniae* the offeree showed an irrevocable and serious intention to bind to themselves the subject displaying the automatic machine. Therefore, in this case Cicu underlines that was neither required nor set up the notification of the acceptance to the offering subject, and neither was "that debate between the offering subject and offeree which usually precedes the ordinary executions of the contract".

It is not hard to notice in this matter that there is a sort of anticipation on some of the arguments which led doctrine, Irti[15] in particular, to question the consequences arising from the lack of dialogue between the parties as determined in the identification of the category of the so-called "exchanges without arrangements", in which the agreement would be the result of a combination of two unilateral juridical acts, often through a conduct implying intent, without any possibility to constitute a fully-fledged consent in any way.

Cicu effectively underlines how, in an automatic transaction, some of the rules laid out for the execution of the contract in general cannot be applied; and this happens exactly in relation to the innovations that technology has determined in relation to exchanges, with a clear necessity to adjust legal schemes and rules to the real case. In such context, it is stated that "the offeree may have manifested to the offering party their intention of agreeing to the offer one hundred times, without the automatic transaction being completed because of this". Therefore, in this context,

[14] CICU A., cited work, p. 294.

[15] IRTI N., Scambi senza accord, in *Riv. Trim. Dir. Proc. Civ.*, 1998, p. 347 ss.

"the required consent being not expressed, but implicit (through a conduct implying consent).

Once it has been ascertained that the automatic transaction has contractual nature, Cicu undertakes the task to investigate if only the subject of the general discipline of the contract, or the discipline of certain special contracts is also applicable to it.

Assuming that the automatic machine is only a means to execute the contract, Cicu comes to the conclusion that contracts executed through it comply with the standard rules in the matter of the contract.

3. Most part of the considerations made by Cicu more than a century ago can be essentially repurposed for a close examination of the discipline, which can be applied to the execution of the electronic contract.

As a preliminary step, it is necessary to clarify the difference between electronic contract and IT contract, around which various and profoundly different points of view exist[16].

At this stage, for ease of reference, we can follow the approach which defines as IT those contracts that are executed through the use of special means (e.g.: e-mail, or offers proposed for so-called Virtual auctions) for communicating the intentions of the parties, without there being particular differences with a normal execution of common transaction, and which defines telematic those contracts in which electronic means, although still defined by a human will programming, take on the role of counterparty[17].

In IT contracts, we don't seem to find particular issues once we set aside the debates on the attributability of electronic contracts to the intentions of their author, to the meaning to give to the behaviour of the user, and the doubts linked to the lack of dialogue between the counterparts.

Therefore, the major issues lie in the negotiation performed through the so-called "point and click" method, where the exchange of declarations of intent is replaced by a process of a totally unique contract drafting which ends by pressing the so-called negotiation virtual button[18], a technique implying the verification of its compatibility with the general principles with regards to the execution of the contract.

In fact, restricting the analysis to telematics contracts executed through pressing the so-called negotiation button, does not exempt the academic researcher from

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16 NAZZARO A.C., *cited work*, p. 7 et seq.

17 On this topic, refer to PERLINGIERI G., *Il contratto telematico*, in D. Valentino (edited by), *Manuale di diritto dell'informatica*, Napoli, 2010, op. 274 et seq.

18 Very used expression in the doctrine, among the others, refer to: FRANCESCHELLI V., *Computer e diritto*, Rimini, 1989, p. 165 et seq., NAZZARO A.C., cited work, p. 10.

differentiating those theories which, according to normal procedure, are commercialising goods and services which cannot be managed via electronic means, and which will require material delivery of object or service within the performance of the contract, and hypotheses according to is possible to "download" directly from the website[19], in which the performance stage happens within an electronic context anyway.

Therefore, it is not possible to reduce to such *summa divisio* the possibilities to make distinctions in the matter of telematics contracts. Things can also be complicated by the evaluation of issues pertaining the methods of payment established by the offering party and/or chosen by the accepting party. In fact, it is not rare for the user to have to submit his credit card details when it comes to accepting the offer, or at least before hitting the so-called negotiation button. Therefore, in such case, there is no time distinction between the drafting stage and the execution stage of the contract.

If a delivery must be carried out after the execution of the contract, it lies within the normal procedures of agreement completion (Art. 1326 of the Italian Civil Code) unless, for example, the offering party has reserved the right to verify the presence of the goods in the warehouse. In such case, it may happen that the good is available or not. In the latter instance it is possible that the seller will offer to replace the item with another one which is similar and has the same (or more) value, and, in this case, the accepting party has the right to withdraw from the contract. Hence, herein, one could question whether the contract is executed with the accepting party sending the service voucher, or only through communication by the offering party certifying the availability of the product. And again, in the latter case, having the client sent the service voucher, can it be considered an effective and proper irrevocable offer[20]?

Article 13 of Legislative Decree No. 70 of 9 April 2003 (implementing decree of Directive 2000/31/EC) established that:

1. The regulations on the execution of contracts are also applied in those cases where the beneficiary of an asset or service from the information company shall send its order via electronic means.

2. Except in the case of a different agreement between parties different from the end users, the supplier must, without unjustified delay and through electronic means, report receipt of the order placed by the beneficiary along with a summary of

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19 Concerning this matter, refer to SCOGNAMIGLIO C., *L'adempimento dell'operazione economica informatica tra realtà virtuale ed interesse dei contraenti*, in V. Ricciuto, N. Zorzi (edited by), *Il contratto telematico*, in *Tratt. Dir. comm. e di diritto pubblico dell'economia*, supervised by Francesco Galgano, vol. XXVII, Padova, 2002, p. 159 et seq.

20 Concerning this kind of considerations, refer to NAZZARO A.C., cited work, p.11 et seq.

the general and specific conditions applicable to the contract, information relating to the basic features of the item or service, and detailed indication of the price, payment methods, withdrawal, cost of delivery and applicable taxes.

3. Order and receipt will be considered once the parties they are addressed to are able to gain access to them.

4. The provisions listed in paragraphs 2 and 3 are not applied to the contracts executed exclusively through e-mail exchange or equivalent individual communication.

4. Ultimately, except for cases of incompatibility and employing the suitable adjustments, agreements executed with electronic means follow the general discipline of the contract, especially with reference to the attributability of an internet-mediated offer to frame of public offers or invitations to offer[21].

Provided that the discipline of the code relating to the drafting of the contract was already in some respects obsolete at the time of its promulgation, it is necessary to adjust it to the technological innovations which have arisen in the society. This is the *fil rouge* linking Cicu's studies on the automatic transaction to modern dissertations on online contracts.

However, it is not possible to apply the general discipline in its entirety to the contracts executed through electronic means, and, herein, I believe it is sufficient to limit my analysis to one hypothesis.

I refer specifically to the case regulated by Article 1327 of the Italian Civil Code, stating the execution of a contract through the beginning of the performance.

This is a very controversial matter, but, ultimately, it seems that the established prevailing view allows the application of such procedure also to an online-executed contract.

Moreover, it seems legitimate to embrace the view[22] which considers that the employment of electronic means to execute a contract should rule out those pretexts that could lead the proposing party to request the application of a drafting iter which cannot be justified by the need to guarantee a prompt execution of the service. Indeed, such need can be met without any losses.

The *ratio* in accordance of Article 1327 of the Italian Civil Code[23] is the offering party's need to safeguard their interests in a prompt and immediate execution of the purpose on the behalf of the offeree. Such interest, in this case, should prevail on the

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[21] Refer to CONTE G., *La formazione del contratto*, in *Comm. Cod. civ.* Supervised by Schlesinger P. and continued by Busnelli, F.D., Milano, 2018, p. 282 ss.

[22] NAVONE G., *Sull'applicabilità dell'art. 1327 cod. civ. ai contratti conclusi mediante l'uso di strumenti telematici*, in www.diritto.it, p. 2.

[23] BIANCA C.M., *Diritto civile. 3. Il contratto*, Milano, 2000, p. 243 ss.

interest relating to the obligation to notify the receipt of acceptance. However, the use of the Internet, which guarantees the communication of pre-negotiation deeds in real time, makes the employment of such procedure of completion of the contract wholly unnecessary. Suffice it to mention, the online download of software, music, pictures, books, the delivery of which can occur instantly thanks to the Internet. In this case, it is not a principle of execution of the contract which is being fulfilled, but an immediate and total execution of it; therefore, it would be pleonastic to imagine the offering party preemptively waiving their notification of acceptance before the execution of the performance.

In a recent dissertation on contracts, the author[24] solely states the applicability of the iter as described in the Article 1327 of the Italian Civil Code, assuming always to this purpose a request submitted by the proposing party, or if the iter complies with the nature of the offer, or according to the purpose.

Another author[25], with reference to those examples of online contract where the offering party requests the communication of their own credit card details, presupposing that such typing will constitute a settlement activity, deems it possible that the termination of the contract will be fulfilled through (the beginning of its) execution.

Regardless of the fact that the identification of payment methods usually follows the effective completion of the contract through the pressure of the so-called "negotiation button", even if the provision of credit card details were requested previous to such pressure, this would not qualify as an advance payment in view of the execution of the contract, but as a mere authorisation to a subsequent collection of the amount[26], or as an execution of the payment as concurrent to the execution of the online contract, being it beyond question that the system requires, in real time, a simultaneous communication of the fulfilled payment and the termination of the transaction to the offering party, with the further purpose of allowing a prompt fulfillment of the relevant fiscal obligations.

Finally, it is important to reaffirm that the general discipline of the contract, excepting clear stretches in its meaning, can not be entirely applicable to the completion procedure relating of exchanges performed through electronic means.

[24]GALLO P., *Trattato del contratto, 1. La formazione*, Torino, 2010, p. 846.
[25]CONTE G., cited work, p. 286 ss.
[26] G. OPPO, *Disumanizzazione del contratto?*, in *Riv. Dir. iv.*, 1998, I. p. 525 e ss.