The University of Texas at Austin
Studies in Foreign and Transnational Law

GUIDO ALPA & VINCENZO
ZENO-ZENCOVICH:

ITALIAN PRIVATE LAW

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The volume offers both a general overview and selected details of Italian private law and its transition from early twentieth-century legal tradition to a modern legal system based on constitutional values and geared towards European integration.

Among the areas presented are family law, succession, legal persons, businesses and companies, property, contract, and tort. The volume takes into account not only the legislative system, starting from the 1942 Civil Code and highlighting the many and significant changes that have been made in the past six decades, but also the profound influence of case law and legal scholarship. The authors emphasise the eclectic but systematically solid foundations of Italian private law, which has been able to blend successfully the best of the diverse continental legal traditions and adapt itself to the ever growing pressure of EU legislation.

The volume is addressed to legal scholars, practitioners and students who wish to gain first-hand knowledge of Italian private law in their research, professional or academic activity.

Guido Alpa, FBA, is Professor of Civil Law at the University of Rome 'La Sapienza'. **Vincenzo Zeno-Zencovich** is Professor of Comparative Law in the University of Roma Tre.

The University of Texas at Austin Studies in Foreign and Transnational Law

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Foreword

There are many reasons why this book could attract a reader's attention. Italy is, first, home to one of the oldest legal cultures of the world, and Bologna, the cradle of modern legal scholarship to which European private law owes so much, centuries later continues to be a symbol of learning and innovation. Italian academics have lived up to this long tradition by contributing much to the discourse on comparative methodology, today set to inherit on a global scale the role played by Roman law in Europe for so long. The names of Gino Gorla, Rodolfo Sacco and Mauro Cappelletti, among many others, are well-known to those working in the field. Finally, the country boasts one of the largest European economies, offering professional and commercial opportunities in many areas, and remains a prime destination for anyone wishing to escape the colder regions of the Continent for more mundane reasons. This book, we feel, will assist the student, scholar, and practitioner in pursuing or advising others on any of these very different aims.

A first point of entry to Italian private law, it is the fourth book to appear in this Series, the second one on a foreign legal system, and perhaps the only general introduction to Italian private and commercial law currently available in the English language. We are extremely pleased to have recruited for this project two leading Italian scholars who have not only excelled in the legal environment of their own country, but brought to the world of comparative law rich insights into the Italian system on a number of occasions. Professor Guido Alpa of the University of Rome 'La Sapienza' and his colleague Professor Vincenzo Zeno-Zencovich of the University of Roma Tre have each written extensively on all areas of Italian private law and, through their work as comparativists, know instinctively how to present their material to an international audience. The reader will thus find a concise account of and insightful background knowledge not only to the basic questions of Italian contract law, but also chapters on family law and succession, business and company law, property law, torts, and the basics of the Italian law of civil procedure.

As General Editors of this new and rapidly developing Series, we remain deeply grateful to our supporters in the New World who have

done so much to help us spread the Gospel of the Old. The University of Texas at Austin School of Law, since 2006 led by Dean Professor Larry Sager, continues to provide the institutional platform for the project. The School has assisted us greatly in attracting the attention of the American legal audience. The M. D. Anderson Foundation of Houston and Mr Gibson Gayle, formerly Managing Partner of Fulbright and Jaworski, are thanked for providing the financial support for the many small and large steps which eventually lead to the publication of our books. The authors wish to express their gratitude towards Dr. David T. Wild who has edited the English edition of this handbook. Finally, thanks must go to the new team of Routledge-Cavendish, which has taken over the production of the Series with dedication and professionalism.

Jörg Fedtke
London, 8 November 2006

Chapter I: Introductory Concepts

1.1. Private law today

1.1.1. Private law, civil law and commercial law

Private law traditionally includes relations between private persons. It is divided into two main branches: *civil law* (from the Latin *civis*, citizen) and *commercial law*.

Civil law is concerned with all legal relations that can subsist between private persons, with the exception of economic operations pertaining to commerce, industry and professional activities, all of which are covered by commercial law.

Between these two branches may be inserted a third: employment law, covering the individual and collective relations in the world of work.

Before the current civil code, dating from 1942, was promulgated, the distinction between the two branches was enshrined in legal form, as there were two codes, the *civil code*, which regulated relations between civilians, and the *code of commerce*, regulating relations among traders, and between traders and private persons. Many legal systems still retain this division. In France, for example, there is the Civil Code (from 1804) and the Commercial Code (1808). In the United States the laws on civil relations are not codified, whereas commercial law partly has been, in the *Uniform Commercial Code* of 1962.

In the Italian system this double codification was abolished in 1942, with the promulgation of a civil code made up of six parts, known as 'books' dealing with the individual and the family (Book I), the law of succession (Book II), property law (Book III), the law of obligations (Book IV), employment law (Book V) and the protection of rights (Book V). Business contracts are dealt with in Book IV and businesses and companies in Book V.

1.1.2. History and function of the civil code

To date, there have been two codes regulating the Italian legal system. The first came into force in 1865 following the political and administrative unification of the various Italian states. The second,

currently in force, was promulgated during the Second World War. The basic intentions behind the earlier code are clear. From a political viewpoint, it gave uniformity to the regulation of private relations which had hitherto differed between the various states out of which Italy was formed. From a commercial and economic viewpoint, such uniformity made the conduct of business easier and quicker. From a judicial viewpoint, the earlier code was based largely on the Napoleonic code.

The 1942 code, on the other hand, reflects the need to update a regime which in many respects had become too outdated to satisfy the requirements of an economy that had changed substantially and was much more dynamic than that of the nineteenth century. There was also a desire on the part of those in power to signal in a durable form the development the Italian state had undergone, by means of the detailed regulation of private activities.

However, unlike other codes, for example, the criminal code of 1930, the civil code was not profoundly influenced by the Fascist government in power at the time. Its drafting – completed in only a few years despite wartime difficulties – was entrusted to jurists not identified with Fascist regime and the ideology concealed behind such disciplines as property, succession and family law was consistent with the attitudes of most citizens of the time and reflected the needs of a laissez-faire economy.

1.1.3. The civil code and legislative reform

The civil code has undergone significant change since 1942. Modifications to its text, together with the addition of numerous laws profoundly affecting individual aspects of private law, show how the civil law has developed and become progressively integrated with public law, and reveal the growing distinction between general law and that concerning economic development: altogether a veritable phase of innovation in the civil law.

Considering these innovations not in chronological order, but following the order of the Books of the code, it will suffice to outline some of the important changes to give a picture of how civil law is developing and of how the civil code is being transformed.

Of particular significance in the area of personal rights is law no. 675 of 31 December 1996 on personal data protection, which gives legal recognition to a right to *privacy*. Family law underwent thorough reform with the introduction of law no. 151 of 19 May 1975, which also made important innovations in the law of legitimate succession. Divorce was introduced (law no. 898 of 1 December 1970, as amended by laws nos. 436 of 1 August 1978 and 74 of 6 March 1987) as was a different regime for adoption of children (laws nos. 431 of 5 June 1967, 184 of 4 May 1983, and 476 of 31 December 1998 on international adoption).

The marriage rules arising from the Concordat of 1929 with the Holy See were revised by the Villa Madama agreement of 18 February 1984 and the revisions implemented by law no. 121 of 25 May 1985. Previously, law no. 194 of 22 May 1978 legislated for the medical termination of pregnancy (abortion).

The regime of property law has been extensively revised, not only through national legislation, but also through EU and regional intervention in the areas of agricultural land, hunting, protection of flora and fauna, cultural and environmental heritage (legislative decree no. 42 of 2004) as well as through important new legislation concerning buildings (laws nos. 10 of 28 January 1977 and 47 of 28 February 1985), urban leases (fair rent law no. 392 of 27 July 1978 and law no. 431 of 9 December 1998) and timesharing property (legislative decree no. 427 of 9 November 1998).

In general, fewer changes have taken place in the areas of obligations and contract, with the exception of hire, insurance and rental of rural property. However, laws have been increasingly required to give effect to EU rules, particularly on consumer protection (among other examples, legislative decree no. 50 of 15 January 1992 on sales away from commercial premises, presidential decree no. 185 of 22 May 1999 on sales at a distance and the rules in Arts 1469 *bis* ff. of the civil code on unfair terms in consumer contracts), and also others designed to adapt to the demands of new technologies (presidential decree no. 513 of 10 November 1997 on digital documents).

Employment law has been transformed from two directions, both by the introduction of a parallel set of rules in the form of sectoral contracts and by a law on fundamental principles of work, the Statute of Labour (law no. 300 of 20 May 1970), together with a new set of trial procedures (law no. 533 of 11 August 1973). Finally, new measures to ensure equal treatment of men and women have been taken to remove the obstacles to equal opportunity (laws nos. 903 of 1977 and 127 of 1991).

In commercial law, a register of businesses has been created (law no. 580 of 29 December 1993 and presidential decree no. 581 of 7 December 1994) and the law on sub-contracting (law no. 281 of 18 June 1998) and factoring (law no. 52 of 21 February 1991) has been regulated. A consolidated law text (legislative decree no. 58 of 24 February 1998), bringing together the various rules on financial brokerage, has made provision also for quoted companies and for providers of banking and credit services (legislative decree no. 385 of 1 September 1993).

Reform of shareholder-owned companies has also taken place (first with law no. 216 of 7 June 1974, containing provisions on the stock market and taxation of shareholdings, and more recently with legislative decree no. 6 of 2003, all modifying the civil code). The nucleus of

a regime covering the stock market has emerged (laws nos. 77 of 23 March 1983 and 281 of 4 June 1985). Other important reforms relate to specific sectors, including compulsory insurance of motor vehicles and boats (laws nos. 900 of 24 December 1969 and 29 of 26 February 1977), regulation of commerce (law no. 426 of 11 June 1971 and legislative decree no. 114 of 31 March 1998) and the protection of competition (law no. 287 of 10 October 1990).

In some cases these modifications have been applied directly to the text of the civil code (for example, adoption, family law). In others there has been a preference for specific statutes having effect alongside the code. This process of decodification represents a new phase in the civil law, in which the dominant tendency is away from gathering together all regulation of private relations in a single text and towards developing specific laws in appreciable numbers in derogation from the general rules.

Does this imply that the function of the civil code, and of codes in general, can be said to have nearly run its course in advanced capitalist society?

In the view of some, the process of decodification demonstrates the inadequacy of current codes to regulate all aspects of private relations, and hence the need for special laws to regulate in minute detail those relations that cannot be brought within the scope of the codes. There are others who, fearing for the certainty of law, contrast these tendencies and argue for a literal and rigid interpretation of the law. It should not, however, be assumed that the function of codes is coming to an end in today's society: as evidence of this, note that systems such as the common law that have historically not adopted codification have recently adopted sectoral codes.

1.1.4. Private and public law

Little remains of the concept and structure of private law as it was understood in the nineteenth century. Wholesale economic and social transformation since the First World War have irreversibly changed both the nature of private relations and the private law concepts underpinning them.

As far as relations are concerned, a new form of state, the *welfare state*, governed by public law, has come into being. In this new state, the concerns of public authority are not confined to internal security and defence of frontiers, but expand in a far more intrusive way to embrace economic processes, taking measures to benefit the economy, with direct administration of social services (transport, public assistance, medical services and so on) and intervening in private commercial relations (regulating prices, credit, insurance, etc).

As far as private law concepts are concerned, one must bear in mind the ever-widening field of activity covered by laws, thus reducing the scope for negotiated relations reflecting the common will of private parties, and ensuring that negotiations themselves are to a large extent covered by regulation and administrative provisions.

On the other hand, public powers are decreasingly subject to a special regime (*public law*) and more and more subject to a 'combined' law applicable both to public and private subjects. This new area of law consists not only of numerous constitutional rules, but also to a large extent to laws that at one time made up private law as distinct from public law. Examples include the many provisions of the civil code governing contracts that today are often applied to relations between local authorities and individuals in the matter of land-use planning.

For this reason, as already noted, the traditional distinction between private and public law is tending to become less useful and may even be a hindrance in areas such as property law where private and public law aspects are closely intertwined.

It should also be noted that private law is used also today to protect interests that are neither individual nor, according to some, pertain strictly to public power and so cannot be considered as public interests. This arises in the case of organised categories, for example, collective trade-union interests, and in groups, communities and associations with interests as various as health, the environment, and the interests of consumers and investors.

Provisions of private law can also be applied to forms of social control, covering private activities (particularly business activity) in such a way that the control comes not directly from public authorities but is exercised by other private persons organised into groups, associations and communities. Examples are the control over individuals' use of cultural heritage, and the influence of associations such as consumer groups in the manufacture of products.

1.2. Constitution and private law

1.2.1. Constitutional rules that concern private relations

Precisely because the relationship between the individual and the State has changed with the historical development of institutions, it is possible today to speak of the *constitutional importance* of private relations and, by the same token, of the *effect* of constitutional rules on the actions of individuals.

The separation between the *private* and *public spheres* of relationships is subject to many exceptions. Whereas under the previous constitutional regime the rules governed relations between individuals

only to the extent required to protect their autonomy vis-à-vis State intervention – Art 29 of the mid-nineteenth-century Albertine Statute declared private property to be *inviolable* – today the 1948 Constitution (which entered into force when democratic institutions were restored in Italy after the Second World War) considers numerous other relationships, such as employment, savings, access to housing, the family and so on, which implies a variety of State intervention in sectors traditionally reserved to private relations.

We shall return later, when discussing specific topics, to the particular importance of individual constitutional provisions, but here we shall undertake a brief survey of the principles that have the greatest importance for our field of study.

The Constitution begins with rules that protect the **person** and the so-called inviolable rights. These rules afford protection to the individual, both singly and as a participant in groups (Art 2) such as family, school, workplace and various kinds of association. In this context particular importance is given to the principle of equality and individual freedoms.

In Part I, covering the rights and duties of the citizen, are enshrined important personal rights such as the inviolability of the person and the home, the privacy of correspondence and the right of association (Arts 13ff of the Constitution). Of particular importance are the rules dedicated to the family, an institution protected as a 'natural association' (Art 29), a community in which the moral and legal equality of spouses is assured (Art 29(2)) and those in Art 30 setting out the duties of parents towards their children, be they born in or out of wedlock. Among other personal rights guaranteed by the Constitution, the right to health (Art 32) extends beyond the mere right not to undergo medical treatment without consent, conferring a positive right which all can maintain against whoever can violate or endanger them, through hazardous industrial activities, environmental pollution (see Art 9) and dangerous working conditions.

Work (and labour relations) is protected in a special manner. This is made evident as early as Art 1, which states that Italy is a democratic republic based on work, and in Art 3(2), which identifies work as a central factor in individual development. There are also provisions for protection of workers (Arts 35ff).

One of the most profoundly innovative aspects of the Constitution, however, is the way that it approaches economic relations from a social perspective. Indeed, **business enterprise** (Art 41) and **property** (Art 42) are no longer viewed as the privilege of a few, but as components of free economic activity which cannot be exercised either in disregard of its social utility or in violation of the safety, dignity and personal freedom of individual workers and, more generally, of citizens.

The Constitution guarantees individual private property, and prohibits its abolition, but allows the legislature the possibility to make laws to limit the scope of private property in order to promote social goals through the protection of general and collective interests.

Recent examples can be found in the law of landlord and tenant, which indeed realises the social function of property by limiting the landlord's powers in favour of the tenant, and in building law, where a blanket proprietary right to build has been limited in the interest of land protection and orderly urban development.

Business law is invested with the same logic. While the right to individual-economic initiative is recognised, the right is equally reserved to limit it for social ends, extending to economic programmes designed to establish what should be produced and in what quantities or where business enterprises should be situated. Furthermore, while some sectors can remain entirely in private hands, or in private hands under State direction, the State itself can reserve to itself the direct exercise of some economic activities, either to ensure the provision of essential public services (Art 43) or to introduce laws to nationalise or collectivise businesses or sectors in private hands. Such a provision, however, has been substantially modified in its interpretation since 1957 when Italy became one of the founding Member States of the European Community.

The inefficiencies that have resulted from such arrangements have in more recent times led to so-called *privatisations* (law no. 474 of 30 July 1994) and State intervention in the economy is now limited largely to the protection of competition and of consumers, through the activities of the *independent regulatory authorities*.

1.2.2. The direct application of constitutional rules on private relations

Thus, private relations cannot be seen as an area in which the State should take no interest, but rather as one with definite constitutional implications.

It is generally said that constitutional rules are **applicable** to private relations, since these are commands addressed to the legislature, in the sense that in passing laws concerning businesses, property and so on, legislators must keep to constitutional principles.

It has happened, for example, that in some cases the legislature has not respected the guarantee of protection of the individual property owner, for example, in the laws on rural property. The Constitutional Court declared in the end that laws which unduly favoured tenants at the expense of the landowner were illegitimate (Constitutional Court decision no. 153 of 1977). In other cases, however, the legislature, either because the law came into effect before the Constitution or violated its

requirements, has unduly favoured suppliers at the expense of users, for example, in laws on prices and tariffs for public services. In these cases also the Constitutional Court has intervened to restore the balance.

On the other hand, according to the doctrine of **direct applicability** of constitutional rules, they have more than the general importance outlined above in that they can be directly applied by the judge who at the request of the parties may establish whether the individual has conducted his activities in a manner contrary to the constitutional rules and may also make any necessary orders and apply appropriate sanctions. The doctrine of direct applicability is generally rejected: however, there are apparently situations where the judge can refer to the Constitution in order to repress illicit acts or to support the justification of his decision. The emission of smoke and liquid sewage, by violating the constitutional protection of health (Art 32), should ipso facto be considered illegitimate. Again, the elements of fair trading relating to unfair competition (Art 2598 of the civil code) are based on the provisions of Art 41 of the Constitution.

The problem is very complex and legal scholarship has not yet been able to resolve it clearly. The traditional view did not admit the possibility of constitutional rules being applied directly to private relations by a trial judge, but modern scholarship has opened the door to such a possibility, especially in cases of protection of the person or definition of the import of general principles (of which more in subsequent chapters).

To summarise, the relationship between private law and the Constitution can be considered from two different viewpoints:

(a) legislative intervention in private relations with a view to attaining social ends and serving general interests through the institutions of private law (such as property, business enterprise, contract and liability);
(b) the protection of individuals from State intervention, with the aim of protecting the person whether qua individual or as a representative or member of groups and communities (such as families, associations, parties, trade unions, professional bodies and societies) and by means of the necessary measures to assure the equality of citizens.

In this sense, the fundamental principles – protection of the person, of substantive equality, the removal of obstacles which, for economic or social reasons, prevent people (particularly the poorest) from participating in the country's decisions – can be found not just in the *formal constitution*, but also in the *living constitution*, that is to say, in the nexus of principles inhering in the pact formed between political and social forces at the founding of the Republic and progressively modified to adapt to changes in society.

1.2.3. The principle of equality in private law

The principle of equality in the formal sense (Art 3(1) of the Constitution) can be applied in many ways to private law. Relevant legislative measures require, for example, the equal treatment of consumers in cases where the goods or services are supplied by businesses operating under conditions of legal monopoly: Art 2597 of the civil code states that 'whoever operates a business enterprise in conditions of legal monopoly is obliged to contract with whomever requests the services provided by the business, maintaining parity of treatment.' Other measures have recently attempted to eliminate the discrimination still suffered by women (law no. 903 of 1977, on equality in the workplace) and by wives (law no. 151 of 1975, reforming family rights).

There are, in addition to Arts 3(1) and 29, a number of other constitutional rules which can be invoked to give effect to the principle of substantive equality and by which the State undertakes to remove the economic and social obstacles which impede the full development of the individual and the effective participation of all workers in the political, economic and social development of the country.

1.3. The new sources of private law

Public law is concerned with the sources of law; from the point of view of civil law it is both necessary and sufficient to observe that the laws regulating private relations can be of a *national*, *regional* or *supranational* origin.

The laws regulating private relations are for the most part of national origin, having been passed by the national parliament. With the establishment of regions (Art 117 of the Constitution) and the commencement of their effective functioning, the question arises as to whether regions have the necessary competence to pass laws regarding private relations. At the same time, with the proliferation of supranational organisations of which Italy is a member, the supranational rules governing private relations are multiplying.

1.3.1. The problem of regional private law

Does **regional private law** exist?

The question has been widely debated. Article 117 of the Constitution, which sets out the legislative competence of regions, explicitly affirms that the State has pre-emption over 'private (and criminal) law'.

The Constitutional Court has declared that the regions have no specific standing to regulate private relations, but on the other hand private law is not always a subject in itself, being made up of various

matters over which the Constitution grants competence to the regions. For example, buildings, which certainly fall within the scope of private law, are subject to planning law, a regional competency; similarly with agricultural property, quarries, peat extraction and hunting. In these areas, regions have legislated intensively in areas with private implications, for example, on hunting, environmental protection and the landscape, on agriculture, building activity and so on.

It can be maintained, therefore, that regions have standing to legislate for private relations, even if only in cases where general principles of law are not broached (for example, rules on forming and construction of contracts, etc) and only where the subject matter is of particular regional interest.

1.3.2. Supernational sources and EU law

The provisions regulating private relations can be not only of State and second order (that is, regional) origin, but also of supranational origin, deriving either from EU law or from treaties and international conventions.

Italy has concluded numerous treaties with other countries that affect private relations. Among the most significant are the Lateran Treaty and the Concordat with the Holy See in 1929 now substituted by the 1984 agreements. The Concordat contains rules relating to marriage and to religious education in schools.

Of particular importance are conventions which enshrine rights designed to safeguard a person's rights and the expression of his personality, especially significant for those groups of individuals marginalised in present-day society or belonging to minorities. Of these the most notable are the Universal Declaration of Human Rights, made by the UN in 1948, and the European Convention on Human Rights signed by the Council of Europe in 1950, which elaborate rules on political and civil rights and on individual liberty.

Of still greater importance, however, is European community law, that corpus of fundamental and operational rules created by the organs of the European Union, which has had such a large impact on private law that these wide-ranging and important interventions have led to talk of the creation of a European Private Law.

1.4. The role of judges in private relations and general principles. General equity

1.4.1. The general principles

The role of the judge is to apply the law to resolve conflicts. Applying the law, however, implies what is called a creative component: *interpreting* it,

especially in cases where **general principles** need to be applied. This term, which originated in German jurisprudence, refers to expressions with a general, non-specific scope, such that their import can be refined over time by judges in a manner reflecting the changing habits and sentiments of the citizens: in short, a collective *social consciousness*.

Legislation often incorporates general principles into private law. One only has to think of circumstances in which these expressions are used: 'just cause' (in dismissal, for example); 'creditor's interest' (Arts 1173 and 1414 of the civil code); 'reasonable period' (Art 1379 civil code); 'serious cause' (Art 24 civil code) and so on.

The judge is thus in a position to appraise, from time to time, the circumstances of the case and to adapt the letter of the law in the historically most appropriate manner.

Some general principles are of particular importance, either because they affect the performance of a contract (for example, **good faith**) or because they concern the validity of legal documents (for example, **public order**, **public morals**). Each of these will be subject to a specific analysis below.

Public order is a rather ambiguous expression. It does not, in a private law context, mean only external order, collective order, in other words, police-enforced order: rather, it means the totality of peremptory principles on which the legal order is based. The rules of public order are established to protect public interests, and affect both family relations (for example, rules governing marriage) and relations of an economic nature.

The expression 'public order' is one of the most frequently recurring in case law, and is often decisive in a ratio decidendi of the issue in that any declaration that a relationship of any kind is contrary to public order is sufficient to invalidate it.

'Public morals' refer not only to the many aspects of sexual morality, as is often assumed (and as everyday language would imply), but rather the entire range of social and moral principles on which a society is based, and which are respected by the majority of its members.

For example, it is held to be against public morals for A to promise to pay B to influence his conduct of a public function (this is the practice of bribery, elegantly referred to as 'trafficking of influence' in some decisions).

Among the preliminary provisions of Book IV of the civil code, the legislator also sets out, over and above sources of obligation and the proprietary character of performance, duties of **fairness**. These consist of duties, rather than obligations in a strict technical sense, because they concern the behaviour that is expected from a person in his manner of discharging an obligation. The expression *propriety* indicates precisely a fairness and probity of conduct, and corresponds to good faith in an objective sense, to which reference is made in the context of negotiations

(Art 1337 civil code), pending contingency (Art 1358 civil code), and the interpretation, integration and execution of a contract (respectively, Arts 1366, 1371 and 1375 civil code). Fairness is thus a general principle that can be said to feed on the principles that underpin the legal order: principles that adapt to the ideological basis of social attitudes and consciousness.

1.4.2. General equity

General equity should be distinguished from these general principles. Some commentators indeed hold that it cannot be considered a general principle: *general equity is a means of doing justice*. This is to contrast it with the law, viewed as a set of rigid rules. There are numerous instances where the law (particularly the civil code) accords the judge the power to act not according to the law, but to follow general equity, that is, his own considered – this clearly is not the same as 'arbitrary' – assessment.

The judge uses general equity to *evaluate damage* (Art 1226 civil code), to *integrate contracts* (Art 1374 civil code), to *interpret contracts* (Art 1371 civil code), and in many *special forms of contract* (supply, leases, commission, agency, etc).

1.5. Legal relations

1.5.1. Rights and interests

The idea of **legal relations** was coined as long ago as the nineteenth century as part of the construction of basic concepts needed to organise legal discourse. It denotes any relationship between two or more subjects, or a relation with things, on which the legal order bestows significance and defines consequences.

To speak of legal relations it is first necessary for there to be a relationship between persons (for example, *choses in action* as when A borrows a sum million from B) or between people and things (A buys a house, over which he holds *property rights*: the house belongs to him, but he cannot do exactly what he wants with it). There must also be an interest involved. This need not be economic, but can be simply moral: it is important, however, that an economic value can be ascribed to that to which the interest attaches (Art 1174 civil code). The interest must also merit protection.

In the Italian tradition, legal relations consist of two aspects, or two 'sides', the active side and the passive side. Legal situations, which apply to private persons (subjects), are, therefore, active and passive. Active positions include rights, powers or licences, expectation. Passive positions include duty and obligation, 'subjection' and burden.

Each such situation will be illustrated by examples below; here it is sufficient to outline their content and meaning.

Rights are the most legally robust. They are individual interests protected directly by legal rules (property rights, choses in action, for example). They can be divided into rights which must be respected by everyone, and are effective as against everyone (such as rights of the person, property rights over tangibles) and those which apply vis-à-vis specifiable others (such as choses in action, rights to enjoyment). Rights can take the form of powers, authorities, claims and immunities.

Powers or **licences** are those rights exercised vis-à-vis persons who may not detract from the wishes of those who hold them. Examples include the right to withdraw from a contract, from an association or from a company, or the right to first refusal on the same terms where the other party wishes to sell property (the right to pre-emption).

Authorities are powers accorded to a person to exercise not in his own interest, but for the benefit of another whom the law considers worthy of protection, for example, parental authority over children.

Expectations are future prospects or entitlements that correspond to an unvested right. An example of *expectation de jure*: A will receive a flat as a gift if he obtains his degree; in the period while he is studying he can, by Art 1358 of the civil code, sequester the property if he fears that the donor, B, wishes to get rid of it. An *expectation de facto* is a mere desire, a future possibility not protected by law (for example, A believes that, because of his friendship with B, who is childless, he will become B's heir at the death of the latter).

Corresponding to rights are the passive conditions of **duties and obligations**, which require people to refrain from doing something (A's property rights over a house entail a general obligation on everyone to refrain from causing damage to the house) or else to give or do something (A has contracted to sell his house to B and so is under an obligation to transfer the title; C and M are a married couple and have mutual duties of material and moral support established by law).

Corresponding to authorities, powers and licences and de jure expectations is the passive condition of '**subjection**': an individual over whom others can exercise powers may not exclude himself from the scope of such powers, but must submit to them.

The concept of **legitimate interest** has been used to describe the relations between the public administration and individuals. The individual is protected by this qualified interest for reasons of public interest. In other terms he does not have a right that public bodies act in his favour, but he has a legitimate interest that they should follow the rule of law.

Applying to relations between the public administration and individuals, but also in some situations to private relations, is the concept of group rights, that is, interests not confined to individuals, but extending to groups and communities (examples include the protection of health, of the environment and of cultural heritage).

1.5.2. The parties in legal relations

A **party** is someone who takes part, or participates, in an agreement or other legal relationship. A **third party** or bystander is someone outside the agreement or relationship. He is called a third party because normally there are two 'first' parties and so he is 'third' with respect to these. But the idea of 'third party' does not change even if there are more than two parties to the agreement, or indeed if there is no agreement but merely a unilateral declaration such as a will or a promise to pay.

Neither should it be supposed that the concept of parties necessarily equates to the number of persons who participate in an agreement. If, for example, A, B and C jointly purchase a house from D, there are still two parties in the contract for sale: on the one hand A, B and C, on the other, D. The concept of party, therefore, relates to the person or persons who in respect of the dealing form a *single locus* of interests. A, B and C in the sale of the house are such a locus, as their interests contrast with D's. In this sale D, by reason of having contrasting interests to A, B and C, is known as the *opposite party*.

1.5.3. The acquisition of rights through originating and derived title

Rights can arise from legal relations. Such rights are created for their possessor by means of *acquisition*: there needs to be an action of a legal nature to give rise to such a right.

The acquisition can take the form of *originating title* or *derived title*. Originating title occurs where the title has not been obtained from an existing title-holder, but is constituted autonomously by the possessor (an example is treasure trove: Art 932 of the civil code). Title is derived when there has been a relationship with the previous title-holder. In this case, certain conditions must be satisfied before title can be transferred: (a) the possessor must be the effective title-holder and (b) there must be a purpose to the transfer.

He who transfers the right is referred to as the **transferor**; he who receives it is called the **transferee**.

Title denotes the juridical fact on and through which the transfer is based. Title must be both sufficient and valid: a contract for sale, for example, is sufficient title to transfer the property of a thing from A to B;

a purely gratuitous loan by which A lends a thing to B does not confer sufficient title to transfer property. The title is not valid if it is defective, that is, not in the prescribed form. The purpose of the transfer, the reason which validates it, must be *legitimate* (the so-called *legitimate cause of assignment*).

1.5.4. 'Loss' of a right. Transfer, limitation, lapse and other causes

Every time goods are put into circulation, the property right is transferred from the prior possessor and is acquired by another. The seller's property right is lost in being transferred to the purchaser. The loss of a right can generally be a consequence of the operation of law, as in the case where a sanction is applied. This occurs, for example, where an individual constructs a building without first having obtained a *planning permit* from the relevant authority. In such cases, the improperly erected building may be confiscated and henceforward be the property of the local authority in which it is situated (Art 151 of law no. 10 of 1977).

In other cases, the loss of a right is brought about by collective requirements. If the construction of a school necessitates the acquisition of certain land, it may be compulsorily acquired from the owner, who then loses his property rights over it. The land becomes the property of the State or the local authority, depending on the type of school. This is an example of *compulsory purchase*.

In yet other cases, a right is extinguished through not being used, that is, by *limitation*.

All rights, other than a certain number specified by law, may be extinguished by limitation 'when the person entitled to them does not exercise them within a period of time determined by law' (Art 2934 of the civil code). The legal order has no interest in preserving for an individual rights that he does not make use of, and which through disuse keep property and resources out of circulation to the detriment of the national economy: if the individual does not make use of his right, it is a sign that he has no need of it, that he is not taking care of his own interests and does not wish to profit from them.

Limitation periods can be interrupted when the holder of an interest resumes exercising it and in other circumstances provided for by Art 2943 of the civil code.

For how long must the non-use of the right continue, in order to be terminated by limitation? This varies according to the case. The most common (so-called *ordinary limitations*) have a 10-year period. Some periods are shorter (for example, a purchaser's claim expires after one year). Others are longer, for example, for the non-use of an easement such as a right of way over land belonging to another. Finally, there are cases where a limitation is presumed, by default, to come into effect unless

the holder of the interest affirms it by some means, such as a deed or conduct which indicates that the limitation is suspended or interrupted. This is frequently the position with commercial dealings of very short duration. A typical case is the money a guest at a hotel owes the owner.

There are instances where, in order to avoid uncertainty of legal effect, rights must be exercised within a prescribed time limit. The purchaser of a defective good must inform the vendor within eight days of delivery, otherwise he deprives himself of a remedy (Art 1495 civil code on reporting defects).

This is a case where the right *lapses*.

1.6. Rights

1.6.1. Rights and legal situations

The most important of legal situations, whether from the viewpoint of volume of provision or historical significance, is the *right*.

The right has a long lineage. It received much attention particularly after the introduction of the Code Napoléon, when it was identified largely with property rights over immovables, whence the definition of this right as an 'unconditional power' and as an expression of the free and sovereign will of the individual. It provides guarantees against outside intervention, whether on the part of private persons or the State: all are enjoined to respect the individual's will and power.

1.6.2. The idea of 'subjective rights' and the Historical School perspective

Historians identify the *origins of the idea of 'subjective rights'* as dating from the seventeenth and eighteenth centuries, a period when absolutism was gaining ground and all power was attributed to the sovereign. It was thus necessary, from a philosophical and legal point of view, to identify a sphere in which the individual was free from outside interference and State power. The idea of 'subjective rights' is indeed contemporaneous with that of *natural rights*, that is to say, rights (such as the right to life, to personal freedom, political rights and the right to property) inhering in every individual qua *person*, inviolable and immune from change in either time or space.

In writings on jurisprudence the concept of 'subjective rights' was developed with particular assiduity in the nineteenth century by the German Historical School. This School conceived of legal relations as 'a sphere of dominion independent of individual will' in the sense that legal relations were interposed among more than one subject to operate a rule of law, but from these relations rights arose, viewed as 'the power of

the subject's will', universal and unconditional, which the legal order could not abridge or modify without the consent of their proprietor.

There is an obvious connection between these theories of legal relations and the concepts of bourgeois individualism. The political function of the theory of 'subjective rights' was thus to protect individual holders of rights. If property rights are thought of as the right par excellence, it becomes clear that the theory of 'subjective rights' became a potent instrument for the protection of property owners in the face of interference from public authority, but of course they could not protect those who, belonging to the proletariat, had no property to defend.

Implicit in any 'subjective rights' is the right to take *action* to defend it. Legal action is the means whereby a right can be protected and is, so to speak, the packaging that rights come in. The legal order protects an interest on behalf of a person vis-à-vis other private parties and thus creates a bond, the respect of this right by everybody, backed by a sanction. Sanctions are issued by a judge's intervention at the request of the holder of a right infringed by a third party, by means of a legal action.

1.6.3. Abuse of a right

There is a close connection between the erosion of the notion of 'subjective rights' and the concept of abuse of a right. This principle dates from the end of the nineteenth century as an effect of two rather different tendencies, which nevertheless converge in respect of the creation of the idea of *abuse*. One tendency is of a catholic background, and inhibits an individual from performing actions contrary to conscience, that is to say, doing harm to others and to the community in general. In exercising his rights, a proprietor must seek his own advantage but not to the detriment of others. The other tendency, coming from a socialist background, appeals to the principle of solidarity: the State may impede individuals from exercising their rights so as to cause harm to others, without obtaining an advantage for themselves. The expression *abuse of a right* may appear contradictory as it indicates the excessive exercise of a right which by its nature is untrammelled.

The prevailing viewpoint today is to regard the problem of abuse of a right as theoretical in nature and of purely historical importance. The cases in which abuse may be considered prohibited are for this reason restricted to isolated examples that are considered from time to time, such as dismissal for good cause or with good reasons, or the nullity of a contract through illegality, 'emulative'(that is, spiteful) acts (Art 833 of the civil code). In the rare cases where case law admits the existence of an abuse, it is through recourse to a general principle such as propriety or good faith, or else to the principles of tort covering wrongful harm

(Art 2043 civil code). The consequence is indeed compensation by way of damages to whoever suffered as a result of the abuse.

1.6.4. Property rights and choses in action

The general category of rights is traditionally divided into two main sub-categories: **property rights** and **choses in action**. The former are attached to a tangible thing (the expression in Italian is '*diritto reale*', '*reale*' deriving form the Latin '*res*' meaning 'thing'). The latter on the other hand attach to a form of compliance which another person, the '*obligor*', owes to the holder of the right, the '*obligee*'. It should be noted that Italian law – as the rest of the civil law systems – considers that 'property' is referred to a tangible thing, whether movable or immovable. In this sense 'property' is considered as opposed to 'credit rights', or 'obligations' and will be used in the civil law sense throughout this work.

Property rights are *unconditional* and immediately effective. Choses in action are by contrast *qualified* and mediated. This means that property rights can be asserted as against anyone (*erga omnes*) and devolve immediately onto the thing from which the right derives its utility, whereas a chose in action can be asserted only against specific obligors to comply with the exercise of the right, and so are mediated in the sense that they require the co-operation of such persons.

Property rights moreover have these characteristics: (a) *fullness*, or 'unencumberedness' relating only to property, considered as the tangible right par excellence; (b) *inherence in rem*, that is, the inseparability of the right from the tangible object from which it derives; (c) the *right to trace*, that is, the proprietor's right to 'follow' the good (Arts 924–25 civil code) as arises, for example, when a swarm of bees leaves the hive and settles on neighbouring land; (d) *expansion* or *elasticity*, in the sense that when the object of the right is subject to a third person's temporary right (for example, a life interest in land) such curtailment of an unencumbered right is a kind of compression which is undone when the reversion takes effect and the right reattains its fullness (see also Arts 1014 and 1072 civil code).

1.6.5. Property rights as enumerated

One of the fundamental principles of the legal order is implied in the *specificity* of property rights. While the autonomy of parties leaves them free to negotiate and conclude contracts of any kind, and containing whatever terms they please (Art 1322 civil code), they are not, however, free to create new property rights different from those already laid down and enumerated in the civil code. This principle expresses, clearly enough, a policy of the law which avoids burdening property with

additional encumbrances over and above those expressly laid down, and at the same time protects anyone entering into relations with the owner or the possessor of subsidiary tangible interests so that they can know the exact extent of their rights. Protection of the proprietor, therefore, implies a concomitant protection of third parties.

1.7. Obligations

1.7.1. Basics

The obverse of rights are certain requirements which are divided, in the Italian legal tradition, into *duties* and *obligations*.

These terms are not used interchangeably. On technical grounds one reserves the term *obligation* to indicate the position of an obligor who is constrained, or has undertaken, to behave in such a way that the obligee may acquire a sum of money loaned or receive a promised prestation. This is thus a situation where an entitlement on one part implies and requires due compliance on the other.

This requirement of a certain type of conduct which has to be adhered to can apply equally in the case both of choses in action and of property rights. In the latter, it arises at the moment that third parties have to respect the thing to which the right attaches – as stated above, this proprietary right can be asserted *erga omnes*, and binds third parties without limit. In the case of minor tangible rights, it arises at the moment that the proprietor has to afford the interested party (for example, a life tenant, mortgagee or judgment creditor in garnishee proceedings) enjoyment or satisfaction of the minor interest. In these situations connected to property rights, however, we normally speak of *duties*.

Characteristics of obligations include *privity*, whereby the obligation must be carried out only by the obligor and by no other; and *participation* in the sense that the obligor is bound to co-operate with the obligee in the realisation of the substantive benefit that the right bestows.

Obligations are of a *personal* nature, in that they are predicated on performance on the part of the obligor measurable in money or money's worth, whether this be the delivery of a good (*obligation to give*), or performance by some required conduct (*obligation to do)* or indeed by abstaining from some specified conduct (*obligation to refrain*). Though the obligor is bound by whatever he has undertaken, the obligee has no power to enforce performance, nor threaten imprisonment. (In the nineteenth century, by contrast, an obligor who withheld performance was liable to house arrest or a prison sentence. In the Roman period, a defaulting obligor could even be detained in the obligee's own private prison.) The obligor's liability extends instead to his entire material wealth, both present and future (Art 2740 of the civil code). In some

cases, the obligation can also be tangible, in the sense that, when the person liable to it, that is the obligor, changes in accordance with the relationship that the obligor has with the thing (which may happen with certain minor interests in land).

Obligations generally devolve onto a particular person, the obligor. But the person to whom a promise is addressed need not be immediately ascertainable (*incertam personam*). A promise may, for example, be addressed to the public at large (Art 1989 of the civil code), as when a sum of money is promised to whoever finds a lost object.

The term obligation does not, however, merely refer to the passive part of the relationship: it implies a relationship in which the *power* possessed by the obligee mirrors the obligor's passive position. There are thus two persons involved who have opposing interests. According to the best view, therefore, the obligation is that legal relationship in which a specified person, the obligor, has to comply with a requirement of conduct that can be valued in patrimonial terms in order to satisfy an interest, itself not patrimonial, of another specified person, the obligee, who has the right to require performance by the former (for example, a pianist performs a service at a fee satisfying a non-patrimonial interest of the public).

What is the *structure* of an obligation? We have said that it is composed of two positions: one (the obligee's) dominant and the other (the obligor's) subordinate. It is, therefore, linked by a right, a chose in action consisting of the power to require from someone (the obligor) a thing or a performance which can be either a positive act or refraining from acting.

The obligor is potentially liable in two ways: (a) compensation for damage in the event of non-performance (Art 1218 civil code), known as *personal liability*, and (b) to have his present and future goods (Art 2740 civil code) subject to action by an unsatisfied obligee, known as *property liability*. Personal liability is a preparatory stage of property liability: if the former is not adequate to satisfy the obligee's right to compensation, the latter can be invoked as against a defaulting obligor by way of enforcement of a judgment.

1.7.2. Sources

The civil code lists the possible sources of an obligation as *contract*, *tort*, or *any other action or instrument qualified to give rise to one*, in conformity with the legal order (Art 1173 civil code).

The expression 'in conformity with the legal order' indicates that the legislation has incorporated the positivist theory which holds that no human action has legal significance unless the law expressly so provides. In other words, for the obligation to have any legal value, it must have

arisen from one of the occurrences foreseen by law (contract, tort, or other act expressly recognised as a possible source) and must also be expressed in one of the prescribed forms (that is, public or private written document, or a simple oral declaration).

Thus we can obtain a definition of *legal* obligations, which are wider in scope than merely *statutory* obligations, in that they can also derive from a contract, will or other legal document of private origin.

Legal obligations stand in contrast to *natural* obligations, which arise not from legally material events, but from principles that may be of a moral, social or religious nature or similar. The enforcement of these depends on the conscience of the obligor, on his respect for the said moral, social or religious principles. Such a case arises when it comes to honouring gambling debts, which are legally unenforceable; in other cases enforcement may be impossible because of limitation, for example, or because the professional to whom a debt is owed is not on the roll of members of his profession. In all these cases, the rule is that the obligor cannot be forced to pay, but if he does so, he cannot subsequently claim return of the payment (*soluti retentio*) unless the principles, which we will examine below, of unjust enrichment or undue payment apply.

1.7.3. Varieties of obligation

The legal order permits parties to assume obligations without setting quantitative or qualitative limits: one may assume as many obligations, of whatever kind, as one wishes. One may create new obligations, extinguish or modify them, and so on. This principle, fundamental to civil law, is known as 'private autonomy'. Private autonomy is that freedom whereby individuals can institute legal relations between one another arising from agreements containing patrimonial arrangements (*contracts*). The most common way in which obligations are created is indeed through contracts.

Obligations can be formed concerning many and varied types of subject matter. This is a manifestation of private autonomy. The possible legal forms of an obligation are, however, limited by the specificity principle to those, and only those, expressly provided for by law.

Depending on their content, obligations can be divided into various types. Obligations to *keep custody* of things arise usually out of bailment, gratuitous loan, pledging, and so on (Art 1177 civil code). There are also obligations to *give* (a sum of money or a thing); to *do* and to *refrain*, that is, to give performance by some required conduct or by abstaining from some specified conduct.

A distinction is made between *generic* and *specific* obligations. The former deal with provision of things of a kind determined only in a general sense; in such cases the quality the obligor must supply need only

be of a general standard (Art 1178 civil code) (for example, a pound of rice). If instead the obligation is specific, such as in the restoration of a painting or the construction of a piece of furniture, the obligor may not provide something different, albeit of the same general kind, from the precise prestation he has undertaken to perform.

We have already distinguished between personal and tangible obligations. There are also *strictly personal* obligations, which can only be discharged by a specified obligor (for example, an artist, a surgeon, etc), or for the benefit of a specified obligee, such as in the parental obligation to support.

Obligations are **simple** when they can be performed by a single prestation, or (in the so-called case of cumulative obligations) by more than one prestation to be carried out by a single obligor. They are **alternative** when the obligor can choose between the performance of two obligations – or more, in which case we refer to 'multiple alternatives' (Arts 1285 and 1291 civil code). When this applies, the obligor cannot make the obligee accept partly one and partly another (for example, the payment of a ground rent partly in money and partly in produce.) The choice 'falls to the obligor, unless it has been conferred on the obligee or a third party' (Art 1286 civil code).

If an alternative obligation cannot be fulfilled in more than one of the ways, it becomes simple and the obligor must fulfil it by the remaining possible means (Art 1288 civil code) even if the impossibility is due to the obligor himself (Art 1289 civil code). If both alternatives become impossible 'the obligor must compensate for one of them, and must pay the equivalent of the performance that became impossible last if the choice was his. If the choice was the obligee's, the obligee may require the equivalent of one or the other' (Art 1290 civil code).

We can further distinguish obligations which are **discretionary** in that the law (Art 1197 civil code) permits the obligor to fulfil his obligation by furnishing a different performance. Thus, in the case of a simple obligation which can be fulfilled by a different performance, if the only prestation owed becomes impossible through no fault of the obligor's, the obligation lapses and the obligor is discharged from it.

The obligation is **joint and several** when 'more than one obligors are bound to perform the same prestation, in such a way that each can be made to perform the whole and the performance of part by one of them discharges the others' or when 'among more than one obligors each one has the right to request performance of the entire obligation and performance by one obligor discharges him vis-à-vis all obligees' (Art 1292 civil code). In the first case we speak of the joint and several liability as passive, because the bond is between several obligors and one obligee, and in the second as active because the bond is between several obligees and one obligor. A jointly and severally liable obligor is entirely

liable, including for the other obligors. If he is responsible only on his own behalf, the obligation is not joint and several, but merely several. Obligations of this sort are created through necessity, when the law itself so provides (Art 2560 civil code) or when it is advisable to do so to strengthen the obligee's security, such as occurs, for example, in a contract of *guarantee* (Art 1294 of the civil code).

The obligation is indivisible when its performance is necessarily such that it cannot be divided, either by its nature or because the contemplation of the parties precludes it (Art 1316 of the civil code), for example, the release of an apartment or the delivery of a specified object. In all other cases, the obligation is divisible.

1.7.4. Pecuniary obligations and the 'nominalist' principle

In view of their importance in economic dealings, **pecuniary** obligations are of particular significance. These involve sums of money (from the Latin *pecunia*, money) and are in practice the most common form of obligation. They can include the lease of a building, rent of a productive asset, purchase of an object, of commodities, of goods, payment for transport services, intellectual work and so on. They are normally paid for in money, and usually with money that is legal tender at the time of payment. The value of the money is nominal, or equal to what is written on it, independently of its real purchasing power. This, the '**nominalist**' **principle**, is fundamental to economic dealings, and forms part of the rules of pecuniary obligations.

When setting interest rates, the parties to an agreement may agree – in writing – a rate higher than the one set by statute. In the absence of such agreement, the statutory rate shall apply (Art 1284 civil code). Compounding, or paying interest upon interest, is prohibited. In the absence of contrary usage (such as banking usage: Art 1834 civil code) 'outstanding interest can only attract interest from the date of a claim or through agreement reached after the due date, provided always that such interest has been owed for at least six months' (Art 1283 civil code).

Article 644 of the penal code prohibits **usury**, that is, the requirement of exorbitant interest, but the civil code also provides against profiteering from a state of need (Art 1448, rescission of unconscionable contracts) and the demand for usurious interest in loan agreements (Art 1815(2)). The law (no. 108 of 1996) empowers the Ministry of Treasury to fix, on a quarterly basis, the maximum interest rate above which interest is considered usurious.

An acute problem, particularly in inflationary economies, such as Italy's was for many years, is the effect of inflation in eroding values. It was in this regard that the Constitutional Court considered the question of the legitimacy of the provision applying the **statutory interest rate** in

the absence of contrary agreement between the parties. The argument centred on whether this provision (seen as unduly favourable to the obligor at the obligee's expense) was contrary to Arts 3 and 47 of the Constitution. The court found the claim to be groundless, however (judgment no. 60 of 1980).

It should also be noted that with the adoption of monetary union by the majority of Member States of the European Union, with effect from the ending of the transitionary period on 1 January 2002, the currency unit in Italy is no longer the lira, but the *euro* (legislative decree no. 213 of 24 June 1998).

1.7.5. Default by the obligor; notice to perform

The default can relate to the conduct of the obligor, who has to provide performance, or of the obligee, to whom performance is due.

Obligor's default arises when he does not carry out his obligations within the period of time contemplated in the agreement. Since the obligee will generally tolerate a certain amount of delay, service of notice to perform serves to bring this state of uncertainty to an end, and has significant effects. Think for example of a situation where A has to supply B with fruit: at whose risk is it if the fruit perishes during the period of delay? On A, who caused the delay, or on B who tolerated it?

To remove the uncertainty, and to regulate the effects of delays, the civil code prescribes that the obligee should issue a formal document, putting the obligor on **notice**, 'the obligor is put on notice of default by formal notice in the form of a written request' (Art 1219(1) civil code). The preconditions of such notice are therefore:

(a) that performance *can be demanded* (if the time limit for giving performance has not expired, then there is no delay on the part of the obligee, who can carry out his obligations at the last minute);
(b) there is *formal notice to perform* (if such formal notice is not given the obligee will be deemed to tolerate the delay);
(c) that the *non-performance is unjustified* (the obligee conceding a delay, for example, would amount to a justification of it).

There does not always have to be formal notice. There are some situations in which it can be taken as read:

(a) when the default arises from an illicit act;
(b) when the obligor has stated in writing that he does not intend to discharge the obligation;
(c) when the time limit for performance has expired and it was supposed to be carried out at the obligee's address (Art 1219 civil code).

The obligor cannot be considered in default if he has offered to carry out the obligation in timely fashion unless the obligee has a legitimate ground for refusal (Art 1220 civil code).

Issue of a formal notice has several effects:

(a) The obligor must *compensate for loss or damage* arising from the default.
(b) If the obligation consists of a sum of money, the obligor is liable to *pay interest* from the date of the notice.
(c) The *risk* of loss of the goods, and thus of performance becoming impossible, devolves on the obligor, even if such impossibility arises through reasons over which the obligor has no control; in other words, the obligor assumes no-fault liability (Art 1221 civil code).

1.7.6. Obligee's default

The obligee can also be in default. This occurs when 'without a legitimate reason, he declines to accept payment offered or does not take whatever steps are necessary to enable the obligor to fulfil the obligation' (Art 1206 civil code). Thus the obligee's default can arise in two different situations: when he does not co-operate with the obligor to receive the prestation or when he refuses it, even though it be offered in one of the forms established by law.

The obligor can put the obligee on notice by means of a *formal*, or solemn, *offer*. The obligor can, however, merely make an informal, non-solemn offer. In this case the offer will serve to produce those effects produced by an obligee's notice (assumption of risk in the eventuality of performance becoming impossible, interest for delay, and compensate for loss or damage), in so far as the obligor wishes to provide performance and the delay is a result of the obligee's fault, not his own (Art 1220 civil code).

A formal or solemn offer has further consequences for the obligor's liability: he will have to refund loss or expenses incurred by the obligor, and in the case where goods are lost he cannot enforce payment of consideration; if the offer is made informally, both parties are released in this eventuality from the obligation to provide consideration (Art 1207 civil code).

A formal offer is valid when: (a) it is made to an obligee with capacity to receive it or to another authorised to receive it on his behalf; (b) it is made by a person who can validly offer performance; (c) it comprises in their entirety the sums or goods owed, interest and accruals and liquidated expenses or provision for unliquidated expenses; (d) the time limit has expired (if stipulated in the obligee's favour); (e) the condition on which the obligation depends is confirmed; (f) it is served on

the obligee personally or sent to his address; (g) it is made by an authorised public official.

1.7.7. Termination of obligations. Performance

Obligations can be terminated in many different ways. The first, and most important, is by **performance**, that is, the obligee receives whatever is due to him, for example, A returns the sum of money loaned by B, C finishes making the suit ordered by D, architect E completes the design of a house for which F has engaged his professional services, and so on.

But there are other ways, which fall into two distinct categories, according to whether or not the obligee's interest is **satisfied**.

Performance, even if carried out by a third party, by its very nature entails the satisfaction of the obligee's interest, as do payment by means of *subrogation*, *set-off* and *intermixture*.

The following terminate the obligation without satisfaction of the obligee's interest: *novation, release* and *limitation*. (Performance and payment will be dealt with separately.)

Set-off occurs when two people have obligations towards each other and the two obligations partly cancel each other out. If A borrows 1000 from B and B later borrows 2000 from B, the first loan terminates through set-off, and B remains indebted to A in the sum of 1000. Set-off only arises as between two debts in the form of money or a quantity of fungibles of the same type (Art 1243 civil code). The two debts must be *liquid*, that is, of a determined amount, and *collectible*, that is, not subject to conditions or a future due date. If these circumstances obtain, set-off comes into automatic effect and is referred to as set-off by *operation of law*.

By contrast, *judicial* set-off is that ordered by a judge (not of his own motion, but at an obligor's request) when the debt is not liquid, but can be easily and readily liquidated (Art 1243(2) civil code).

The parties may also depart from the provisions outlined above and establish their own forms of set-off (*voluntary set-off*, Art 1252 civil code).

Intermixture occurs when an obligor becomes his own obligee, or conversely when an obligee becomes his own obligor (for example, when the obligee becomes the heir of the obligor or vice versa).

Of the ways in which the obligation terminates without satisfaction of the obligee's interest, the most important is *supervening impossibility* of performance, which entails non-performance on the part of the obligor.

Novation (a term which implies renewal) can refer to a new obligation in which the object or entity to which it attaches is substituted replacing the existing one (*novation by substitution of subject matter*,

Art 1230 civil code) or to the case where a new obligor takes the place of a predecessor (*novation by substitution of the original obligor*). The latter situation can be termed assumption or delegation of debt.

Where novation is by substitution of subject matter any pledges, liens or charges attaching to the original obligation are discharged unless the parties expressly agree to carry them over into the new one (Art 1232 civil code).

Novation is ineffective if the original obligation did not exist (Art 1234 civil code). If however, the original obligation is derived from a voidable instrument, the novation is valid if the obligor was aware of it (Art 1234(2) civil code).

Release occurs when the obligee renounces the debt and declares to that effect (Art 1236 civil code). This is effective from the moment that the obligor becomes aware of it, unless the latter declares in suitable terms that he does not wish to take advantage of the release, because, for example, he wishes to discharge the debt for reasons of prestige or wishes to complete the prestation for reasons of professionalism, etc.

1.8. Possession. Detention

There are two distinct aspects to the concept of property rights: on the one hand, the *ownership of a right* – A buys a house from B and so becomes the owner of the legal title – and on the other, the assortment of powers that go with ownership – the power of alienation and the right of enjoyment by virtue of which A can live in the house, let it to tenants, or even destroy it – and that permit the *exercise of a right*. If A, instead of acquiring the house, occupies it (for example, if B has left on a long trip, it is not known if he is going to return and the house is unoccupied) and if he acts as if he is its owner, we say that A is in a de facto position to exercise the attendant rights. In other words, he possesses the house.

Possession is a de facto situation in which conduct in relation to a thing corresponds to the exercise of a right of ownership or other chose in action (Art 1140 civil code).

In everyday language possession and ownership are often used interchangeably and seem to denote the same thing, but in legal language o*wnership* is a *chose in action* whereas *possession* is not a right but a *de facto relationship*. The reason that the two terms are often conflated in common use is that usually the owner of a property also possesses it, that is, he can exercise all the rights that go with the property.

Possession is distinct from **detention**. Detention is a de facto relationship with the property that unlike possession does not include the exercise of the owner's rights over it. The detainer merely holds the property – goods received in the form of a bailment are detained, not possessed, as they cannot be used or treated as one's own. Detention is

material when the non-owner holds the object in a domestic context or is a guest or in any other situation where it is temporary and under the direct control of the possessor (for example, the butler detains the house, the porter detains the luggage).

Possession may be *legitimate* or *illegitimate*. It is legitimate when it derives from a competent instrument (by which is meant any document capable of conferring rights). For example, the owner dies while in legitimate possession of a property; a person who, not knowing that the owner's will is void, wrongly supposes himself to be his heir, takes legitimate possession of the property bequeathed him.

Possession is illegitimate when there is no competent instrument. For example, A occupies B's house. Illegitimate possession can be in bad faith (as when A knows B owns the house and is going to return, or C steals D's watch) or else in good faith if the illegitimate possessor was not aware that there was no competent instrument (as when a peasant cultivates a strip of land belonging to his neighbour, wrongly believing it to be his own).

Possession can further be direct or indirect. It is direct when the possessor has the immediate exercises of the powers attached to the property and indirect when exercised through others who detain the property. A depositor has possession of the item deposited, but the possession is indirect because it is exercised via the deposit-holder.

Sometimes detention is exercised in one's own interest, such as in the case of a tenant who occupies a flat in order to live in it, or of the bailee who makes use of an item he has received free of charge. To distinguish this type of possession, it is necessary to refer back to the instrument on which the relation is based.

Possession is *full* when it is equivalent to exercise of the right of property and *minor* when it amounts to the exercise of a minor interest or easement (such as a right of way).

Traditionally, legal doctrine and case law distinguish two elements of possession. One is an *objective* element, the activity which corresponds to the exercise of powers akin to an owner's, and the other *subjective*, the will to possess as if one were the owner, or in Latin the *animus possidendi*. This last is an intentional or psychological element presumed to be present when possession is objectively exercised. This subjective element derives from a conception of private law relations which lays emphasis on the importance of the will of a party, an individualistic conception to be found above all in the guise of the legal transaction.

Chapter II: Natural Persons

2.1. Personality and the protection of individuals

Private law is concerned with individuals as *legal subjects*, that is, as persons having rights and being liable to duties. In the analysis of private law, therefore, the **person** is always at the centre, whether qua individual or as part of a social grouping expressive of his personality, such as the family, associations (such as trade unions and political parties), in economic activity (companies and bodies corporate in general). The Constitution has a large number of provisions directed at the protection of persons: civil rights, the right to liberty, the various aspects of the personality are constitutional bedrock and hence fundamental to the legal order in its entirety.

Of particular importance in this regard are certain rules in the opening part of the text of the Constitution. Article 1 founds the legal order on **work**, as an ennobling feature of man giving rise to a duty of solidarity which everyone, as a member of the Republic, must observe. Article 2 lays down the protection of the individual, whether qua individual or as part of one of the groupings expressive of his personality; these are the social groupings, such as the family, associations and other groups, the work community etc, in which the individual lives, grows up and undergoes his lifelong experience.

The State undertakes to protect the individual in his economic and social relations, formally guaranteeing the equality of all, and removing those obstacles of a social nature which impede self-fulfilment. The protection of the individual is to be understood within the meaning of Arts 3(1) and 3(2) which enshrine the principle of equality.

2.2. Legal capacity. Birth and death

2.2.1. Legal capacity in general

Legal capacity means eligibility to have rights and duties: it can apply to natural and corporate persons. The law lays down that to be the holder of a right (such as a chose in action) or liable to a duty (such as the parental obligation to support) one has to be recognised as eligible to

enter into the relevant relations. For a natural person, such eligibility occurs automatically at *birth* (Art 1 civil code); corporate entities acquire it through *recognition*.

2.2.2. Special legal capacity and its limits

General legal capacity needs to be distinguished from **special legal capacity**. While the former has moral and historical significance, the latter is of great practical importance. It denotes the eligibility to become a principal of particular legal relations, and the issue is usually encountered in the negative, when we speak of (special legal) *incapacity*. To the extent that such ineligibility can be general or limited, there is a further distinction between absolute and relative special legal incapacity. An example of the *absolute* kind is that minors under the age of 15 may not do work involving heavy labour; of the *relative* kind, that A, having killed or attempted to kill B, cannot then become his heir.

2.2.3. Acquisition and loss of legal capacity

Legal capacity attaches exclusively to persons. When, in everyday language, we attribute rights, duties or benefits to things or animals, the intention is obviously to refer to the relevant owners. Legal capacity is acquired at birth, the event with which life outside the womb begins. For an individual to have been *born* he must (following medical science) be capable of breathing at least for a moment. The requirement of the previous code – that the newborn be 'hale and hearty' – has been dropped.

Birth is a crucial event even if the individual dies immediately afterwards, because it is the moment when various rights arise, such as rights of succession (Art 462(1) civil code) and rights relating to gifts (Art 784(1) civil code). For example, if A leaves part of his estate to nephew B, the son of C, and the rest to his sons C and D, it is important to know if B was born dead, in which case his intended legacy will be divided between C and D, or whether he died immediately after being born alive, in which case his intended legacy will devolve to C, and D will receive only the part he was originally intended to have if B had survived.

The law also provides for *unborn children*, already *conceived*, as well as those who, at the time of the relevant disposition, have not yet been conceived but could subsequently be born. Children, either unborn or yet to be conceived, may be beneficiaries of a will, but their rights are perfected only once they have been born, and are thus dependent on the event of their birth (Arts 462(3) and 784(1) civil code).

It must, however, be observed that a child en ventre sa mere has a 'legitimate expectation' of being born, which extends to that of being

born in a healthy mental and physical state. If, therefore, the foetus was in a poor condition at the moment it came into being, the problem arises of imputing this condition to the parents; if, however, its condition deteriorates during pregnancy or during labour, this is evidence of a civil wrong for which whoever caused it is liable.

Legal capacity ends with *physical death*. (At one time it could be lost by sanction, such as through bankruptcy, with attendant loss of political rights: this was known as civil death.) Physical death is certified either directly, by the appropriate registrar or other authorised public official, or indirectly when the person cannot be identified or has disappeared without trace (such as in a shipwreck, fire, etc).

Controversy surrounding the determination of the precise moment when death could be certified has been resolved by law no. 578 of 29 December 1993. The moment is now identified as that when 'all brain function ceases irreversibly'.

2.2.3.1. Disappearance. When no trace of a person can be found, and he does not reappear or it is presumed that he has died in mysterious circumstances, his interests must be taken care of in the interim, until such time as he reappears or, if his absence is prolonged, action must be taken on the assumption that the missing person has died. These situations are not uncommon, as can daily be observed from newspapers. There are indeed some serious situations, such as war, deportations, natural disasters, serious accidents and prolonged abduction, where disappearances often occur.

The least serious case is a straightforward **disappearance**. Here, there is no reason to doubt that the person is still alive, but his interests must be taken care of while he is absent; this situation exists when the person has not reappeared at his residence, family home or workplace and there is no news of him (Art 48 civil code).

In such cases, unless the missing person already has a legal representative, a trustee is appointed. A request can be made to the court by any interested party. The trustee's powers are wider than those of guardians for persons under a disability or 'emancipated' minors (as defined below at 2.3.2) as they can be given a general authority to perform acts of disposition.

2.2.3.2. Absence. A disappearance which continues longer than two years is defined as an absence (Art 49 civil code).

A declaration of absence, made by a court, can be requested by presumptive heirs and by anyone with an interest. The effects of such declaration are significant, as it gives rise to a legal uncertainty as to whether the absentee is still alive; his rights are provisionally transferred

to the presumptive heirs and legatees (Art 50 civil code), who may also request the temporary discharge of possession of goods by posting a bond with the court (Art 50 civil code). An inventory is made prior to discharge to prevent any misappropriation by the possessor. The discharge permits acts of management, the representation of the absentee, the benefit of rents and revenues (within the limits laid down by Art 53 of the civil code). Any acts of disposition must, however, receive the consent of the court (Art 54 civil code). What happens if the absentee returns? Or if he is shown to be still alive? The effects of the declaration of absence are terminated, but measures taken to preserve the property will still stand; the possessors must return goods, but may retain rents and revenues (Art 56 civil code). If on the other hand news of the absentee's death is received during the possession period, the process of succession takes place to the benefit of those who at the moment of death were the heirs and legatees of the deceased (Art 57 civil code).

2.2.3.3. Presumed death. **Death** is **presumed** when a disappearance continues longer than ten years (Art 58 civil code).

Such a presumption of the absentee's death is declared by the court (Art 58 civil code). The presumption is simple in the sense that it may be rebutted by any proof to the contrary. Periods of less than 10 years are provided in special circumstances (Art 60 civil code). Once presumed death has been declared, a spouse may remarry (Art 65 civil code); any remarriage is annulled – though any civil consequences arising from the marriage are not thereby retrospectively vitiated – by the return of the absentee or a finding that he is still alive (Art 68 civil code). Administration of the estate may begin, but an inventory must be completed. The return of a person previously presumed dead entitles him to repossession of his property; however, the rules pertaining to absence still apply.

2.2.4. Domicile and residence of the natural person

It is important to establish legally where a natural person works and resides with his family; many official documents need to be delivered to a person's domicile, as defined below, and in some cases obligations must be performed at the obligee's domicile; choice of domicile or residence can have an effect on relations between spouses, and so on. Different relevant places are distinguished and variously denoted.

The place where a person may currently be found is known as his **abode**.

Of more importance is **domicile**, which is the place where a person takes care of his affairs and interests (Art 43 civil code). The concept of domicile combines an objective aspect in the form of economic interests

being present and a subjective one consisting of the individual's intention to have his domicile there. In these cases, domicile is *of choice*, whereas it is *of origin* when no choice has been made, such as in the case of a minor under protection. It is *of necessity* (or 'legal') when it is imposed on a minor or incompetent person, and *special* when established by a person for specified purposes.

Residence is a person's regular abode (Art 43 civil code), the place where he normally leads his life. It can coincide with domicile, if he works and lives on the same premises. Residence also combines objective and subjective aspects: the latter being the individual's intention to establish his current abode in a particular place.

2.3. Capacity to exercise rights

2.3.1. Basics

Capacity to exercise rights is to be distinguished from legal capacity.

Capacity to exercise rights means capacity to 'perform acts' (Art 2 civil code) which are material legally and touch one's own interests. Those who prefer a voluntaristic conception of legal relations define this capacity as the power to perform 'valid legal acts and transactions'. It is distinct, therefore, from legal capacity, which involves the individual's ability to undertake and complete actions. Minors under 18 have legal capacity, but not capacity to exercise rights in the legal sense: they are presumed, that is, incapable of looking after their own interests. Legal capacity is acquired at birth, capacity to exercise rights only on attaining majority (Art 2 civil code).

As with legal capacity, the capacity to exercise rights is generally encountered in a negative context, when we speak of *incapacity to exercise rights*.

As well as minors, incompetent persons and persons under a disability lack capacity to exercise rights. Incapacity to exercise rights is connected with *incapacity to take legal action*, meaning legal proceedings to protect one's interests: a minor, for example, is represented in legal proceedings by whoever exercises power over him (Art 75 civil procedure code). It also entails *incompetence to enter into contracts and transactions affecting property*, since it is presumed that a minor is not in a position to properly evaluate the benefits of such undertakings. Exceptions are made, however, for contracts of employment. Incapacity to exercise rights further entails *incompetence to assume liability* for wrongful acts carried out to the detriment of third parties. However, in this last case a parent can be liable, if the minor lives with him (Art 2048 civil code).

A minor is represented legally by parents who exercise parental authority (Art 320 civil code). If only one parent has such authority, he or

she is the minor's sole representative. Parents with parental authority may separately execute acts of management such as collecting or gathering claims and revenues. However, joint representation is required for acts of disposition, which can diminish or prejudice the minor's property or place it at risk.

Actions which tend to *preserve* the property are acts of management; those which entail an *increase* or *reduction* of it are acts of disposition.

2.3.2. Emancipation

A minor can acquire the capacity to exercise rights by means other than attaining majority: by marrying, and in other exceptional circumstances, provided he is at least 16 years old (Art 84 civil code). The reform of the family law has abolished another once common possibility, emancipation of a minor by act of a tutelary (similar to a probate) judge.

Emancipation is thus the acquisition by a minor of the capacity to exercise rights before reaching the age of majority.

Emancipation does not, however, confer capacity to exercise rights in full, but only to a reduced extent. The minor may undertake acts of management, but acts of disposition require the aid of a trustee with the consent of the court (Art 394 civil code). The acts are voidable otherwise at the instance of the minor, his heirs or assignees (Art 396 civil code). Emancipation is encountered most commonly in the *exercise* (or better, the *continued exercise*) *of a business enterprise*. In these cases the emancipated minor may, with the court's consent, undertake all acts of disposition relating or not relating to the business, without the aid of the trustee (Art 397 civil code).

2.3.3. Natural incapacity

Natural incapacity is to be distinguished both from legal incapacity and from incapacity to exercise rights. It refers to an individual's inability to form a will or intention. Such incapacity can befall anyone, whether temporarily (such as when one is drunk, or in a trance) or permanently, as is possible in cases of mental illness. In contrast to legal incapacity, natural incapacity cannot be assumed, but must be demonstrated. In other words, it is assumed that anyone over 18 is capable of forming a will and intention in relation to his actions. Once this assumption is rebutted and incapacity, whether temporary or permanent, is shown, important legal consequences flow. Any abnormal emotional state is important in natural incapacity, even if it is unanticipated and transitory. Apart from the various kinds of mental illness, natural incapacity can apply to states of drunkenness, hypnotic suggestion, outbursts of anger, intense pain, etc, which cause a mental disturbance that removes the

ability to form a will or intention. These conditions must exist at the moment the legal act in question is perfected, and specific and rigorous proof of it must be adduced in order for the act to be annulled.

Since the law is concerned to protect those who, by reason of natural incapacity, are in a weaker position and more exposed to risk than others, it is laid down that contracts concluded by persons while in such a state are voidable if it is proved that: one party was in a state of natural incapacity; the other acted in bad faith because he knew of this circumstance; and the agreement was prejudicial to the incapacitated person (Art 428(1) civil code). Knowledge on the part of the other party need not be shown (merely incapacity and economic prejudice) when the incapacitated person has acted unilaterally. Finally, some acts, such as *marriage, wills* and *gifts*, are so important, either intrinsically or because the exercise of will is of the essence, that they can be annulled simply upon proof of natural incapacity.

2.3.4. Disqualification

When the incapacity is serious and permanent, there are two different non-contentious procedures that can be followed to obtain a declaration that the person is either **disqualified** or **under a disability**. These forms of legal incapacity are similar to those, respectively, of a minor and of an emancipated minor. The second condition obtains in the less serious situations, such as blindness, deaf-mutism, spendthriftness, abuse of narcotic substances and of alcohol.

Disqualification can be judicial or statutory. *Judicial disqualification* is obtained via a procedure begun by relatives (up to the fourth degree), persons related by affinity (up to the second degree), court-appointed guardian or trustee, or prosecutor (Art 417 civil code). It can be applied to persons who have attained majority, or will do so within the next 12 months, according to Art 416 of the civil code, and suffer from a chronic mental illness that renders them incapable of looking after their own interests (Art 414 civil code). *Statutory disqualification* on the other hand is available as a sanction for voluntary manslaughter carrying a prison sentence of not less than five years. The two forms of disqualification are equivalent, except that a person under statutory disqualification can marry, and can undertake personal acts for which representation is not permitted.

The disqualified person loses the capacity to exercise rights. He cannot perform legal transactions: these must be carried out in his name and interests by the guardian. If the disqualification is judicial, he cannot marry (Art 85 civil code), cannot stand in court (Art 75 civil procedure court) and is not liable for harm caused to others, unless the court decides to impose an indemnity (but not damages) in line with his means (Art 2047 civil code).

The disqualified person will be assigned a guardian, preferably a relative, appointed by the tutelary judge.

2.3.5. Disability

A person is placed under a disability by the same procedure as disqualification, in less serious situations such as congenital blindness and deaf-mutism (when the handicap has not been overcome by suitable instruction), spendthriftness and abuse of narcotic substances and alcohol.

The person under a disability has the same capacity to exercise rights as a disqualified person. Indeed, he can freely undertake *acts of management*, but for *acts of disposition* the aid of a court-appointed trustee is required. With the trustee's aid the person under a disability can even pursue business affairs.

Whether the person is under a disability or disqualified, formal transactions can be *avoided* at the instance of the guardian or of the disqualified person's heirs and assignees in the case of disqualification (Art 427(1) civil code), or at the instance of the person under a disability or of his heirs and assignees in the case of disability (Art 427(1) civil code).

When the cause of the disability or disqualification no longer applies, these can be removed at the instance of the spouse, of relatives (up to the fourth degree), persons related by affinity (up to the second degree), court-appointed guardian or trustee, or prosecutor (Art 429(1) civil code).

2.3.6. Citizenship

By 'citizenship' is meant a condition applying only to people who live within a given legal order by virtue of belonging to the State of which that order is the legal expression. The law concerning citizenship was amended by law no. 2 of 5 February 1992, which regulates first of all the acquisition of Italian citizenship. It can be acquired by various means including: family membership (being the child of an Italian father or mother – *jus sanguinis*); being born or found on the Republic's territory (where the parents are unknown or stateless – *jus soli*); marriage, if followed by at least six-months' residence in Italy – *jus coniugii*. Other means include adoption of a foreign minor, filiation by a father or mother who are Italian citizens, military service for the Italian state performed or 10 years' residence completed by a foreigner or stateless person. A citizen may lose citizenship, for example, by assuming public office abroad and not renouncing it when requested to do so by the Italian state; he can also renounce it, if he resides abroad. The *status* of a citizen entails a range of

rights and duties, such as the right to vote and the duty to perform a given period of military service. However, the fundamental rights recognised by the Constitution are afforded to foreigners too, who may enjoy matrimonial, contractual, commercial and other civil rights subject only to the 'principle of reciprocity' (Art 16 of preliminary provisions: in practice, if equal rights are afforded to an Italian citizen in the foreigner's country of origin). It should be borne in mind, however, that such reciprocity does not apply, pursuant to legislative decree no. 40 of 6 March 1998, to non-EU citizens normally resident on Italian soil (see also legislative decree no. 113 of 13 April 1999 and presidential decree no. 394 of 31 August 1999). However, criminal and security law applies to anyone present on Italian soil. There is no restriction on the enjoyment of civil rights by citizens of other EU countries; rather, EU citizenship is added to national citizenship of an EU country, conferring duties and rights among the most important of which are free movement, the right to reside and pursue business and professional activities, employment or self-employed work, and transfer of goods and capital.

2.4. Personality rights

2.4.1. General characteristics. Person and 'status'

The Constitution guarantees certain rights defined as *inviolable* (Arts 2, 13ff). These rights are protected for every individual, but at the same time the Constitution imposes a concomitant duty of political, economic and social *solidarity* on everyone.

The guarantee of the human person is therefore extensive: beyond personal liberty, the Constitution protects the inviolability of domicile and correspondence, freedom of movement and travel, of religious conscience, of expression, which contribute to self-fulfilment; and it protects the right to health and the rights of groups to which the individual belongs (Arts 39, 49, 17, 18 and 19).

The legal position of the person varies according to his *status* or condition. The concept of *status* is a traditional one, but it is flexible enough to evolve over time. Roman Law recognised statuses of *liberty*, *citizenship* and *family*. Today liberty is guaranteed to all, citizenship to whoever is born in Italy (and to those who acquire it by other means). Family *status* still exists, in the form of spouses, legitimate and natural children. Other *status*es are recognised as well, such as that of worker, with rights guaranteed by the Constitution (Arts 35ff).

History books record a development 'from *status* to contract', from the situation in which the individual was born into a fixed social caste, with its associated rights and duties – one thinks of the position of the mediaeval serf – to one where, the principles of liberty, equality and

fraternity having been proclaimed in the French Revolution, the individual could be whatever he made of himself and could thus only be bound of his own free will. This, as is universally recognised, is one of the major outcomes of the bourgeois revolution.

With the emergence of totalitarian regimes after the First World War, the concept of *status* re-emerged as an inescapable juridical situation facing an individual.

Whereas it cannot be maintained that today we have returned to a *status*-based regime, it is nonetheless clear that private autonomy, and thus the sphere of individual liberty, is only apparently reduced from that which obtained in the nineteenth century. State intervention is more extensive and intrusive and so appears to reduce the area of individual liberty; but such intervention, when made on social grounds, is calculated to assure a real sphere of liberty and substantial equality to all individuals, not just to property owners. This is the meaning that should attach to the constitutional provisions enshrining personal rights.

The expressions *personal rights*, *personality rights* and *civil protection of private life* all indicate aspects of the same problem: how can an individual, considered as a *natural person*, be protected within private relations? Rights relating to an individual qua *person* are today regulated above all by constitutional and entrenched laws. Certain provisions of the civil code also regulate in this area, but these by no means account for all the rules governing personal rights (Arts 5–10 civil code).

What are the rights of the person? Two different answers may be given. First, from a traditional viewpoint, accepted by judges and partly followed by academic opinion, personal rights can be defined as those expressly provided in the civil code and by certain special laws (such as on copyright). Second, it can be held that personal rights cannot be enumerated in this way, for there is a single overarching right of the person, almost a general principle, whose specific content is set out from time to time according to the person's *status*.

To put it more precisely: adherents of the first school of thought maintain that there can be no personal rights distinct from those *specifically* provided by law. The second school of thought, however, holds that a list of personal rights cannot be compiled, but that a *global* right exists instead, whose aspects, characteristics and features are determined from time to time by the situation in which the person lives. On this view, the personal rights laid down in the civil code thus reflect the most important and commonly encountered situations, but cannot be held to have exhausted the entire field of personal rights.

This last point of view is predominant today, both in terms of constitutional rules and the development of civil rights.

To identify the legal foundations of this viewpoint, not only the rules of the civil code, but also those deriving from statutes and the Constitution must be taken into account. Between them these yield the right to life, the right to physical integrity, the right to sexual freedom, the right to physical and mental identity, to the correspondence between one's status and one's actual sex, the right to health, the right to privacy, and finally the rights specifically governed by the civil code, such as the right to one's name, to respect, to the privacy of one's likeness and so on.

Formally, the rights of the person are unlimited, and can be asserted in the face of all parties. They are for the most part inalienable, that is, a person cannot renounce them (though some can be renounced, for example, the right to the privacy of one's likeness and the right to privacy: Art 10 civil code).

2.4.2. The right to life

The right to life is connected with the right to self-fulfilment (Art 2 of the Constitution), with the right to health (Art 32) and with other rights enshrined under the rubric of workers' protection (Arts 35ff). In contrast to other systems, such as the German, in which the right to life has a constitutional basis, the Italian Constitution does not make express provision for a right to life. This does not mean that an individual can be deprived of this right: the Constitution instead provides that 'there shall be no death penalty, except in cases provided for by military law in wartime' (Art 27(4)). The protection of life is provided for in the penal code at Arts 545ff and 575ff.

The Italian legal order prefers to dedicate certain provisions to the individual's 'personality' (Art 2 Constitution) and to tend to those aspects of life which are not merely biological, aspects such as social and economic conditions, protection of health and defence of the environment from pollution, protection of the workplace and health and safety at work, and so on (Arts 2, 3, 9, 32, 35ff Constitution). From this we may conclude that where the right to life is concerned, we cannot consider only the biological aspects, but the conditions in which a man lives, and which determine his existence, must be considered in their entirety.

The problem of the right to life is a current one in Italy for another reason, that is, for the rules relating to **abortion**. Before any statute on abortion had been passed – that is, before the enactment of law no. 194 of 22 May 1978 – the Constitutional Court, in determining the constitutionality of certain rules in the penal code that punished abortions carried out on women whose life was endangered by their pregnancy, established that 'article 2 of the constitution recognises and guarantees the inviolable rights of man, among which the legal situation

of the unborn child cannot be placed, if only by virtue of its sui generis nature' (decision no. 27 of 1975). This obiter dicta has been the basis for pressure by those political parties opposed to legalising abortion who maintain that such a law is against the Constitution and contrary to the position of the Constitutional Court itself.

There is no direct connection between the right to life and the rules on abortion: abortion does not take life away from an individual with a legal existence, but prevents the birth of an individual who, for reasons definitively laid down by law, the mother does not wish to give birth to. These reasons are listed in Art 4 of the statute: they consist of serious danger to the mother's physical or mental health, in 'relation to her state of health or to her economic, social or family situation, or to the circumstances in which conception occurred, or to any risk of abnormality or deformity in the unborn child'.

The law on abortion is a landmark for women's position in society and the family. Article 1 of the statute states that 'The state guarantees the right to responsible and willed procreation, recognises the social value of motherhood and protects human life from its inception; the termination of pregnancy cannot be regarded as a method of birth control.'

A woman intending to terminate her pregnancy may during the first 90 days attend a public clinic or a doctor of her choice. In either case, the woman's situation is studied in a manner which respects her dignity and privacy 'with the objective of helping her to remove the causes that have led her to seek a termination, to enable her to appreciate her rights as a worker and mother, to enable any practical steps to be taken to support her, before and after the birth' (Art 4). If despite this the woman decides to proceed with the abortion, the surgery can be carried out free of charge in an appropriate clinic or hospital (Art 5). If the woman is a minor, the consent of a parent or guardian is required; if consent is withheld, a tutelary judge may, having assessed the circumstances of the case, authorise the woman to proceed with the abortion (Art 12).

2.4.3. Sexual identity, rectification and change of sex

The tendency, currently predominant in legal theory, which denies the specificity of personal rights and posits rather the existence of a general right of personality finds support also in the context of an *individual's sexual identity*. Indeed, case law has developed along lines which affirm the existence of a right whereby an individual's *status* conforms to his or her real mental and material identity. In other words, the rights of personality have been expanded to admit the right for the attribution of one's *sex*, in society and in the legal order regulating it, to be that corresponding to one's subjective experience of self.

A statute that appears to have been inspired by principles of respect for individual personality is law no. 164 of 14 April 1982, containing rules regarding rectification of attribution of sex which allow a birth certificate to be amended to alter the sex entered on it originally 'subsequent to a modification occurring in [a person's] sexual characteristics' (Art 1).

2.4.4. Sexual freedom

Sexual freedom is considered by case law and legal scholarship as a true and proper aspect of personal rights, and is therefore ranked among the fundamental rights. The legal order provides no relevant laws, but only particular rules, enforceable in the criminal law, against *offences against sexual freedom* (Arts 519–23 and 526 penal code).

The penal code describes the offence of seduction by promise of marriage thus: 'Whoever, by a promise of marriage, seduces a female of minor age, inducing her to an erroneous belief as to his marital status, shall be liable upon conviction to a prison sentence from three months to two years. Seduction occurs when there has been sexual intercourse' (Art 526 penal code). For the offence of seduction by promise of marriage to occur, the following three elements must exist: (a) the promise of marriage on the part of the seducer; (b) the minority of the female; (c) the seducer is already married. Civil liability can exist without the presence of all three requisites (a), (b) and (c).

Following the most recent case law, which takes into account the changing nature of sexual customs, civil liability does not attach – and no offence has been committed – to a seduction if the woman has attained majority and enters into the relationship of her own free will. In such a case the only applicable sanction is that provided by Art 81 of the civil code.

2.4.5. Privacy and private life

Among the rights of the person listed in the civil code there is no mention of a right to **privacy**, the right to keep secret certain conduct and other intimate aspects of one's life. This absence of a specific rule has for a long time given rise to the belief that no such right exists to be protected. More recently, however, certain elements of and references in the law have supported the contrary claim, that there is a true and proper right to privacy, even leaving aside the consideration that, if the existence of a general right of the person is admitted – as the currently predominant view has it – this implies the right to defend one's intimate personal sphere against wrongful invasion from outside.

Article 2 of the Constitution provides that 'the Republic recognises and guarantees the inviolable rights of man in the social groupings in

which his personality may be fulfilled.' This expression, albeit general, provides the foundation for a right to privacy, which tends precisely to preserve for the individual an *environment* in which he can pursue self-fulfilment free of outside intrusion. Article 8 of the European convention on human rights explicitly protects respect for private and family life; there are also other rules in specific laws (for example, the rules in Art 97 of the copyright law) which establish limits to the use of information about individuals, reproduction of personal writing and pictures, etc.

When we speak of privacy in this sense we refer to one of its two basic aspects: the privacy of the individual within his own four walls or in a private, intimate or reserved environment; and privacy regarding the control of the circulation of personal information concerning the individual, whether by private persons or by public bodies.

The firat aspect has received much attention in legal commentary and case law. In response to a burgeoning growth of incidents of intrusions into the private life of individuals in the public eye by reason of their political or social positions or their professions (one thinks particularly of film actors, MPs, scientists and so on) and of the wide circulation given in magazines to unpleasant revelations concerning more obscure people, it has been found necessary to protect a right to individual *privacy*. In every case, however, it is necessary to balance two equally important interests: alongside the protection of individuals there must also be protection of the *right to know*, the right to be informed, a right itself protected, albeit indirectly, by the Constitution (Art 21).

2.4.6. Privacy and data protection

The second aspect of privacy is equally as important as the first, but in public life, unlike in the private sphere, it is not possible to trace a line beyond which a person has the right to be left alone. In this case there is no *environment* that can be delineated within which can be asserted not only property rights but also a right not to be disturbed.

Gathering of information is a ubiquitous practice, and has an impact on the deepest aspects of personal life, being unrestricted in method and no respecter of boundaries. The Italian legal order did not have laws that regulated information gathering or its subsequent organisation and diffusion by third parties. There were specific rules that applied in particular situations, such as a ban on gathering information on a worker's political and union-connected views, to avoid discrimination in the workplace (Art 8 of the Workers' Statute), and another ban on the use of information about servicemen's political and religious views, again to prevent discrimination (Art 17 of the basic rules on military discipline of 1978).

In the last two decades of the twentieth century, however, theorists have given attention to the need to assure, by means of appropriate laws, citizens' right to be *made aware* of the collection of information about them, the right to *verify* the accuracy of this information and therefore a right to *rectify* any inaccuracies, as well as a right to *expunge*, that is, to have information removed after a specified lapse of time.

The use of electronic methods of storage and retrieval has made the issue more critical, exposing the individual to an even more invasive threat, which it is not easy to counter, to both his *personal identity* and the confidentiality of his opinions. Recent facts fully attest to this, not least surveillance and recording of information on employees of large companies or the public administration, or of political and cultural figures. After a long wait, a regulatory regime has finally seen the light of day in the form of law no. 675 of 31 May 1996 (now encompassed in a 'privacy code' decree no. 196 of 2003) which, as well as setting out the permitted means, ends and limits on retention of personal data, lays a series of obligations on the 'principal' of the database (in practice, the person responsible for the collection and use of data). It also sets out the rights of the subject of the information, particularly the means by which he can consent to the keeping of data, and how long the consent obtains, as well as rules governing when and how the data may be communicated or published. An independent *regulating authority* has been set up to oversee the application of the rules; the regulator has powers to verify compliance, declare violations and apply sanctions and in general take responsibility for the observance of the principles established by the law.

2.4.7. Other personal rights

Any *act of disposition of one's own body* is prohibited if it would occasion a permanent diminution of physical integrity (Art 5 civil code). In other words, an individual cannot decide to undergo a surgical operation or submit to a physical disablement unless necessitated by illness or accident, if permanent and irreversible harm to physical health could result. Such acts are also prohibited, even though not damaging to physical health, in other circumstances, for example, unauthorised organ transplants, if contrary to law, public order or public morals (Art 5 civil code).

It is a different matter when therapeutic treatment and surgical operations are undertaken with curative aims in mind and do not violate the above rules, because (and to the extent that) they are performed for the injured individual's own protection. The general interest in public health has to be reconciled with the individual right to refuse medical treatment deriving from Art 32 of the Constitution. In every case, therefore, the surgeon has a duty to inform the patient about the nature

of the intervention, about the possible outcomes and their likelihood, because such information is a prerequisite of the patient's valid consent, which must be fully informed so as not to conflict with Art 32 of the Constitution. There is, however, a tendency to authorise health treatment which the doctor considers essential despite the withholding of consent, when the latter is not the result of a free determination on the patient's part (many cases of this kind have arisen related to the refusal by a Jehovah's witness of a blood transfusion).

Transplants present a more complex problem. A distinction must be made between cases where the donor is still alive, to which the prohibition in Art 5 will generally apply with certain specified exceptions (such as kidney and liver transplants, which are permitted), and those from a deceased donor, which pose almost insuperable difficulties. An attempt has been made by law no. 91 of 1 April 1999, which introduced the principle of silent consent on the citizen's part to donation of his own organs. In practice, the removal of organs after death is permitted where the deceased has during his lifetime declared his consent thereto or else has not withheld it on being informed of the possibility, that is, unless a signed statement is produced in which the deceased has refused such consent.

Thus an attempt is made to protect individual will, such as in the treatment of the body of a deceased, in relation to which, and always excluding any commercial use, we may speak of a limited availability (understood as a highly personal right) and of a form of transferability (or creation of a new right) in favour of the closest relatives. The current law (law no. 130 of 2001) provides that a person may opt during their lifetime for burial, rather than cremation or other form of disposal, and may decide the place and form in which his mortal remains shall be kept. The *electio sepulchri*, nevertheless, must take the form of an express declaration of precise wishes and not merely a general expression of desire.

Every person has the right to a **name** by which by law he will be referred to. The name consists of first name ('Guido') and surname ('Alpa'). The name is the instrument whereby his identity can be confirmed using identification documents such as a passport or identity card, and whereby his civil status and family situation can also be established (for example, by birth or marriage certificate). It cannot be modified except in cases prescribed by law and then only having followed the prescribed procedure.

A person's visual image is also protected by law. Use can be made of a likeness in sketches, photography, film, etc (Art 10 civil code). If the person whose likeness it is does not consent to such use, there is a breach of image rights, which can be remedied by ending the abuse and the payment of damages.

2.4.8. Personal identity

The right to identity has been forged by case law over the last three decades.

Its origins in Italy can be traced to cases dating back to the early 1970s, and it was later developed in a series of scholarly works in the late 1970s and early 1980s.

The main difference from other violations of personality (such as defamation) is that while in the latter the news that is circulated is both false and disparaging, personal identity protects an individual from being presented erroneously. A figure similar to the American tort of false light in the public eye. The seminal case was that of a young couple presented in political posters as opponents of the recently introduced divorce law, while in fact they had both filed a divorce proceeding. Or a prominent anti-tobacco researcher presented as promoting the use of low-tar cigarettes. Or a libertarian political activist presented – contrary to truth – as having an extreme-right past.

After having been forged by the courts, the right to one's personal identity has found legislative recognition in the 1996 data protection law (law no. 675/96) and is widely applied to ensure that the profile which emerges from the personal data collected is correct, complete and up to date.

2.4.9. Rights of the person relating to the person's 'status'

The rights of the person dealt with thus far apply in general to *all* citizens. There are also provisions of particular laws – for example, the law on military discipline – which protect an individual's person with special regard to the *status* they hold. A good example is the protection of the personality of a worker, laid down by the so-called *Workers' Statute* (law no. 300 of 20 May 1970).

The statute protects workers' freedom of opinion (Art 1) and prohibits: the use of audiovisual and other equipment designed for surveillance of a worker's activity (Art 4); any checking by the employer on the worker's fitness or unfitness to work through illness or injury (Art 5); and investigation of political, religious and union-related opinions. (It also empowers trade-union representatives to act in order to prevent work-related illness.)

Other workers' rights are guaranteed by the civil code and the Constitution. The right to be paid is a prominent example: 'the worker has the right to be paid an amount commensurate with the quantity and quality of his work, and in any case sufficient for him and his family to live in freedom and dignity' (Art 36(1) Constitution). There is a right to daily and weekly rest and holidays: 'the maximum length of the working

day shall be established by law; the worker has (and cannot renounce) the right to a weekly day or days of rest and annual holidays' (Art 36(2 and 3) Constitution).

The right to a job, which is acquired through a contract of employment, is not considered a right of the person, but is an example rather of a right which is enforced as if it were real property.

2.4.10. Means of protecting rights of the person

The means of protection are many: (a) putting a stop to the action which violates the right, which can be obtained by *seeking an injunction* – to obtain one it is sufficient to prove the action is occurring and that it may result in the breach complained of, but fault by the other party need not be proved; (b) *correction*, by which a judge orders that false information be rectified through media comparable to those by which the original information was diffused; and (c) *compensation by means of damages*, if there is fault on the part of the person liable.

Chapter III: The Family and Succession

3.1. Individual, family and social groupings

The position of the individual is protected within the social groupings in which he seeks personal fulfilment. Of these groupings the first and foremost is the *natural family unit*.

The Constitution makes explicit reference in Art 2 to the family as a locus of protection of the individual, and furthermore defines the family in Art 29 as a *natural society based on marriage*, as well as clearly setting out the equal legal and moral status of the spouses within a marriage. In Art 30, the rights of minors are protected, whether they are born in or out of wedlock.

In the 1942 code family law was cast in an authoritarian mould, reflecting social attitudes of the time. The father was considered the head of the family, the other family members (including the wife) were dependent on him, subject to his power generally, and his right to impose discipline (Arts 143–45 civil code). The wife was still considered a weak person who deserved protection and advice, direction and control.

The code appeared to lend support to the idea that family law did not form part of private law, but rather of public law. From this perspective the legal order accorded to individuals who held the *status* of husband, or head of a family, powers, rights and duties attaching to a specific 'office': that of administering the most important community within the State. He intervened to resolve conflicts within the family, remedy situations involving illness, and help those members who because of their age (minors) or because of their physical and mental constitutions (women) were unable to take care of themselves as well as those who, because of particular disabilities such as proscription or incapacity, had need of assistance (from a trustee or guardian) in the legal process.

Family law does not, however, belong to public law, but to private law, in that the kind of relations that it is concerned with belong to the most private and intimate sphere of personal life. The law cannot penetrate beyond the margins of the social and moral phenomenon that is the family. Relations, contacts and conflicts between its members do not normally belong to the realm of legal regulation and intervention, but to the world of affective relationships characterised by mutual help, too

spiritual and intangible to be readily classifiable in legal terms. The family, in other words, is 'an island that the waves of the law can only lap against'.

In 1975 a radical reform was introduced into Italian law that placed family law firmly within this sector. The unity of the family (which can become a limitation on equality between spouses) is to be understood in a spiritual sense: the family members are to be considered on a par with one another, minors are to be protected as they receive instruction, education and otherwise develop their personalities (Art 30 of the Constitution). The 1967 law on adoption improved the positions of illegitimate and abandoned children. The 1978 law on abortion established the right to free and planned motherhood. Laws on women at work have ushered in an effective equality between men and women. In practice, it is the way that judges have applied the reforms that has proved most important.

3.2. The 'patriarchal' family and the 'nuclear' family. Family, property and contract

3.2.1. From the patriarchal to the nuclear family

When we refer today to the 'family', we generally mean a restricted group, usually parents and children. This is the kind of family defined by sociologists as *nuclear*, precisely because of its minimal size. The nuclear family is contrasted with the more extended type which existed in earlier centuries and well into the twentieth: the *patriarchal* family, consisting of many people (grandparents, aunts and uncles, people who were not actually blood relatives, such as servants and so on), all living together under the authority of one person, the father, or paterfamilias.

3.2.2. The economic function of the family

Today, with government intervention of the type characteristic of the *welfare state* – which provides for assistance (hospitals and refuges), education (compulsory schooling), social services (nurseries, clinics, parks with play areas, recreational areas and services) – the role of the family has adjusted accordingly. Even its economic function has diminished: one no longer works, in general, within the family milieu. Work takes place outside the family, in the factory or office. Even peasant families are no longer as patriarchal as in former times. Migration to towns and to industrialized regions, the flight from the countryside and the preference of young people for better-paid work all continue to contribute to this process. Work within the family belongs to the so-called submerged or *informal economy*: the wife often works outside in addition to keeping

house, husbands among the less well-off do other part-time work alongside their main jobs. While society in general has moved towards ever greater degrees of specialisation, within the family tasks are still lumped together.

The development of the modern economy has deprived marriage of much of its significance in property relations. Property today is held to a much greater extent in liquid form, such as shares, bonds and other convertible assets, which can be quickly and easily transferred, and less visible and more profitable investments that are more immune to taxation. Other offices (such as maintenance, education and care of children) are often undertaken on a social or community basis. In this sense one can talk of a crisis of the family and there are even sociologists who posit the *death of the family*, in the sense that it is no longer necessary today to make the families of times past where people stayed together for a lifetime and created an enduring affective community. *Crisis of the family*, *crisis of couples* and *crisis of relations between parents and children* are all invoked.

Recently, however, we seem to be witnessing the reverse phenomenon, a rediscovery of the *private*, of the primary function of the family, the usefulness, over and above necessity, of family relations, with its bond of affection and mutual protection.

3.3. The family in the constitution and recent laws

In contrast to the mid-nineteenth-century Albertine Statute, that had no rules concerning the family, the present Italian Constitution makes numerous provisions which potentially relate to the family, as well as some specific to the family (Arts 29–31, 35, etc). In particular, the Republic recognises the family as a **natural society** based on marriage, and marriage is subject to the moral and legal equality of the spouses, within the limits established by the law guaranteeing the family unit.

3.3.1. The family as a natural society and the equality of spouses

The bearing that constitutional principles have on the question of family relations is clear. Even a literal reading of Arts 29, 30 and 31, by which the family is assigned a role of central importance within a group of rules governing ethical and social relations, shows that the family enjoys a position of autonomy with regard to the State (as expressed, indeed, in so many words by Art 29: 'The Republic recognises the rights of the family as a natural society'). The principle of *moral and legal parity* of spouses is declared, the rights of children are guaranteed and there are provisions for the benefit of children in the event of incapacity on the part of their parents (Arts 30(2), 31). Within the limits of compatibility, the rights of

legitimate children are put on a par with those of children born outside wedlock (Art 30). Marriage, on which the family is based, is subject to the moral and legal equality of the spouses, within the limits established by the law guaranteeing the family unit (Art 29).

In particular, the principles of Arts 29, 30 and 31 put into specific form, within the family grouping, the injunctions of Arts 2 and 3, in which the family is presented irrevocably as a *social grouping* in which individuals can fulfil themselves and whose inviolable rights are protected by the Republic. It is the primary grouping within which the profound contradictions of Italian society, with its inequality and discrimination, are to be resolved (Art 3(1) and (2)).

The Constitution ascribes a privileged position to the legitimate family, attributing to marital union a 'legal form for a couple living together that cannot objectively be equalled as a guarantee of certainty, stable relations and sincerity of intention'. This does not mean, however, that the protection offered to the legitimate family, with its more intensive guarantees for family members, cannot also be afforded to de facto families, which are important not only qua family – a united group who share common values and affection – but also more simply as a 'social grouping' (Art 2) whose members may fulfil themselves as a part of it. The principle of consent and the respect of dignity and of the individual person is more fully confirmed in the provisions of Art 29(2) of the Constitution, which removes the obstacles that age-old tradition had placed in the way of equality between spouses.

3.3.2. *The position of children and the educational role of parents*

Articles 30 and 31 concern filiation and the associated rights of minors. It is both a right and a duty of parents to maintain, instruct and educate their children, even those born outside wedlock. In the case of parental incapacity, the law provides for the assignment of these duties. The law assures to children born out of wedlock a level of social and legal protection on a par with legitimate children. Legal rules and limits for establishing paternity are provided for by Art 30. The Republic is required, by economic and welfare measures to facilitate family formation and the fulfilment of related tasks paying special regard to large families, and to protect maternity, infancy, and youth, supporting and encouraging institutions necessary for this purpose (Art 31).

3.3.3. *The* de facto *family*

Families termed *de facto* or *natural* are so called because they are not based on marriage as provided for in the civil law, but rather of a man

and a woman who live together, and any children (known as *natural* children) that may issue from their relationship. Since the family is, according to Art 29 of the Constitution, *a natural society* based on marriage, the law confers particular importance on families deemed legitimate, in the sense that the parents are married and the children issue from the marriage.

Does this mean that the legal order frowns on families not based on marriage? This is an issue that has been much disputed, revealing two contrasting views of the law. Some downplay the emphasis on marriage and regard as a fundamental element the provision in Art 29 which protects the family whether 'legitimate' or 'natural'. Others, however, view Art 29 as setting a limit beyond which recognition of the 'natural' family will not extend.

A good deal of debate also surrounds the suggestion that the reform of family law incorporates rules for the protection of de facto families. Article 317*bis* of the civil code provides, in its second subsection, that 'if the recognition [of a natural child] is affected by both parents, the exercise of parental authority devolves jointly onto them both, provided they are living together.' Indirectly, therefore, the reform acknowledges and confers legal significance on the de facto family.

The rules do not indeed require that parents who recognise natural children, and so acquire parental authority under the rules, should be married, notwithstanding that such authority is to be exercised *jointly*. Under the repealed rules, each natural parent had a relationship with the child that was so to speak *exclusive*, irrespective of whether the child had been recognised by the mother or by the father.

The requirement of *cohabitation* (which implies an enduring relationship, even if not so stable a one as provided by marriage) is thus implied by the joint exercise of authority. In other words, the legislation, in order to protect children, has privileged living together *more uxorio* (in the manner of man and wife). Should one therefore conclude that the incorporation of Art 317*bis* into the code has given rise to an adequate (albeit incomplete) regime covering the de facto family?

This is a delicate issue, and the answer is fairly complex.

Indeed, it is a matter of dispute whether it would be appropriate to extend the rules governing the legitimate family so that they also cover the natural family, given that if they were, cohabiting couples would lose some of their freedom. At the same time, not to extend them entails depriving the natural family of some measure of protection. The question is still open and the prospect of a solution appears fairly remote, opinions (and ideological positions) among lawyers and legal commentators being so divided. There have been numerous court cases, sometimes decided in ways favouring the de facto family (as in Constitutional Court decision no. 404 of 1988 which held that it was irrational to withhold from a

surviving cohabitee the right to assignment of a lease as provided for by law no. 392 of 1978). Other decisions have, while recognising de facto families, been disadvantageous for them, holding that the current cohabitation of a divorcee was material in determining how much payment by way of maintenance she should be entitled to receive. It can be seen that the courts, even where they are well-disposed towards cohabitation *more uxorio*, nonetheless confirm that it is to be treated as profoundly different.

3.3.4. The reform of family law

Shortly after the end of the Second World War, legislators had already laid the foundations for a substantial reform of family law. The rules in the Constitution are among the most modern and advanced to be found in any western legal order. Some laws in this area predate the reform, such as: the registration of births and recording of paternity and maternity by law no. 1964 of 31 October 1955; the introduction of special adoption by law no. 431 of 1967; and the introduction of divorce by law no. 898 of 1 December 1970.

The reform, promulgated by law no. 151 of 19 May 1975, made many changes to the previous regime. It was in part a response to the many Constitutional Court rulings that had abolished the main forms of discrimination, between legitimate and natural children and between husband and wife, as they were affected by laws on succession, property and personal relations.

The most important innovations can be summed up in a few basic points.

(a) raising of the minimum age for marriage from 16 to 18;
(b) introduction of more grounds for the annulment of a marriage, relating particularly to mistaken qualities of the spouse and sham marriages;
(c) equal treatment of spouses regarding the running of the family, in regard to personal and property relations and children;
(d) abolition of fault as a relevant factor in separation;
(e) introduction of a *community property* regime to give effect to the equality required by Arts 29 and 3 of the Constitution;
(f) abolition of dowry;
(g) abolition of the *family property* system and its replacement by a *property provision* regime to give effect to Art 30 and to protect children;
(h) provisions relating to determination of paternity where unknown, whether to the mother or to the child;
(i) recognition of children conceived in adultery;

(j) admissibility of unlimited judicial enquiry into paternity;
(k) improvement of the positions on inheritance of spouses and natural children;
(l) provisions for judicial intervention in certain cases where spouses disagree over the running of the family.

Despite the extensive changes evident from a perusal of the specifics of the reform, it should not be imagined that they add up to a decisive break with the past. Even if a simple case-by-case comparison of the old and the new provisions might give this impression, the constitutional principles, taken as a whole, will reveal that there already existed a corpus of rules which were programmatic in practice, in spite of their origins, thanks to legislative inertia, in judge-made precepts. And the (in any case marginal) modifications in family relations introduced by specific laws (such as the register of birth, special adoption, divorce and the reduction of the age of majority), as well as incisive interventions on the part of the Constitutional Court, are but harbingers of a process that was already underway, the continuous nature of which can readily be inferred.

The reform of family law is just one of many examples of the law adapting to reflect a changing reality, which it is the legislature's task to respond to, within the framework of rules laid down by the Constitution. Indeed, family law correlates naturally to the legal regime governing the 'social and legal' position of women, the treatment of minors and employment law. On the other hand, the regime does not extend its scope to every possible aspect of the family. The image of the family that one would infer from the new rules in the civil code equates to the 'nuclear' model, which has been characterised in several Constitutional Court decisions as consisting of a married couple and their immediate offspring. A different model is, however, becoming discernible (more or less vividly), that of the 'enlarged' family, to which other people connected by family ties are admitted, and the 'open' family, composed of several couples and their children. No rules are directed at this aggregated type of family, so the problem of its legal status remains unresolved. Similarly unresolved is the legal significance of families based on a homosexual couple, protection of which the European Parliament recommended in 1994.

Other significant points are revealed by a study of the rules introduced by the reform. It is clear enough, indeed, that this reform forms part of a general revision of legal provisions reflecting the new social reality. This entails important changes to the way in which the rules provide for the 'legal' condition of women, the position of minors and judicial intervention in family relationships. These aspects will be examined more closely in turn below, general points of relevance having been outlined in these introductory remarks.

3.3.5. The legal and social position of women

The social position of women, in primitive society, in the mediaeval period and up to the nineteenth and early decades of the twentieth centuries, was always inferior to that of men. The subordinate position of women was founded and perpetuated on reasons of natural inequality, psychological differences, and on moral, religious and political theories. A woman was seen as a mother, a wife, an obedient daughter, 'weak' creatures in need of guidance, assistance, also of being disciplined where necessary. The nineteenth-century codes clearly entrenched this lowly status. Napoleon was personally overseeing the framers of the French civil code when he uttered his famous remark for their guidance in defining a husband's power over his wife: he must be able to say, 'madame, you belong to me body and soul; you shall not go out, whether to the theatre or to visit this person or that, without my consent.'

The property rules also placed a woman in a subordinate position. She could not normally pursue a profession or business affairs. The dowry she brought to her marriage was for her husband to administer, as was her personal property generally. She had no political rights and could not vote in elections. In order to enter into any legal transaction she needed the consent of her father or husband.

In Italy, marital authorisation was abolished in 1919 and universal suffrage, by which women obtained the right to vote, was introduced as recently as 1946.

The reform has therefore signalled innovations in the Italian legal order which have contributed to the change in the social position of women.

3.4. Concepts and measures in family law

3.4.1. Relatedness and affinity

In social relations the bonds of relatedness are very extensive, even though they are becoming more and more attenuated by the encroachments of the nuclear family and the isolation of the individual in modern society. The law distinguishes between **relatedness** (by a blood relationship) and **affinity** (relatedness by marriage). The expression *common ancestor* is also in use to denote the most recent ancestor from which any two individuals can trace a common descent, if they are trying to establish whether they are related to each other. The rule is that two related people are in *line of direct* (or lineal) *descent* if one is descended from the other (such as a father and son) and of *collateral descent* if one is not directly descended from the other but they share a common ancestor (such as brothers, whose common ancestor is their parent; or cousins, whose common ancestors are their shared grandparents; and

uncle and nephew, whose common ancestor is the parent of the former, grandparent of the latter). By contrast the *degrees* of relatedness, which must be established for purposes of succession to the estate of a deceased or marriage between relatives, follow different principles. In lineal descent, the number of degrees is the number of generations between the two persons in question, not counting the elder; for example, great-grandfather and great-grandchild are related in the third degree. In collateral descent, one counts upward from one relative to their common ancestor and down again to the other relative; the count excludes the common ancestor himself. For example, between cousins one counts upwards three degrees from one cousin to the common grandparent and down two to the other cousin. Excluding the grandparent yields relatedness in the fourth degree.

Except in a few cases, the law does not recognise degrees of relatedness beyond the sixth (Arts 572 and 583 civil code). There is, however, *affinity* between the relations of one spouse and the other spouse (Art 78 civil code); the degree of relatedness is the same as that obtaining between the spouse and his blood relation.

3.4.2. Material support

Relatedness and affinity give rise not only to affective, but also legal relationships. The latter are manifest in the obligation to provide **material support.**

This obligation arises from the fact of relatedness. It is not derived from spouses' obligation to co-operate and lend assistance (Art 143 civil code) or the duties owed by parents to a minor child (Art 315 civil code), but rather from other circumstances distinguished by two salient features: the recipient of the material support must be in need of it, that is, he is not in a position to take care of himself; and the provider of the support must have the means to provide it for the recipient. The obligation to provide material support extends, by virtue of Art 433 of the civil code: to the recipient, his spouse, his children (legitimate, legitimated, natural and adopted, and in default of these, their descendants); to his parents (and in default of these, their ascendants, a term used here and below to mean 'living ancestors') and adoptive parents; sons- and daughters-in-law; parents-in-law; full brothers and sisters (that is, born of the same mother and the same father) and half-brothers and sisters.

The expression *material support* encompasses the satisfaction of the essential need for both food and the provision of shelter. The extent of the aid can vary both in respect of the recipient's needs and of the provider's position in society (Art 438 civil code).

The obligation to **maintain** must be distinguished from that of providing material support. The former includes the satisfaction of all

the material needs directly commensurate with the social position of the obligor and his standard of living; unlike the obligation relating to material support, *need* is left out of consideration, except that the ability of the recipient to provide for his own needs is taken into account.

3.5. Weddings. Types of marriage

In common parlance, but also in legal language, **marriage** can denote either the *wedding ceremony* or the *relationship* it gives rise to, anticipated to last until the death of one of the spouses, or until divorce. Marriage by its very nature is the personal relationship par excellence, characterised by the utmost personal freedom in that nothing short of or beyond the will to enter into matrimony is sufficient to bind an individual to it.

Matrimony is a *bilateral legal transaction*, with its own rules relating both to capacity and to voidness and voidability, and its own procedures.

Rules on marriage vary according to the *type* of wedding, which can be either civil or religious. Religious marriage in turn can be carried out according to Roman Catholic rites or another form of observance. Catholic marriage produces civil consequences (the same ones as produced by civil marriage) pursuant to the Concordat between Italy and the Holy See dated 11 February 1929, now replaced by the concordat of 1984.

3.5.1. Civil weddings

Civil weddings were introduced under the influence of the French tradition as recently as the beginning of the nineteenth century, when religious marriage in France was downgraded with the creation of the secular state. A new form of wedding was invented, carried out before a registrar (usually the mayor or a person delegated by him). This situation was followed in Italy also, from its unification in 1860 until the signing of the Concordat in 1929: the principle of the separation of church and State was observed, and there were accordingly two forms of marriage ceremony, one before a registrar which produced consequences governed by the Italian legal order, and another for those who chose it before a priest, to give expression to religious sentiments and to produce consequences in ecclesiastical law.

The Concordat gave rise to a 'hybrid': church weddings celebrated by a catholic priest were privileged in that once they were entered in civil records they produced civil legal consequences. Law no. 115 of 1929 laid down that marriages carried out according to non-Roman religious rites were equal in status to civil marriages, apart from the different form of celebration. Law no. 121 of 1985 has ratified the new Concordat and has innovated above all in terms of the economic relations between church

and State, religious education in schools and the position of members of religious orders vis-à-vis the State, but has left relatively untouched the arrangements in the Concordat concerning marriage apart from certain changes in registration procedure and the rules on voidness.

The preconditions of civil marriage are as follows.

(a) *age*: the partners must have attained majority, but the court upon examination of the mental and physical maturity of the applicant, and of the grounds for the application, and having heard submissions from the prosecutor, parents or guardian, may in exceptional circumstances authorise a person not less than 16 years of age to marry (Art 84 civil code);
(b) *natural capacity*: persons cannot marry if they are under a disability by reason of mental illness and such incapacity as seen above results automatically in the marriage being void;
(c) *unmarried status*: a person who is already married may not contract another marriage. This applies only to a previous civil marriage or one with civil legal consequences. Any purely religious marriage which has not been civilly registered does not preclude the celebration of a new marriage, as it is without effect as regards the Italian legal order;
(d) *absence of impediment* arising from relatedness, affinity or adoption (Art 87 civil code);
(e) *absence of offence* (committed or attempted by one partner at the other's expense);
(f) expiry of any *period of widow's mourning* (which lasts 300 days from the death of the previous husband, to eliminate the possibility that the bride might give birth to a child of uncertain paternity (Art 89 civil code));
(g) finally, the partners must be of *opposite sexes* (if not, the marriage is without effect).

The celebration of a wedding must be preceded by a public announcement issued by the registrar. A notice must be displayed at the town hall for eight days stating the names of the partners, their ages and the place where the wedding is to take place.

Such *announcement* is necessary to give notice of the wedding to whoever might wish to raise objections to its taking place. Objections may be raised on the grounds set out above by parents, relations up to the third degree, and any existing spouse of one of the partners. Notice of objection suspends the celebration of the ceremony until a judgment permits it to proceed (Arts 102 and 104 civil code).

The ceremony takes place in public in the town hall in front of the registrar; it may also be carried out by way of *mandate* (for soldiers in wartime and for overseas residents). The mandate must be in the form of

a public document. It may be revoked, but continued cohabitation after the ceremony negates the revocation.

Particular rules attach to the *invalidity* of a marriage.

A marriage is void if it has been contracted in breach of the rules relating to age, unmarried status, and if there is an impediment arising from relatedness, affinity or adoption, or a crime has occurred. But avoidance is of limited scope, as, apart from the spouses, only certain persons (in most cases the parents) can pursue an action for nullity in relation to each of these defects.

A marriage is *voidable* on the grounds of disqualification (Art 119 civil code), natural incapacity (Art 120 civil code), duress or mistake (Art 122 civil code). Mistake applies to identity or to personal qualities, which include: physical or mental illness; sexual anomalies which prevent a normal conjugal relationship; the commission of an offence punished by a prison sentence of not less than five years – the victim may be a third party – or an offence of prostitution punished by a prison sentence of not less than two years; declaration of habitual or professional criminality; and pregnancy by a third party.

3.5.2. *Marriage and the Concordat with the Holy See*

The Concordat governs *canonical marriages having civil consequences*. ('*Canonical*' is used here and below in the sense of 'contracted according to the rites of the Roman Catholic church'.) The church wedding must be followed by a reading of Arts 143 and 144 of the civil code on the rights and duties of the spouses, such that by so doing they wish to assign civil significance to the church wedding. The priest official should then apply within five days of the ceremony for the religious marriage to be entered on the civil State register.

The religious marriage cannot be so registered: when the spouses are already parties to a civil marriage, either to each other or to third parties (the civil connection is not recognised from a religious point of view); when the spouses or one of them has not attained the prescribed age for contracting a civil marriage and has not obtained authority of the court to marry below such age or when one of them is disqualified by mental illness (a defect which does not prevent a canonical marriage); or when an impediment considered fatal by the civil law exists between the spouses (Art 8 of law no. 121 of 1985). Breach of this rule renders the registration null and void. Registration can be affected after a delay. In this case, the defects which bar registration immediately following the ceremony must also be absent at the later date when registration is affected.

Defects in the marriage (concerning impediments, consent, the ceremony) are subject to the jurisdiction of the ecclesiastical courts. An ecclesiastical order of nullity must be ratified in the Court of Appeal

by a judge versed in recognition of foreign decrees who will verify that the proceedings were in order and that the ecclesiastical decision was in conformity with the fundamental principles of the Italian legal order. Resolution of issues concerning separation, divorce and the consequences of marriage is, however, reserved to the jurisdiction of the Italian civil courts.

The rules concerning other (non-canonical) religious marriages are different in that all issues are governed by Italian law. Such marriages are governed by law no. 1159 of 24 June 1929.

A more comprehensive guarantee of the freedom of religion and of observance of confessions other than the Roman Catholic is now given by the new Agreements which the Italian state is from time to time establishing with representatives of the various faiths. Examples are the Agreements with the Waldensian community incorporated into law no. 44 of 11 August 1984 and the Agreements with the union of Jewish communities signed in Rome on 27 February 1987.

3.5.3. Promise of marriage

Family affairs are always marked by the principle of maximum freedom. Such is the bond created by marriage that the law prefers that people undertaking it are as free as possible. From this flows the consequence that a promise of marriage *does not confer an obligation to fulfil it nor to carry out what was agreed* in the case of non-fulfilment (Art 79 civil code). If the promisor has made gifts on account of the marriage, he may ask for their return (Art 80 civil code). This is an exception to the principle that motive is irrelevant to the validity of private legal transactions. Pre-marital gifts are made precisely in contemplation of the future marriage; if it does not in fact take place, their return can be sought. There are also firm limits to compensation for harm caused: this can only be recovered if the promise was made by a public document or private deed and the presumptive spouses had both attained majority. It is also necessary for the promise to have been broken without just cause. Finally, damages awarded are limited to actual loss (costs and obligations incurred as a result of the promise). There are also limits, provided for by statutory exception, which circumscribe the harm done to the parties' situations. The limitation period is also exceptionally short (one year: Art 80 civil code).

3.6. Marriage relations. Personal relations between spouses

3.6.1. Personal duties

The family is the social grouping in which most of the personality's development occurs. This applies not only to children, but also to the

spouses who, in embarking on a life together with common intent, love and affection, create a kind of spiritual and material communion that is unique. It should not, however, be supposed that the law with its rules breaches the ramparts of the family only in response to dysfunction: a breakdown in the community of living or disappointed affection. The thorough social reform brought about by law no. 151 of 1975 has already made important contributions to the efforts of those who would seek changes in social habits and prevailing attitudes: the position of women in society has been re-evaluated as a direct consequence of the change in their position in the family, as wife and mother. The parity of spouses is proclaimed in Art 143 of the civil code: 'in matrimony husband and wife acquire the same rights and assume the same duties.'

The duties deriving from marriage are reciprocal: *fidelity, material and moral support, co-operation* in the family's interests, and *cohabitation*. The moral and legal equality of spouses is made plain also by the fact that they have equal responsibility for the running of the family: 'both spouses must, each according to his or her means and their ability for professional work or housework, contribute to the family's needs' (Art 143(2) civil code).

Marriage entails various duties towards children, of a moral nature (such as to instruct and educate) and of a material nature (help and maintenance). Both spouses must provide for these needs according to their respective capabilities. In default, the responsibility devolves onto ascendants, both legitimate and natural.

3.6.2. Separation

The marriage 'contract' is terminated by either the *death* of one or other of the spouses or by *divorce*. When the marriage relationship, that is, the common material and spiritual life, runs into difficulties or becomes intolerable, the spouses have the option of separating. It is only through divorce, however, that the problems encountered in the relationship lead to the legal consequence of severing the 'contractual' aspects of the marriage.

Personal separation may be of three kinds. It is (a) *de facto* when the spouses have decided to try living apart, but this is an informal arrangement with no legal significance, provided they continue to discharge their marital obligations and do not without good cause put too much distance between themselves and the family residence (Art 146 civil code). It is (b) *consensual when* the spouses take a joint decision to live apart and make arrangements concerning the care of the children, property and the family home. Separation by consent has no legal consequences unless it is ratified by a court, that is, approved by a judge (Art 158 civil code). It is (c) *judicial* when the spouses do not succeed in

reaching the necessary agreements and put the matter before the court to make a declaration of separation.

Separation may be requested when, with or without the approval of one or both spouses, it is ascertained that the situation makes continued living together intolerable, or poses a serious risk to the education of the children.

3.6.3. Divorce

Divorce (introduced by law no. 898 of 1 December 1970 and amended by laws nos. 436 of 1 August 1978 and 474 of 6 March 1987) can be pronounced only in certain cases exhaustively listed by statute: (a) when one of the spouses has been sentenced to life imprisonment or been convicted of a serious offence against the family; (b) when the spouse has been acquitted of such an offence by reason of mental incapacity, but the judge has ruled that the spouse so acquitted is not fit to maintain or rebuild a communal family life; (c) when there has been a judicial separation, or a separation by consent ratified by the court (but in the latter case, the separation must have continued in effect for three years between the ratification and the issue of divorce proceedings); (d) when the other spouse, being a foreign citizen, has obtained an annulment or dissolution of the marriage abroad, or has remarried abroad; (e) when the marriage has not been consummated (Art 3).

Personal relations between ex-spouses are regulated in a manner different from those between separated couples, because the marriage has been dissolved. The ex-spouses continue, however, to have duties relating to the matrimonial property and the children.

3.6.4. Judicial intervention in other family 'crises'

Separation and divorce are extreme remedies in response to the breakdown of communal life between the spouses. When this breakdown occurs in the spiritual unity of the family, and the affection and *consent* that cement the union are no longer present, there is no alternative to dissolving the bond, through divorce, or loosening it through separation.

Such conflicts can be described as irremediable, but not all conflicts call for such extreme measures.

The reforming legislation anticipated such circumstances and provided accordingly for *judicial intervention*, as in the case of disagreement over the place of *residence* (Art 145(2) civil code). In other cases, when so requested by both spouses, the judge will 'attempt to find a solution by consent' after having listened to the children. The judge can intervene not only to resolve disputes concerning the basic affairs of the family, but also to protect the children, in cases where the parents exercising authority over the children are in dispute. Where there is a

dispute on an issue of particular importance, either spouse may 'make an informal approach to the judge to indicate the provisions he or she would regard as most suitable'. The judge, 'having heard both parents and any children over 14 years of age, shall suggest the solution which he considers best serves the interests of the children and the family unit. If the dispute is not thereby resolved, the judge shall grant the power to make the decision to whichever spouse he considers most suitable in the current instance to look after the children's interests' (Art 316 civil code).

3.7. Property relations between spouses

3.7.1. Joint estates

It has been said of the evolution in property relations between spouses over the centuries that from being of the nature of a property agreement, such as one might have sealed and notarised, marriage has developed into a lifetime community of interests, both material and spiritual. The property dimension also draws inspiration from constitutional principles: legal and moral equality, which in property terms means equal duties and responsibilities, along with equal rights.

To ensure equality (Art 29 Constitution, but also for the benefit of the individual within the family, Art 2) the reform introduced the principle of community property, derived from the existing legal form of *joint estates*. All properties acquired during the marriage, whether together or separately, belong jointly to both spouses. Rents and revenues therefrom are also owned in common, as well as enterprises run by both spouses (Art 177 civil code). The proceeds of activities undertaken by the spouses separately from each other – for example wages and salaries – become common only at the moment when the joint estate is severed, and the residue, that is, whatever remains from such earnings, is divided between the spouses. This does not mean that each spouse is free to spend separate income without giving thought to the needs and interests of the family (Art 177c civil code)

Personal effects as defined below are excluded from the joint estate by Art 179 civil code:

- property acquired by the spouse before the marriage;
- property acquired also after the marriage by gift or succession on death;
- goods of strictly personal use (for example, clothes and jewellery);
- goods which serve the exercise of a profession (for example, books and instruments);
- money obtained in the form of damages;
- money obtained from the sale of personal effects.

Both spouses administer the joint property separately. Acts of disposition, however, require them to act jointly. Therefore, selling or acquiring joint property requires the consent of both (Art 180 civil code); if consent is lacking and the transaction nonetheless takes place, it is voidable, but any action for nullity must be taken within the very short time limit of one year (Art 184 civil code). The spouse who intends to undertake the transaction may, however, seek the authorisation of a judge if it is necessary to the interests of the family or of an enterprise (Art 181 civil code).

The regime of personal separation gives the judge the task of establishing which of the spouses shall have the duty to maintain the other, if the latter lacks adequate means of his or her own (Art 156 civil code). In divorce, new provisions, introduced by law no. 436 of 1978, bring the position of ex-spouses closer to that of separated spouses.

Joint ownership of property is not binding on the spouses, but operates by default. If no declaration to the contrary is made when the marriage is celebrated, it is assumed that they have chosen community property. They can, however, opt later on for a regime of *separate estates* – this was the regime in force before the reform – by which each spouse retains exclusive title to goods acquired during the marriage and as sole owner has therefore the sole right to manage the property in question (Art 215 civil code). When a couple separate for reasons of disqualification or incapacity or because property held in common ownership has been managed badly, a regime of separate estates supersedes the community property regime.

3.7.2. Community property by agreement

If the spouses agree to modify the provisions of the joint estate regime, they may do so and thereby enter into a regime of **community property by agreement**. They cannot, however, exclude the rules on administration of property nor the requirement for equal shares (Art 210 civil code).

To allocate particular resources exclusively to the family's needs, the spouses, or one of them, or a third party may set up a trust fund (Art 167 civil code). The funds are thus tied: revenues must be used only for the family's needs, the management of the funds is carried out according to joint estate rules, disposal of part of the funds requires the consent of both spouses and also, if there are children, the authorisation of the court (Arts 167ff civil code).

3.8. Legitimate issue

3.8.1. Principles of legitimate issue

Among the changes produced by the reform of family law are many innovations in the position of minors within the family. These have had a

profound effect on the regime of **filiation**, meaning usually the rights and duties of children, and above all the assessment of the nature of relatedness between parents and children, from which flow many legal consequences.

Differences in how this assessment is carried out lead, if only in part, to differences in the effects of filiation, depending on whether it concerns *legitimate* or *natural* issue, the former conceived within and the latter outside wedlock.

Although to establish legitimacy it would in principle be necessary to show that the parents were married to each other when the child was conceived, in practice it is not always necessary to make inquiry to ascertain this, as two legal presumptions are applied: (a) that the husband is the child's father and (b) that conception occurred after the parents married each other.

3.8.1.1. Presumption of paternity and maternity. The **presumption of paternity** of the husband means that any child born into a family based on marriage is presumed to have been conceived by the mother through the agency of the man to whom she is married. This is not, however, a merely practical (so to speak) or sociological or statistical consideration: the presumption has ancient roots and derives from a disapproving attitude towards extra-marital relations, and the fact that the father acquired as his own whatever was born into his family (Art 231 civil code).

3.8.1.2. Presumption of conception. The **presumption of conception** applies to births which occur at least 180 days, after the wedding or not more than 300 days after dissolution of the marriage. The gestation period cannot indeed be less than 180 days, nor exceed 300. If the child is born sooner, it is still presumed that the husband is the child's biological father, but the contrary, if true, is easily proved (Art 233 civil code). If the child is born more than 300 days after dissolution, he is presumed illegitimate, but if he was in fact conceived during marriage, this can be demonstrated (Art 233(2)). Children born while their parents are separated are presumed legitimate, but their legitimacy can always be contested.

3.8.1.3. Disclaimer of paternity. The presumption of the husband's paternity can also be challenged through a procedure known as **disclaimer of paternity.** Since an order sought and obtained under this action operates to a child's disadvantage by removing his or her legitimate status, and thus is inconsistent with the presumption in favour of legitimacy (*favor legitimatis*), it is obtainable only under one of the following specified circumstances:

(a) if the spouses have not cohabited between the 300th and 180th days preceding the birth of the child;

(b) if the husband was impotent (or merely infertile) during the relevant period;
(c) if the wife has committed adultery and hidden from her husband both her pregnancy and the birth of the child (but actual adultery must be proved, not merely the existence of a relationship).

The action may be commenced by the father, or by the mother or a child who has attained majority.

3.8.1.4. Contesting legitimacy. There is also a presumption of maternity. The identity of the mother is always certain: that she gave birth to the child is attested by an entry in the register of births, along with the name of the father. The presumption of maternity can nevertheless be overturned in an action **contesting legitimacy**. It must be demonstrated that the newborn child was substituted, or that labour was false (non-existent and simulated). The action contesting legitimacy may also serve to exclude legitimacy when the marriage is void, when the child was born outside the prescribed period described above, and when both parents acted in bad faith (Arts 239 and 248 civil code). A child can claim legitimacy. To do this, he or she must prove maternity and paternity, conception within marriage, and the fact that his or her parents were legally wed (Art 130 civil code).

3.8.1.5. Possession of civil status. If there is no birth certificate to confirm a child's status, legitimacy can be established by means of the child's **possession of civil status**, that is, by showing that he or she has been living in circumstances which give rise to a presumption of legitimacy, such as having the same surname as the parents, being treated as a child of the family and being considered as such in the social milieu (Art 238 civil code).

3.8.1.6. Legitimation. A natural child can become legitimate, that is, acquiring the status of a legitimate child, or **legitimacy**, when the parents of the child marry after his or her birth (*legitimation by subsequent marriage*, Art 283 civil code). The parents must in addition, by a document of **recognition**, have acknowledged that the child is their own. The effects of legitimacy run from the date of the marriage if the child was recognised at or prior to the marriage, or from the date of recognition if this was later.

When a child cannot be legitimated by subsequent marriage, it is possible to obtain *legitimation by judicial order* (Art 284 civil code). This requires that legitimation does not act against the child's interests

and there are other conditions relating to consent and the ages of the parents.

3.8.1.7. Parental authority. The reform brought in a new regime of parental authority over children. In the 1942 code this was attributed to both parents, but to be carried out by the father (the so-called *paternal authority*). Today this is replaced by **parental authority**, exercised by common agreement by both mother and father (Art 316 civil code).

3.8.2. Adoption

A child can become legitimate also by means of adoption. The 1983 reform (law no. 184) has wrought profound changes in this institution. Today two kinds of adoption are distinguished according to whether the child is a minor or has attained majority, and there is also a regime covering international adoption of foreign minors which is in line with the relevant international conventions.

3.8.2.1. Adoption of persons who have reached majority. Adoption of adults is almost always for reasons connected with property. It allows a person without children to make provision for the inheritance of his or her property and name. Between the adopting and the adoptee there must be at least 18 years of difference.

Children born outside wedlock cannot be adopted by their parents. For adoption the consent of both adopting parents and adoptee and the assent of the parents of the adoptee and of the adopting parent's and adoptee's spouses is required, but an order of the court can make good any absent assents. The relationship established between adopting parent and adoptee is equivalent to that of legitimate issue. However, the adoptee maintains relations with his or her family of origin. Although adoption establishes a relationship between adopting parent and adoptee, no relationship is established thereby between the adoptee and the adopting parent's relatives.

3.8.2.2. Fostering. The law of 1983 created for the first time a coherent set of rules covering fostering of minors. Fostering is designed to deal with *temporary difficulties* in the family of origin. In such cases the minor is fostered with another family which provides for his or her maintenance and education with a view to a return to the family of origin when circumstances permit. Fostering is temporary in nature: it does not therefore alter the minor's family status, nor have consequences for the minor's surname or rights to succession. It is thus essentially an arrangement of assistance, aimed at restoring the minor's relationship with his or her own family and not at substituting it with another.

3.8.2.3. Adoption of minors. The law considers it a basic right of minors to be brought up within their own family. When this family is, however, incapable of looking after the minor and the difficulty is not merely temporary, but involves neglect amounting to abandonment, the minor may be adopted by a suitable family. In this way the neglect is put right and the minor is again assured the basic rights of maintenance, instruction and education (Art 30(1) and (2) Constitution).

For this reason, adoption is reserved to cases where the minor has been neglected materially and morally for reasons beyond a temporary difficulty in the family of origin. The adoptive parents must be a couple married for at least three years and not separated, even de facto. The original text of the law established that the age of the adoptive parents must be at least 18 but not more than 40 years more than the adoptee's. The Constitutional Court, however, has held that these age limits are too restrictive. First, disapplying the lower limit where one of the adoptive parents was less than 18 years older than the minor. In such a case the court may consent to the adoption if otherwise the minor would be exposed to serious unavoidable harm. Subsequently, the Court has held that the upper (40-year) age limit was also too restrictive and a recent, very innovatory judgement has disapplied the upper limit where *both* the adoptive parents were more than 40 years older than the minor. The judge must decide whether the adoption not going ahead due to the ages of the adoptive parents would expose the minor to serious unavoidable harm: if so, consent should be given to the adoption. The family court can order adoption as a result of a procedure designed to establish both the extent of the neglect of the minor and the suitability of the prospective adoptive parents. If the minor is 14 or more years of age his or her consent to the adoption is required. Adoption severs all relations between the minor and his family of origin and makes him a legitimate child of the adoptive family with full relations to both the lineal and collateral relatives.

The adoption of minors' regime is a completion of the special adoption rules introduced by law no. 431 of 1967. This is a basic instrument for the protection of minors who cannot find within their own families the essential conditions for their human and civil development. In this sense the constitutional principles designed to protect everyone's basic rights are given effect (Arts 2 and 3 Constitution), and in particular the rights of a minor to maintenance, instruction and education, even where the parents are incapable of discharging this duty (Art 30(1) and (2) Constitution). The corresponding question of the parents' rights arises: these too are guaranteed by the Constitution (Arts 29 and 30(1)) as are general guarantees of assistance to families in situations of need (Art 31).

Adoption is effected by a procedure in the family court. It is not permitted for parents to give their own children for adoption via any

private arrangement, nor may they give them for fostering indefinitely (or for any period greater than six months) without informing the tutelary judge. Judicial intervention in adoption and fostering has the purpose of guaranteeing the rights of minors and avoiding unconscionable commercial transactions. There are three distinct phases to the procedure: declaration of suitability, preadoptive fostering, and adoption order. In the first phase the judge makes sure that the necessary conditions for adoption obtain: the state of neglect through inquiry into the minor's recent history, his or her legal status and actual situation, and the conditions in which he or she has been living. The situation of neglect cannot be due to force majeure alone (through temporary economic or other difficulties such as illness or absence of parents in hospital). Once suitability for adoption has been declared, the prospective adoptive parents can now take charge of the minor for *preadoptive fostering*, on probation, so to speak, so as to establish whether the new family milieu is suitable for the minor's personal development. It should be noted that the parents cannot 'choose' the minor they wish to adopt. A team of psychologists and social workers assigns the minor to the couple it considers best able to bring him up. Once a year of fostering has elapsed and the necessary checks and monitoring of the adoptive family completed, the court can declare that adoption may proceed, or else reject the parents' application.

It is debated today whether recourse to special adoption is necessary but discriminatory, in that it favours by its nature better-off families, and so operates against poorer families who do not have the means to fulfil the obligations of maintenance, instruction and education that the law imposes. This is a sensitive issue, raising some of the negative aspects of special adoption, which nonetheless remains a very useful instrument of support for families, and, in particular, for neglected and abandoned minors.

3.8.2.4. Particular cases of adoption. In certain specified situations adoption of minors can take a simpler form with different requirements of the prospective adopters. This arises when the minor is not in a position of neglect (for example, the adoption of one's spouse's child by another father or mother, or adoption of an orphan by relatives or friends). It can also arise where the minor has suffered neglect, but preadoptive fostering by a married couple has proved impossible to arrange, for example, because the minor is an older or a 'difficult' child and it has not been possible to find a young couple prepared to take care of him.

This type of adoption is available not only to couples, but also to single people, and there is no maximum age for adopting, so long as there is at least an 18-year age difference between adopter and minor. Adoption is effected by consent between the adopter and the adoptee

(or the latter's legal representative), as ratified by the court. The consequences of adoption in these cases are less extensive than those otherwise obtaining with adopted minors, and are equivalent to those arising from adoption of an adult (see above at *3.8.2.1.*)

3.8.2.5. International adoption. The results of the regime for adoption of children have on the whole been positive, because thousands of abandoned and neglected children have been returned to a family milieu. However, the difficulties and delays associated with the procedure have led couples wishing to adopt to look abroad to countries where they will find it easier to realise their intentions. To control this tendency and prevent or restrict the 'trafficking in minors' that has grown up around it, the legislature has intervened in the form of law no. 184 of 4 May 1983.

Organisations concerned at an international level with the protection of minors have also intervened.

Law no. 476 of 31 December 1998 ratifies and gives effect to the Convention on the protection of minors and co-operation in international adoption, signed at the Hague on 29 May 1993. The same law amends, as regards adoption of minors from abroad, law no. 184 of 4 May 1983.

So today married couple who wish to adopt a minor from abroad must apply to the family court, which will determine whether the necessary conditions are met (Arts 29*bis* and 30). The spouses must confide the carrying out of the procedure to one of the appropriately authorised bodies. Once all the documentation necessary for the various assessments has been obtained, the body will send all relevant information to the commission which will evaluate the situation, and, if it considers the minor's interests are best served thereby, authorise the adoption.

Adoption may also be pronounced abroad. In such cases, the court will verify whether the requirements for doing so also in Italy have been met (Art 35).

3.9. Illegitimate issue

3.9.1. Recognition of natural children

The birth of a child outside wedlock confers an immediate obligation of aid, education and instruction identical to that in respect of legitimate children (Art 261 civil code). But having a child does not entail an obligation to recognise the child as one's own. This principle obviously does not apply to legitimate children born within wedlock, but to illegitimate children born outside wedlock (*natural children*). In the civil births register, the name of the mother and the father can be indicated only if they have registered the birth: otherwise the child is designated of

unknown parentage and given an arbitrary name. Once recognised, the child can obtain authorisation from the judge to keep the original name preceded or followed by the name of the parent who has recognised him or her.

If on the other hand the parent wishes to enter into a relationship of natural issue with the child, he must make a solemn form declaration of **recognition** of the natural child.

The recognition is effected by a public document (executed before a registrar, tutelary judge or notary) or in free form as part of a will (Art 254 civil code). Recognition can be carried out only by a person over 16 years of age, conditions cannot be attached, nor can it be done through another person. Furthermore, recognition cannot have legal consequences for persons other than the parent and the child; it can assert nothing regarding the other parent.

3.9.2. Judicial declaration of maternity and paternity

The child may apply to the court for a declaration of paternity or of maternity (Art 269 civil code). This declaration can only be made in the same circumstances as would make a recognition permissible (Art 269 civil code).

Evidence can be furnished by any means. Maternity can be proved by showing that the person who claims to be the child is the same person as the woman claimed to be the mother actually gave birth to. The action is not time-limited, and can be brought by a descendant (Art 270 civil code). It may also be brought in the child's interest by the other parent, in which case the child's consent is required if he is 16 or more years of age. In any case, the court will decide if the action could prejudice the child's interests (Art 274 civil code). A favourable decision produces the same consequences as recognition (Art 277 civil code). A child who cannot bring this action may nevertheless apply for material assistance from the natural parents (Art 279 civil code).

3.9.3. Present legal position of children born of adulterous or incestuous relationships

While children born of an extra-marital or adulterous relationship can be acknowledged and thus become part of the family (with the consent of the other spouse and of any other children: Art 252 civil code), neither recognition nor seeking a declaration of paternity or maternity is possible in the case of a child born of an *incestuous* relationship. An exception is made where the parents were not aware at the time of recognition of their mutual relatedness, and where the marriage from which the affinity derives has been annulled. When only one of the parents has acted in

good faith, only he or she may declare recognition and only in order to avoid prejudice to the child (Art 251 civil code).

3.9.4. The relation between legitimate and natural issue

Academic opinion has it that the rules concerning natural (and legitimate) issue are among those that the 1975 family law reform has most innovated, both in terms of the ways in which filiation can be settled, and of the consequences of this being done, in short the rules concerning the relations of parents to their children. In so doing the reform has completed a process of renewal of civil code rules – up until then still mainly inspired by a 'nineteenth-century' conception of the family, derived from the Napoleonic Code – which has progressed in stages via the principles in the Constitution, special laws and decisions of the Constitutional Court.

All children, even those conceived in wedlock, may, pursuant to Art 269 of the civil code, now seek a declaration of paternity, and without legal time limits. The importance of this provision should be emphasised. Judicial determination of filiation can no longer be considered as, so to speak, a subordinate and residual recourse vis-à-vis recognition, but is concurrent with it and of equal status in lending certainty to filiation.

As regards legitimate issue, the measure that corresponds to these innovations is the new regime of legal presumptions and status actions that spell the end of *favor legitimitatis*, meaning the tendency, notwithstanding civil code provisions, to give a more protected status to a child deemed legitimate, even though this purported relationship may not correspond to actuality.

The entire regime of filiation demonstrates a tendency to combine formal certainty with a respect for the realities of filiation relations (the so-called *favor veritiatis*). But this is by no means the only value promoted by the reform. The regime of second recognition – with the power it gives a child of at least 16 years of age to revoke his consent, and the power given to judges to evaluate whether a second recognition is in the interests of a child aged younger than 16 – and now (since a Constitutional Court decision in 1990) the scope of judicial declaration are both indications of limits imposed on the lengths to which a search for the truth of a child's parentage may be taken. Or better expressed, these legal instruments help us grasp the true basis of the principle, which is not a purely abstract homage to 'truth' seen as an absolute value, but is intended rather to give effect to the principle of 'responsibility for procreation' embodied in Art 30(1) of the Constitution, which imposes an obligation on anyone whose conduct has resulted in a birth to take responsibility for the child's upbringing as a man or woman and as a citizen, but which at the same time does not permit the parent who fails

to discharge these functions to claim a status that might compromise the child's interests and balanced family relations.

3.10. Succession, property, family

3.10.1. Terminology

The terms 'succeed' and 'succession' denote a 'substitution': for a person who has died – *de cuius* is the technical term – another is substituted, in the same position in terms of both rights and duties. But **succession** strictly takes place in transactions between living persons (such as the sale of a building) as well as when caused by death (as in inheritance). Succession can also result from *de facto relations (possession)*. It can be *universal*, that is, involving all legal relations, or *particular*, involving only some.

In all societies, at all times, there exist forms of succession on death. The principles which regulate them vary. It can be said that there are broadly two models: the *Roman*, in which the testator's will prevails in the disposal of his assets and other effects after his death; and the Germanic, in which a more inheritance-based view prevails, such that blood relations limit testamentary freedom and privilege the surviving family.

The succession regime is therefore closely connected to the property regime. Indeed at one time, succession was, along with contract, the only way to acquire the title to property. Today testamentary succession is less common, because there are so many other ways of transferring property, taken advantage of especially for reasons of avoidance of tax, now a significant factor in inheritance and legacies. Assets destined for heirs are often made over to a commercial company, or else they are 'sold' to the heirs at a particularly advantageous price, or other transfer devices are found.

Acquisition of part of a deceased's estate is subject, in Italian law, also to constitutional provisions: 'the law shall establish the rules and limits governing legitimate and testamentary succession, and the rights of the State over inheritance' (Art 42(4) Constitution). Thus the law is permitted to regulate succession by statute and at the same time the institution of succession is entrenched: any law purporting to abolish it would clearly be unconstitutional. The Constitution permits the State to impose taxes and other conditions on inheritance, or even make itself the beneficiary on intestacy if there are no surviving heirs up to the sixth degree.

3.10.2. Constitutional principles

Other constitutional principles have an important bearing. The provision in Art 29(2) of *equality* between husband and wife precludes any discrimination in the operation of succession between spouses.

Such discrimination was used, in practice, to operate to the wife's disadvantage, who did not in general acquire all due revenues and was not on the whole the co-owner of assets acquired by the husband. Today the spouse succeeds as a full heir (and thus acquires legal title to property) whereas in the past was subject to a reversion and so had a mere interest in the property (Arts 579 and 581 civil code).

Similarly, discrimination between children, whether legitimate or natural, has been abolished. The principle of *equal treatment* applies also to succession: 'legitimate and natural children succeed to their father or mother in equal shares' (Art 566 civil code); 'there shall be equality between legitimate, adoptive and legitimated children' (Art 567 civil code). Only children who cannot benefit from recognition, that is, children born of incest, are at a disadvantage, having the right only to a life annuity yielding an amount equivalent to what they would be entitled to if filiation was declared or recognised (Art 580 civil code).

3.11. Elements of succession law

3.11.1. Intestate, testamentary and necessary succession

When the deceased has not left a will, the estate is distributed according to rules laid down by law. These rules are based on the relatedness of the deceased to the various heirs. In law the legitimate **successors** on **intestacy** are (a) the spouse and legitimate and natural descendants; (b) legitimate ascendants and brothers and sisters; (c) other relatives and the State.

Each level of entitled persons excludes the next down, so that if there is a spouse or direct descendants, the ascendants receive nothing; if there are ascendants and brothers and sisters, the other relatives receive nothing. The civil code regulates the division of shares in the estate (Arts 566ff).

When a will has been left, the provisions it contains are applied to the division of the estate. The testator's will is always respected and succession according to the terms of a will is denoted **testamentary**. But the testator cannot override rights that the law assures to certain of his blood relations. A proportion of his assets is, whether he wishes it or not, always reserved to them (the *reserved* or *legitimate portion*). This type of succession, being unalterable, is termed **necessary succession**. Disinheritance is not permitted in the Italian system. The persons to whom the law guarantees rights to a part of the estate or other rights in it are known as *entitled successors*. This category consists of: the spouse, legitimate children, natural children, legitimate ascendants; adoptive and legitimated children have the same degree of entitlement as legitimate children; the law provides for a per stirpes entitlement for the descendants of legitimate and natural children (Art 536 civil code).

The portions of entitled successor cannot be defeated either by testamentary disposition or by the rules of intestate succession (which do not take account of gifts made by the deceased during his lifetime). To calculate the 'legitimate' portion the total amount given (*donatum*) is added to what is left in the estate (*relictum*) to make a notional aggregate (Art 556 civil code). The *relictum* consists of the net assets of the estate after deduction of debts; the *donatum* is the total amount of gifts made by the deceased during his lifetime. Sums received during the testator's lifetime are deemed to be advances on the entitled successor's portion and so are subtracted to ensure equal treatment of each entitled successor, as well as equal treatment between them and other, elective heirs.

When the reserved portion has been appropriated, in the sense that the testator has bequeathed the whole or part of it to others, the following procedure applies. Any shortfall so resulting is resolved in favour of entitled successors by the rateable abatement of the legacies of other legatees so that the reserved portion is recovered for its destinatees; the amount of this portion must, however, take into account any lifetime gifts or legacies to the latter (Art 553 civil code). Any lifetime gifts in excess of the amount the testator was permitted to bequeath is liable to *reduction* by an equivalent amount (Art 555 civil code); gifts are not reduced unless and until the value of bequeathed assets is exhausted, and any reduction starts with the most recent gift and continues backwards in time as necessary (Art 559 civil code). Reduction does not, however, operate automatically: application must be made to the court in the form of an **action for reduction**. Only entitled successors, their heirs and assigns have standing to bring such an action (Art 557 civil code).

3.11.2. The estate

The estate is the totality of assets, rights and obligations that are transferred through testamentary or intestate succession and an **heir**, understood as the principle or residual heir in contrast to a legatee, is a person who acquires a whole estate (in the case of universal succession) or an entire portion of an estate. The beneficiary of a universal succession can be referred to as sole heir. If the testator has made individual bequests to several people, the disposition is referred to as a series of **legacies** and their beneficiaries as legatees.

Succession begins at the moment of death, at the last place of domicile of the deceased (Art 456 civil code). The estate is acquired by *acceptance*, effective from the start of succession (Art 459 civil code). Acceptance can be *pure and simple* or with *benefit of inventory* (Art 470 civil code).

Acceptance can come about either *express*ly or *tacitly*. It is *express* when, by public document or private deed, the acceptor so declares or assumes the title of sole heir. Acceptance is unilateral and cannot be

made subject to conditions or terms. Any attempt to do so render the acceptance void, as is also any partial acceptance (Art 475 civil code).

It is *tacit* when the acceptor performs a transaction which necessarily entails consent to acceptance and which no one other than an heir would have the right to perform. An example is the sale of inherited property, acts of management, or granting a lease of inherited property.

The right of acceptance expires after 10 years counting from the beginning of the succession period (Art 480 civil code). If acceptance is delayed, anyone with an interest may ask the relevant court – via an action known by the Latin expression *actio interrogotaria* – to set a time limit within which acceptance must be made or else the estate renounced. The right to accept is forfeited if this time limit is not adhered to (Art 481 civil code). Acceptance may be annulled if the acceptor has been the victim of coercion or intentional wrongdoing (Art 482 civil code), but not on grounds of mistake: to avoid mistake the acceptor could have availed himself of an acceptance with benefit of inventory (Art 483 civil code).

Acceptance with benefit of inventory is made by declaration, notarised or made before a civil court clerk (Art 484 civil code). The declaration is followed or preceded by an inventory which lists all the assets and liabilities of the estate.

An important consequence of acceptance with benefit of inventory is that it keeps the property of the deceased distinct from that of the heir. The two estates do not intermix: however, the heir retains all the rights and obligations he had in respect of the deceased, other than those that expired automatically upon death. The heir is only liable for payment of debts and testamentary expenses to the extent of the value of the assets he has inherited. Claims to the estate on the part of creditors of the estate and legatees take priority over those brought by the heir's creditors.

When the putative acceptor has not in fact signalled acceptance of the estate and is not in possession of its assets, the civil judge may on the instance of an interested party or on his own motion appoint a trustee of the estate (Art 528 civil code). The undistributed assets of the estate are termed the *estate in abeyance*. The trustee must arrange for the inventory to be compiled, administer the estate and may pay debts and legacies (Art 530 civil code). The trusteeship of the estate ceases once acceptance is made (Art 532 civil code).

It is said that the heir becomes the owner of the estate assets once succession has begun. Acceptance has retroactive effect, but so long as no acceptance has been made there exists a property consisting of goods, but also assets (such as shares and contracts) and liabilities (for example, debts) that belong to the deceased and are for the time being awaiting transfer to the successor in universal title. This situation is referred to as one in which there are *rights without a beneficiary*, rights that are currently unsubstantiated (hence, the *estate in abeyance*).

Once the estate has been accepted, the heir can take action against anyone who falsely holds themselves out as the heir, and seek recovery of the estate assets against whoever possessed the whole or part of them without being entitled. Such action is known as an *estate petition* (from Latin *petere*, to ask for). This action presupposes a dispute over who is the heir and the contested issues tend not to be exclusively over the property, but primarily over status. As with actions to claim property rights, the estate petition is real action, it deals with objects and gives the claimant standing to pursue and recover them wherever they are. The difference is that the claim action can attach to a single item, whereas the estate petition is *universal*, in that it aims to recover the estate assets in their entirety. Furthermore, whereas an owner has title to legitimate his own possession of the assets, the heir only has title qua heir. Anyone in possession of estate assets who believes himself to be the heir, for example, because he was so named in an earlier will later revoked by another, is an *apparent heir*. The actual heir can also take action against anyone who has acquired estate property from the apparent heir. Rights of a third party who has acquired for value are protected provided he can demonstrate he has contracted in good faith (Art 534(1) civil code): good faith is not presumed, and by the same token good faith will not avail a person in possession of estate assets as a result of mistakenly believing himself to be the heir if such mistake was grossly negligent (Art 537 civil code).

3.11.3. Legacies

A **legacy** is the acquisition, by reason of a death, of a determinate thing. In contrast to the estate, a *legacy* is not subject to acceptance: acquisition occurs automatically, but the *legatee* may renounce it (Art 649 civil code). The legatee is further protected in that there is no intermixing of the legacy upon acquisition with the legatee's existing property. Any obligation arising from the former is limited to its value (Art 671 civil code). The legacy must be released by the principal heir, and the legatee becomes a creditor of the principal heir from the moment that the succession begins.

The legacy may be discharged in favour of an *entitled successor* or other beneficiaries.

3.11.4. Capacity to inherit, unfitness, representation, accretion

All persons alive or en ventre sa mere at the moment when the succession begins are **capable of inheriting**, whether through operation of law (*intestate succession*) or by virtue of a will (*testamentary succession*).

A person who is born no more than 300 days after the death of the person whose succession is in question is presumed to have been already conceived at the beginning of the succession. Children who were not yet conceived at the start of succession can nevertheless benefit from a will if one of their parents was alive at the time of the testator's death (Art 462 civil code).

A person who has killed or attempted to kill the deceased whose succession is in question, or a close relative of the deceased, is excluded from the succession by reason of his **unfitness**. These other persons are excluded for the same reason: anyone who has committed wrongdoing of equal gravity to homicide of which the deceased or his close relative is victim; anyone who has falsely accused the deceased or his close relative of committing a homicide; anyone who through wrongdoing or coercion has induced the deceased to make, revoke, or alter his will or has hindered him in making it; anyone who has suppressed, falsified or hidden the will by which the succession is to be determined; and anyone who has forged a will or made use of a will knowing it to be forged (Art 463 civil code). The future deceased may release a person from his condition of unfitness (Art 466 civil code).

A testator may also make provision for the situation where the putative acceptor is unable or unwilling to make acceptance, or predeceases the testator, or is absent when the succession commences. In such cases, the testator's provisions are observed and *testamentary substitution* occurs.

If the testator does not otherwise provide, then **representation** can ensue. The right to the estate passes per stirpes to an original heir's legitimate or natural descendants whenever the heir cannot or will not accept the estate or a legacy from it. This provision can operate when there is no substitution clause in a will, or upon intestacy (Art 467 civil code). Representation operates in favour of the lineal descendants, legitimate, legitimated or adopted, and of the descendants of the natural children of the deceased. In the collateral line the descendants of the brothers and sisters of the deceased can benefit. Descendants can benefit from representation even if they have renounced, or are disqualified by reason of unfitness or incapacity from, the inheritance of the estate of the original beneficiary (Art 468 civil code).

When representation does not apply (for example, where there are no relevant children), or the person or persons who would become entitled by virtue of representation cannot or will not accept the estate, their entitlement is added to that of the other legatees by **accretion** (Art 674 civil code). This gives rise to an increase in the portion accruing to other heirs and legatees. If there is no will, the portion otherwise destined for the principal heir accrues to the reserved portion (Art 677 civil code).

The order of entitlement to assets of the estate is derived thus: (a) by testamentary substitution; (b) by representation; (c) by accretion; (d) by reserved portion.

3.11.5. Common inheritance, severance, hotchpot

To avoid the division of estate assets among the heirs, the institution of **common inheritance** attributes a notional share to each heir of a property over which all of them exercise an owner's rights. If one of them wishes to dispose of part or a portion to an outsider, he must notify the others, who then have two months in which to exercise a right of pre-emption. In default of notification, the co-heirs have the right to reclaim the portion from the purchaser and his assignees (that is, any subsequent purchaser) as long as the common inheritance continues to exist (Art 732 civil code). This procedure is referred to as *tracing estate property*.

The aim of tracing is to avoid an outsider being introduced, against the express or tacit will of the co-heirs, into the common inheritance. The co-heirs must pay the estate debts and release legacies, but their obligations are not joint and several: if one co-heir fails to pay his share of a liability, the creditor cannot seek payment from the other heirs.

The normal rules of co-ownership apply to common inheritance, as do the rules on severance. Co-heirs may seek severance at any time (Art 713 civil code). The testator may provide that no severance can be affected until one year after the minor heir or heirs have attained majority, or make other provision (Art 713(2) civil code). If one of the heirs is still unborn, there can be no severance until after the birth (Art 715 civil code).

Severance can also be affected by the testator, who may specify in the will the manner in which the portions shall be divided among the heirs. Assets not thus divided by the heir are allocated according to the rules of intestate succession. If one entitled successor is neglected then the apportionment is void (Art 735 civil code). Any heir who has received less than his due share of the reserved portion can pursue an action for reduction against the other heirs (Art 735(2) civil code). For severance to come into effect, the estate must be notionally reconstituted in toto. Any lifetime gifts made to the heirs must be taken into account, if the recipients were legitimate or natural children or their descendants, or the spouse. This is to protect other heirs: it is presumed that such lifetime gifts made by the deceased were intended as an advance on the reserved portion, so the assets are reassembled in a tangible way. In this sense **hotchpot** differs from the *fictional reassembly* that operates in the case of reduction. Its other difference from an action for reduction is that the latter exists to protect entitled successors, whereas hotchpot defends other heirs from the deceased's spouse, his children and their descendants.

Chapter IV: Intermediate Communities

4.1. Individual members of groups

4.1.1. The group

The individual fulfils his personality not only as part of a family, but also as a member of **groups** based not on relatedness but on other common links, such as *occupational interests* (professional associations), *religious interests* (religious associations), *political interests* (parties), trade unionism, *civil rights interests* (movements promoting the rights of women, disabled people, homosexuals, consumers, etc), *artistic and cultural interests* (theatre and film groups, scientific associations) and, especially, *economic interests* (commercial companies). In general, freedom of association is guaranteed (Art 18 of the Constitution); in some cases it may be obligatory, such as belonging to the relevant professional body if one wishes to exercise a profession such as doctor, lawyer, architect, engineer or accountant.

There are two parallel reasons why the law concerns itself with these groupings: to safeguard freedom of association (and thus the existence of associations) on the one hand, and to protect individuals within the group, so that a person can realise the benefits for which he joins it.

4.1.2. Bodies and intermediate communities

Physical persons, corporate bodies and de facto bodies are all **subject to the law**, as applied by the courts.

The courts have always found it necessary to define, alongside physical persons, other legally *accountable entities*, which can be called to account in the discharge of legal rights and responsibilities. These entities are not discernible in nature, but have a purely legal existence. They include associations of physical persons or property incorporated into an autonomous entity. The reasons for this practice are many, but essentially they come down to economics: it is seen as necessary to combine the (physical) strength of a group of persons or the property put at the group's disposal to accomplish ends of which an individual acting alone would be incapable. Such combinations are known in

a non-technical sense as bodies, that is, entities known only to law, that are distinct from their component parts, whether those parts be persons or goods and assets composing a single property.

Bodies are by nature diverse, but they share a fundamental material basis in being formed of people or property, depending on the category of entity, as well as a formal element, which consists in their existence being recognised by the State. Not everybody, however, has this formal element: there are bodies of which the State does not recognise the right to an autonomous, legally defined existence separate from the persons or property of which they are comprised.

Bodies are created for a variety of different purposes, be they purely cultural or recreational (sports clubs, cultural and scientific associations) or social and welfare-based (mutual help societies, hospital foundations, social charitable organisations) or profit (commercial companies) or political and institutional (parties and trade unions). Voluntary associations are an instantiation of the freedom of association (Art 18 of the Constitution). Some bodies and entities have a special status, for example, the State, regions, provinces, districts, autonomous service-providers (for transport, electricity, gas, water and milk), political parties and trade unions. Because of their importance, the Constitution makes special provision for them (Arts 39, 40, 117ff).

From a sociological point of view, *bodies* are intermediate communities, in the sense of intermediate between the State and the individual. They occupy a position between that of the State which organises the life in society of a nation and the individual who participates in it.

The family, an association of several people linked by relatedness, is the intermediate community par excellence. There are also religious communities, run according to ecclesiastical law; there are scientific, academic, sporting communities and so on.

In legal terms, bodies are *de facto* if they have no recognised legal existence, or *de jure* if they are so recognised. They can be further divided into *associations* if their prevailing material component is people, and *foundations* if their prevailing material component is property. So there are *de facto* associations such as political parties, trade unions and recreational clubs, while others are de jure, with legal personality; some, undertakings such as companies (based on persons or on capital), are profit-making and others are non-profit, such as cultural and sports associations.

4.2. Legal personality, 'form' and 'reality'

4.2.1. Historical background

The creation of bodies is typical of the modern world and is a response to mainly economic demands. Once a body is recognised it has significant

and specific privileges. It is considered from the legal point of view as a *person* independent of its members, almost as if it were indeed a new person (though not physical) to be added to the existing, physical, persons recognised by law. The privilege enjoyed by a body recognised as a legal person consists essentially of having assigned to it property separate from that owned by its component members, as well as a legal competency separate from that of its members.

Historically, the modern artificial person was created during the period when new parts of the world were being discovered and colonised. Important expeditions were mounted and a system of international trade created. These were very risky operations, and success or failure could make the fortune of the organisers or else ruin them. From this arose the demand to separate the personal risk attaching to the organisers' enterprise from individual personal risk, and the artificial person was created to meet this demand. Physical persons formed groups of founders and members with their capital; the economic enterprise they undertook was for the profit of the *company*. All that they stood to lose was the capital of the company. If the ship sank or the expedition did not return, if the exploration yielded no profit, these events bore on the amount contributed to the enterprise by each individual member, but not on their other personal property. The East India Company was created out of this formula, which soon extended to all kinds of economic operation, throughout the various sectors of trading and commerce.

The idea of **privilege** is thus always associated with that of the artificial person (and of legal personality, that is, the artificial person's capacity to enter into valid legal transactions). It is a privilege to be able to risk only that part of one's capital that has been allocated to the company. This is an exception to the general rule that a debtor's liability extends to the whole of his property (Art 2740 civil code), and this exception does not apply in the case of non-recognised, de facto bodies. The latter are indeed subject to legal rules – they can make contracts and incur debt through individuals and regulate themselves internally and so are legally accountable entities – but they do not enjoy the privileges of artificial persons.

How did the concept of the *artificial person* evolve over time? At first, the artificial person was held to be analogous to natural persons. On the basis of this analogy, those who act on its behalf, administer its capital, undertake its economic operations and conclude contracts can be considered its *organs*. This is a naturalistic conception, deriving from the realist theory of persons. Today, however, artificial person is regarded as merely a nominal. So instead of saying 'a group of people acting together under the name of company A formed for the purpose of construction and sale of boats have acquired a building in which to display models for sale,' we can simply say 'company A has acquired a building, etc.' At the

same time, it is maintained that the analogy between physical and artificial persons holds good only under certain conditions, but not invariably. For example, artificial persons do not have children, or feelings, so it cannot claim damages for pain and suffering, it cannot revoke a gift on account of the ingratitude of the donor, nor as a donee, can it show ingratitude towards the donor, it cannot make a will, and so on. Artificial persons can on the other hand acquire, alienate and be the owner of property, as well as enter into contracts.

4.3. Artificial persons

4.3.1. Basic concepts

The elements that make up an artificial person are: a group of physical *persons* (the personal element), the basic constituent element of an association and present though not predominant in a foundation; a *property base*, that is, goods and/or assets assembled and identified in its charter; an *objective*, which must be lawful, possible and determined and may be fixed, and to the fulfilment of which the use of the property and the physical persons' activities must be directed; and the formal element, constituted via *recognition*.

The existence of an artificial person must be entered in a public register, along with key documents. There is a register held by the court office in every provincial capital. The effect of registration is in most cases purely declarative: it serves merely as *published notice* to third parties. For capital-based companies, however, registration is a sine qua non of the company's existence: we might refer to this as a *constitutive* company registration.

There is a debate over the distinction between artificial persons of a public nature and artificial persons of a private nature. This issue turns on the same problems of distinguishing between private and public law as have been signalled above.

4.3.2. Patrimonial autonomy

The privilege enjoyed by artificial persons is a limited exposure to risk. In other words, the property of the artificial person is kept separate from the personal property of its members. This separation is known as **autonomy**, and since it concerns property, it is referred to as **patrimonial autonomy**. Patrimonial autonomy is *perfect* in the case of bodies endowed with legal personality, that is, creditors of individual members have no recourse to any property owned by the artificial person, and conversely, creditors of the artificial person have no recourse to any property owned by individual members. In the case of other, unrecognised

bodies patrimonial autonomy is *imperfect*. Whereas creditors of individual members have no recourse to any property owned by the artificial person (short, that is, of obtaining the dissolution of the body and the distribution of its assets among the members), the converse does not apply, and creditors of the artificial person can seek satisfaction from the resources of individual members. Recognised associations and foundations enjoy perfect autonomy, as do capital-based and limited companies – the various types of company will be examined below under the heading of 'commercial law'. Other bodies are restricted to imperfect autonomy.

The bond between legal personality and proprietorial autonomy is indissoluble. At the same moment as a body acquires the former, it also becomes privileged with the latter.

4.3.3. Capacity to have and to exercise rights

For artificial persons the capacity to have rights is inherent in the very concept of personality, with the limitation that, being a creation of the law and not existing in nature, they cannot enter into transactions of a family nature. This is not the same as stating, as was done above, that rules concerning injured honour, damages for pain and suffering, etc cannot be applied also to artificial persons.

As for the capacity to exercise rights, that is, to enter into valid legal transactions, artificial persons act through their organs. The will manifested by the organs (that is, by the directors, the chairman, or, if they are so authorised, by individual members) is imputed directly to the artificial person. The organs cannot express their own will, as they are mere *instruments*. Every action taken by an organ is referrable to the artificial person; even wrongful acts committed by the organ give rise to liability on the part of the artificial person.

4.3.4. Residence of an artificial person

According to Art 46 civil code: 'Whenever the residence or domicile of a person is legally relevant, these in the case of an artificial person will be determined by where its principal office is established.' And the legal consequences of where an artificial person has its principal office are many, in regard to formation of contracts, performance of obligations, the law dealing with registered offices and hence the nationality of the artificial person, in questions of jurisdiction in legal actions brought by and against the artificial person. Where these arise from a contractual dispute, there will generally be a term specifying that the competent court will be the one where the *artificial* person's principal office is situated. This location may also effect the interpretations placed on contracts to which the artificial person is party (Art 1368(2) civil code).

The artificial person, whether company, association or foundation or other body, is governed by statute, including the constitutive procedures (Art 25 of law no. 218 of 31 May 1995). Foreign artificial persons are assured a treatment equivalent to that of the corresponding Italian artificial person, provided there is reciprocity (Art 16(2) of the private international law provisions which precede the civil code.

Foreign companies with offices in Italy (of which there are many, particularly in industries such as oil and engineering) are subject to Italian law as regards company registration, publication of accounts and representation (Art 2506(1) civil code). Secondary offices are subject to Italian business law (Art 2507 civil code).

The reasons for this regime are various: a wish to protect third parties and creditors having relations with the company, a wish to subject the company to Italian tax laws and so on. To protect third parties and creditors, it is laid down that until the formalities outlined above have been duly completed, anyone who deals in the name of the company has unlimited liability in respect of the company's obligations (Art 2508 civil code).

4.4. Recognised associations

4.4.1. Internal affairs

Legislation has resulted in few rules concerning associations, but many more concerning companies, which are a particular type of association covered in detail in Book V of the civil code. Whereas companies are intended to be profit-making enterprises, associations (whether recognised or not) are not-for-profit: their aims may be religious, historical, scientific, cultural in general, sporting, recreational and so on.

Associations are set up by a charter (Art 14 civil code). Foundations can also be set up by testamentary disposition. The difference between associations and foundations is that the most important feature of an association is the *personal element* (for example, a cultural association where many teachers work and the administration is concerned with the pupils), whereas in a foundation the *property element* is predominant (for example, funds dedicated to the cure of the sick and hospital care).

The document by which the association or foundation is created is known as the *constituting instrument*. The document which sets out the internal rules of the body is known as its charter. The constituting instrument and charter must include the name of the body, its objectives, details of its property, the address of its main office, and rules of a constitutional and administrative nature (Art 16 civil code). Where associations are concerned, they must also provide for rights and duties of members and conditions of membership. In the case of foundations,

they must include criteria and procedures for distribution of revenues to the beneficiaries.

As well as these essential elements, the constituting instrument and statute may also provide for contingencies such as the dissolution of the body, alienation of property and, in the case of foundations, rules covering their reorganisation or reconstruction. The constituting instrument and charter, and any modifications thereto, must be approved by the authority responsible for recognition of associations and foundations.

The *administrators* and the *members' meeting* are the organs of an association.

The **directors** have executive powers. They must exercise them with diligence, inform the meeting of the body's activities, and account for their operations according to the principles governing their mandate (Arts 18, 1710ff civil code). A director is not liable for any action in which he has not participated, or for any action in which he has participated but has not approved provided he has registered his dissent with a note of his reasons. The directors represent the intentions of the body to the outside world.

The directors will call a member's meeting in various situations: to approve the budget; when they deem necessary (such as to approve a change in the charter or to expel a member); when a request is made, with reasons, by at least one-tenth of the members. In the last case, the court can call the meeting if the directors fail to do so (Art 20 civil code).

The **members' meeting** approves the budget and instructs the administrators to take responsibility for carrying out various actions. It may also modify the constituting instrument and charter, and decide that the association be dissolved. Modifications to the constituting instrument and charter require a qualified majority – a quorum for this is three-quarters of the total membership, of whom a simple majority must vote in favour, whereas for ordinary decisions the quorum is one-half of the members, with again a simple majority of those present voting in favour. A higher majority, three-quarters of the total membership, is required to dissolve the association.

Decisions taken by the meeting can be annulled if they are contrary to law or to the constituting instrument or charter. That is to say, they can be rendered invalid on an application made to the court by the body's organs (directors, chairman), or by a member or the public prosecutor (Art 23 civil code). Any effect of an annulled decision nonetheless remains valid for the benefit of a third person who has acquired from a dealing with the association, provided that person has dealt in good faith without knowledge of grounds on which the decision was voidable and has acted in reliance on that decision (Art 23(2) civil code).

An association can be dissolved on grounds provided for by the constituting instrument and charter, or when its objectives have been attained or become impossible of attainment. *Dissolution* is declared by the relevant authority at the instance of any interested party, or of the members' own motion.

Once the association has been dissolved, the administrators can no longer carry out actions on its behalf, otherwise they become personally (and jointly and severally) liable for actions carried out in breach of this rule (Art 29 civil code).

4.4.2. Judicial intervention

One of the most important problems in the regulation of recognised associations – the relevant rules also apply to associations without legal personality – is the protection of the individual member within the body.

Article 24 civil code only provides that a member cannot be expelled by decision of a member's meeting except on very serious grounds. It does not indicate, among other things, whether there can be any derogation from the principle that expulsion can only be decided by a member's meeting. The prevailing view is that the rule is generally subject to derogation and that the constituting instrument and charter may lay down which other organs of the association (a special committee or internal arbitrator, for example) are competent to make such a decision. Case law has also held that the rule on expulsion may be derogated from in the statute, but asserts also the power of the affected member to obtain review by the court.

4.5. Foundations

The civil code contains provisions common to associations and foundations. At the same time, there are rules specific to foundations. The founder can indeed revoke the founding document which has bound all or part of the allocated property to a particular objective only up until the moment that recognition is made. Thereafter the foundation has a separate existence as a body (corporate or charitable) independent of the founder with its own property and he can no longer act or purport to act in its place (Art 15 civil code).

In the Constitution there is no direct reference to foundations. However, freedom of association is guaranteed (Art 18 Constitution); individuals are protected in the 'social groupings' within which they fulfil themselves (Art 2 Constitution); culture is protected (Arts 9, 33, 34 Constitution). All these are considered by the currently dominant legal interpretation to be references on which a regime of foundations can be based, even if they do not amount to a very solid basis in that the rules

(particularly Arts 2 and 9 which the current doctrine has only now begun to pray in aid) are all of a rather general nature.

Although the civil code deals with foundations, it does not define them. In other words, legislators, lavish though they are with legal definitions in other contexts, have preferred in this case to rely on current terminology and allowed the meaning of foundation to be inferred from common usage without venturing into any theoretical attempt at a definition (a practice they have also adopted in the case of associations). Any definition of foundations is thus the work of case law and academic legal theory.

4.5.1. Endowing the foundation

The founding document is a unilateral act which can be made in the form of a public document intra vivos or by will (Art 14 civil code). In the first case the public document is required, in the latter, the will may be holograph or notarised.

When endowing the property on the foundation the founder makes a deed of settlement that relinquishes his title to the property entirely. Legal theory holds that, since the settlement will also contain directions as to how the property is to be used in pursuing the purposes for which they are needed, this function is essential to the document. From this it is concluded that any deed of settlement not containing such directions should be considered void, but the courts tend to save the settlement in these cases as the rules on organising the property can be effectively provided by the public administration.

4.5.2. Constituting a testamentary foundation

Legal theory distinguishes three ways in which a foundation can be created in a will. Two of these are considered valid, the third not properly applicable in the same way as the first two. There may be either a wish expressed by testamentary disposition or a disposition in favour of a foundation to be created, otherwise (and this is the unreconcilable possibility) conditions attached to hereditary entitlement or to a legacy. This last case, though conditions can be attached to a bequest, does not amount to a normal way of setting up a foundation.

The testator can also directly nominate the foundation to be constituted as his principal heir. In such a case the body, once it has been constituted, also inherits the testator's debts.

On the other hand, foundations are rarely created by 'public subscription'. Such situations normally give rise to the creation of a committee, though these can subsequently transform themselves into a foundation.

4.5.3. Protection of beneficiaries

It is a matter of debate whether beneficiaries have any claim over a foundation or can exercise control over its activities. A judiciable claim can be made if the beneficiary is sufficiently identifiable as such, that is, conforms to a precise description in the statute of who a beneficiary can be. The charter may also provide that a beneficiary via representatives can exercise control over a foundation's activities, but this a matter of choice for the founder, who may prefer not to confer any such right. It is submitted that when beneficiaries are defined as members of not precisely defined groups or generic categories, they may still be able to bring an action to reverse decisions that are in conflict with the statute or otherwise abusive.

4.6. Non-recognised associations. Political parties and trade unions in private law

Associations that do not have *legal personality* have not been recognised as autonomous entities with the privilege of proprietary autonomy. They are simple *de facto* (or unincorporated) *associations*. Such associations can have all kinds of purposes, whether cultural, artistic, recreational, etc. This form of body, being flexible enough to allow maximum freedom, is the choice, within private law relations, of political parties and trade unions.

Political parties and **trade unions** are major players in the political and economic life of the country. They contribute to the dynamic of public power – and in this guise they are subject to public law – with a structure typical of private law entities: the non-recognised association. The fact that political parties and trade unions have not requested recognition (and with it legal personality) shows that they wish to avoid coming under the controlling influence of the State provided for artificial persons. In legal terms, belonging to a non-recognised association is thus a guarantee of freedom and autonomy.

Parties and trade unions are set up then on the collective bases that are the foundations of these associations. Trade-union relations, as well as political relations, give rise to an internal organisation that is not created by the State, but they are also autonomous with regard to their statutes. They are a clear illustration of the theory of the pluralism of legal orders: they are in sum an instance of *private autonomy*.

The rules of private law govern non-recognised associations and hence parties and trade unions. This is the only form of State regulation that applies to associations, since Art 39 of the Constitution which provides for registered trade unions has not been put into effect. Since they are governed by the legal order of the State (more precisely, the civil code),

parties and trade unions are 'legally accountable entities' with a limited form of personality, that of *imperfect patrimonial autonomy*.

4.6.1. The regime governing association activities

The civil code devotes only three provisions to non-recognised associations (Arts 36–38), but they are subject insofar as possible to the rules governing recognised associations although. The controls in favour of creditors do not apply.

Internal rules and administration of non-recognised associations are subject to agreement among the members (Art 36 civil code).

To pursue their purposes, associations can benefit from a pool of assets that is not referred to as property but as a *common fund*. Individual members, so long as the association lasts, cannot request the division of these assets, nor claim to receive a share if they leave the association (resignation of membership, Art 37 civil code).

4.6.2. Committees

Committees are less important than associations and foundations. They are formed by groups of people with various ends in mind, and very often to raise money in support of those ends. Often they are formed to pursue political pressure campaigns such as safeguarding human rights and trying to secure a referendum on a particular issue. They may also be for specific and time-limited purposes such as organising a festival or exhibition (Art 39 civil code).

Committees are usually not recognised and have no legal personality. Certain principles apply to them, however, analogous to those applying to non-recognised associations, even if they take a form more similar to a foundation.

Organisers and those who take control of funds assume personal, joint and several liability for the safe-keeping of funds and ensuring they are put to their intended use (Art 40 civil code). If there is no legal personality, the members of the committee (unlike members of a non-recognised association) are also responsible. Whoever has subscribed the requested amount of money only has to pay it (Art 41 civil code).

When the funds raised are not sufficient for their purpose, or the purpose has been attained, or is no longer attainable, there are applicable rules for the disposal of remaining funds in default of any provisions made when the committee was set up (Art 42 civil code).

Committees, being autonomous and legally accountable entities, can possess rights and be liable to obligations, including having title to land registered in their name (Cassation decision no. 6032 of 1994).

4.7. Voluntary and non-profit organisations

The variety implied by the world of associations, whether recognised or not; the demands placed on them in seeking to accomplish their purposes without engaging systematically in economic activity; the desirability of distinguishing these groups of people from organisations formed for profit: all these are reasons why the legislature has from time to time turned its attention to associations, conferring on them privileges and immunities, mainly of a fiscal nature, and promoting reform and modernisation of a more general nature in the provisions of the civil code. With hundreds of laws pertaining to groups or individual associations, the difficulty of appreciating the concrete problems of associations is matched by that of properly understanding the regulatory framework they operate within.

The simplification of the recognition procedure has been mentioned, as has the freedom to acquire land and now also inherit an estate or legacy.

Two recent laws complement the general regime covering the entire sector:

- the framework law on the voluntary sector (no. 266 of 11 August 1991);
- legislative decree no. 460 of 4 December 1997 on non-profit organisations.

4.7.1. Voluntary organisations

The law on voluntary activity takes note of the wish of young and old people, men and women, to give freely and regularly a significant part of their time and effort in the service of hospitals, refuges, orphanages, home, help for the disabled and in other situations where help is offered to persons in need. The law recognises 'the value to society and the use of voluntary service as an expression of solidarity, pluralism and a civic sense, and wishes to promote its development, while safeguarding the autonomy of voluntary service in recognition of its contribution to social, civil and cultural goals'. These goals are set out by the State, regions and local bodies.

Voluntary activity is defined as activity characterised as follows:

- by its personal nature, offered spontaneously and freely;
- by its realisation within a voluntary organisation.

The activity cannot be paid, by the beneficiary or anyone else, and the nature of 'voluntary' activity is incompatible with any employee or self-employed status or other economic relationship with the organisation.

Voluntary organisations are defined as 'freely constituted organisations' set up to carry out the voluntary activity on the part of their members in a manner predominantly (though not necessarily exclusively) personal, voluntary and unpaid in nature. These organisations can assume the *legal form* they find most suitable, but the following must be provided for in their by-laws:

- the absence of any profit-making purpose and the unpaid nature of the members' services;
- the democratic organisation of the body, elected positions and their unpaid character, requirements for membership and expulsion of members, and members' rights and duties.

Since 1991 this type of organisation has been permitted to receive (over and above the fruits of traditional private and public fundraising) donations and testamentary bequests, as well as revenues from 'ancillary commercial and productive activity'.

The law provides for voluntary associations to be entered on the appropriate register.

As may readily be noted, considerable exemptions apply with respect to the general law on associations:

- legislation requires a democratic structure (although the organisation is free, thanks to the autonomy of charter enjoyed by associations, to choose its own preferred form and structure);
- at the same time, this type of association is exempt from the rules against mortmain.

4.7.2. Socially beneficial non-profit organisations

Tax legislation has added a further piece to the jigsaw of rules governing non-profit bodies, by accompanying the introduction of immunities and privileges for purely non-profit activity with certain rules of private law.

An ONLUS (socially beneficial non-profit organisation) is defined by legislative decree as being one of the following:

- associations (whether recognised or not), committees or foundations;
- co-operative societies and other private bodies, with or without legal personality, whose charter (in the form of public documents or certified private deeds) provide exclusively for activities in the fields of social work or socio-medical assistance, welfare, education and training, amateur sport, protection and promotion of cultural heritage and the environment, of culture and art, civil rights and scientific research.

ONLUSs may not distribute, even indirectly, earnings or operating profits, nor funds, reserves or capital while the organisation remains extant. All profits and revenues must be devoted to the purposes of the organisation or activities connected thereto, and if property is to be disposed of it must be done according to legislative rules. There is also the duty to maintain accounts and deliver an annual financial report and to have a democratic structure.

Their activity may be for the benefit of their own members or for third parties.

They are entered on the register of the Finance ministry and enjoy tax benefits and favourable rates for the use of essential public services.

Chapter V: Business and Companies

5.1. The entrepreneur

The defining traits of an entrepreneur are to be found in the civil code definition of a person who 'pursues in the course of a profession organised economic activities organised with the aim of production or exchange of goods or services' (Art 2082 civil code). An entrepreneur can thus be considered as a person who pursues: (a) an *economic* activity, that is, one based on property and wealth-creating, not merely the enjoyment of existing goods; (b) in the course of a profession, hence stable, if not necessarily continuous – the activity must at least be more than just occasional; (c) through an *organisation*, meaning involving directing the work of others or the use of property and not resulting in a merely personal outcome; and (d) the activity is destined for a *market*, by producing new goods, adding value to existing goods, or bringing producers and consumers together.

It is debatable whether the *profit* motive is a further prerequisite. This condition is, however, open to wide interpretation, implying not merely the enrichment of the protagonist, but the creation of *anything* of economic benefit, be it a cost saving or other economic advantage.

Within the single category of entrepreneur, the civil code makes several significant distinctions: small businessmen as opposed to those who run medium-sized businesses, and those involved in agricultural versus commercial, and private versus public enterprises, and sole traders as opposed to partnerships and companies.

The first of these distinctions is important when it comes to assisting small businesses, whether from the point of view of duties (civil or fiscal) or through their exemption from the procedures imposed on creditors on cessation of business activity: the small business is not subject to *collective creditor action*.

According to the civil code (Art 2083) *small* businessmen are: farmers who work their land directly; artisans who pursue a mainly personal type of activity, using equipment on a modest scale, for example, blacksmiths and joiners; small shopkeepers and keepers of similar small undertakings such as bars and fruit and vegetable stalls; and in general people whose businesses involve primarily their own labour and that of their families.

It is easier to describe the difference between agricultural and commercial enterprises, as this is based on the product and not on the size of the undertaking. The difference is nonetheless fundamental in that commercial entrepreneurs are subject to their own specific legal regime, known generally as their *statute*.

An agricultural entrepreneur (Art 2135 civil code, as recently amended) is one whose activity involves cultivation of the soil, forestry, husbandry of animals and connected activities such as the processing and sale of agricultural products such as jam, preserves and wine, the sale of crops or farm animals. Connected activities also include the provision of goods and services using mainly farm equipment or resources, for example, land improvement or taking in paying guests. The category has been expanded to include persons involved in the fishing industry, whether directly involved in the taking of fish from the sea, or in ancillary services, as well as co-operatives engaged in *forestry*. *Commercial* activities are those listed in Art 2195 civil code, or those whose purpose is the industrial production of goods and services, or the marketing and distribution of goods, including the transport, banking, insurance and other related sectors.

A *sole trader* is one whose enterprise is carried out in his own name, and of which he enjoys the profits directly and assumes the risks with his own property. If more than one person is involved, the enterprise is *collective*: a group of people acting together in pursuit of non-profit (as in the case of associations and foundations which participate in business activities) or profitable ends (in which case it is a *company* or *partnership*, with profits and liabilities shared among the participants in a variety of ways).

Family concerns are, however, not considered collective enterprises. They are governed (without great clarity) by Art 230*bis* civil code, and are legally sole traderships and those who work together with the principal, being a spouse, blood relative up to the third degree or related by marriage up to the second degree, are merely in a privileged position vis-à-vis ordinary employees, having rights of pre-emption where the business is to be sold to a third party, a right of maintenance and to a share of gains and revenues, as well as the right to take part in certain decisions relating to acts of disposition.

The distinction between private and *public* enterprises is of relatively minor importance, given the tendency in recent years towards 'privatisation', as the process of offering publicly owned enterprises for sale on stock markets is known. A similar observation can be made, not only now of sectors where the State and other public territorial entities operated in competition with private enterprise, but also increasingly of businesses operating under monopoly conditions, thus rendering rather dated many of the old theoretical disputes about public enterprises

(particularly, their compatibility with the profit motive deemed central to the concept of enterprise).

5.2. The entrepreneur's statute

The law applying to entrepreneurs can be found in a complex of rights and duties that vary according to the kind of activity pursued. For example, a great many activities are subject to specific requirements or administrative authorisation. There are many rules designed to protect employees' safety. Manufacturing techniques are regulated and there are a host of security measures for the prevention of fires and accidents.

Commercial businesses are further subject to a series of laws traditionally referred to collectively as the *statute*:

(a) requirements concerning capacity – for minors and persons under a disability there is a specific procedure for obtaining the consent of a court to the continuation of a commercial enterprise, consent that can also be obtained by an emancipated minor, while some categories of individuals, notaries, lawyers and State employees among them, cannot also be entrepreneurs;
(b) documentation by way of *account books* – all businesses must maintain a day book, an inventory book and files of correspondence, and there are specific requirements for some categories of business, such as company books for commercial companies;
(c) being subject to the appropriate insolvency procedures, particularly in bankruptcy, to guarantee the fair distribution of the enterprise's remaining assets among creditors;
(d) entry on the register of enterprises, complete with all relevant details serving as legal notice to third parties.

5.3. The property of the enterprise

All the assets that the entrepreneur commits to the running of the enterprise are defined by Art 2555 civil code as the property of the enterprise. Central to the definition is the *functional unity* acquired by the assets by being collectively destined, whoever may own them, to the pursuit of the entrepreneur's activities.

An age-old theoretical dispute surrounds the nature of enterprise property. The unitary theory holds that it must be considered as a whole or as incorporeal, whereas the atomistic theory sees it in terms of a plurality of heterogeneous goods, connected by a merely functional link such that the various parts can be treated in isolation.

One solution to this controversy may be provided by the distinction between legal transactions and property rights: the property of the

enterprise may indeed form the object of a single transaction in which its component parts are considered singly, but it cannot give rise to a right over the property as a whole, as distinct from the rights over its component parts.

Whoever disposes of the (entire) property of an enterprise must not within five years of the transfer set up another business which by reason of its objects, location or other features is calculated to take customers away from the business that has been ceded. An agreement may be made between the parties containing more specific provisions, but the period of five years may not be extended (Art 2557 civil code).

Such transfer entails the transfer of contracts, except those of a personal nature, entered into by the undertaking (Art 2558 civil code) as well as of the assets and debts of the undertaking. A debt is discharged, however, if paid in good faith to the transferor. The transferor cannot on the other hand be absolved from liabilities incurred prior to transfer without the creditors' consent. The transferee is also liable for any debts arising from the compulsory account books (Art 2560 civil code).

5.4. Trademarks and competition

The entrepreneur carries on business under a *trading name* which can be his or her own name or one he or she has made up. He can use a *sign* to identify his place of business. To distinguish his products, a *trademark* can be used, which can take the form of an emblem (such as the crocodile of Lacoste), a name, a number ('501'), or a distinctive form of product (such as the Coca Cola bottle).

There is much litigation over alleged misuse of distinctive marks by competitors aiming to create confusion between the 'genuine' product and copies. The law protects the producer's interests (and indirectly the public interest too) against such confusing practices by conferring the exclusive use of trading names (Art 2563 civil code), signs (Art 2568 civil code) and trademarks (Art 2569 civil code) on whomever registers them first, thus enabling their use by others to be challenged. There is limited protection for 'prior use' of trademarks, allowing others who used these before they were registered to continue to do so in the same way as they had done before registration.

Legislative decree no. 480 of 1992 brought innovative change to the rules for transferring trademarks. This was previously permitted only when the undertaking or a branch of it was transferred, but now it is more generally available, including under licence, provided that it occasions no confusion on the part of the public.

Other litigation between businesses concerns forms of competition alleged to be unfair (Art 2598 civil code) whether through methods calculated to *confuse* (that is, misuse of trade names and distinctive signs

in a misleading manner or producing close imitations of competing products), through *disparagement* (publishing information designed to discredit a competitor's product) or *misappropriation of goodwill* (appropriating the esteem enjoyed by another's products) or any conduct contrary to professional ethics. In these situations the law contrasts the abuse of the right to competition by providing for injunctions to cease the wrongful activity and for damages payable to the injured party.

The rules on unfair competition are not, however, adequate to deal with advertising techniques described as *misleading*, that is, calculated by the manner of presentation or otherwise to cause mistake on the part of its target audience to the detriment of consumers and competitors. Legislative decree no. 74 of 1992, passed to give effect to an EU directive, now gives the antitrust authority the power to control misleading advertising.

5.5. Copyright and industrial inventions

The civil code provides rules for 'works of ingenuity', meaning literary and artistic compositions and scientific works, with the goal of assuring protection for ideas and their practical results, so that their inventors or creators can reap an economic benefit from their application.

One can speak of *intellectual property*, to indicate the relation between author and work, or of *intangible property*, to underline the fact that, although in most cases they exist in a recorded form (such as on disk or on paper), the works of ingenuity in themselves remain non-physical, being the fruits of ideation.

In relation to works of ingenuity we can distinguish a *moral* right and a *patrimonial* right. The former forms part of the rights of the author and as such is not transferable, while the latter can be alienated since it attaches to the economic use to which the work is put. In some cases, however, the protection of the author's moral right (the 'paternity' of the work) can be enforced by entitled successors.

This is provided for by law no. 633 of 1941 which, together with the civil code, governs copyright, covering 'works of ingenuity of a creative character in the realms of science, literature, music, the figurative arts, architecture, theatre and cinema' (Art 2575 civil code).

Many problems are posed by the rules, particularly concerning the nature of 'creativity' in the face of the impressive quantitative and qualitative development over the past few years of means of expression and communication (one has only to think of the astonishing growth of the internet).

Case law has specified that *creativity* does not require a novelty of absolute originality, but a personal, individualised creation expressed as one of the human arts. Copyright in scientific works, however, is

concerned with the intellectual organisation of the work and how it is expressed, the coherence of the arguments and original solutions to technical problems; in short, requiring the application of up-to-date rules and techniques adapted from those already in place to cover new areas of technical knowledge.

Among works of ingenuity we may single out *inventions*, defined as new methods or techniques of manufacture of products on an industrial scale.

An invention, therefore, if it is *original*, that is, representing an advance on the current state of technology, *new* (unpublished) and *industrial* in nature, can be protected by a *patent* so that the inventor can benefit for a time from the economic fruits of his work. He or she can *licence* others to use invention, exclusively or otherwise, in return for a single payment or regular payments of *royalties*.

The law of patents is found in the civil code (Arts 2584ff) and in decree no. 30 of 2005. International protection is guaranteed by a number of conventions, principally the Paris Convention of 1883 on industrial property.

By Arts 2592ff of the code, patents and the consequent industrial protection may also include, with certain variations, *utility patents*, for developments which render machines or parts of them or other tools and instruments more efficient or easier to use, and *registered designs*, for distinctive ornamentation and combinations of line and colour in industrial products.

5.6. Contracts of association

A conflict of interest between the parties is played out within any barter contract. The negotiated agreement is a solution to the opposed demands of both to maximise the utility of the arrangement for each of them. In the relation between a vendor and a purchaser, the former will seek to obtain the best possible price from the sale of the goods while the latter will try to obtain them for the minimum outlay possible. This is completely different from the relations that pertain between the members of an association, who come together by contract for the realisation of common goals. This distinct form of relationship gives rise to the constituting articles of an association (or a company or consortium) by means of the so-called multilateral contract of common purpose.

The civil code makes provision for failures in this type of contract in Arts 1420, 1446, 1459 and 1466, where it states that, respectively, voidness, voidability, non-performance and impossibility of performance of one part of the contract (providing it is not of the essence) will not be fatal to the contract as a whole, or lead to the dissolution of other ties.

A particular characteristic of such contracts is that the mutual executory consideration, 'synallagma', which normally applies (such as, in sale contracts, the transfer of the goods on the one hand and payment on the other) is located in the relation between the various prestations and the common purpose for which the organisation came into being. This can exist at different levels of complexity and can, as with a capital-based company, be such as to prevail over the contractual aspect.

The different forms of association do, however, share the existence of a common fund and of activity directed towards its purpose, as well as an organisation which makes it possible to present a unified face to third parties. These points aside, it is difficult to find common features within a category so vast as to encompass both a village bowls club and a multinational corporation.

An analysis of the applicable laws will support this view. For example, Art 1332 civil code governs means of adhesion to contracts open to more than two parties: this is essential for formations with an open structure (such as associations and, to a different extent, co-operatives and consortia) which new members can join without necessitating changes to the constituting articles, but are inapplicable as such to partnership companies. Another example is the special set of rules covering a member leaving the group, which has different consequences for companies (in which case the participants' shares must be liquidated) and for associations (on whose common property the member leaving has no claim).

5.7. Common activity and company contracts

'With a company contract two or more persons pool goods and services for the common pursuit of an economic activity with the intention of dividing the profits' (Art 2247 civil code). This definition shows clearly enough the requirements for setting up a company, namely, *pooling* of resources, the *common* pursuit of an economic activity and the intention of dividing *profits*. What may be less clear is the distinction between this and other forms which economic activity may take, such as the **partnership contract** (Art 2549 civil code).

It is not essential for the activity to be continuous, as a company can be formed for a single, one-off transaction, and there are no specific requirements for the form of a company contract, except in cases where it is required to be in writing (as for a building) or otherwise provided for by law (for example, a public document for a capital-based company).

Otherwise it is sufficient for the formation of a company for two or more persons to join together 'de facto' and begin to pursue a common activity. Case law has, however, established that for a **de facto company** to exist there must be a common fund, the assumption of risk and

a division of revenues, and direct collaboration in the pursuit of the activity. There should also be another subjective component, the so-called *affectio societatis*, consisting of the contracting parties' intention to be mutually bound and to continue the collaboration.

The nature of the activity and the profit motive allow the distinction to be made between a company and a society that exists for the enjoyment of an amenity, even though in both cases there may be a proferring of goods. Case law has indeed held that in a society the activity is instrumental to the enjoyment of the asset, whereas in a company the enjoyment of the asset is instrumental to the pursuit of the economic activity.

The division of profits is, however, merely potential, because to allocate them a members' decision is necessary and if no assignation is in fact made this does not detract from the economic nature of the company's activity. And, as has been noted in the context of business enterprises, the profit motive is to be understood in a very broad sense (in some types of company the distribution of profits to members is even prohibited).

A series of members' rights arise from the company contract: to profits, to a share of the company's assets in the case of liquidation, to control over the directors' actions (which takes place primarily with the approval of the annual budget). Members also acquire duties, such as making good losses (which in unlimited companies can lead to the company's creditors having a claim over the members' personal property).

However, the so-called *leonina societas* is not permitted, that is, an unconscionable arrangement in which one or more members are excluded from any share of the profits or losses (Art 2265 civil code).

A member may withdraw from the company, under the conditions stipulated in the contract or by the civil code (*death, exclusion, voluntary withdrawal*). A company can itself be brought to an end (either through lapse of time provided for, or by members' decision). In this case, a *winding up* procedure is commenced and finishes with the extinction of the company.

5.8. Types and classification of undertakings

The principle distinction is undoubtedly that between undertakings **based on persons** (non-business associations, general partnerships and limited partnerships *simpliciter*) and those **based on capital** (share companies, limited companies, limited partnership with shares). The two categories differ in terms of organisation, functioning, and on the rules governing members' liability (unlimited in the former, limited in the latter to the amount invested).

The types of undertaking in the first category have no legal personality and are based on the principle (to which exceptions can be made) of joint administration by the members and on a simplified internal structure, based essentially on the primacy of the personal element: the admission of a new member requires the modification of the original contract and the consent of all existing members thereto; the death of a member does not normally entail his successors' involvement in the association. A sum invested in this kind of undertaking is normally a stake amounting to a suitable fraction of the total property and conferring a rateable share of members' rights.

The **non-business association** is the only one which cannot undertake commercial activity (in practice it is restricted to agriculture). A creditor must look to the individual member for payment, though the means of satisfaction may be association property. Personal creditors cannot, however, because of the association's autonomy in its property, appropriate the latter, but can merely seek to have the debtor's share in it liquidated.

The articles of a **general partnership** must be in writing and contain the essential elements of the partnership, namely, members' personal data, business name, which members have powers of administration and representation, the premises and objects of the partnership, the contribution each member has made and the stake each holds, the allocation of profits and losses, and the duration of the partnership. The emphasis on a general partnership's autonomy in its property means that its creditors must seek satisfaction from the partnership assets before turning to the personal property of members, while personal creditors may not, other than in special cases, seek the liquidation of a member's stake but merely look to the profits accruing from the latter.

A **limited partnership** ***simpliciter*** (in the sense that the interests of the partners are not represented by shares, cf. below) can have two kinds of member: acting and silent partners. Both contribute capital to the undertaking, but only the former take part in its management.

In undertakings based on capital, which have legal personality and the privilege of limited liability, the duties of the different organs are clearly defined. The shareholders' *meeting* takes the most important decisions for the company's future, the *board of directors* runs the company from day to day and is accountable to members and outsiders, and the *board of auditors* supervises the administration and ensures that the accounts are in order.

The members of the two boards are elected by the shareholders' meeting, but the board of directors can delegate its powers to a smaller body (an *executive committee*) or to one or more of its members (*managing directors*). The shareholders' meeting has in addition the important task of approving the company's annual *financial statement*.

This must show profits and losses clearly and in detail and in the case of quoted companies there must be a certification by an *independent auditor* that the financial statement is consistent with the recorded accounts. Once the financial statement has been approved, the meeting then decides whether to distribute the profits. This is an issue where the interests of the directors are frequently at odds with those of the members. The former are bound to seek to consolidate the company's assets, which militates against a distribution of profits, while the shareholders will seek the best possible return on their investment.

Capital-based companies must be set up via a public document. The memorandum indicates how the company has been set up and is accompanied by the by-laws of association, which regulate the organisation and functioning of the company, which must be entered in the register of companies. There are minimum limits set for capital: 120,000 euros for share companies and limited partnerships with shares, 10,000 euros for limited companies. A capital-based company may be administered by non-members.

Changes to the memorandum or by-laws of association must be approved by an *extraordinary general shareholders' meeting*, with a quorum higher than for an ordinary meeting, and must then be confirmed and registered in the same way as on first incorporation. Among the most important changes are those that produce an increase or reduction in the company's capital.

A decision to *increase capital* can be taken for various reasons, including soliciting investment by the public and the need to invest. It can be *free* when it occurs without a corresponding increase in the company's property, such as when reserves are transferred to capital or the property is revalued. It can also occur *on payment*, but in this case first refusal must be offered to members, who have a right to take *option*s in preference to third parties. A *reduction* in capital, on the other hand, is *optional* when the capital is greatly in excess of that required to realise the company's objects, and *mandatory* when the capital has been eroded by losses in excess of one-third. Any reduction below this limit will require the company to be wound up.

Capital-based companies are governed according to a majority principle. Decisions taken by a majority, calculated according to the relative capital contribution of each member, at a meeting are binding on all members, including those who dissent from or have not taken part in the decision. Decisions which violate the law or the company by-laws can, however, be challenged in court (Art 2377 civil code).

To regulate the functioning and organisation of a company shareholders can always conclude agreements among themselves. Such *part-membership agreements* are binding only on those who have entered into them. Two particularly significant examples of the type are the

so-called *block syndicate* whose participants undertake not to assign their share of the capital and the *voting syndicate* whose participants undertake to vote the same way in company meetings.

To these rules, which are for the most part common to all three varieties of undertakings based on capital – albeit that they are designed for share companies, the most socio-economically important of the three – others can be added that apply to just one of the three, and which may in some cases detract from the general rules outlined above.

The shares into which the capital of a **share company** (S.p.a.) is divided have a nominal value relative to the capital and a real value that reflects the company's economic performance. The peculiarity of **limited partnership with shares** (S.a.p.a.), on the other hand, is the existence of a category of member, the active partners, who jointly and severally have unlimited liability to third parties for the partnership's obligations and occupy by right the role of the directors of a company.

In a **limited liability company** (S.r.l), which has to be run by its members, the respective contributions to capital are expressed as stakeholdings that can only be transferred if the memorandum does not provide otherwise and that can be acquired by creditors of the company. Enacting a EU directive from 1993 it is possible to form *one-person* limited liability companies that permit individuals to pursue a commercial activity alone without risking unlimited liability. This is a significant exception to principle and indeed the risk of abuse prompted the legislator to incorporate numerous safeguards in the form of restrictions on the limiting of liability. On the one hand the substantial possibility of separating property is admitted, while on the other the title 'company' can be given to an entity created by a unilateral act (Art 2463 civil code).

Other distinctions could be drawn, whether based on the purpose of the undertaking (such as trust companies, audit companies and real property agencies) or on the regularity of the constituting procedure – companies can be regular or irregular in this regard. The most significant of such distinctions, however, is that between *stock-companies* and *non-stock-companies*, respectively, those whose shares are and are not traded on the stock exchange. This distinction has assumed an importance above all other ways of categorising the system.

Stock-companies are subject to supervision by a regulating authority, CONSOB (the national commission for companies and the stock exchange) and to a system of regulation which puts a premium on transparency and protection of investors and minority interests. For this reason there are strict reporting requirements, for example, concerning property arrangements and the existence of any part-membership agreements, as well as particular rules covering organisational aspects such as the functioning of meetings and the role of the board of auditors.

5.9. Various aims of a company contract

5.9.1. Co-operatives, consortia, consortial companies

The company contract is compatible with other motives than that of profit. Indeed, in *co-operatives* the purpose is the mutual support and benefit of the members, who by participating in the co-op obtain either a reduction in expense or an increase in income.

In the first case we speak of a *consumer* co-operative. The member pays less than he would on the open market for the goods or services provided by the co-op. The second case is a *production* co-operative. The member supplies goods or services to the co-operative, which pays him for them.

Among the essential characteristics of a co-operative company (which can nevertheless pursue its activities as an entity towards third parties: in this sense the mutuality may be deemed 'spurious') are the variability of the company's capital and the personal nature of participation. Members vote on the basis of one person one vote, with no weighting for the value of each one's stake.

There is another set of rules particular to the *consortium* contract, by which 'several entrepreneurs set up a common organisation to regulate or facilitate specific aspects of their respective businesses' (Art 2602 civil code).

Internal consortia reflect a mere intent on the part of entrepreneurs to fulfil a common objective, while an *external consortium* is a single entity in the eyes of the law and for the purposes of legal relations. To attain the same objectives a *consortial company* can be set up. It is not intended to produce profits directly, but to save production costs or to raise the prices of goods and services produced by members of the consortium.

5.9.2. Secret and ostensible companies

When the company contract is not revealed to the outside world we speak of a *secret company* or partnership. One member acts ostensibly as a sole trader but is in reality pursuing an activity governed also by the other members, with whom profits are divided. An *ostensible company*, by contrast, is one which two or more persons appear to be operating in their dealings with the outside world when in fact they have not, even 'de facto', entered into a company contract. The courts tend in such cases to protect the trust that third parties have placed in the unlimited joint and several liability of all the parties involved.

In practice, though the contract is missing in secret companies, the conduct of the participants can give rise to a constructive presumption of one. In an ostensible company, although there is a contract covering the internal affairs of the company, the conduct of the participants towards third parties does not reveal it.

5.10. Company fortunes

Undertakings can be transformed from one type into another. It is quite common for one based on persons to be *reorganised* as a capital-based company.

Two or more companies can come together by *merger* to form a new one, or by *acquisition*, the incorporation of one in the other(s). The reverse phenomenon is *transfer*, when a company transfers the whole or part of its property to one or more other companies, and stakes and shares in the latter are assigned to the members of the former.

Companies may also invest their capital to acquire stocks and shares in other companies. In such cases we refer to a *controlling interest* when one company has a majority (or just a *dominant* share) of the votes in the general meeting of another or can exercise such control through the terms of a contract (Art 2359 civil code). *Linked* companies are those in which one exercises a *significant* but not controlling influence over another: such influence is presumed when the holdings of one in the other exceed certain thresholds.

The *winding up* of a company involves a complicated *liquidation* procedure in which its activity comes to an end, its assets are distributed among creditors and any left over are apportioned among the members. These measures do not, however, result by themselves in the *extinction* of the company, which only comes about once all legal relations with third parties have been extinguished.

The reasons for a winding up (Art 2272 civil code) may depend on the wishes of the members, on the operation of law (for example, insolvency in the case of commercial companies), or on external causes such as the attainment of the purpose of the undertaking or that purpose becoming impossible of attainment. There are also grounds particular to one or other form of undertaking, such as the disappearance of one of the categories of members of a limited partnership, or the reduction of the capital of a capital-based company to below the legal minimum.

Chapter VI: Property and Goods

6.1. Goods and things in the legal sense

6.1.1. Basic concepts

Things have always been one of the most important areas that the law deals with. They give rise to rights and are the object on which these rights are exerted.

In the nineteenth century, when the economy was closely tied to the land, there was essentially a physical and naturalistic concept of things. Today the legal analysis has become more complete and sophisticated. Rights can attach not only to things in a physical sense, but can be activities, such as the work done by a paid employee, products of the intellect, aspects of personality such as privacy, identity, sex and so on. Rights can also attach to energies (Art 814 civil code). Not all things, however, can be the object of rights. Things outside commerce, such as those serving religious ends, do not; nor do things which belong to everyone, like the air, the sun and sea.

In legal language one applies the term **goods** in a technical sense to denote things which can be the object of rights (Art 810 civil code). Thus in a legal sense things are not synonymous with goods, but they share certain aspects and differ in others. Thus there are physical things to which rights can attach, such as earth, a house, trees and fruit: these are goods also but air by the same token is not, nor would we normally describe such non-physical phenomena as the energy put into work, products of the intellect and privacy as 'things', although rights do attach to them. It used to be wrongly held that the rights attaching to things were goods: *rights* (whether property or choses in action) *are not considered as things*. Rather they regulate the uses to which the latter are put, and thus are covered by the same regime.

Goods can be divided into various categories, according to their nature and content. The most important distinction is that of entitlement, that is, the issue of whom they belong to and who has use of them. One of the most important aspects of rules concerning goods and property is therefore *ownership*.

6.1.2. The regime of property ownership

The rules on property stem from Art 42 of the Constitution which states that *property is public or private*, and further, that economic property *belongs to the State, to bodies or to private persons*; the expression *bodies* can mean either public or private bodies, whether de facto or de jure. The fact that the Constitution provides for private property is significant because it affords it a protection that could only be removed by laws to change the Constitution.

Private and public property is regulated also by the civil code and by statute. The civil code sets out many principles drawn on such statutes as those on mines, quarries and peat extraction, on water, fisheries and so on (Arts 822ff).

Neither the Constitution nor the civil code gives a definition of private or public property, but they (and particularly the civil code) distinguish between categories of property that belong to private persons or to the State or public bodies.

Public property is that belonging to a public *authority* (*public property by title*) or those distinguished from private property by some characteristic feature (*public property by nature*).

According to the distinctions established by formal statutory criteria, public property, belonging to the State and public bodies such as regions, provinces, local and other authorities, is divided into two categories which we can render literally as *domain* and *patrimony*, the latter being further subdivided into the *disposable* and *non-disposable*. The word 'demanio' derives via French 'domaine' from the Latin *dominium* meaning property owned by the State. **Formally public property** (public property by title) is thus either *domain*, *disposable patrimony*, or *non-disposable patrimony*.

Domain consists of *maritime domain* (shoreline, beaches, ports and harbours, and lagoons opening into the sea), *historic, artistic* and *archaeological domain* (State cultural heritage), and also of *local markets* and *cemeteries*.

The rules on domain are very strict. This property cannot be sold (Art 823 civil code), nor can third parties acquire rights over them (Art 1145(2) civil code). The property rights enjoyed by the State and public bodies over property belonging to others are subject to the same restriction, if it is connected to domain or if they are for the attainment of public objectives (Art 825 civil code).

Domain property that is not being used can be licensed upon consideration to third parties, but the State has to carry this out by means of an administrative act, with all the consequences this implies.

The rules on patrimony are less strict. **Non-disposable patrimony** (Art 826 civil code) includes: *forestries* (forests and regional and national parks);

extractive property (mines, which belong to the State, and quarries and peat workings which belong to the regions, though there are also private quarries and peat workings); *military property* (barracks, armaments, ships, aircraft and other items put to military use); and finally, *public buildings*, used to house public offices such as ministries, town and county halls and regional administration, as well as other public depots and establishments.

Non-disposable property cannot be put to any other than its allotted use, except by the processes laid down by law (Art 828 civil code). It is therefore bound only by an allotted use.

It can also be alienated, so long as there is no change of allotted use.

Finally, **disposable patrimony** is property, such as office furniture, that the State and other public bodies acquire as private parties. Specific laws and, where there are none, the principles of private property apply.

Two situations relating to public property by title need to be distinguished. There is property which the State and other public bodies have the power to use and dispose of (property which the State and other public bodies use for public purposes such as military property and the railways) and other property which belongs to the State or public bodies for the use and enjoyment of the wider public or part of it. This latter category includes the seashore and national heritage, but also mines leased to private interests.

The second situation helps define *public property by title*. It consists of public property, originally reserved by law to the State and other public bodies, but which is put to collective use or to private commercial use, such as in the mining example.

There is also **property for collective use** which is not public, but held in common, that is, property belonging to everyone (the air, the sea and the airwaves used for radio–TV transmission). This category once included animals that were not privately owned, and wildlife, but the current law on hunting has changed this position. The ownership of wild animals is regulated in minute detail with the aim of ensuring the survival of species.

There is another type of property, collective property, which belongs to large and small communities. These forms of property holding are historic survivals, for example, the farm holdings in Emilia and the closed farms of Trentino-Alto Adige.

More common and more important are traditional rights over the property of others, such as the gathering of wood and pasturage on public land. The law looks with disfavour on these vestigial remnants of collective property.

One form of collective property is particularly significant, due to the prominence given to it in Art 43 of the Constitution, even though no instances of it have ever in fact been instituted. Alongside nationalisation

(which has taken place, for example, the electricity industry by law no. 1643 of 1962), the Constitution also provides that laws may reserve enterprises or categories of enterprise to groups of workers and specified consumers, where essential public services, or energy sources, or monopoly situations or overriding public interest are involved.

Regional domain and **regional patrimony** were set up by law no. 281 of 16 May 1970. Article 11 states that 'property of the kind indicated by the second paragraph of Art 822 of the civil code, if it belongs to a region by acquisition of any kind of title, constitutes regional domain and is subject to the regime provided by the said code for public domain property.'

The same regime applies to property rights which regions have over property belonging to others, when those rights are constituted by a use made of any of the property referred to in the preceding paragraph or are intended for applications in the public interest of the kind which the property itself is used for.

Ports situated on lakes have been transferred to regions and form part of regional domain, as have aquaducts of regional importance belonging to the State.

Property belonging to regions but not coming under any of the categories set out above form the regional patrimony.

6.1.2.1. Moveable and immoveable property. Alongside the distinction between private and public property, the most important division of types of property turns on whether it is *moveable* or *immoveable*. This distinction gives rise to profound legal consequences and it also has a historic importance.

The historical significance of the distinction is readily understood. In an economy based on the exploitation of agriculture, immoveables, that is, the land and buildings on it, acquired a particular value differentiating them from moveable things which could easily be displaced, transported, passed on or destroyed. Immoveable things have in most cases a higher value and because they are so basic to the economy they have required particular attention by legislators.

Land, whether in town or country, outlives its owner, can be readily subjected to taxation and is easier to defend. From these circumstances arises a formalistic and restrictive regime based on its *circulation*. Transfer of immoveable property has to be supported by a written document and registered and extended limitation periods apply (Arts 2643, 1158 civil code). Moveable property, on the other hand, can circulate with much more fluidity and less formality, limitation periods are shorter and simple possession, suitable evidence of title and good faith are sufficient to secure ownership of the property, even if the purported transferor was not in fact the owner (assignment by non-owner, Art 1153 civil code).

The simplest criterion for distinguishing between moveable and immoveable property is also the most natural: if it can be physically shifted it is moveable, otherwise not. However, the law does not always follow this naturalistic criterion. Property that is *united to the land*, even if transiently, is treated as immoveable. Thus Art 812 lists the following as immoveable: the land, springs and watercourses, trees, buildings, constructions transiently united to the land (for example, flimsy prefabricated structures floating buildings anchored to a bank or the bottom of the sea). At one time animals and other things that the owner used in connection with the land were also considered immoveable – 'by allocation' (Art 413 of the 1865 civil code). Today this distinction is no longer made, and once the category of immoveable property is defined, that of moveable property is thus also defined by default as any property not defined as immoveable. Registered moveable property, such as cars, boats and aeroplanes, share certain features of restricted circulation with immoveable property.

6.1.2.2. Other categories of property. Productive property is that which can be used to 'bear fruit' in a broad sense. In this context natural fruits (pears from a tree, cereals, grapes) are distinguished from '*civil fruits*' such as interest, rents and dividends (Art 820 civil code). The former are acquired once harvested, the latter mature day by day.

Among productive property, particular importance attaches to the undertaking, in the sense of the totality of property organised by an entrepreneur for the exercise of his or her business (Art 2555 civil code). A specific legal regime applies to the transfer of undertakings, their customers and so on.

Intangible property consists essentially of creations of the intellect. These properly belong under the heading of property and are regulated as if they were things. For example, a film is considered the principal object, with the soundtrack as an appurtenance affixed to it. A distinction of great economic and political importance is the one between *producer* and *consumer* goods. The former exist in order to produce other goods, such as the latter which will be consumed, used up, by their user. This distinction is sometimes invoked in academic discussion to point out that ownership of the former can have a social function whereas that of the latter cannot: the owner has 'total control' over its use.

6.2. Legal circulation of property

6.2.1. Rules on acquisition

Economic and, in a broad sense, legal relations involve the circulation of property and of rights and are organised to facilitate the circulation of physical things and rights. *Circulation* can mean either physical removal

to another place or transfer or assignment in the legal sense, that is, the acquisition of the thing or right by one party and its corresponding surrender by the other party.

The law gives particular importance to the circulation of goods. The reasons for this are economic – goods are source of wealth – and historical – wealth has always taken the form of 'things' transferred by promises, contracts, or by succession after death.

The circulation of documents is, however, of equal importance, particularly *contracts* (by assignment) and *credit* (by documents of title or negotiable instruments, or other forms of contract which will be examined later, such as delegation, novation, assumption and assignment).

The law protects the interests of persons who acquire or dispose of property or credit or enter contracts, but the general interest is also protected where circulation can confer benefits or disbenefits. Various regulations have been made in this regard, which sometimes protect the assignee's interests (for example, in unilateral promise or gifts) and in other situations protect the general interest (such as by prohibiting transfer clauses and agreements).

6.2.2. *Circulation of immoveable goods and functions of property registers*

To ensure the certainty of rights and to protect third parties, the law states that transactions which create, regulate or extinguish rights in immoveable property must be registered.

The criteria for registration of dealings in immoveable property are manifold, but two are certainly predominant: they can be referred to as the subjective and the objective criteria. The objective criterion is embodied in the reproduction in map form of the entire national territory, showing the boundaries of different properties, the agricultural activity or building development carried out on each, and the identity of landowners. This criterion, known as 'tabular' because it is realised through maps and tables, is pursued for fiscal reasons and retains the old name of 'cadastral survey' (of land and walled buildings). The information in this survey (which is not up-to-date, and is currently being overhauled) does not provide proof of title to property and is thus not of much use for circulation purposes, though it is relied on heavily for tax assessment.

The subjective criterion is applied in the compilation of **property registers**. A document that creates, modifies or extinguishes rights over immoveable property is recorded in favour of the acquiring party and against the other party, the *assignor*. Thus successive transfers of the property are recorded on the register, and earlier transactions can be

traced back from the most recent. There must be continuity in this chain of recorded land transactions and so rules provide that any document or other provision that has the effect of transferring any property or any right attaching thereto, or creating or modifying any such right, must be made public (Art 2645 civil code). Until the transferee has complied with these registration requirements, the transfer is legally ineffective (the principle of continuity of transactions, Art 2650 civil code) towards third parties. The following can be **registered**: a judgment, a public document, or a private deed with signature authenticated or verified by the court (Art 2657 civil code). In addition to a copy of the document itself, registration must be accompanied by a note (the so-called registration note: Art 2659 civil code) of the names and addresses of the parties, the instrument to be registered, the name of the public office which has received the document or authenticated the signatures, and the nature and location of the property affected by the registration. The registration must be effected in the local register covering the area where the property is situated (Art 2663 civil code). The registrar keeps the copies of documents provided and transcribes the registration note. Any inaccuracy in the latter does not invalidate the registration. The registrar must furnish copies of the entry to whoever requests them.

The registration, whoever carries it out, is effective as against any person having an interest in it (Art 2666 civil code). There are many *effects* of registration: it serves a public notice function by making the transaction a matter of public record, but it also resolves arguments between people who claim to have title to the same land. Disputes over precedence of conflicting titles and property are resolved in favour of whoever registered the title document first (Art 2644(1) civil code). No subsequent entry or registration of rights can be raised in precedence against the person who made the prior entry, even though the purported right may have been acquired at an earlier date (Art 2644(2) civil code).

6.3. Property

6.3.1. Terminology explained

In everyday language, expressions such as *property, possession, ownership* on the one hand and *use, availability and enjoyment* are used more or less synonymously, but the law assigns precise and distinct meanings to the various expressions which apply depending on the facts of a situation or the different powers a right confers on its owner. Thus, whoever buys a car can do what he likes with it: resell it, keep it in a garage, use it for work, lend it, give it away or destroy it. He is the *owner*. A person whom he allows to use it becomes the *user*, or *borrower* or *possessor*. The owner in doing this deprives himself of the enjoyment

of the car, but not of his property in it. The user may seem to all appearances as if he owns the car, but he is not allowed to sell it on, give it away or destroy it. There are other situations in which people merely make use of property such as public transport. They are not thereby exercising a legal interest, but merely *enjoying* an amenity. Thus there are many situations which can be differentiated from the basic, straightforward position of outright **ownership**.

Alongside the 'meta-juristic' expressions that originate in common usage, there are others which come from other fields of study. Ownership of property is investigated as a phenomenon by economics in the context of wealth distribution and societal development. Its importance for sociologists is as an indicator of membership of a social class (for example, that of the *rentier* who lives off the income from land and shares). Town planning has to take account of it in connection with development of the city and the country, the layout of a city and its building patterns. Philosophy studies the historical role of property in different systems and in the whole ideological complex of currents of thought, political parties and governing classes. And history records that property (particularly of agricultural land) has been and remains in many countries a determining factor in revolutions and other upheavals, in fact as a basis for the whole of civil society.

It emerges clearly from this that the concept of ownership of property is not (any more than those of 'private law' or of 'legal person') unchanging over time or absolute. It is relative, in that it is influenced by what the ideological context of the time as expressed in laws implies for it, as well as being historically determined, in continuous development and differing from place to place. A jurist observed at the end of the nineteenth century that 'it is precisely the concept of ownership, the most significant of property relations, that has undergone the most change at the hands of the various political and social conditions and the various philosophical outlooks that have prevailed from time to time.'

6.3.2. *Models of property. Feudal, absolute and relative property ownership*

A historical perspective on the rules of property makes their relative nature evident. They reflect the changes that history has wrought on the relations between citizens and State, as well as the 'class struggle' and thus social and economic history in general. The history books describe the changes that the concept of property has undergone with reference to the economic exploitation of the land and political upheavals. Property rules have changed in the wake of the determining events of human history: the collapse of the feudal system, the French Revolution, the assumption of power by the bourgeoisie and domination by Napoleon as

manifested in his civil code, the first and second, consolidating, industrial revolutions, the First World War followed by a new conception of property emphasising its *social function* (as in the Weimar Constitution of 1919), the totalitarian regimes and special property legislation, the Second World War and the final fracturing of the concept of property. In each of these phases of history a different model of property has applied, but they can be reduced substantially to three: **feudal property**, **bourgeois** (absolute) **property** and **relative property**, directing its use with a view to its social function.

There is no need to dwell on the first model which is at the basis of the common law notion of property. Feudal property is closely tied to an essentially agrarian economy, and derives from the mediaeval social system with its pyramidal structure. The monarch is formally the owner of all land, exercising *eminent domain*. Below him, and delegated by him, the nobles govern the land and exercise useful domain through a descending hierarchy of vassalage. At the base of the pyramid, the serfs lived their lives tied to the soil, cultivating it without having rights over it, living from what they produced after handing over most of it to the owner and in tithes to the church. Property is thus closely linked to the structure of feudal society, indeed is the foundation of it, in particular landed property which configures society. No land can be without its *lord of the manor*, who exercises *seigneurial rights* over the produce it yields.

Property was also the basis of the family, transmitted primarily through inheritance or by marriage. The system of *birthright* assured that the first-born male inherited the bulk of the family property, long before the industrial revolution, which began, on most accounts, in England around 1760 and did not spread to continental Europe, principally France, until the early decades of the nineteenth century and not to Italy until mid-nineteenth century.

The feudal structure was overturned and disappeared rapidly once the bourgeoisie reached positions of power in the wake of the French Revolution. The proclamation of the principles of liberty, equality and fraternity had a profound effect on the regime of private and above all property relations. The pyramidal structure fragmented and property relations assumed a horizontal profile. All owners were absolute proprietors in their own house. They were no longer subjugated to the manor, tithes were abolished and they no longer had to pay tribute to other proprietors. *All owners were equal* and had equal property rights.

Property, from being feudal, became *absolute*. It conferred on the owner all powers, subject only to limited constraints. These could be through public regulation, for example, in the interests of public order, hygiene or building standards, or they could be private, to balance the interests of neighbouring landowners in terms of boundaries, distances between buildings and discharges.

Property in this situation too came to symbolise the proprietor's status, but here it was a bourgeois, not a noble, whose status was on display through property acquired by the fruits of commerce or the exercise of a liberal profession such as that of lawyer, doctor, notary, official, State servant or magistrate.

Property was also in principle, as a *natural right*, within everybody's reach. There were no longer any slaves or any other class of persons excluded in the abstract from property ownership, and all owners could legitimately exercise the same powers over their property. It is clear, however, that this new model of property was fashioned by the bourgeoisie to serve middle-class interests: the revolution was halted at the moment that power was concentrated in bourgeois hands, that of the *third estate*, and there it remained without any further property distribution in favour of the *fourth estate* or proletariat. Property, according to the declaration of rights and the series of constitutions (except Robespierre's) established in France, was considered *sacred* and *inviolable*. The Albertine Statute, the 1848 Italian Constitution which remained in force until 1948, also proclaimed *private property inviolable* (Art 29). This meant that the only limitations on property were those duly passed into law and that the owner had the right (so important as to be considered 'sacred') to the absolute enjoyment of it. This is indeed the definition of property found in the Napoleonic Code (Art 544: 'property is the right to enjoy and dispose of one's belongings in the most absolute manner'). This definition was copied into the first unitary Italian code (Art 432).

This model, on which both the Napoleonic Code and the 1865 Italian code were based, endured a long time. It still holds, even today, for a large category of property, that is, *moveable property*, over which the owner has virtually unlimited powers. This model is founded on agrarian property and was extended little by little to cover other forms of property: urban (such as buildings that produce rental income) and industrial property (undertakings and such intangibles as trademarks and patents).

Linked to this model, though different in origin, is the definition of property in the code currently in force. Article 832 of the civil code provides that 'the owner has the right to enjoy and dispose of things fully and exclusively within the limits and with observance of the duties established by the legal order.'

This formulation differs in many ways from that of the nineteenth century, but the essential core has not changed. The owners' powers are defined as they are, as is 'property' itself, because within the conception inspiring the civil code the codifiers wished to highlight the significance of intentionality in the realm of '*dynamic*' as opposed to the '*static*' (that is, land-related) forms of property of the nineteenth century. A similarly

historical reason is the disappearance of the 'physiocratic' model of property, which considered it only in relation to agricultural production, giving way to the commercial economy and the industrial revolution. (The term 'physiocratic' derives from the Greek for 'natural rule' and is applied to eighteenth-century French economists such as Quesnay and Turgot who affirmed the primacy of agriculture as the only source of wealth.) Greater limits are now applied to property rights, in both public and private law, with a correspondingly stronger role played by *duties*, which the owner must discharge as well as benefiting from powers (Arts 838, 833 and 837 civil code).

It is not, however, historically valid to examine merely the letter of the law in emphasising these differences. Though at variance in their formulations, the nineteenth-century model and the civil code currently in force are not so far apart, and while the legislative policy followed in the 1942 codification gives pride of place to 'dynamic' property, the wording of Art 832 follows the nineteenth-century model, at least in part.

The difference can, however, be identified in two basic aspects. The first is the legislation for property, not by means of the code, but through *statutes*, which began to be enacted from the First World War on. The second, linked also to the First World War, though it only became evident in Italy with the advent of the republican regime and the approval of the Constitution, was the recognition of the *social function* of property.

Gradually from the start of the First World War a large body of legislation was introduced in response to the demands of war. Some of these affected property. Laws were passed which for the first time prolonged leases of residential property and controlled rents, thus preventing landlords from giving notice or increasing rents as they might wish. Landlords had duties to stockpile imposed on them, or they had to allow their tenants to cultivate uncultivated parts of the property. Other laws increased the number of public easements as well as laws protecting historical and archaeological heritage.

From this it may be concluded that one can no longer maintain a unitary conception of property and hence of ownership, precisely because various laws impose a specific regime on types of property according to their physical nature and economic importance: a more developed conception of property is required. Every type of property has its own legal regime. The wartime legislation fragmented the unitary, monolithic conception of property which disappeared entirely after the end of hostilities as for economic and social reasons the wartime regime in this regard became a permanent condition. So the idea took root that one could no longer speak simply of *property*, but rather of *types* of property. From this one derives the conclusion that property is a relative concept. Ownership of moveables is distinct from that of immoveables,

agricultural land is subject to different rules from building land and yet other rules apply to residential buildings, land important for its landscape or for environmental reasons, hotels and buildings used for similar purposes, quarries, peat workings and so on. Even the civil code, alongside its model of absolute property declared in Art 832, contains examples of diverse provision for different types of property. The 1942 code in fact restated many laws dating back to the specialised statutes concerning individual property or categories, such as public property (Arts 812ff civil code), agricultural land, building land and so on. Because it is connected with the running of a business enterprise, the ownership of intangible property is covered by rules to be found not in Book III but in Book V (Arts 2569ff civil code).

6.4. Property in the Constitution. Work and savings

The *social function* of property and *guarantee*, that is, the defence of private property, are an indissoluble pairing. Insofar as private property is guaranteed by law, it is absolved of its social function. What is more, the term 'recognition' is not used equivocally in the Constitution (Art 42(2) 'private property is recognised and guaranteed by law'). The expression *recognition* does not mean that the law accords any primacy of ownership over State intervention, as though it was some kind of natural right: instead, the individual owner derives what powers he has from the law, in other words from the State.

If private property were a natural and inviolable right, it would have to be declared as such in the Constitution. The reality, however, is that property is not accorded the status of fundamental principle, and its relations are regulated not by civil but by economic criteria in common with enterprise, work, investment as one of the values, or factors, of the economy, and it must be viewed in this light.

Today property is protected to the extent that it serves a social function (Art 42(2) Constitution). The State, in its new guise of *welfare state*, took it upon itself to ensure a more equal distribution of income and so to promote access for all to property, without protecting landowners against non-owners as nineteenth-century bourgeois society had done (Art 42(2) Constitution).

The basis of property in the constitutional scheme is neither rents, nor (exclusively) inheritance, but **work** and **savings**. The Constitution provides for transfer to workers of enterprises and categories of enterprise (Art 43), promotes access to property for those with inadequate means (Art 42(2)) and promotes popular investment, ownership of one's home and the land one cultivates, as well as 'popular shareholding' (Art 47). Thus it is savings, along with work, (foundation of the Republic, Arts 1 and 4 Constitution) that legitimate property.

6.5. Private property and the public interest

6.5.1. The limits placed on private property

The unitary Italian code of 1865, like the Napoleonic Code before it, provided for the possibility of limiting the powers of owners, that is, to sacrifice their seigniory over the property. And the 1942 civil code, although it posits an *absolute* conception of property, stipulates that the owner's powers are to be exercised 'within the limits and with observance of the duties established by the legal order' (Art 832).

The limits imposed from time to time on private property become ever greater in number. At one time these limits were related to issues of urban policing, appearance and ornamentation of buildings and civic hygiene. Today the limits on building and circulation of property are numerous.

What is meant by *limit* needs to be clarified, however: there are two concepts, each relating to different situations. The first is the *external limit* or restriction. The owner, within the area of his property, is 'lord and master', but he cannot exceed the external limit which could consist, for example, in a prohibition on discharges, or on constructing within a prescribed distance, or of having windows that open onto a neighbouring property, or the owner might even be forced to give up his property because of a compulsory purchase order.

The second is the *internal limit*. This is the limit implied by the source of property rights, their social function. In pursuance of this function, the owner may be obliged not to construct on his land, or to construct only in a certain way, not to cultivate, or to raise only certain crops, not to keep livestock, or to keep only certain kinds. The importance of the internal limit is thus clear, and not only in historical terms. It is a limit introduced with the Constitution (Arts 42, 44) which does not leave the owner free to do as he pleases within the confines of his property, but precisely defines his powers. It has been observed that today it is more correct to view the impositions and restrictions placed in the public interest on owners not as *limits*, but rather as *features* which indicate the forms of **compliance** that the law imposes on property.

Traditionally, the (*external*) *limitations* on property were divided into *public* and *private*. They were public when imposed in the general interest and private when imposed in the interests of other parties.

The forms of compliance that the law imposes on property include *requisition* (Art 835 civil code), *stockpiling* (Art 837 civil code) and the *smallest unit of cultivation* (Art 846 civil code). The limitations in favour of others include rules on neighbouring properties, relating to *discharges* (Art 844 civil code), *access to neighbouring property* (Art 842 civil code), *distances* (Arts 873ff civil code), *light* and *views* (Arts 900ff civil code) and to *privacy* (Art 908 civil code). To these may be added the

restrictions on alienation of objects of historical and artistic interest, now in the cultural heritage code of 2002 the limits on construction, on use of the parts below the surface (Art 840 civil code). It is more correct, however, in viewing this last group to emphasise that the law makes certain arrangements for and with property, so that we should speak not of limitations but of ensuring compliance, which can take various forms.

Particularly important is one limit which can for some be of a private nature, for others, public, and for yet others be an internal limit. This is the prohibition on acts of *emulation*, or spite, an issue connected to the problem of *abuse of rights*. Article 833 civil code prohibits an owner from carrying out actions whose sole purpose is to inflict harm or inconvenience on others (so-called *emulative acts*). Thus a principle of great historical importance is codified (though with limited scope), allowing for actions taken by the owner to be examined with a view to imposing sanctions on conduct considered to exceed his rights, that is, to exercise them abusively. The owner no longer has the right to use and abuse his property. Uses contrary to the public interest are no longer permitted.

6.5.2. *Social function of property*

Securing compliance of property means imposing limits on it which ensure that the use made of it is consistent with the overall public interest. Academic opinion differs on this point. Those who wish to emphasise private interests seek a minimal interpretation of the various restrictions on property, while their opponents see them in wider terms.

Two approaches predominate, those of 'bounded property' and 'property compliance'. The first posits a *minimum essential kernel* of property rights which the owner must be allowed to enjoy as he sees fit and without restrictions on his choice and power of disposal. If legislation encroaches on this 'space' the owner has a right to indemnification. Thus it is held that a ban on building imposed as part of a land-use plan, and which renders a parcel of land uneconomic because no uses other than agricultural are permitted, gives rise to a veritable 'concealed expropriation' which should therefore attract compensation, otherwise it would be unconstitutional (Art 42(2) and (3) Constitution).

The Constitutional Court has subscribed to this view, with several qualifications. It has declared unconstitutional building bans imposed without compensation on private owners as part of a land-use plan (Art 7 of the general town planning law of 1942). The view this represents is, however, without foundation, being based on a nineteenth-century conception of property, because it proceeds from the pre-supposition that the owner is free to do as he wishes within the limits and duties imposed by law. This is legally incorrect, because it gives primacy to the civil code,

which is an ordinary law, over the entrenched Constitution. The social function of property is clearly set out in the Constitution, and does not permit an owner to do as he wishes, but obliges him to submit to the curtailments of property rights imposed by ordinary laws.

Those who adhere, more consistently with the Constitution, to the 'property compliance' thesis hold that property does not consist of rights of enjoyment and disposal which would be unlimited but for legislative intervention: rather, the powers of owners are those, and only those, provided by or deriving from statute, from administrative decisions (for example, land-use plans). This view does not allow the imposition of limits, even if they reduce the powers the owner previously enjoyed under the law, to be considered expropriating.

One can thus readily distinguish social function and public law limitations on property (Art 42(2) Constitution) from compulsory purchase (Art 42(3) Constitution).

The expression **social function** of property is a general principle that bears various interpretations according to ideological perspective.

In the Roman Catholic view, social function connects to interpretative models that go right back to the eminent mediaeval theologist Thomas Aquinas. This view holds that a person should, as a property owner, use his property in a way which combines a social function, the general interest with his own. In other words, since the goods of this world are a gift from God to humankind, he who is privileged must share with others who have less, and must use what he has for the common good. Thus the holder of an interest (the owner) assumes of his own initiative and on the basis of a moral principle (seeking the common good) a duty which has not been legally imposed. This conception had an influence on the corporatist idea of property which arose from Fascist ideology.

In the liberal view, the social function of property is merely programmatic, and should be considered side by side with guaranteed individual rights. In the first place property is *free*, and individual access to it protected. Second, the State may limit it, but any time it applies limits that constrain its potential use and economic value for the collective benefit it must compensate the owner. This concept of social function clearly takes a fairly reductive view of the Constitutional position.

In the Marxist view, the social function of property is, however, of great importance, because it heralds the end of unbridled individualism and the onset of the first forms of socialism. Collective interests prevail in economic relations over individual interests. The owner can lay claim to the state's guarantee of protection of his property only insofar as he respects its social function. Social function in this sense is not, however, a limit self-imposed in response to a moral imperative, it is a complex of limits imposed by the State *ab initio* to constrain the powers of property

owners. In other words, the social function does not operate like lesser limits (such as the right to light and a view and other appurtenances of neighbouring land) as a barrier which owners must not overstep, but within which they can do as they please; rather it amounts to a modus operandi for the property and thus a set of user instructions for the owner. His powers are not indefinite and restricted in particular cases, they are powers which are circumscribed, from birth as it were, by a constraint inhering in legislation.

An analogous analysis can be made of private economic initiative (Art 41 Constitution) which is subject to the limits imposed by considerations of *social utility*. There is no real semantic difference between this formulation and 'social function', and the various interpretations of it follow the same arguments as for the social function of property. Property and enterprise are an important pairing which, as factors driving the economy, are subject to far-reaching controls permitted by the Constitution which ensure that they conform respectively to their social function and their social utility.

6.5.3. Compulsory purchase

Expropriation occurs whenever property is taken from an owner involuntarily. In this process (known as *ablative* from the Latin *auferre*, to take away) the expropriator may be the State or a region or local authority, or indeed a private individual or concern carrying out an initiative in the public interest. In this case title in the property passes to the expropriator, but as the dispossessed owner must always be adequately **compensated** (Art 42(3) Constitution), it amounts to compulsory purchase of the property.

6.5.4. So-called acquisition by occupation

From the 1970s onwards local administrations began to take possession of land scheduled for construction of public works without going through the compulsory purchase procedure, but merely occupying the property (on occasions dispensing with any procedural steps) and then carrying out the work on land still in private ownership. In order to circumvent the *merger* principle, which provides that rights to structures are consolidated with ownership of the land on which they are erected – the private landowner would thus have found himself the owner also of schools, hospitals churches, etc – case law applied the contrary principle of *reverse merger*, and in so doing 'invented' *acquisition by occupation*, which recognises the owner of the public works as the owner of the land they stand on, and makes restitution to the former landowner by means of damages (or compensation).

The thread of case law that produced this new route for public administrations to acquire property was based on a series of fictions. Fictions are widely recognised as an expedient employed in legislation and by judges to accomplish various ends, or as legislative and judicial short cuts. Such expedients should be employed with caution, however. In this case, the many fictions invoked to legitimise acquisition by occupation are all unreasonable.

To recall the fictions employed at various times here is a list of them.

- The situation is deemed appropriate for reverse merger, and thus one to which Art 938 of the civil code applies.
- The matter in dispute is deemed not to be covered by specific laws and thus susceptible in default to general principles, namely, the one whereby public interests prevail over private interests; in fact the laws in this area are tolerably precise and to the point, whether from the perspective of compulsory purchase law or the regulations covering placement of electricity lines, as the rules referred to earlier will demonstrate.
- There is deemed not to be an applicable legal principle, in that the Constitution (Art 42(2)) provides for laws covering only means of 'acquisition' but not of 'relinquishment' of private property; in a moment of forgetfulness, it seems to have been overlooked that wherever there is a person acquiring property there is necessarily a corresponding person who 'relinquishes' it, the one role being a mirror image of the other.
- There is deemed to be a 'concealed expropriation'.
- The private owner is deemed to have *abandoned* the property.
- There are deemed to be various types of occupation, among which permanent occupation.

The only fiction which seems excusable is the one which deems the land in question to have been irreversibly transformed, a circumstance which gives rise to a new legal context. A case can be made not for the reason that has gained judicial authority which states that transformation is tantamount to a new property coming into being, but rather that once the public works have been carried out the private landowner would, if the merger principle operated, acquire a new title or interest of a disproportionate value to that of the land he has lost, and would thus be unjustly enriched. If on the other hand the principle of reverse merger were applied, the amount by which he was enriched could never exceed twice the value of the land in question (from Art 938 civil code).

As for recompensing the owner, several approaches have been adopted, from *full damages* to restorative but not complete

compensation. Legislation has been required to create some order out of the confusion, first through Art 65 of law no. 549 of 28 December 1995 and then by legislative decree no. 80 of 31 March 1998 which reconciled *acquisition by occupation* with the compulsory purchase laws and which imposes a scale of compensation using the same criteria as compulsory purchase laws.

6.5.5. Property and public use. Environmental and cultural heritage

As previously stated, the civil code indicates the respective status of public and of private property. Additionally, within the scope of property *in compliance*, there is another category, that of *public use*, of property owned privately. This category applies to so-called *environmental* and *cultural heritage*.

In common speech the expressions cultural heritage, environmental heritage and cultural–environmental heritage are equivalent, or differ only in nuance. In legal language these categories have a precise meaning. They are property, belonging to private owners, to which a particular regime applies. There are many laws, of State and regional origin, regulating the uses to which they are put. The personal preferences of the owner have to be postponed (albeit not unconditionally) to the service of the community.

This regime began before the Second World War with the so-called *legislation restricting user*, in which limits were imposed on uses to which owners could put their property. Among these laws were no. 1089 of 1939 on works of art and no. 1497 of 1939 on areas of natural beauty, followed by numerous general and specialised laws ultimately consolidated in the cultural heritage code of 2004 (decree no. 42 of 2004). These provisions impose specific limits and duties on owners, connected to the *conservation* and *circulation* of property. For example, the owner of property of artistic, historic or archaeological interest must notify the public administration, and give notice of an intention to sell it so that the administration can exercise a right of pre-emption over prospective purchasers.

As environmental awareness has spread, and with the growing importance of private participation in administration, of decentralisation and management or control of property, a new regime covering these special kinds of property has been instituted. Article 9 of the Constitution already provides that the Republic 'protects the landscape'. The Constitutional Court in various decisions has established that the duties imposed on the owner are not indemnifiable, they are rather, so to speak, a 'burden' imposed on the owner by the community interest that the property represents. Regions (especially those without a special statute)

have launched an intensive programme of legislation for the protection of the environment, historic centres, areas of natural beauty and so on.

6.6. Property: building property

6.6.1. The right to housing and the accommodation problem

The constitutional provisions concerning property give rise to some fairly serious problems of land use and exploitation of cultivable property.

A large volume of legislation bears on building uses. The 1865 law on execution of public works was followed by other laws, many of a specialised nature, culminating in 1942 with the *basic town planning law* (no. 1150). This law confers control over private building activities on local authorities. Municipalities *may*, and in the case of the most important, identified as such by regions, *must* adopt a structure plan indicating the zones where construction is to be permitted, and zones to be reserved as public or private green space. The plan also indicates permitted types of building in different zones, factories and other production facilities, buildings of social use such as schools, hospitals, refuges, churches, commercial services and so on. Municipalities that do not have a structure plan adopt *building plans* indicating the limits of each zone, types of building permitted and the overall direction to be taken by housing expansion. Private owners intending to undertake construction must apply for authorisation (*building permission*, now known as *planning permission*).

There are many provisions designed to satisfy the need for housing. They fall into three types: those for *subsidised building*, to provide directly a supply of cheap popular housing allocated according to relative need; those for *assisted building*, which provide low cost loans to private owners intending to build houses for themselves or for resale; and those for *building agreements* with private constructors (as exemplified by law no. 10 of 1977). Subsidised building laws used usually to provide for owner occupation, but this led to a depletion of public housing stocks and from 1971 (law no. 865, followed by similar laws such as no. 513 of 1977 and no. 457 of 1978 which institutes 10-year house-building programmes) the tendency has been reversed, and to conserve public property new buildings are destined for rent and not owner occupation.

Both forms of holding do, however, conform to the constitutional principle protecting housing. By Art 47 Constitution: 'the Republic favours popular access to savings, to housing and ownership of land for cultivation'. 'Housing' means clean and comfortable accommodation and the right as worded in the Constitution is not restricted, in the view of some, to owner occupation, but to any interest capable (as, for example, a lease with the requisite obligations) of providing an adequate standard of accommodation.

6.6.2. The right to build and planning controls

In the modern economy the law on building property has great importance, while agricultural property, with the relative decline of that sector, is of lesser importance.

A decision of the Constitutional Court in 1968 declared unconstitutional the building bans imposed by municipalities on private landowners. The situation this judgment produced appeared particularly delicate in that if all restrictions were lifted there would be a rash of uncontrolled building resulting in the kind of environmental degradation and disfigured urban landscape encountered in tourist resorts. At the same time, the municipalities would, if they wished to maintain the bans, have had to devote considerable sums to compensating landowners. An interim period followed during which parliament passed laws extending the bans until in 1977 a proper reform of the law was realised introducing the present building permit system.

6.6.3. Lettings, tenancies and leasing

The housing question is a very serious social problem that cannot be solved entirely by State intervention in the form of subsidised or assisted building or by building agreements. The use of accommodation involves also lettings, whereby the owner assigns the use of residential property to a tenant. Because of its social dimension, lettings are not left to the free contractual accord of the parties, because the *landlord*, inevitably the stronger party, could abuse his position at the expense of the weaker, the *tenant*. The State has intervened for decades. As long ago as 1915 controls over tenancies were introduced for wartime reasons. These controls were extended, with only a brief interruption of a few months in the 1930s, up until 1978 and concerned two aspects of tenancy contracts: the *length* of a tenancy and *rent*. If these terms were left to the free determination of the parties, market criteria would apply, resulting in very short tenancies imposed by the landlord to enable him to re-occupy the property to offer to other potential tenants. He would be able to impose a market rent with provision for increases in line with inflation. A free market in rented property has always existed alongside the controlled market, whether because certain properties were not subject to controls or because it took time to impose controls on new-built property.

This dual market, the high cost of buying a house and the increase in housing demand are among the factors inducing legislators to intervene, in the form of **fair rent** laws.

The law on **fair rents**, no. 392 of 27 July 1978, distinguishes between residential and non-residential property and applies a different set of rules to contracts for each.

The dirigiste spirit informing such law has proved a substantial failure, however, resulting in unjustified privileges and a thriving black market in lettings. It has not solved the housing problem. After a first tentative attempt in 1992 to allow market forces back into the rented housing sector, law no. 431 of 9 December 1998 finally reformed the delicate area of residential property while leaving the regime for other lettings substantially unchanged.

The new law does not allow a term of less than four years for **residential** leases, and once elapsed contracts are renewed for an equivalent period. Exceptions are made for certain uses which the landlord wishes to put the property to, and for carrying out certain works as set out in Art 3 of law no. 431 of 1998. Examples include intended occupation by the landlord's spouse and the need for structural building work, or otherwise where other accommodation suitable for the tenant cannot be found in the same town. Once the second period expires a renewal procedure can be invoked, but if both parties accept a 'standard form contract', as agreed by landlords' and tenants' organisations, the term is reduced to three years and in default of agreement on further renewal it is extended for another two years, with the exceptions in Art 3 still applicable. The fixed determination of rent is abolished and replaced by 'general criteria' agreed on at a national level.

The fair rent law lays down some court procedures which depart from general principles governing trials. This is to ensure the quick disposal of disputes and to ease the administration of justice which is often overloaded by this kind of litigation.

The regime provided by the civil code (Arts 1571ff) is thus now residual. It defines a rental contract as one in which one party, the lessor, assumes an obligation to provide the other party, the lessee, with the use and enjoyment of moveable or immoveable property for a specified period in return for consideration. It establishes the lessor's duty, to deliver and maintain the property in good order, carry out necessary repairs and defend the lessee from claims and interference by third parties, and the lessee's, to accept possession of the property, take care of it and pay the rent, and return it to the lessor at the end of the rental period in the state in which he received it. The civil code also deals with defects, duration of contracts and the assumption of risk for loss of or deterioration to the property. It also establishes in what circumstances the contract will remain in force upon the property being alienated (*emptio non tollit locatum*). The code distinguishes **leases of productive property** from other kinds of lease and provides rules appropriate to this kind of property (Arts 1615ff). The lessee must manage the property in accordance with its economic purpose.

Leasing, on the other hand, is a fairly widely used form of contract, imported from the Anglo-American tradition, in which the *lessor* is an

enterprise that rents property, normally acquired for that purpose, to a *lessee* for a total rent calculated in terms of the purchase price of the property. The bulk of the rent is usually paid by instalments, with a relatively small sum paid at termination which gives the lessee the choice of returning the goods to the lessor, buying them, or renewing the contract.

6.7. Property: agricultural land, rural property and uncultivated land

Agricultural property receives particular attention in the Constitution. Land outside urban areas is dealt with not only by the property provisions in Art 42, but more specifically by Art 44 which states: 'For the purpose of ensuring the rational use of land and establishing equitable social relations, the law imposes obligations on and limitations to private ownership of land, defines its limits depending on the regions and the various agricultural areas, encourages and imposes land cultivation, the transformation of large estates, and reorganisation of productive units. It assists small- and medium-sized farms. The law shall make provision in favour of mountainous areas.'

In addition to the Constitution and the civil code, various statutes provide for agricultural property. The competencies of the European Union do not extend to law, but they do extend to agriculture.

The statutes were introduced over time to effect an **agrarian reform**. Their principles can partly be found in the civil code, which provides rules for the reorganisation of rural land and the smallest unit of cultivation (Arts 846ff civil code), for the cultivation of marshy, unhealthy, spoiled and extensively cultivated land (Art 857 civil code) and for hydrological measures and land improvements to prevent flooding and other degradations (Art 866 civil code).

Legislation continued to be passed to give effect to constitutional principles, even after the civil code was introduced, but the agrarian reform has never been completed. Some of the laws can, however, be singled out as having significantly affected use of agricultural land.

Agrarian contracts are in *standard form*, that is, the parties' freedom of contract is curtailed: law no. 756 of 15 September 1964. They are intended to favour the economically weaker party, the cultivator (sharecropper or tenant farmer), limiting the profits that the non-cultivator landlord can make.

Law no. 203 of 3 May 1982 has further restricted freedom of contract by establishing that only one form of contract can apply to rural property: the **productive property lease**. Any contract purporting to be of another kind (such as sharecropping or tenant farmer leases) will be modified by law to conform to the productive property lease.

6.8. Property and private interest

6.8.1. Concepts

The landowner may enclose property whenever he wishes (Art 841 civil code), but must abide by the legislation on hunting (law no. 968 of 1977) by continuing to allow access for such purposes. The landlord may prevent fishing (Art 842(2) civil code), but may not refuse access where it is necessary to repair a party wall or when a person, exercising the right to trace, wishes to retrieve an object or animal, unless the landlord returns the object or animal himself (Art 843 civil code).

Private owners must maintain certain specified *distances* when building on their land.

At one time limits imposed by the civil code were the only form of control over building and urban expansion. These rules covered only *decoration*, applying to the facades of buildings and also regulating their height and *access* rules designed to ensure that traffic continued to circulate freely. The civil code is still the basic reference for minimum distances, but local authorities can impose more severe restrictions. New buildings cannot approach within three metres of neighbouring property (Art 873 civil code). More detailed regulations apply to party, dividing and curtain walls (Arts 874ff civil code). Rules also apply to the siting of trees (Art 892 civil code) and factories (Art 890 civil code). Rules of this fairly detailed kind are now contained in local authority building regulations, and also often in the structure plans of large cities and building plans of smaller districts.

Other rules apply to windows. These are of two kinds, those serving principally to admit air and *light*, but which do not overlook neighbouring property, and those which do, affording a *view* or *prospect* directly, laterally or obliquely (Art 900 civil code).

Roofs must be built so as to permit water to run off onto the owner's land and not onto adjoining property (Art 908 civil code).

There are further rules concerning *water*, whether it is on the property (in wells, tanks or rivulets) or flow through or by it (streams, rivers, lakes, etc). Law no. 36 of 5 January 1994 provides that all water, be it on the surface or underground, is *public*, including water not yet drawn from below ground but excluding any rights acquired before the law came into force. The law seeks to ensure conservation of water for immediate and future use, with priority given to consumption by humans. Law no. 37 of 5 January 1994 provides for the 'environmental protection of riverine property, torrents, lakes and other public waters' and in so doing repeals or modifies certain civil code rules. In particular, Art 942, which encoded a traditional rule allowing the riparian to claim ownership of land covered in water which later recedes, is replaced by a provision conferring title on the State, making it 'public domain'.

The new text states, 'Land from which flowing water has receded, gradually transferring from one bank to another, belongs in the public domain and the opposite riparian cannot claim title to the land lost' (para. 1). 'Flowing water' in para. 1 means rivers, torrents and other waters defined by relevant law as public (para. 2). The provisions of para. 1 apply equally to land from which the sea, lakes, lagoons or ponds in public domain have receded.

On the same principle, islands that appear in rivers are public too, and Art 945(2) and (3) is repealed. Similarly, Arts 946 and 947 have been reformulated to declare as public domain (respectively) derelict riverbed and land revealed by the effects of natural events.

Law no. 97 of 31 January 1994 contains 'new regulations pertaining to mountainous zones'.

6.8.2. Timesharing

Timesharing is a recent phenomenon. Its legal framework has been imported from the English tradition. It is encountered in blocks of flats, buildings used in the hotel trade, and so on. Construction companies are formed to build and sell building complexes subdivided into independent residential units with common services. The owner of a single unit does not have an exclusive patrimonial right over the building outside his fraction of it, but is entitled to a portion of the whole complex. And he can use the building only for a certain period of the year, for an indefinite number of years.

There is a debate over whether this is a form of *co-ownership* (excluded because co-owners have property rights over the whole, not merely a single unit) or of *usage* or *abode* (excluded because the owner has a title and not merely a minor interest; neither are there any limitations relating to family needs). Others, instead, suggest that timesharing should be seen as a new form of temporary property, understood not as subject to an end date, but as an indefinite right constrained by the restricted annual period during which it subsists.

This is a widespread phenomenon because it is a way of investing in real estate at the same time as using one's capital for recreational benefits, allowing the owner to stay in a tourist area during holiday periods.

Legislative decree no. 427 of 1998 gave effect to an EU directive (94/47/CE) designed to protect those who enter into 'contracts relating to the purchase of the right to use immovable properties on a timeshare basis'. The decree does not take a position on the nature of the timeshare right (although it does state that the term 'timeshare' could only be used in the context of a contract or a property right), but imposes on the vendor a series of duties to inform and guarantees to the purchaser, concerning contract terms and practices, the nature and condition of the

building, the price and the purchaser's right to withdraw, as well as requirements relating to the form and content of the contract. In default, the contract can be avoided or the withdrawal period extended.

6.9. Co-ownership and condominium of buildings

6.9.1. Co-ownership: legal nature and regulation

When we refer to property we generally think of individual property. Often, however, people club together to invest money that they would not be able to raise alone in property acquired as *co-owners*. They often use common parts of a building of which they part-own the whole, or have jointly inherited a house that it is not convenient to divide up. These are a few of the most common situations where co-ownership arises. They are not separate titles to the same property, but rather the same right of which each participant has a *notional portion*.

There is no academic consensus on the theoretical basis for the legal nature of co-ownership. Some emphasise that the property belongs to a *group* (or to a community, but in this case we would be discussing a form of 'communal property' regime such as the closed farms of the alpine regions). Others emphasise the fullness of the property right which each participant, or part-owner, enjoys, a plenitude hedged in only by the corresponding rights of the other participants. Some deduce from the latter perspective that co-ownership is an ensemble of *limited property rights*. The prevalent thesis is that of property in notional portions: 'notional' as opposed to 'tangible', otherwise we would be speaking about so many property rights divided up and mutually distinct. When one participant withdraws, the notional portions grow accordingly – the 'elastic title' principle.

The best view appears, bearing in mind the relevant laws and in particular Art 1100 civil code, to be that co-ownership is a **situation characterized by** *joint or common ownership*, that is, from the concurrent right of several people over the same thing; hence, a plurality of those entitled to a right that is unitary, albeit in a transitory way.

The civil code regulates co-ownership giving the rights of the group priority over those of the single part-owner. Each part-owner is entitled to the *use and enjoyment of the common property* without appropriation of any kind. He may freely *dispose* of his portion entitlement, but cannot alone alienate the undivided asset, nor manage it alone: a simple majority is required for acts of management and a two-thirds majority for acts of disposition (Arts 1105 and 1107 civil code). The part-owner does have a *right to request division* of the property (Art 1111 civil code). This is a declaratory act, and so does not change the existing legal position, and the property or part thereof assigned to each participant is deemed to have always been fully his.

Case law follows the traditional view that sees co-ownership as a collection of several *notional portions* of a property right.

6.9.2. Condominium

Condominium of buildings is a special form of co-ownership. It is usually explained as co-ownership of common areas such as the ground, the foundations, the roof, stairs, courtyard and so on (Art 1117 civil code). When 'a condominium' is heard in everyday usage, it is usually referring to the fact that a building is divided into a number of separate residential units and the occupier of each is its owner. In the legal sense, condominium in building applies to the common parts, which are indeed the common property of the individual owners of the different residential units.

The particularity of the regime applying to condominium is threefold: *the indivisibility of the common parts* (Art 1119 civil code); *the need to nominate an administrator* (Art 1118 civil code); and *the drawing up of condominium rules* which fix the terms on which the owners live alongside one another and share common areas. The condominium is administered by a meeting of owners, but in calculating majorities regard is paid to the number of participants and to their respective portions (divided into thousandths of the whole). As well as the owners, any tenants there may be can take part in meetings under certain circumstances. They may sometimes have a vote (as in decisions involving heating and air conditioning) or a right to intervene (as when changes to communal services are contemplated) (law no. 302 of 1978, Art 10).

The difference between *co-ownership* and *condominium* can be stated thus: the concept of *notional portions* gives the part-owner rights over the entire property, but this is limited by the use all the part owners make of it, whereas the condominium owner is the exclusive owner of one or more distinct parts of the same building (floors or parts of floors) and part-owner of common parts of the building such as stairs and lifts. With co-ownership there is a de facto transitory state, but the common use of property is a permanent feature of condominium.

The nature of condominium is unanimously agreed to be a *management entity*, with no legal personality distinct from that of the individual participants. It takes action via the person of the administrator.

6.10. The means of acquiring property: by conveyance

6.10.1. Transfer of property

As long ago as the code of 1865 the institution of property was considered a fundamental aspect of private law and the code was

organised entirely so as to regulate property, persons with rights to property and the means by which property could be acquired. *Transmission* of property was considered to take place mainly through succession on death and by contract. Testamentary and intestate succession left property to the family. The family was very often understood as a means of production or increase of property by acquisition of goods and otherwise. Marriage, as we learn not only from analytical history but also from nineteenth-century novels such as those of Maupassant and Balzac, was often entered into with acquisition of revenues in mind, to become landowners or from similar economic motives.

Contract was and continues to be the principal means of transferring property. It is no accident that the rules of contract, in the nineteenth but also in the twentieth centuries, were mainly modelled on exchange, that is, the contract for sale.

The situation today has certainly changed. With the rise of the nuclear family and the intervention of the State in many areas of assistance and education once the task of the family, the role of the latter has progressively diminished as a factor of production in society. In the same way, property is no longer transmitted solely by succession and the importance of land has increasingly become matched by that of moveable property such as money, shares, bonds and valuable objects which do not lend themselves so readily to control over the transfer – and taxation – of wealth. Moreover, companies are increasingly used as a vehicle for the participation of families in their own wealth. Thus marriage also has lost much of the status it enjoyed as a pillar of bourgeois society. The independence of women has robbed it of its function in uniting two estates.

Under the current regime, contracts are subject to the principle of consent to transfer. Article 1376 civil code provides that 'in contracts which have as their object the transfer of the ownership of a specified thing, the creation or assignment of a property right or the transfer of some other right, the ownership or right in question is transferred and acquired by the consent, legitimately made manifest, of the parties.' This means that a will common to the parties, translated into an agreement, is alone sufficient to affect the transfer of property. In other words delivery of the property is not a prerequisite to concluding a transfer contract. A category of contracts including *loans of property*, *money loans* and *bailments* are exceptions to this rule. There is also no need for formalities of notification, except for where the law expressly requires written form or registration (Arts 2643ff civil code).

Succession on death and contract are means of acquiring property by *assignment*, in the sense that the right to be transferred already exists and moves from one person to another. There are other ways of acquiring

originating title, where the right is not a pre-existing one and there is thus no one to assign it. These were once of great importance, but are far less so today.

6.10.2. Acquisition by originating title

The most important way of acquiring a right that did not previously exist is by **prescription**, continuous possession of the property for a period of time. This will be further discussed below, with possession.

Another widely used means of acquiring property is **occupancy** (Art 923 civil code) which consists of taking possession of moveable property that does not belong to anyone, such as abandoned items or animals captured by hunting or fishing.

There are, however, significant innovations in this regard, dictated by the need to protect wildlife and the natural environment in general.

The new regime on *hunting* provides that 'wild animals on Italian soil constitute a non-disposable patrimony of the state and are protected in the interest of the national community' (law no. 968 of 1977, Art 1).

Thus the principle by which wildlife was the common property of all (*res communis omnium*) has been abolished. Wildlife is non-disposable patrimony, along with forests, quarries and historic and artistic heritage. The various regions establish the hunting season and the types of animals that may be hunted. Any that are taken, that is, killed by the hunter, become his property (Art 8 civil code).

Lost property must be handed in to the mayor of the town where it was found. If not reclaimed within a year it becomes the finder's property. Acquiring property in this way is known as finder's right (Arts 927ff civil code). If the original owner subsequently claims the property, the finder is entitled to a reward.

Treasure trove is subject to particular rules. Treasure is 'any valuable moveable item, hidden or underground, which no one can prove ownership of' (Art 932 civil code). The treasure belongs to the owner of the land on which it was found. If the finder is not the landowner the treasure is divided equally between them. Objects of artistic, historical or archaeological value become the property of the State (cultural heritage code).

As the property of a landowner extends upwards and below the ground, anything installed, planted or constructed on, above or below the ground, even if put there by others, belongs to him by virtue of **accretion** (Art 934 civil code).

When several objects belonging to different owners become joined or intermixed but are still separable without undue harm, each owner retains his ownership and has the right to obtain separation. If they are not reasonably separable, they become common property in shares

proportional to the value of each item (Art 939 civil code). If, however, one of the items is much more valuable than the other(s) its owner becomes owner of the whole by **intermixture**, and must pay the other owner(s) the value of their former property.

Anyone who has worked on materials that they do not own to create a new object becomes the owner on paying the former owner the value of the materials used. If, however, the value of the materials significantly exceeds that of the thing made, ownership remains with the owner of the materials who must pay the value of the work carried out. Acquisition of this kind is referred to as '**specification**' in Art 940 civil code.

For immoveable goods the code lays down specific rules relating to the displacement of rivers, inundation of areas of land, etc, supplemented by law no. 37 of 5 January 1994 on environmental protection. Accretions of land which appear gradually and imperceptibly alongside rivers and torrents belong to the riparian owner by **alluvion** (Art 941 civil code). Land revealed by a watercourse which shifts from one bank to the other is, however, public domain (Art 942 civil code). Land which appears at the upper levels of a lake or pond, however, belongs to the owner of the sheet of water (Art 943 civil code). If a river or torrent severs a substantial piece of land from one property and joins it to another, it becomes the property of the owner of the latter by **avulsion** (Art 944 civil code), and the new owner must pay compensation to the previous owner. Dried-up river beds belong to the public domain (Art 946 civil code) as do islands and land formations arising from riverbeds and torrents (Art 945 civil code).

6.11. The means of acquiring property: by purchase and barter

6.11.1. Purchase

We have mentioned 'contract' several times in the last few pages. This expression, which in everyday, non-technical language means agreement, or economic operation, is associated with a bond: that by which the parties who have concluded the contract are obliged 'to keep the promise made' and carry it out. We will examine the legal definition of and rules on contract in general below. Here, to understand in greater detail the legal mechanisms by which property is transferred, it is sufficient to note that a contract is an agreement between two or more parties to set up, modify or extinguish a legal relationship involving property (Art 1321 civil code).

Among the assignment contracts relating to property (sale, barter, loan, contango, sale or return, current accounts, bank deposits, surrender of assets to creditors), those for **sale** are certainly the most widespread.

Usually we identify a contract with a sale by a form of antonomasia. In mature capitalist societies the sale of consumer products has become almost automatic, instantaneous and without special form (as when we shop at a supermarket or buy from a vending machine). Sales often take place with slips or forms provided by the vendor enterprise (mass sales with standard form contracts).

In our current context of property transfer we will examine contracts of sale only for their transferring effects.

According to the definition in the code, the purpose of contracts for sale is to transfer the property in an object or other right in return for payment (Art 1470 civil code). The sale contract is thus an *exchange contract, with payment as consideration*. The **price** to be paid is one of the essential elements, along with the thing sold. The amount may be established by a third party to whom the parties refer in concluding the contract or later; in default, the price may be set by a judge at the request of the parties (Art 1473 civil code). Where things normally sold by the vendor are concerned, if no price is specified, it will be presumed that the parties intended to apply the price normally charged by the vendor (Art 1474 civil code).

A sale contract gives rise to obligations for both vendor and purchaser. The purchaser has only to pay the price of the item sold, plus the costs of the sale (Arts 1498 and 1475 civil code). The price must be paid when and where the contract stipulates, or, in default of contrary provision, at the time and place of delivery (Art 1498 civil code).

Since sale is a contract that transfers ownership, and transfer arises from simple consent, the delivery of the goods is a vendor's obligation and is not an essential element in the execution of the contract. *Delivery* is the simple physical transfer of the thing in the condition it was in at the moment of sale. In the absence of a contrary intention by the parties, delivery must include accessories and appurtenances and accruals since the date of sale. The vendor must also deliver any certificates of ownership and other relevant documents that go with the item sold (Art 1477 civil code).

The vendor is under an obligation to perfect transfer of title or other right if this is not an automatic consequence of the contract (as may be the case in the sale of future goods, etc). If the vendor has sold something which he does not own and has not acquired title to enable him to transfer it to the purchaser after the conclusion of the contract, the purchaser may request rescission of the contract (Art 1479 civil code). The vendor in such cases must reimburse the full purchase price even if the goods have deteriorated or reduced in value. He must reimburse costs legitimately incurred through the contract, incidental expenses reasonably and necessarily incurred and, if he has acted in bad faith, that is, he knew he had no right to purportedly sell the property, unnecessary expenses also (Art 1479 civil code).

The purchaser may suspend payment of the purchase price if he has cause to believe that the item he is buying is not in fact the vendor's property and that a third party wishes to assert his right over it by means of an action for conversion. The purchaser may similarly suspend payment of the purchase price if the item is subject to collateral or other charges, or are subject to sequestration or attachment orders and the vendor has not declared this fact (Art 1482 civil code).

The vendor must also guarantee that his title has not been compromised by third parties in any other ways that may prevent him from transferring it. This is equivalent to *an implied condition as to title*, which entitles the purchaser to damages if breached (Art 1483 civil code). Such damages would include any expenses paid and revenues repaid to the effective owner (Art 1483(2) civil code). If the purchaser has paid an indemnity to the effective owner so as to perfect title, the vendor may avoid further liability by reimbursing the sum paid, with interest and expenses (Art 1486 civil code).

Certain agreements made by the parties may affect the transfer of property. These include stipulations as to *redemption*, *retention of title* and *pre-emption*.

By a **stipulation as to redemption** the vendor may reserve the right to reacquire the ownership of the property transferred by repaying the sum paid, together with any agreed expenses. The repurchase price must not be higher than the original sale price: any excess is automatically discounted and any clause providing for a higher repurchase price is void, but this does not vitiate the contract as a whole (Art 1500(2) civil code). The stipulation as to redemption introduces a *condition subsequent* into the sale in that it cancels the effects of the sale, as well as a '*potestative condition*' meaning that it operates at the vendor's option. It produces the immediate return of the ownership of the property to the vendor at the end of the prescribed term with no further requirement for consent by the purchaser and can therefore take place against the latter's will.

The stipulation as to redemption must thus be distinguished from the **stipulation as to repurchase** which does require the original purchaser's express consent.

To prevent restraints on the goods and on the purchaser's right to dispose of them as he wishes, the maximum term for a redemption clause has been set at two years for moveable property and five years for immoveable property. Purported longer terms are automatically reduced to the legal maximum (Art 1501 civil code). The stipulation as to redemption has effects *in rem*. If the purchaser assigns the goods to third parties the original vendor may claim them back provided that the third parties could have ascertained from public notice or entry on a register that such a stipulation was in effect (Art 1504 civil code).

The **stipulation as to retention of title** or **sale by instalments** provides that the purchaser does not acquire title to the property until he has paid the final instalment of the purchase price, but assumes the risks of ownership at the moment of delivery (Art 1523 civil code). This kind of sale has been very widespread since the nineteenth century, originally for less well-off purchasers buying relatively expensive moveable goods by monthly payments. Today it is more generalised, and a typical instance is the *sale on credit*. Since the price is not paid immediately, the purchaser discounts this advantage by assuming the risks before the goods have become his property, that is, when the final instalment is paid. The code provides that a single missed payment will not be sufficient to terminate the contract (Art 1525 civil code). If the contract is terminated, the vendor must repay instalments already paid. If the termination results from the purchaser's fault, he must pay compensation to the vendor and a quantum meruit for the use of the goods (Art 1526 civil code). The stipulation as to retention of title does not bind third parties who acquire the goods from the original purchaser. The exception to this rule is when a machine is sold for a price above 15 euros provided the stipulation is entered in the relevant court registry. In any event, the stipulation binds creditors, so long as the written deed dates from prior to any seizure of property (Art 1524 civil code). The **stipulation as to pre-emption** will be considered under stipulations added to a contract.

Because the regime governing the circulation of property varies so much according to whether the property is moveable or immoveable, the code lays down separate regimes for the marginal aspects of *sale of moveable property* and *sale of immoveable property*.

For the **sale of moveable property** delivery must take place at the location where the object is situated at the moment of sale, or where the vendor is domiciled or has his place of business. If the goods have to be transported the vendor has discharged his obligation once they are delivered to the carrier or forwarder (Art 1510 civil code). A specific guarantee, that of *proper functioning*, applies (Art 1512 civil code). The vendor may deposit the goods in a public warehouse if the purchaser does not attend for delivery (Art 1514 civil code). If the purchaser fails to pay the purchase price the vendor may without delay auction the goods on the purchaser's account and at his expense. The vendor has the right to claim the difference between the purchase price and the sum realised at auction in addition to any other damages (Art 1515 civil code). If the vendor is in breach, and the sale goods consist of fungible items with a current price, the purchaser may without delay buy them elsewhere through a court official at the vendor's expense. The purchaser has the right to claim the difference between the original purchase price and the sum paid for replacement goods in addition to any other damages (Art 1516 civil code).

The sale may also be *on approval*. In this case the contract is concluded when the purchaser communicates his approval to the vendor (Art 1520 civil code). Sale *on trial* is subject to the condition precedent that the goods are of the agreed quality and are suitable for their intended purpose (Art 1521 civil code). If sale is *by sample*, it is implied that the whole of the goods will conform to the sample; if not, the purchaser may terminate the contract, unless trade usage establishes that the sample is only intended as an approximate guide to the nature of the goods (Art 1522 civil code). The sale of goods in transit or stored in a warehouse is carried out via *documents*. These are negotiable instruments (bills of lading, warehouse receipts, consignment notes) which represent goods. The vendor has discharged his obligation when he delivers the relevant document – as above or as otherwise provided in the contract or by trade usage – to the purchaser (Art 1525 civil code). Negotiable instruments such as bonds and shares can be bought and sold.

The **sale of immoveable property** distinguishes between sale *by measure* and sale *by portion*. The former gives the purchaser the right to a price reduction if the measure supplied is less than that provided in the contract, and must pay a supplement if it is greater (Art 1537 civil code). A sale by portion, relative to the physical entirety of a building or the entirety of a delimited area, gives rise to no price reductions or supplements, unless the actual dimensions are 5 per cent more or less than those indicated in a promised (Art 1525 civil code).

6.11.2. Barter and similar phenomena

Barter is the most ancient form of exchange contract, dating from the time when production stopped being merely a matter of immediate personal subsistence and became an object of trade. The purpose of a barter contract is the reciprocal transfer of goods or rights between the parties (Art 1522 civil code). If one party can no longer transfer goods, the other has the right to their value. The parties are equally liable for expenses. The laws on sale contracts apply to barter wherever they are compatible (Arts 1552ff civil code).

A variation on sale contracts is the **contract for sale or return** (Arts 1556ff civil code). One party supplies one or more items of moveable property; the other party must pay the purchase price unless he returns the goods on or before an agreed date. On the other hand, **contango** (Arts 1548ff civil code) is a form of contract, 'real' in the sense that the property must be handed over as a condition of its validity, whereby one party transfers a quantity of stock of a given description for a given price and the other party undertakes to return it on an agreed date when the price will be returned (increased or reduced according to circumstances). Such a contract may be entered into because the consignor wishes to raise

money temporarily or because the consignee has temporary need of the stock, for example, to entitle him to attend a shareholders' meeting.

There are clearly many other types of transaction involving stock transfer, encountered daily in the stock markets, some of them purely speculative. The main distinction is between *spot trading* where the transfer of stock and payment therefore must be made within five days of the agreement, and *forward contracts*, where execution date is deferred for both parties, giving vendor and purchaser alike the opportunity to speculate on stock price movements. The second form is much more common and gives rise to ever more elaborate permutations, involving the payment of a specified sum (premium sale) in exchange for the option, for example, to not execute the contract (*dont*) or to choose between acquiring or selling the stock (*stellage*). Other variations include substitution for transfer on the due date by a payment of a sum equivalent to the price movement of the stock during the period (*differential contracts*) or indeed there need be no actual stock involved in the contract, merely an agreement based on differences in price indexes of various financial activities (*derivative contracts*, of which there are various kinds: *futures, options, swaps*, etc).

6.12. Actions in defence of property

Actions in defence of property are known as petitionary actions from the Latin *petere*, to ask for, and also *aedile* actions after the title of the magistrates who heard them in the Roman period. They are standard actions with fixed procedures, of long standing and very frequently pursued. There are four kinds, all of them available as of *indefeasible right*: *recovery* actions, *injunctive* actions, actions to *declare boundaries*, and actions to *mark boundaries*.

6.12.1. Recovery actions

Recovery actions are so called because they are brought to recover property in the hands of others who are in possession or have retained it and can be brought even after these persons have lost the power to dispose of it (Art 948 civil code).

To pursue this action it is necessary for the owner to have lost possession of the property against or without his will, otherwise he must bring an action in personam for *restitution*.

Moreover, a recovery action is designed to secure recognition of the owner's property right, whereas an action for restitution does not require proof of ownership: to obtain redelivery of the goods it is sufficient to show that whatever previously entitled the possessor to them, such as a loan or other bailment, has now expired.

The most problematic aspect of recovery actions is the burden of proof. It is for the owner to prove that his claim is justified by proving he is the rightful owner, whereas his opponent can shelter behind an old maxim designed to protect possession: 'possideo quia possideo' ('I am in possession because I'm in possession'). The burden of proof is onerous enough to have been described as 'diabolic'. It is necessary to demonstrate either an originating title or an unbroken chain of title from the originating title. The owner can, however, plead the rules of prescription in aid if he can show uninterrupted possession by himself and his predecessors in title for 20 years. The proof can also sometimes be made easier by a judge who finds what? For the claimant having enquired into the circumstances and heard the respondent's evidence. It must be remembered that evidence from the cadastral records is indicative but not conclusive as to ownership of land.

6.12.2. The injunctive action

An owner can take an injunctive action to obtain a declaration that the rights claimed over his property do not in fact exist, when he has reason to believe that he is prejudiced by such assertions. This serves to put an end to nuisances and harassment. The owner may also seek damages (Art 949 civil code). It is necessary that the nuisances and harassment be accompanied by a claim to a property right, otherwise a simple action for damages will be appropriate and damages, but not an injunction, will be the available remedy (Art 2043 civil code).

6.12.3. The action to declare boundaries

When the boundary between adjoining properties is uncertain, either owner can apply to have it judicially determined through an **action to declare boundaries**. Any kind of evidence is admissible. In the absence of other evidence, the judge may take note of the cadastral maps (Art 950 civil code).

6.12.4. The action to mark boundaries

When the boundary between adjoining properties is unmarked, or the markings are unclear, either owner can apply to have it marked at their joint expense through an **action to mark boundaries** (Art 951 civil code). The boundary must, however, be certain, otherwise the action to declare boundaries is appropriate. The action to mark boundaries is only available for a simple request to make well-established boundaries clearly visible.

6.13. *Iura in re aliena*

6.13.1. Concepts

The historical and political reasons why a restricted number of types of minor rights are recognised have been discussed above. Alongside the right to property, which is also referred to as the 'dominical' right (from the Latin *dominus*, lord), there are other interests to which it is subject. These are rights in rem and are minor in comparison to the right of ownership itself. They may consist, for example, of a *right of way* over another person's land, or the right of *usufruct*, that is, to use whatever the property yields, without altering its original economic purpose. These rights can only exist over property belonging to others. When they are extinguished, the property right undergoes a reversionary 'expansion' as if a weight placed on it had been removed (and hence the principle of 'dominical elasticity').

Minor interests in the property of a third party can be placed in two main categories. **Rights of enjoyment** are those which enable the holder of the right to derive a use from the property of another. **Rights of guarantee** are those which enable a creditor of the owner to ensure satisfaction of a debt. Rights of enjoyment include the *surface right*, *usufruct, use, abode, emphyteusis* and *easements*. Tangible rights of guarantee include *pledge* and *mortgage*.

Minor interests also have features in common with property rights. These include the right to trace, and absoluteness (within the limits relevant to a right which by definition exists within a property right).

A minor interest, for example, an easement, surface right or abode, may confer rights on a single person or on various people.

Minor interests are created by *contract*, by *will*, or by *prescription*, or indeed by *law*, that is, independently of the will of individuals.

It should be noted that even though it co-exists with a property right, a minor interest does not lose its legal relationship with the property in rem. That is to say, it is not merely a bilateral relationship between the owner of the property and the holder of the interest, but one created between the holder of the interest and the property itself by means of a juridical process (law or prescription) or an act of will such as a contract.

6.13.2. The surface right

Property rights can be divided up into distinct and discrete forms of enjoyment, according to whether they are exercised below, above or on the ground. The owner may accord a right to construct and maintain a building on his land to others, who thereby become owners of the building. Or he can alienate the ownership of a building already in

existence, separately from the property of the land on which it stands (Art 952 civil code). Both cases are instances of the **surface** right. It can thus be of two forms. It allows the holder of the right either to construct a building on land belonging to another or to become the owner of an already existing building, without acquiring ownership of the land on which it stands. These rights may also apply to constructions beneath the property of others (Art 955 civil code).

The surface right is therefore wide in scope, as it greatly reduces the property owner's powers while the right subsists. For this reason the surface right exercised by constructing a building is also referred to as '*surface ownership*'.

The surface right is extinguished by *renunciation*, by *consolidation* (when the owner of the land and the holder of the right are the same person), by *expiry of term*, and by *prescription* if the construction is not effected within 20 years.

6.13.3. Usufruct, use, abode

Together with emphyteusis, discussed in the section below, usufruct is the right in rem which confers the most power on its holder, hence the limits imposed by the civil code on its duration (Art 979 civil code), from the moment that it 'empties' the property itself of those powers.

Usufruct confers the right to use the property of another and to enjoy the fruits of it, and the law recognises such enjoyment as a power of the interest holder (Art 981 civil code). The law limits not only the duration of such rights, but also prevents the interest holder from changing the economic purpose of the property (Art 981 civil code), that is to say, if A has usufruct in a property given over to growing tobacco, he cannot change its use into, for example, a lorry park.

The powers of the usufructuary are thus wide: possession of the property (Art 982 civil code), the right to acquire the goods which accrue to the property (accretion Art 983 civil code), to take and enjoy what the property yields (Art 984 civil code), to make and be reimbursed for improvements to the property (Art 984 civil code) and to make additions which he can remove at the end of the period of usufruct or leave with the property, in the latter case with a right to reimbursement calculated according to the criteria laid down in Art 986(2) civil code. He may avail himself of mines, quarries and peat workings, and of live- and deadstock (provided they are replaced with stock equivalent in quantity and quality, the '*tantundem*' principle), and may lease it and collect assets (Arts 999 and 1000 civil code).

Usufruct can be constituted by a *voluntary act* such as a will, contract or unilateral act, by *operation of law*, or by *prescription* (Art 978 civil code).

Legal usufruct attaches to parents, or those exercising parental authority, over the property of minors (Arts 324, 327 civil code). It no longer attaches to a spouse, since the reform of family law which made the surviving spouse the heir to full title in the property of the deceased (Art 540 civil code).

The duties of the usufructuary include that of maintaining the economic purpose of the property, returning the property to the owner at the expiry of the term, to exercise diligence in its use, without consuming or destroying it. He is also responsible for costs of maintenance carried out in the normal course of repairs. The cost of any extraordinary repairs falls on the owner. The usufructuary who may consume the property and return the '*tantundem*' to the owner at the expiry of the term is an exception (Art 995 civil code). This applies when the property yields revenue in the form of money or commodities. In such cases the usufructuary becomes the effective owner and the legal situation that arises is known as *quasi-usufruct*.

Usufruct is extinguished by *expiry* of the term, by the *death of the usufructuary*, or if the usufructuary is an artificial person, by the *extinction of its legal personality* (Art 979 civil code). *Twenty years of non-use* is a further reason for extinction, as are the *absorption* of the minor into the major right when the usufructuary becomes the owner of the property, the *loss* of the property or the *misuse* of it (Arts 1014 and 1015 civil code).

Interests of minor importance include **use** and **abode**. These can be distinguished from usufruct by the less extensive powers they confer, restricted to a single type of enjoyment.

Use is limited to the necessities of the holder and of his family and concerns a thing. They are assessed having regard to the holder's social condition. The family is defined as everyone living together with the holder of the right (Art 1023 civil code).

Abode is the right to make use of a house to live in with one's family according to one's needs.

Holders of the rights of use and abode have the same powers and duties as a usufructuary, except for the right to lease the property or to assign the right: the right is thus 'personal' to the holder and his family. Artificial persons cannot hold these rights.

6.13.4. Emphyteusis

Emphyteusis is a legal interest in land in connection with agricultural property and the legislative tendency has been to increase the powers of the party who actually cultivates the property or renders it productive – as opposed to those of a mere title-holder to the land. The name given to this right indicates what it consists of and

the historical tradition from which it derives. *Enfytèuo* is Greek for 'I cultivate in', 'I plant in', reflecting the ancient practice of granting parcels of land to a tenant, the *emphyteuta*, with the right to enjoy its produce and with the duty to improve it by breaking it in and then cultivating it, and to pay an annual *emphyteutic* rent in money or in agricultural produce.

This practice, dating from the Roman period, became well-established in the Middle Ages, a period when the emphyteuta was burdened with other forms of tribute in addition to rent. It proved advantageous to the economy, once it became a preferred form of tenure for monasteries, religious congregations, churches and other large landowners who otherwise risked their land becoming unproductive because they could not themselves keep it under cultivation. So emphyteusis became a long-term lease.

Even today emphyteusis can be a lifelong lease, or can be for a term of not less than 20 years (Art 958 civil code).

Redemption occurs when the emphyteuta becomes the owner of the land by paying the equivalent of 15 years the annual rent.

6.13.5. Easements

An easement – sometimes known as a *praedial* servitude, from the Latin *praedium* meaning 'land' – is a burden imposed on one parcel of land for the benefit of another belonging to a different owner. The land for the benefit of which the easement exists is known as the *dominant tenement*, the other parcel as the *servient tenement*.

The following examples serve to illustrate the many forms an easement can take. A owns a claypit and agrees with B who owns the adjoining land to store the material on his land; an *industrial easement* is created. C wishes to be sure he can continue to enjoy the views from his villa and agrees with D who owns the overlooked property an easement whereby the latter will not add anything to the top of his house; this is a *covenant restrictive of adding height to a building*. F needs to cross G's land in his tractor to reach his vineyard and so agrees a *vehicular right of way* with G.

Easements are the most commonly encountered minor rights in rem.

The following are among the most important of the many principles that inform the law on easements.

(a) They may be created only for the benefit of land, not of persons; purported *personal easements* are irregular and do not create rights in rem, but a relationship of obligation in personam.
(b) The parcels of land affected must, if they do not adjoin, be close to each other, otherwise there is no point in creating an easement.

(c) The easement must provide some benefit to the dominant tenement and no remuneration can be claimed in return for a purported easement that in fact does not benefit the neighbouring owner.
(d) An easement cannot be created where the dominant and servient tenements belong to the same person; the owner can already do as he wishes with his land.
(e) The easement may not lay duties to act upon the owner of the servient tenement, merely a duty to allow things to be done.

Easements fall into a number of categories. They are *affirmative* if they permit the holder to use the servient tenement and to do things which would otherwise require the owner's permission (for example, a right of way). They are *negative* if they prevent certain things from being done (for example, adding to the height of a building). They are *apparent* if they require visible works for their functioning (for example, aquifers and channels, wells and electricity lines).

There are further two distinct ways in which easements may be created. They are *voluntary* or created by will or contract, whereas an easement *of necessity* can arise against the will of the owner of the servient tenement.

Particular rules apply to the acquisition of easements. An ancient rule stipulates that an easement can be acquired *by attribution of paterfamilias*. This alludes to an ancient custom whereby in dividing land between his children, the father would assign the necessary easements. The expression has been preserved unaltered in the current civil code (Art 1062), but it now refers to a different situation, namely, 'attribution of paterfamilias occurs whenever it is shown, by any kind of evidence, that two parcels of land, now separate, have in the past been part of the same tenement and that the owner performed or permitted the actions now in question as constituting an easement. If the two parcels no longer belong to the same owner, the relevant easements are deemed, without any disposition being required, to exist for the benefit of and to be imposed on both separate parcels.'

Easements can also be acquired by prescription. Only apparent easements can be acquired by prescription or by attribution of paterfamilias.

Easements are extinguished in the following ways: *merger* of the right of surface with legal title when the holder of the right becomes the owner of the land; through non-use; through impossibility of use; by relinquishment; by the loss of the servient tenement; by the loss of the dominant tenement; and by lapse in default of use during a 20-year period. The date of lapsing is reckoned differently depending on whether the easement was affirmative or negative. If the former then one counts from the last time the easement was exercised; if the latter, one counts from the first action by the servient owner that infringes the easement.

The holder of an easement may take action to determine its existence and to halt infringements of it (Art 1079 civil code).

6.14. Rights of guarantee and means of guaranteeing credit

6.14.1. Pledge and mortgage

There are many means by which a creditor, owed either money or a prestation, can assure himself that his claim will not go unsatisfied.

If the debt is not repaid or the prestation not performed, he will have a right to predetermined damages by way of compensation (a penal clause: Art 1382 civil code), or else an arrangement with the creditor can be made in the form of a fiduciary pact *cum creditore*, allowing the debtor to retain the ownership of property delivered to the creditor by way of guarantee. The expropriated property belongs, as the case may be, either to the creditor or may be property of the debtor alienated to third parties (action to obtain revocation: Art 2901 civil code). Otherwise, property to which the debtor is entitled as creditor of third parties can be realised (action in subrogation: Art 2900 civil code) or his rights as a preferential creditor may be invoked (Art 2745 civil code), and so on.

Among these various means provided for by law which we will examine below, the most important are **pledge** and **mortgage**, which share the defining feature of being authentic *rights in rem* over property belonging to the debtor, or over the property of a third party over which the debtor has in his turn rights of guarantee (a *third-party pledger* or *mortgagor*). These are therefore collateral security over the property pledged or mortgaged which may be followed by the creditor in satisfaction of the debt even if the debtor has in the meantime transferred the property to a third party. The creditor has the further privilege of being *preferred* over other creditors in respect of the pledged or mortgaged property.

So that third parties are aware that a pledge or mortgage exists, the law provides for particular forms of notice to be given. A mortgage over land or buildings must be entered on the public register (*property registers*). Mortgages subsist over immovable or registered moveable property and are not valid if not entered in the correct form. Pledges on the other hand subsist over moveable property which cannot be registered and so the existence of the pledge cannot be advertised in this way. The creditor, as pledgee, therefore takes possession of the object pledged, or else the object may be entrusted to third parties, but in either case is no longer at the debtor's disposal.

Pledges and mortgages are thus indissolubly connected to the debt which they guarantee. Once the debt is extinguished, the pledge or

mortgage is extinguished with it. If the debt does not exist, then neither does the pledge nor mortgage. If the property over which the pledge or mortgage subsists is lost or destroyed, the pledgee or mortgagee may ask the court to establish a pledge or mortgage of equivalent value over other property, or demand immediate payment of the debt. If the property is in danger of being lost, the pledgee or mortgagee may ask the court to take the necessary precautionary measures (Arts 2812 and 2813 civil code). If the property is insured and the insurer is liable to pay the debtor for its loss or destruction, the pledgee or mortgagee may satisfy the debt from this sum (*equitable conversion*, Art 2472 civil code).

Although pledges or mortgages are designed to protect the creditor's interest, this protection cannot be realised by threats in the form of extortion from the debtor. The law thus prohibits the *agreement of forfeiture* (Art 2744 civil code) which purports to provide for the transfer of the pledged or mortgaged property to the creditor if the debt is not paid on the due date. Instead, if the charge is not redeemed, the property may be sold at public auction for the highest obtainable price so as to satisfy the interests of both debtor and creditor; the latter satisfies his debt out of the proceeds of sale. The creditor may also apply to the court (as opposed to 'taking the law into his own hands') for the property to be transferred to him by way of payment. If this occurs, the value of the property in excess of the amount required to discharge the debt is returned to the debtor (Art 2798 civil code).

A **pledge** may subsist not only over individual specified items of property, but over a person's moveable property in general (Art 816 civil code), over assets represented by claims that the debtor has as creditor in respect of third parties, which the pledgee may in turn claim in default of payment of the original debt (Arts 2800ff civil code) and over other rights attaching to moveable property. The pledge is created by the delivery of the pledged property to the creditor (Art 2786 civil code). Such delivery makes the pledge arrangement a *bailment*. To protect the debtor, the pledgee is under a legal obligation to keep the property in his custody and is liable for its loss or any deterioration (Art 2790 civil code). He is further prohibited from using it without the debtor's consent and may not dispose of it, whether by way of pledge or by allowing third parties enjoyment of it (Art 2792 civil code). If the property yields fruit, the creditor may gather and consume them, setting off their value against, first, expenses, then interest and then against capital (Art 2792(2) civil code).

A **mortgage** confers on the creditor a right to the mortgaged property sufficient to satisfy the debt and the right to trace the property into the hands of third parties to whom it has been transferred (Art 2808 civil code). As it is immoveable property it remains at the disposal and for the enjoyment of the debtor, but the mortgagee may ask the court to

order precautionary measures to preserve the property (Art 2813 civil code). A mortgage may also be created over a minor right such as usufruct or emphyteusis (Arts 2814 and 2815 civil code) or the surface right (Art 2816 civil code).

A mortgage is *statutory*, *judicial* or *voluntary*, according to whether it came into being by *operation of law*, by *court order*, or by a *voluntary deed*.

It is *judicial* when the creditor has obtained a judgment whereby the debtor must pay a sum of money or perform other obligations (Art 2818 civil code).

A *voluntary* mortgage can be created by a unilateral deed or by contract (in public form and with an authenticated signature (Art 2835 civil code)).

Since it concerns immoveable property, a particular procedure is required to enter a mortgage on the register, to redeem it, and to extinguish it.

Entry on a public register remains valid for 20 years, but can be renewed. As soon as a debtor takes out more than one mortgage on his property, they are *graded* in order of creation. The debt is satisfied by the expropriation of the property.

6.14.2. Liens

Liens are not rights in rem as pledges or mortgages are. Their legal status is much debated, because they are *grounds for preference*, that is, they give rise to the priority of one creditors, over another in respect of claims on the debtor's property and so serve a function similar to a pledge or a mortgage.

They are not constituted voluntarily, but legally. The law assigns priority to specified categories of creditor, ordering them in a detailed way. The order depends not on the time the debt has existed, but on the nature of the privilege. Liens can operate in respect of both moveable property (general and special liens) and immoveable property (special liens only) (Art 2745 civil code).

There is competition between liens, pledges and mortgages in terms of priority, and there is no unanimity over their order in legal writing and case law.

Generally speaking, the order of grounds for preference for *moveable property* is as follows:

(a) pledge;
(b) special lien over equipment for credit to industry;
(c) general lien for unpaid wages;
(d) state's special lien for unpaid direct taxes;
(e) lien over a motor vehicle for its purchase price;
(f) hotelier's lien over property brought into the hotel;
(g) carrier's, agent's or depositary's special lien;

(h) machine vendor's lien;
(i) general lien of supplier of works of the intellect;
(j) general lien of commercial agents;
(k) state's general lien for unpaid direct taxes.

For *immoveable property*:

(a) lien for credit to industry;
(b) state's lien for unpaid direct taxes;
(c) state's lien for unpaid indirect taxes;
(d) local authorities' lien for unpaid taxes;
(e) mortgage.

Although they are not rights in rem, therefore, liens prevail (in some situations) over a mortgage. The order of liens is of great importance for insolvency procedure, since it determines the way that assets are distributed among creditors, and postponed creditors may only be satisfied out of any remaining property.

6.15. Possession. Rules and effects

We have already defined possession as a *de facto power* corresponding to the right of property or other minor rights in re aliena and we have already noted several times how the law looks with favour on the possessor, even preferring him at times to the owner.

A final confirmation of this favour is to be found in various presumptions which come to the aid of the possessor. He who exercised possession is presumed to be in possession (Art 1141 civil code). Possession is presumed to be *continuous*: a person in current possession who was also in possession at some past time is presumed to have been in uninterrupted possession between the two dates.

Moreover, there are two institutions which assist the possessor in acquiring the ownership of property: *succession in possession* whereby the deceased's possession passes to the inheritor, and *accrual of possession* whereby possession by successors in title is cumulative with that of their predecessors.

Possession can be inaugurated by originating title, for example, found chattels, or passed on with *adequate title*, for example, by sale. Or else a transformation can occur in the way the property is held, known as *shifting of possession*. This cannot be brought about by a simple act of will, but must involve the intervention of a third party, for example, by *testamentary disposition*, or by some challenge brought by a bailee against the possessor (Art 1142(2) civil code).

Possession is either in *good faith* or *vitiated by bad faith*.

6.15.1. Possession in good faith

Possession in good faith is of particular importance. One possesses in good faith if one is ignorant of rights of others being infringed (Art 1147 civil code). The expression 'good faith' is thus used here in a different sense from its use in interpreting contracts (Art 1366 civil code), in execution (Art 1375 civil code), and in performing obligations (Art 1175 civil code). Here it is used in the subjective sense of 'propriety, fair conduct' implied by the 'ignorance of rights of others being infringed by one's actions'.

6.15.2. Acquisition from a non-owner

An important demand must be satisfied in the circulation of goods, namely, the protection of the buyer as against the seller, and so make the acquisition certain. Generally speaking, this requirement is upset only by unconscionable bargains, since the law offers more protection to a person who has lost possession in this way (or by way of gift).

Such protection is afforded to an acquirer of rights in rem as against the owner, in the case of sale of property belonging to another (for example, the *implied condition as to title*; Art 1479 civil code) and to the assignee of a debt if the creditor was not the assignor (see, for example, Art 1266 civil code). Gifts of property belonging to others are, however, void, and so there is no protection for the purported recipient.

Legal protection does not end here. There are many ways in which the acquirer is protected as against the owner, in such a way as to become the effective owner.

The conflict of interest between acquirer and owner is resolved by the applicable law according to two criteria; protection is subject to the tests of 'whether' and 'how much'. By the first criterion:

(a) a third party who acquires from a non-owner is preferred to the 'real' owner (the holder of the legal title) if the former has acquired the property in good faith;
(b) in exceptional cases possession is not necessary, where colour of title is reinforced by registration (for example, Arts 534, 1415, 23(2), 2377(3) civil code).

As to how much protection is afforded, there is a far higher level for moveable property, for the circulation of which every form of assignment must be facilitated. Article 1153 civil code allows ownership of moveable property to pass to a possessor in good faith where the assignor was not the owner so long as an apparently adequate form of transfer can be shown. There is a lesser level of protection for immoveable property and

registered moveable property, where a prescription period operates (Arts 1159ff civil code).

Thus the acquisition of property from a non-owner entails a form of original and not derived title, because effective possession is of more significance than the ostensible form of transfer – delivery is, however, essential to give a legally valid commencement to the possession. The good faith of the possessor is also essential, backed up by an adequate form of transfer. Acquisition is clearly not possible if the purported transferor is merely a bailee, not in possession of the property.

The reason for these rules is that the law wishes to facilitate easy and rapid circulation of ownership of moveable property. It would be difficult for non-registrable moveable property which is subject to no special transfer requirements to prove every time it is assigned that the vendor is in fact the owner of the property. Transfer is not sufficient: delivery is also required. Then if the circumstances give rise to a presumption that the vendor is not the owner of the property, the penal provisions on handling stolen property are applied to different effect.

This provision is named *possession is worth title*, because possession in good faith serves to transfer title. Nonetheless, an adequate form of transfer, such as a sale, is required.

6.15.3. Prescription

To acquire ownership of property whose assignor is not the owner, three requirements must be met:

(a) the property must be moveable;
(b) an apparently adequate form of transfer;
(c) good faith.

If good faith is present but there is no apparently adequate form of transfer, ownership of moveable property and other tangible rights of enjoyment can be acquired after 10-years continuous possession (so-called *abbreviated prescription*: Art 1161 civil code).

If the property is immoveable, the possessor is in good faith and there is a duly registered form of transfer, ownership is acquired after 10-years continuous possession (Art 1159 civil code: *abbreviated prescription*).

In the absence of good faith, or if there is no adequate form of transfer, the possessor can acquire ownership after 20-years possession (Art 1158 civil code). This is known as *ordinary prescription*.

Particular rules govern prescription globally for moveable property, according to the same criteria as for immoveable property. For registered moveable property, abbreviated prescription takes three years, ordinary prescription 10. Ownership of rural land in mountain areas with

structures erected on it is acquired by 15-years' continuous possession (ordinary prescription). A person who acquires rural land in mountain areas with structures erected on it in good faith, and where there is a duly registered form of transfer, acquires ownership five years from the date of registration (Art 1159*bis* civil code, introduced by law no. 346 of 1976).

Even possession in bad faith can benefit from prescription. The difference is that a longer period is required for ordinary prescription and is calculated only from such time as possession ceases to be by duress or clandestine (Art 1163 civil code).

A possessor in good faith can acquire ownership by abbreviated prescription even if he learns of the infringement of others' rights after possession has begun and thus becomes possession in bad faith. This is the *principle of presumption of good faith*. The contrary does not apply, however. If a person begins to possess property in exercise of a minor right in rem he cannot acquire ownership by prescription after the relevant lapse of time if the ground for his possession is not converted by virtue of third-party intervention or a challenge to the owner (Art 1164 civil code in addition to Art 1141 civil code and shift of possession). The time needed for prescription runs from the conversion of grounds for possession.

Prescription is interrupted when the possessor is deprived of possession for a period greater than one year. To acquire by prescription, the time must start running again from zero (Art 1167(1) civil code). The interruption does not apply if an action for recovery of possession is pursued and possession recovered (Art 1167(2) civil code).

6.15.4. Actions in defence of possession

The civil code prescribes various forms of action for possession as well as for ownership. This does not exclude recourse to other forms of action, such as an action for damages as provided by Art 2043 civil code.

The prescribed forms of action have a specific ambit. **Actions for recovery** are appropriate to recover lost possession, while **actions for abatement of nuisance** serve to prevent interference with quiet possession and **quia timet proceedings** serve to prevent anticipated threats of this kind and anticipated acts prejudicial to possession.

These actions are, within their ambit, respectively possessory (actions for recovery and actions for abatement of nuisance) and quasi-possessory (quia timet proceedings). They are very frequently resorted to, because an owner in possession can also avail himself of them and they can be brought against the public administration if it has infringed the rights of others in misapplying authorised powers.

The object of the protection is the de facto exercise of the right to simple possession, and has no bearing on ownership; possession is protected even if it is wrongful or unlawful.

6.15.4.1. Actions for recovery. Actions for **recovery** are brought by a person deprived of possession by duress or clandestine means. The action can also be brought by a bailee who has kept the property (typically a tenant) unless he has done so for reasons of service or hospitality (Art 1168 civil code). The prerequisites for this form of action are that one has been dispossessed (technically *ejected*) in a way that effectively prevents repossession, that the ouster was carried out with an intention to deprive the possessor of the property and that it has been done through duress or in a clandestine manner.

6.15.4.2. Actions for abatement of nuisance. Actions for **abatement of nuisance** are available to those who have suffered interference with possession of immoveable property or with the exercise of a property right over immoveable property or with a floating charge over moveable property (Art 1170 civil code). The action requires the claimant to have been in possession for at least one year and has not acquired it through duress or by clandestine means, or else that such duress or clandestine methods have ceased (Art 1170 civil code).

Interference is any actual or psychological conduct that expresses a will contrary to the possession of another. It can be an action (de facto harassment) such as a discharge, damage to the property or prevention of its use, or an interference with the right, such as when possession is contested or orders are given. In such cases we speak of an intention to harass (animus turbandi) but this psychological aspect is made manifest in acts of nuisance.

It should be noted that the action for abatement of nuisance serves to put a stop to the nuisance, but does not provide recompense. It does not result in the recovery of possession by the victim of the infringement: an action for recovery is required for this. When, however, the ejectment has been effected *without* duress or clandestine means (simple ejectment) the possessor may use an action for abatement of nuisance to recover possession (Art 1170(3) civil code).

6.15.4.3. Quia timet proceedings. The owner, the proprietor of another property right of enjoyment or the possessor who has reason to fear that *new works* such as the construction of a wall or a house or the digging of a ditch undertaken by another party on his land may damage the property he owns or possesses may challenge the work before the court (Art 1171 civil code).

The work must not, however, have been completed, nor have been underway for more than one year. The court may upon examination of the facts prohibit the work from continuing, or may authorise it subject

to conditions to prevent harm to the neighbour. If harm has already occurred, damages are payable.

Furthermore, the owner, the proprietor of another right of enjoyment in re aliena or the possessor who has reason to fear that any building, tree or other thing constitutes a danger of *harm* (apprehended harm) that is both serious and proximate to his property or right may challenge the cause of the danger before the court and, according to circumstances, obtain a remedy to remove the danger (Art 1172 civil code).

These two actions are also referred to as actions of 'denunciation' because they consist of a complaint to the court which has then to verify the allegation complained of. They are *precautionary* in nature, because the harm is in the future and uncertain: the danger is present, but may not result in actual harm.

The difference between the two lies in the fact that the former is directed against an immediate danger resulting from actual human activity taking place on the claimant's or a neighbouring property, whereas the latter is connected with a pre-existing situation which represents a danger (for example, a dangerous old wall). Thus the former is an action brought against whoever is carrying out the works while the latter is brought against a neighbouring possessor or owner who, through *omission*, has neglected to prevent a situation that endangers the claimant's interests.

Chapter VII: Transactions and Contracts

7.1 The means of freedom of transaction

7.1.1. Terminology

In everyday language terms such as contract, agreement, understanding, promise, transaction, business, obligation, undertaking and covenant are used in loose and overlapping ways. In legal parlance, they each have a precise use and meaning. Specifically, **promise** means assumption of obligations by an individual in favour of others (unilateral promise); **transaction** is a historically determined concept expressing the autonomy of private individuals; **obligation** is the relationship between a debtor and his creditor; **undertaking** is a generic expression; **understanding** is commonly used to denote a preliminary contract; **contract** is the agreement between two or more parties to create, modify or extinguish a legal relationship (Art 1321 civil code); **covenant** is found in various set expressions (*oppressive covenant*, *covenant for pre-emption*, *fiduciary covenant*, *covenant of redemption*, and so on) and indicates a special agreement, usually consisting of a single clause; **agreement** can apply to any meeting of minds of legal significance, and is used fairly generically.

Contracts, and more generally legal transactions, are the means whereby individuals (and groups, such as associations and companies) undertake economic activities. There are also legal transactions without economic motives, such as marriage, but they are the exceptions.

Entering into a contract or promise signifies an individual's intention to assume obligations. Thus, contract and promise are expressions of an individual's *will* and *autonomy*.

7.1.2. Private autonomy and freedom of transaction

Autonomy (from the Greek *autos* and *nomos*) means 'law which an individual applies to himself', within a regime of freedom and independence. Private autonomy means the freedom individuals enjoy, vis-à-vis the State, to regulate their own affairs. In a historical perspective, an analysis of the legal forms of private autonomy must be related to

ideas of individual rights and the liberal State. Individual freedom of economic transaction is currently regulated by Art 41 of the Constitution.

Private autonomy means that individuals are free to undertake the activities they wish to, *within the limits established by the legal order*.

When we refer to autonomy we usually mean a particular form of autonomy, that of *contract*, also called *transactional* (*negoziale*, from Latin *negotium*, agreement). At the time of the nineteenth-century codifications, transactional autonomy was at its zenith. It was indeed held that the individual could express his will with complete freedom wherever the State was expected not to meddle (in economic relations). And contract, in the Anglo-American world view, was 'sacred', as untouchable as was property. The field of commercial relations, economic activity and contract generally was an area exempt from outside interference.

Private individuals were, it was said, free and equal in this respect. Free, because they could undertake whatever activities they wished without limits of any kind; equal, because the same freedom to contract was accorded to all. This myth concealed a falsehood: in the period of *laissez-faire*, the State abstained from intervention in the market, but thereby allowed the stronger to dominate the weak, as happened with labour contracts, considered by the standards of any other form of contract. Bourgeois society could not act otherwise, and the same outcomes were produced in quite different cultural contexts, such as the European and the American.

In this period the theory of the **legal transaction** arose. This theory posits in the abstract a system based on the individual will, embracing contracts and unilateral declarations, irrespective of content and indifferent to the position of the individual, whether rich, poor, strong, weak, professional or not, and so on. This construct derives from several prominent exponents of the German Historical School of the mid-nineteenth century, especially Friedrich von Savigny (1779–1861) and Bernard Windscheid (1817–1892), and had two central programmatic features: to *rationalise* the use of concepts and to *provide a single framework* for the rules on voluntary acts (including contracts and unilateral declarations). They sought to *render the legal transaction neutral* ideologically, detaching it from any influence that it may have come under from the economic content of the prestation, the social position of the participants or the circumstances of specific cases.

The idea of legal transaction was a very significant creation, originating in private law and extended (hence adapted) to procedural law by the device of the procedural legal transaction, now known as a *judicial act*, and to public law, both in the definition of the *public law contract* and above all in the theory of the *administrative action* which for many years was thought of as a species of 'legal transaction'.

The idea of legal transaction performed the function of an abstraction which, insofar as it was not rooted in reality, served the purposes of the proprietorial class. It transferred elsewhere the principles which properly belonged to contract (as exchange) and at the same time shifted the focus from the moment of exchange, concentrating attention on the individual elements of the agreement (will, consideration, objects, etc). It was absent from the French code of 1804 and the Italian code of 1865, in both of which contracts, wills and gifts were treated separately. Legal transaction was, however, a feature of the 1900 German civil code.

But the unification of private and commercial law that was completed in the twentieth century brought with it a *materialisation* of agreements. Industrial mass production requires a flexible but certain instrument to facilitate the circulation of property. This instrument is not the legal transaction, a theoretical abstraction, but the **contract**.

The civil code of 1942 does indeed deal in general with *contracts* and not legal transactions. Article 1324 civil code provides that the rules on contract apply, as far as they are compatible, to inter vivos unilateral acts connected with property (acceptance of an estate, renunciation of an estate, unilateral promise, wills, etc).

In Italy, however, the theory of legal transactions has survived the codification of 1942. Academic and case law continue to invoke it, either to champion (in an anachronistic way) the *individual will*, based on an implicitly individualistic ideology, seeing the transaction as a 'guarantee of citizens' freedom', or else for the sake of the values it implies and to exert a practical control over areas outside the scope of contract.

Recently, the concept of legal transactions, viewed from a historical and ideological point of view, has been dismantled. Its fundamental *inclusiveness* has been rejected in favour of returning a conceptual autonomy to the different manifestations of individual will it subsumed: wills, gifts and other gratuitous dispositions, unilateral promises and, finally, the various types of contract, all distinct from one another by virtue of their differing purposes.

It is a phenomenon encountered in other legal traditions. In North America, for example, one hears of the 'death of the contract', meaning the decline and replacement of the abstract theory of contract (of 'transaction' in Italian discourse), in which the parties are deemed to be on a completely equal footing and which celebrates the individual will.

7.1.3. From 'will' to 'declaration'

Is a legal transaction an act of will or a declaration? The question may appear to be merely theoretical, but it has real practical significance because different legal consequences can follow depending on which theory is followed.

The problem arose in the years following the codification of 1942 and has a historical importance today. According to the first theory the framers of the civil code had adopted the **voluntarist** theory which focused attention on the interior forming of the will or consent of the transactor. Testamentary disposition is a final act of will (Arts 692, 695, 1869 civil code). Gift is a contract in which the will to give (*animus donandi*) is of particular importance. The interpretation of a contract requires the common intentions of the parties to be ascertained (Art 1362 civil code). There seem to be many other instances where the civil code has embraced this theory. If this interpretation is accepted, the *subjective elements*, the actual will of the transactor, must be uppermost in evaluating the transaction, and consequently error, duress, fraud and misrepresentation – all the ways in which consent could be 'distorted' – become significant.

According to the other theory, the civil code embodies not the voluntarist, but the **declarative** theory. On this account, the most important thing is not what the transactor intended, but the external appearance, the *manifestation of that will*. So the test is what a person of normal diligence could be inferred, from reading or hearing the declaration, to have intended. Thus, in cases of sham transactions, the declaration takes precedence over the subjective will, and third parties can rely on what appears on the face of the deed (Art 1431 civil code). In interpreting contracts, regard is had to the 'common' intention of the parties, that is, on coinciding declarations. For adherents of this theory, what prevails in evaluating the transaction are the *objective elements*, those which appear to the outside world, not what the transactor had in his mind, but what the intended recipients of the declaration would in good faith believe.

The 1942 codification has in most cases incorporated the principle of reliance and assigned importance to the declaration, but in some instances, such as gifts and testamentary dispositions, importance is accorded to will and intention. The demands of disposing of legal actions and of the modern economy tend to put a premium on appearances, as opposed to subjective intentions, because observable effects are more manageable than the latter, which can only be ascertained by recourse to difficult and uncertain psychological interpretations.

7.1.4. The principle of the protection of reliance and apparent rights

A wish to undertake a given operation, such as an act of disposition, can be expressed in a declaration. A *declaration*, in the legal sense, binds the person who makes it. It often binds him even if the factual situation was in fact different from the one he thought obtained when he made it, or

if he has wrongly evaluated it, or if the party to whom the declaration is addressed could not possibly have interpreted it in the way that the declarer intended and has in fact interpreted it as a hypothetical reasonable person would have done. In these cases, instead of protecting the declarer's wishes (an interior will, manifested or otherwise, but in any case different from what he would have intended had he known the real facts of the matter) they are postponed to the interests of the other party, who has acted on a *basis of reliance* by placing his faith in the declaration. The *apparent* prevails over the *real* situation.

This principle is expressed by the formula **protection of reliance** or **protection of appearances**. It prevails when a given factual or legal situation does not apply in the absence of knowledge of it on the part of another party or if it is at odds with a conflicting apparent situation.

The reasons for this principle are both historical and practical. They are historical, in that they emerged only once academic law began to downgrade the importance of the subjective will of the declarer; and practical because, especially in commercial relations, it is better to give effect to what appears to be the case rather than have to ascertain what the declarer actually intends, so as to save time and give certainty to legal relations. They are thus reasons of a general nature, but the rules also have their basis in the protection of particular interests, favouring those of the person who receives and relies on a declaration.

7.2. The elements of a legal transaction

7.2.1. Declaration, object, subject matter, form

A legal transaction, being an abstraction comprising any manifestation of will that produces legal effects, can be broken down into its separate parts. Each of these is subject to a particular set of rules, depending on whether it concerns contracts or unilateral acts. Some acts have a regime to themselves, especially wills (unilateral act) and gift (contract). The characteristics of each of these will be detailed in the appropriate place. Here a few general remarks will suffice.

The elements of a legal transaction are d*eclaration, object, subject matter* and *form*. All of these must be present. If one is missing the transaction is ineffective, technically 'void'. The general rule is that form may be freely chosen, so a particular form is only required where specified by statute.

Will is manifested by means of a **declaration**. According to traditional theory, declarations can be divided into *declarations of will*, whereby specific obligations are undertaken such as in a unilateral promise and *declarations of knowledge* whereby the declarer attests to certain statements of fact, as, for example, in a confession. A declaration is

immediate if it produces immediate response received by the other party. It may be made by *express* words, writing or gesture or else be *implied* from conduct that unequivocally indicates the declarer's intentions (so-called *conclusive conduct*). *Silence* has no effect, except for in certain situations expressly provided by law, for example, in mandate where the agent must communicate to the principal without delay that the task entrusted to him has been carried out and if the principal does not reply he is held to have approved the agent's actions (Art 1712 civil code)

The **object** is the outcome that the transaction is calculated objectively to produce. It must not be confused with *motive*, the outcome that the transaction is subjectively intended to produce, which is legally irrelevant.

The **subject matter** is whatever the declarer is making disposition of, in other words the content of the legal transaction.

The **form** is the manner in which the transaction presents to the world.

For example, a contract by which A acquires a flat from B can be broken down into the *agreement* (that is, the consensus between the parties that they intend the transfer of the property from B to A), the *object* (the transfer itself of the flat at a price of €75,000), the *subject matter* (the flat and the purchase price) and the *form* (the conveyance, required in this case by Art 1350 of the civil code as a transfer of immoveable property is involved).

7.2.2. Essential and incidental elements

The requisites mentioned above are essential because if any one of them is absent, or defective in the sense of contravening mandatory rules, public order or public morals (Art 1418 civil code), the transaction is *void*. If there is no agreement, there is no valid transaction, similarly if the subject matter is illegal or impossible or if the object is contrary to public order or public morals, and so on.

Alongside these elements, the transaction may have others which, while not indispensable, can influence its effect: these elements are *incidental*. The contract is not weakened by their presence or absence, but if they are present they are just as important as the essential elements. The *incidental* elements are *conditions*, *transaction period* and *modus*.

7.3. Defects of consent

7.3.1. Mistake

There are cases in which consent is manifested, but would have been formed differently or not at all if the parties, or one of them, had been

aware of certain circumstances, or not been influenced by a fraud or duress by the other or a third party: in other words, if the will of the two parties, or one of them, had not been *vitiated*.

When this happens, when consent is distorted, a **defect** is said to occur. If A believes that the watch B is trying to sell him is made of gold, and is induced to buy it and finds out later that it is in fact only gold-plated, the sale contract can be annulled at A's request, because his will has been vitiated by mistake. If by means of threats C obliges D to sell him some land, D's will is vitiated by duress. If E induces F to make him a loan, convincing him with false documents that he is completely solvent, when he is in fact on the verge of bankruptcy, F's consent is vitiated by E's fraud.

Mistake, **duress** and **fraud** are 'defects of consent' and render the transaction voidable (Art 1427 civil code).

Mistake is a false appraisal of reality. It is a concept that can be either *impeditive* or a *fatal* defect.

Impeditive mistake concerns the declaration, that is, the way consent is made manifest, such as writing 865 instead of the intended 875 or mistranslating from a foreign language.

Fatal mistake, on the other hand, concerns the formation of consent itself, for example, believing a fake Ming vase to be genuine.

The same set of rules applies to both impeditive and fatal mistake. In the previous code, only the former, considered the more serious, rendered the transaction void.

Mistake can be *of fact*, relating to external circumstances (such as the gold watch and the Ming vase), or *of law* when it concerns the existence, scope or applicability of a legal rule. As an example of the latter, A believes he has bought a piece of building land but later discovers it has been designated public open space and so cannot be built on. It may be said that a mistake of law concerns the legal nature of the subject matter. Like mistake of fact, it can only be grounds for voidability when it was the only or principal reason for the contract.

Mistake can also be *unilateral*, where the consent of only one party is vitiated, or *bilateral*, where the consent of both parties is vitiated, but in different ways. For example, A believes that the vase is a Ming, while B equally mistakenly thinks it is Chinese, but from the eighteenth century. *Common* mistake occurs when both parties' errors amount to the same mistake, such as if the vase was from the fifteenth century or indeed was a perfect copy and not an original. The reliance principle does not apply to bilateral and common mistake.

In the former code there was another feature of mistake: *excusability*, which obtained if a person of normal diligence would not have avoided falling into it, and so no blame attached to it. Mistake in the current code is evaluated according to different criteria, those of *fundamentality* and *patency*.

Mistake is fundamental in these situations:

(a) when it affects the nature or the subject matter of the transaction (e.g. a watch is made of silver and not of platinum). A wishes to buy a used vehicle. He visits B's garage and sees vehicle X. He then test drives vehicle Y and buys it, thinking it is vehicle X. The mistake is as to the identity of the subject matter. The mistake is fundamental, similarly, when it affects characteristics of the subject matter which a reasonable observer would consider crucial for consent or where specific circumstances make them so;
(b) when it affects the identity or characteristics of the other contracting party, in cases where one or the other are crucial for consent. A engages B to edit a daily newspaper with the proviso that he had never compromised with fascism. He later finds that B had been purged. Obviously, not all characteristics have sufficient importance, only those which have a practical effect, bearing in mind the circumstances (for example, whether the other party is solvent or a bad payer). Identity and circumstances are particularly important in transactions stipulated to be *intuitu personae*, that is, made with people in whom enough confidence must be placed to allow them to be entrusted with especially delicate tasks;
(c) when, in cases where there is a *mistake of law*, it was the main or only reason for undertaking the transaction. Mistake of law must not be confused with *ignorance of the law*, which is never an excuse. It is not always fundamental, either: only when it was the main or only reason for undertaking the transaction. Suppose A is a foreign tourist who buys a painting by Raphael to take home with him. He then discovers that Italian law prohibits the export of works of art. He had no wish to circumvent the law, but he intended to buy only if he could take the picture back with him. The mistake negates the sole reason for the contract.

It will be noted that mistaken reasons are not listed among the varieties of fundamental mistake. It is not usually legally relevant and we shall see why below. (A buys a flat in Rome, thinking he is going to be transferred there, but does not say so to the vendor. The transfer does not materialise, but A cannot do anything about the mistake as it affects his motives for deciding to purchase.) Mistaken reasons are relevant only in testamentary dispositions, when it appears from the instrument and is the only reason why the disposition was made (Art 624(2) civil code), and in gifts again where it appears from the instrument and is the only reason which induced the donor to exercise his liberality (Art 787 civil code).

7.3.2. Duress

Duress takes the form of threats or undue pressure that induce a party to enter into the transaction. Moral duress (inducing fear) is distinguished from physical (being bodily forced to sign). Only the former is a defect of consent and as such renders the transaction void; the latter is, however, evidence of an absence of consent, and as such constitutes the absence of an indispensable element, from which nullity and not the voidability of the transaction will follow. The difference between nullity and voidability will be examined below at para 13.2.

To be legally relevant moral or psychological duress must amount to a *serious* and *unjustified* threat, that is, one sufficient to 'so impress a reasonable person as to make him fear serious and unjustified injury or damage to his person or property'. Regard is had to a person's age, sex and condition (Art 1435 civil code). In short, not every threat or pressure will suffice: it has to provoke fear in a 'reasonable' person in order to be grounds for voidability. Thus the test is to consider whether a reasonable person of the same age and sex as the complainant would have felt compelled by the other party. Fear deriving from an exaggerated deference towards the other party is not sufficient grounds (Arts 1437, 122(1) civil code).

Duress is always serious, even when carried out by a non-party to the transaction, and it is not necessary for the non-party to be in collusion with the other party: duress is unacceptable in itself and is to be suppressed and punished by law.

Duress is also serious when it is directed against a spouse, descendant or ascendant of the contracting party. If directed against another person, duress may make the transaction voidable at the court's discretion (Art 1436 civil code).

To count as duress, a threat must also be *unjustified*, that is, distinct from a *threat to exercise a right*.

7.3.3. Fraud

Fraud is any deception, simulation, dishonest behaviour or trick which serves to deceive the other party into concluding the transaction. Contractual fraud denotes precisely an intention to deceive. Extra-contractual fraud on the other hand consists of an intention to cause harm (Art 2043 civil code).

Fraud can be *by commission* if it results from a positive act, such as when A tells B that the watch is made of gold and inscribes it with a hallmark, even though it is in fact only gold-plated. Fraud is by omission when it consists of silence (A does nothing to disabuse B of his evident misapprehension that the gold-plated watch is solid gold).

Fraud requires an intention to deceive, but it is not possible to examine in detail the internal psychological processes giving rise to the

deception. Hence it is necessary to examine the external circumstances from an objective point of view.

Fraud can be further divided into **fundamental** and **incidental** forms. It is *fundamental* when the trick used by the dishonest party is such that, had it not been employed, the other party would not have concluded the contract (Art 1439 civil code). It is *incidental* when it is insufficient to vitiate consent: the innocent party would still have concluded the contract, but on different terms (Art 1440 civil code). An example: A has an unshakeable intention to adorn his house with a Ming vase; he would thus certainly have been willing to buy the vase offered by the antique dealer in any case, because he found the designs so magnificent, but he would have paid a much lower price had he known that it was a perfect copy and not an original.

The consequences of these two types of fraud are different. Incidental fraud does not *entail* avoiding the contract. The contract is valid, but the party who acted in bad faith is liable to damages (Art 1440 civil code). With fundamental fraud the contract is void and the fraudulent party is also liable to pay damages to his victim.

It should also be noted that when fraud is responsible for mistake by a party, the contract can be avoided even if the mistake itself is not fundamental and patent, because it goes to the root of consent.

In *unilateral transactions* reliance is not protected, because there is no other party. Regard is had, therefore, to the will of the transactor, and to the criterion of **fundamentality**. Of the two, the exercise of will becomes the predominant factor in whether an interest deserves protection. In some cases it is the determining factor, as when a testator had a *mistaken reason* for making a disposition. In these cases, however, 'reason' is not to be understood in any psychological sense, difficult to assess, but in an objective sense, as a *circumstance* that has influenced the transactor's will (Art 624 civil code).

7.4. Object and reasons. The contractual type

7.4.1. Concepts

The **object** is its scope, what the transaction is about. When A sells his car to B the scope of the contract of sale consists of the exchange of the thing (the car) for the selling price (say, €2000). When employer C takes on worker D the scope of the employment contract consists of the exchange of C's labour (as driver, doorman or secretary) for his or her remuneration (wages or salary).

The object is thus the *economic function* which the concluded contract fulfils. In the economic operation involved in sale and purchase, the object is exchange. In a will, a unilateral act, the object is the

distribution of property after the testator's death. For a gift, the object is the enrichment of the donee, and so on. It is thus an element present in a consistent manner in all transactions of a particular type, nature and category.

Object should be distinguished from **reasons**, which are individual motivations, or the circumstances inducing the individual to undertake the transaction, such as when A sells his car in order to raise money to buy a house, or C makes a gift to D because D is about to marry, or E decides to take F on because his business is expanding and so he needs extra workers. F may be seeking work because he no longer wishes to depend on his parents' goodwill and wants to live independently of his family.

Reasons are too many and varied to enumerate, and one party's very often differ from those of the other party. They may be defined as factors *extraneous* to the object.

The distinction between *object* and *reason* is not, however, as simple as might appear. Indeed it can vary according to whether reasons are considered as *objective circumstances* (and not merely internal psychological phenomena) or else an object can take on a *subjective* dimension as the manifestation of will.

7.4.2. Characteristics of the object

The object must be legal and deserving of protection. It is not lawful when it contravenes mandatory rules (for example, a lease for rural land that does not safeguard the farmer's interests in conformity with the relevant statute) or is contrary to public order (such as a contract impeding a candidate from standing for election) or to public morals (a contract for prostitution: Art 1343 civil code).

The object must not be nugatory, that is, it must produce some economic utility so as to give rise to interests which are, as mentioned above, deserving of protection (Art 1322(2) civil code).

The object is an *essential element* of the transaction; it must always be present in order for the transaction to be valid. There are some types of legal act whose object, albeit present, is (to employ the usual terms) *severed*, *earmarked* or *immaterial*, that is, they do not take account of the grounds on which the act was concluded. As a rule, in bills of exchange no account is taken of the object for which payment is made: it could have been to pay for a loan, for a refrigerator or what have you. In these cases, a contract with severed objects is termed *abstract*.

'Object' can be conceived of in various senses. It can be seen in a subjective sense as the motivation behind an act of disposition, or in an objective sense, as a recurring feature of all acts of a given type. It can be seen as a feature of private business relations used as a *control instrument*

by the legal system to select which interests to deem worthy or unworthy of protection, a feature that can thus be said to give the object a 'social' dimension. It can also be seen as a *basis for contractual risk*, as an objective ground for justifying, in the domain of private relations, the assumption of risk by the contracting parties. Thus are definitions of object numerous.

On occasion an object has been used to establish the binding character of a promise – a promise without an object is not legally valid – to establish the lawfulness of prestations provided for in a contract and the identification of defensible interests.

The 1942 code encompasses an idea of object understood as a 'socio-economic function' of a transaction: *economic* because the transaction is understood as a deal that brings profit to the parties, *social* because it permits the regulatory regime to exercise control over business done in private. Transactions that are unlawful or lack an object are void, because they have no legal effect (Arts 1321, 1243, 1418 civil code).

Whereas the socio-economic function theory accentuates on one hand the collective aspects of control, it provides no grounds for another significant feature of the object, the private aspect, since an object also justifies the conclusion of *private dealings* between the parties.

If conformity with collective interests is the only matter taken into account in controlling the object, to the exclusion of its adequacy to bring about the exchange, such control overlooks all purely private (as opposed to public or collective) interests. What the parties have contemplated and the expectations and so on that they intended to realise are important and touch the object of the transaction. Hence the theory that includes these private interests within the ambit of legal control and defines the object as an *individual-economic function* of a transaction.

7.4.3. The contractual type

The object must be distinguished from the *type*, that is, the schema, the distinguishing character of the transaction. The type of a sale contract is usually manifested by the exchange of an object against a purchase price, but there are other varieties that conform to this type, such as guarantees, duties to deliver and so on. The type is therefore also the *category to which the transaction belongs* (sales, transport, insurance, etc).

A type may be legal or social. It is legal if the transaction is subject to express statutory regulation (such as standard contracts in Book IV of the civil code). It is social if widely adopted in practice without there being a corresponding legal discipline. An example is the *leasing* contract by which an item is provided for the use of others on payment of rent, with the provision that at the end of the rental period the hirer may return the item or buy it at a reduced price. Other examples are supply contracts

and technical assistance contracts. Parties are at liberty to choose the legal type they want, or indeed to create new types (Art 1322(2) civil code). A transaction of a legal type is standard, without a legal type it is *non-standard* or *innominate*.

7.5. Sham transactions

7.5.1. Concepts and types

A sham transaction occurs when when there is a deliberate discrepancy between the will and the declaration. This discrepancy can also result from *non-disclosure* or when A says he wishes to sell his flat when really he has no intention of doing so. But in these cases, where the lack of candour remains in the mind and is not made explicit or revealed in other ways, it is unimportant.

With a **sham transaction**, however, the discrepancy is revealed because it involves an actual agreement between the parties, or between the parties and a third party, by which it is sought to make things appear as they are not. The contract by which the parties create the fiction is thus known as a *sham contract* or agreement. The agreement by which the real and effective intentions are set out is known as the *counter-deed*. The contract which the parties really intended to conclude is known as the *hidden contract*.

A distinction can be made between an *absolute* and a *relative* sham transaction. It is **absolute** when the parties declare that they wish to undertake a certain transaction, but in fact they do not wish to undertake anything. It is relative when the parties ostensibly conclude one transaction, while in reality concluding another: this is *misrepresenting the nature of the contract*. For example, A and B create the appearance of a sale contract, when in reality a gift is being made. Another situation is where the parties pretend to have agreed a contract between them, when in fact one of them is contracting with someone else. So if A makes a sham contract with B while in reality making a hidden contract with C, B can appear to the world as the owner of transferred property, when in fact the real assignee is C: this is *misrepresentation as to parties*. Finally, there is misrepresentation as to subject matter, for example, as to price, as where A and B declare the cost of a lease as €5000, when in fact €25,000 has been paid.

A sham transaction is not in itself illegal, as such pretences at agreement are not always calculated to harm others or to evade the law. For example, if A wishes to make a gift to a person of whom his family does not approve and ostensibly sells the thing to that person, the transaction is legal. In most cases, however, sham transactions are an attempt to circumvent the law; for example, payment of taxes can be

evaded by misrepresenting the price or the nature of the contract, or similar devices can be intended to defeat creditors.

7.5.2. Effects of sham transactions

Among the effects of sham transactions it is necessary to distinguish those affecting the parties and those produced on third parties.

Sham transactions do not produce effects between the parties (Art 1414 civil code). The hidden contract has effects, since it has the formal and substantial characteristics required by the law (Art 1414(2) civil code). In the case of a sham sale which hides a gift, the gift takes effect if there has really been no payment and it is affected by a public document. In absolute sham transactions, the counter-deed can be made in any form.

There is no legislation designed to give reality priority over appearances. If there were, third parties acting on the strength of appearances would be prejudiced. The regime on sham transactions is rather complicated vis-à-vis third parties. The reliance of third parties must be protected, but there are different categories of third parties and not all are protected in the same way. The rules aim to achieve a compromise between diverse third-party interests.

7.5.3. Proof. Particular types of sham transaction

Proof is particularly significant where sham transactions are concerned. How are third parties or creditors to prove that a transaction is sham? The main evidence is furnished by the counter-deed, that is, the document in which the parties have declared their true intentions. But this document is not always available to third parties or creditors, indeed it may be jealously guarded by the parties. However, the code does not set limits on the ways third parties may prove the existence of a sham, and they may rely on other testimony. The situation is different for the parties, however. They must have the counter-deed to prove it, with just one exception relating to an illegal sham transaction: in such a case, so that the lawful may prevail over the unlawful, any kind of evidence (including testimony) is admissible to reveal a sham transaction.

A specific regime applies to sham *marriage arrangements* (Art 165 civil code). Third parties may prove that they are sham. A written counter-deed may be effective vis-à-vis those who are party to it only if it was made in the presence of and with the simultaneous consent of everyone involved in the marriage arrangements.

Similarly specific is the regime applying to a sham *marriage*. The marriage may be challenged by either of the spouses where they have agreed not to perform their marital obligations, nor to enforce the rights

arising therefrom. The action must be brought not later than one year after the marriage is celebrated, and cannot be brought where the contracting parties have lived together as spouses since the marriage ceremony (Art 123 civil code).

Bilateral legal transactions are not the only type that can be sham. Unilateral immediate legal transactions can be sham as well. They cannot occur, however, in declarations intended for the public or unspecified persons.

It is a matter of debate whether a sham *will* is a possibility. An absolute sham is inconceivable, because the testator has no interest in making any disposition that does not reflect his testamentary intentions. A relative sham could occur only in the case where a person intervenes for the benefit of someone under a disability. In such a case, however, the real intention must prevail (Arts 599, 627 civil code and see also *fiduciary provision*). Non-disclosure cannot apply here either, because what counts is the intention disclosed on the face of the will.

7.6. Object and transactional framework

There are transactions in which the object functions in an anomalous way, either because it is against the public interest or because it raises issues of confidence, or again because it produces effects over and above those intended by the parties.

7.6.1. Unlawful transactions

A transaction is unlawful when: it contravenes mandatory rules, or is contrary to public order or public morals; when the reason (being a determining factor common to the parties) for it is unlawful; or when the conditions or subject matter are unlawful. An unlawful transaction is void.

Control of the lawfulness of the object is applied both to standard and to non-standard contracts. The object of the former may be unlawful because the parties have pursued an objective that contravenes mandatory rules, or is contrary to public order or public morals. The parties to non-standard contracts, such as *leasing*, have freely created the model of the transaction they are undertaking. The lawfulness of the object is, however, presumed. The burden of proof before the court is on him who would show otherwise.

7.6.2. Transactions to circumvent the law

An object is unlawful when the transaction serves as a means of evading the application of a mandatory rule (Art 1344 civil code). These are

transactions calculated to circumvent the law. The parties usually attempt roundabout means to achieve an illicit objective that could not be realised by a transaction that produced it directly. Transactions calculated to circumvent the law are therefore indirect, but the corollary does not follow: not all indirect transactions are calculated to circumvent the law. For example, before the law prohibiting gifts between spouses was repealed (Art 781 civil code) a husband intending to make a gift to his wife could make her a bailee of the item without requiring her to account for it. It achieved the objective, but the prohibition was avoided. In these cases the rules are ex hypothesi mandatory, not subject to derogation, otherwise a straightforward transaction would be effective. In the same way, the aim of the law infringed must be considered: a transaction that gets around tax law is not void, because tax fraud is a violation for which sanctions are provided in the fiscal regime itself.

Transactions calculated to circumvent the law are void.

7.6.3. Fiduciary transactions

A fiduciary transaction is one that incorporates two relationships. One is a *relation in rem* that transfers a right and the other, the trust covenant, a relation of obligation based on trust, by which one party, the trustor, places a duty on the other, the trustee, to transfer the right either back to him or to a third party or parties.

The reasons why the trustor decided to carry out the fiduciary transaction are of great importance. A fiduciary transaction effectively carries a transfer within itself. There is no apparent transfer created and yet it is not the same as a sham transaction. When the trustee transfers the right to third parties a *real intermediation*, as opposed to the fictional intermediation referred to above, takes place.

Fiduciary transactions are of two kinds: 'with a friend' and 'with a creditor'.

With a friend means that as a matter of trust, the fiduciary transaction is normally concluded with persons in whom one can place confidence, since it transfers property to all intents and purposes, and the trustee acquires the legal title. If A, for example, has to go abroad on a long journey, he can enter into a *fiduciary sale contract* with B, transferring his title in land to B who undertakes to sell it back to A on his return.

With a creditor means that the fiduciary transaction can operate as a means of guarantee, for example, in the form of a *mortgage*. C urgently needs a sum of money he does not possess, so he turns to D for a loan. D requires guarantees of repayment so he asks C to sell him a flat. The sum realised on the sale becomes the loan. D becomes owner of the flat immediately, but will sell it back to C on repayment of the loan.

This situation should not be confused with the prohibited *covenant of forfeiture*. This was the name given to an agreement whereby the creditor became owner of property immediately upon the debtor defaulting on repayment. In practice, however, it is not always easy to tell a mortgage from a covenant of forfeiture.

It should be noted that with Law no. 364 of 1989 Italy has ratified the Hague Convention on trusts. In these years this typical common law figure has been seeping in Italian legal practice. Very recently an Art 2625 *ter* has been introduced in the civil code in order to allow a segregation of one's estate for lifetime or for 90 years bringing about a result very similar to that of a trust.

7.6.4. Indirect transactions

A transaction is indirect when the parties conclude it with the intention of bringing about by oblique means the outcome of a different transaction. The means adopted by the parties are said to fall outside the scope of their intended outcome.

As an example, M wants to give property to N, but for various reasons does not wish to execute a deed of gift. So he concludes an irrevocable agency contract with N with no duty to account. N acquires the property and may dispose of it as he wishes even if he is not the actual owner. The desired outcome is achieved, even though by a means (*agency*) different from the normal and direct means of a *gift*.

Indirect transactions are therefore *not a typical form of transaction*. It takes one of the various forms which the parties employ with the intention of achieving by indirect means the outcome that they could have accomplished directly by other means.

Indirect transactions are to be distinguished from unlawful transactions, because the outcome sought by the parties may be lawful; and they are to be distinguished from sham transactions, because there is a genuine outcome sought by the parties.

7.6.5. Mixed and complex transactions. Linking of transactions

Imagine the situation where A wishes to have some friends stay as guests for several months and puts a flat at their disposal without charging them any rent. The friends B and C, however, want to contribute to the expenses that A will incur in putting them up for a prolonged period and so they pay each month a modest sum, less than the market rent would come to, to defray these expenses. The transaction is partly a *loan for use*, because this corresponds to what A provides, but it is also partly a *letting*, because while the use is free the friends pay a small sum of

money. So the contract is of a kind which combines two standard types (loan for use and letting) and which is known as '*rewarded sufferance*'.

In this instance the transaction is described as both **mixed** and **complex**. A complex transaction results from combining different forms of transaction which the parties consider as one because it represents a single operation with one purpose and function, a single and self-contained agreement.

A sophisticated distinction can be made between mixed and complex transactions, since the former (for example, selling at a price so low as to appear almost like a gift) is based on just one form of transaction (sale) but imports variations in the guise of clauses borrowed from another form.

What rules apply to between mixed and complex transactions? There are two criteria. *Absorption* obtains when one of the forms employed is so predominant that the others are subsumed into it. *Prevalence* obtains when the forms are equally significant but the parties foreground one of them on account of the end sought.

Linked transactions should be distinguished from mixed and complex transactions. Two *different* and mutually independent transactions may be linked by what we may term *functional* considerations. It is only the practical purpose that the parties seek to accomplish that links them, whereas a complex transaction is a single contract with a single aim.

7.7. The subject matter and content of the transaction

7.7.1. Concepts

Articles 1346–49 of the civil code provide rules to govern the **subject matter** of a transaction. Subject matter of a transaction should be distinguished from the subject matter (or prestation) of an obligation and in turn from the subject matter of the prestation itself, which is the action or abstinence required of the obligor (to do, to give or to refrain). The subject matter of a transaction is, however, often identified by a kind of transposition with that of an obligation. The subject matter is thus the thing or activity on which the transaction is based. In a sale contract, for example, the subject matter is the thing sold and the purchase price; in a letting it is the flat rented and the rent paid for it; in a loan it is the money lent and then repaid; and in a delivery contract it is the thing sent and the price paid for delivering it.

Subject matter is distinct from the object, which is the aim of the transaction.

The idea of *subject matter* derives from a naturalistic view of legal relations. When transactions became subject to statute, the ubiquitous

sale contract was the model uppermost in the legislator's mind. In the exchange contracts that it typifies the subject matter – the thing sold – can be readily isolated, indeed is physically present and visible. In other contexts the subject matter is less easily identifiable. For example, in an employment contract does it inheres in the force, the energy expended by the worker? Or is it the activity she or he pursues?

On these grounds the abandonment of the term 'subject matter' may be proposed in favour of the **content** of a transaction: *the content of a transaction is the totality of obligations, rights and duties that delineate that transaction*.

For simplicity of explanation and to remain faithful to the wording of the law, we shall continue to speak of subject matter, but it must be borne in mind that this is a debatable concept of uncertain meaning.

7.7.2. Characteristics

The subject matter must be *legal*, *possible*, and *certain* or *ascertainable* (Art 1346 civil code).

It must be **legal** in the sense that the transaction must not contemplate prestations or activities prohibited by law. The subject matter of the activity of prostitution (providing sexual services for payment) is illegal. The subject matter of the sale of State property (in the 'domain' category) would be legal, since it is in itself an economic good, but impossible, since it is placed outside the scope of commerce. Similarly, the sale of property that has been destroyed will be impossible. If, however, the subject matter exists and can be disposed of by an economic operation launched by the parties, then it is **possible**.

The subject matter can be something that does not yet exist, but will do (Art 1348 civil code). In this case the transaction involves a future asset.

The subject matter must be **certain**, that is, specified. 'The flat situated on the 4th floor of no. 5, Main street, market', for example, or '1 ton of laminates', '300 kg of wool', etc. It is **ascertainable** if the parties have laid down the criteria by which it may be specified. For example, the price for 300 kg of wool may be that obtaining on the commodity exchange 2006 in Genoa on 30 April. Or the subject matter may be ascertained by a third party, who cannot make his determination arbitrarily (unless the parties have agreed that he may), but must use his discretion so as to reach a fair assessment (Art 1349(1) civil code). If the third party does not reach a determination, or it is unfair or mistaken, the court may do it in his place. If the determination was to be merely arbitrative and has not been carried out, and the parties cannot agree on the relevant terms, the transaction fails for want of subject matter.

7.8. Form

7.8.1. Concepts

Form is the outward appearance of the transaction as drafted, or as representing the intention behind the transaction. Form is usually left in Italian law to the choice of the parties under the principle of *freedom of forms* (other legal systems, such as the ancient Roman Law, are or were different). In specific instances, however, a form may be prescribed by law, and the transaction must conform to it, either to be admissible in evidence in legal proceedings, or, depending on the case, to be valid at all. The first situation is said to require a prescribed form *ad probationem* and the second, *ad substantiam*.

When a prescribed *legal form* is required, or the parties agree to use one (*contractual form*), it becomes fundamental to the transaction. If the prescribed form is not used the transaction is void, as it lacks one of its essential elements.

Solemn form, meaning executed in the presence of witnesses or with particular formalities which give the deed something of a ritual flavour, was necessary at one time when forms emphasised the significance of the deed for private parties and its legal importance. Form was often the only fundamental element of the deed, since an object was not indispensable. For reasons of economy, the speeding-up of circulation and commerce, changing habits, the loss of the 'sacral-magic' aspect of the law, and so on, have progressively changed the rules on form to the point where today rules requiring transactions to be in a specified form are the exception rather than normal practice.

Form is connected to giving notice of a deed or document by *entry on a register* and with *judicial evidence* in civil trials. The form of inter vivos dispositions and last wills is regulated by the law prevailing in the place of their execution, or where the substance of the deed is regulated, or of the national law of the disponer or of both parties if they have the same nationality.

Oral form is the most common: the will to transact is evident either from words spoken or from unambiguous conduct (such as when one places an item in a supermarket trolley).

Written form is where the will of the parties is substantially reproduced in *documentary* form, either on plain paper or, for tax purposes, on stamped paper, of which there is a variety prescribed for judicial acts such as a summons or pleadings.

Public document form is where the deed is executed with the assistance of an authorised public official or a *notary* (Art 2699 civil code). This form exists in an even more solemn variety: sometimes the presence of two witnesses is required as well (the *public testament*, Art 603 civil code).

7.8.2. Characteristics

Form may be legal or contractual. It is *legal* when required in one of the situations exhaustively prescribed by law, and *contractual* when the parties have agreed on its use.

Contracts for the following must be either in the form of a public document or a private deed: to create, modify or extinguish rights in immovable property; deeds of renunciation of a minor interest in immovables; antichresis (Art 1960 civil code), by which the debtor undertakes to deliver, but not transfer, immoveable property to the creditor guaranteeing the debt through use of the revenues; leases for a term longer than nine years; company or association contracts that confer the enjoyment of immoveable property or other rights in immoveable property for a period longer than nine years or for an indeterminate period; perpetual and life annuities; acts of apportionment; and settlements and other deeds that the law requires to be in writing.

If the required form is not complied with in any of the above cases, the transaction is void *ad substantiam* because an essential element is absent.

As to contractual form, unless the parties stipulate otherwise, once they have agreed on its use non-compliance is presumed to be fatal to the transaction.

Form may, however, have only evidential significance (for example, to establish whether a debt has been paid). The court may, taking the circumstances into account, admit *testamentary* evidence in its place (Art 2726 civil code), but the rule usually requires *written evidence* (generally in the form of a written receipt or other suitable form of release). Written form in these evidential situations is required *ad probationem* and does not affect the validity of the transaction per se or modify its effects, though it makes enforcement more difficult.

7.9. Incidental elements

7.9.1. Conditions

A condition is the means whereby the parties insert into the transaction the specific intentions which induced them to negotiate it. This too is an expression of the freedom to transact, but not all transactions are subject to conditions; marriage and the acceptance of an inheritance and bills of exchange do not permit of them.

A condition is, depending on its effects, either *precedent* or *subsequent*, and depending on its nature, *of fact* or *of law*.

A **condition precedent** makes the effect of the transaction dependent on the occurrence of an uncertain future event.

T promises Z that he will repay his debt within a month if in the same period A has repaid him (T) the debt he in turn owes. The condition consists of an event, repayment by A. The payment is future, not present, because A has yet to pay T. It is uncertain, because it is not known if A will pay. Or M promises N to give him a sum of money if a certain ship arrives from the Middle East. The journey is dangerous and uncertain, as there is a war on. So the fulfilment of the condition is not certain. The event is future and uncertain and it is not known if the effects of the promise will be realised.

By a **condition subsequent** on the other hand the parties make the realisation of the effects of the transaction depend on the occurrence of the condition, an uncertain future event.

A buys a plot of building land from B with the condition that the contract will be ineffective if within a year the area is scheduled as a public green space, on which building is prohibited.

A condition is one *of fact* if the event is a natural fact (such as a ship arriving from the Middle East) and *of law* if it depends on some legal provision (such as the revocation of building permit).

A condition is: '**potestative**' if its realisation depends on one of the parties (if, for example, he travels to San Francisco); **contingent** if it depends on an external event (such as Norway joining the EU); and **mixed** if it partly depends on the will of one of the parties (such as the Banking institution accepting my request – for a loan).

If the occurrence of the condition depends entirely on the mere will of one of the parties (the so-called '*merely potestative condition*'), the legal duty is dependent on that party's whim ('I'll pay if I feel like it') so if there is a condition precedent non-occurrence renders the transaction void (Art 1355 civil code), while a condition subsequent produces effects in any case.

The condition must be lawful and possible. An unlawful condition is one that is contrary to public order, public morals or a mandatory rule, for example, offering to buy stolen goods or offering inducements not to stand for election, and is not only void but renders the whole contract void (Art 1354(1) civil code), unless the condition refers not to the entire deed but to a single clause, in which case only the clause is void (Art 1354(3) civil code).

An impossible condition ('I will give you £1000 if you touch the sky with your finger', to cite a classic textbook example) renders the contract void, but a condition subsequent of this kind is merely excised from the contract (Art 1354(2) civil code).

7.9.2. Transaction period

The **transaction period** concerns the dates on which the effects of the transaction begin or end. For example, A employs B as a lifeguard for a

period of three months. The employment contract begins on 22 June and ends on 22 September of the same year. It is certain that the contract will end on the latter date. If, however, the initial date is not expressly stated but it is agreed that A will employ B when the latter ends his studies, then the fact that the contract will begin is still certain but the initial date is not. Transaction period is to be distinguished from a condition because the future event is certain, while a condition is an uncertain future event.

The *transaction period* is a special case of the *legal period* or *legal time limit*. There are time limits for performance, time limits for testamentary dispositions (Art 637 civil code), and so on.

7.9.3. Modus

The **modus** or **modus burden** applies only to gratuitous transactions (such as a gift, legacy or interest-free loan). It creates an obligation on the part of the beneficiary that can be owed either to the transactor or to a third party. There are many examples in connection with wills. So if A receives a bequest of €50,000 on the condition that he causes a chapel of remembrance, or a hospice, or similar, to be erected, he may carry out the condition if he has an interest in doing so, but it is nonetheless a burden. Supposing he does not carry it out? If the task was the only reason that the testator made the bequest, then the bequest will fail if the legatee does not carry out its terms (Arts 648, 793 civil code). A case can be brought upon non-performance only by those who would benefit from the failure of the bequest, in effect the residuary beneficiary of the will. If there is delay in performing the task a request to complete it may be made to whomever would have an interest in doing so, for example, the local authority in the case of a hospice.

7.10. Interpreting a transaction

7.10.1. Concepts

It sometimes happens that the expressions used, whether orally or in writing, to define the terms of an economic operation are understood in different senses by the parties.

For example, when the contract is executed, A thinks he has to keep his part of it in a certain way, but B points out that something different is expected of him. Or C delivers an item to D, but D refuses to accept it, because he thinks it is different from the item contracted for. Often the expressions employed are obscure. For example, in the contract of sale of a flat, which stipulates that the eastern boundary of the dwelling gives onto a courtyard to be turned into a garden, is it intended to create an easement for the purchaser's benefit preventing the space being used for

any other purpose, or is it merely a general indication that does not prevent the vendor from turning the courtyard into a vehicle workshop? Many of the disagreements that arise between parties on execution can be attributed to ambiguous words, or an ambiguity in the sense of a clause.

Several fundamental rules have been introduced by legislation (Arts 1362–71 civil code), which go beyond those to be found in the earlier code. It was once debated whether these provisions were simply rules of common sense, or whether they had legal force. Today the question has been resolved in favour of the latter view: they are *legal requirements* with as much force as any other, and the court must apply them in interpreting transactions.

Many people, supported by the main thrust of case law, consider that there is a hierarchy between the applicable criteria. First, the common intention of the parties must be ascertained (the *subjective interpretation*), then, if this does not yield any resolution, the transaction is interpreted on the basis of good faith and fairness (the *good faith interpretation*). Finally, if neither of these approaches yields a result, the transaction is examined clause by clause, or as a whole, to find the interpretation that yields the most coherent outcome, whether by giving effect to the problematic clauses or by deleting one or more of them (the *objective interpretation*).

There is, however, no law that encodes this order of precedence.

The **good faith** interpretation occupies a peculiar position in this discussion. Its meaning is unclear and widely debated. In situations where it is evoked the judge has his or her widest discretion, because it is linked to rules of *fairness*, a general principle which the court can construe on the basis of legal provisions, but also taking contemporary social, political and moral principles into account. In applying the good faith interpretation to a transaction, the judge must have regard to the hypothetical average person, to determine how a third party would have understood the expressions used by the parties. The judge, however, often looks further into the content of the transaction and alters it to reduce the area of uncertainty to a minimum. In doing so, he or she must strive for a fair balance between competing interests and reconstruct the 'virtual will' of the parties to the contract in rewriting its terms. In doing so he or she employs techniques that might be said to supplement the rules on transactions with the aim of filling lacunae (the so-called *supplementary interpretation*).

7.11. Supplementing the transaction

Supplementing means adding to, filling in, completing. The law has recourse to supplementation when it states that 'a contract binds the parties not only according to its express terms, but also according to

those consequences implied by law, or in its absence, by custom and general equity' (Art 1374 civil code).

The parties are not bound only by what they have agreed: the transaction is subject to many interventions from outside, and when it is *interpreted* by the court, the legal rules take on a meaning that may or may not correspond to what the parties contemplated, but that will nonetheless produce certain effects on the transaction. There is thus a divergence between the *intentions* of the parties and the *effects* produced by the transaction, a divergence emphasised by **supplementation**, when by operation of law, custom or general equity, the transaction is subjected to modifications.

Supplementation means *completion*. When the parties have omitted important detail from the transaction the law can intervene. For example, if the remuneration for a service is not specified, the professional tariff will be applied (Art 1373 civil code). If the parties have not stipulated a price, regard will be had to the market rate. Thus performance can be subject to considerations set out by law, or else by usage, by what similar types of transaction typically provide for, or in the absence of any of these, by general equity. But supplementation also means *modification* of clauses that parties have inserted into the transaction that conflict with mandatory rules, for example, where prices prescribed by law are not adhered to. In such cases the offending clause is automatically substituted and the transaction modified accordingly (Art 1339 civil code).

Where Art 1374 civil code states that the law is the first source of supplementation it is also referring, clearly, to the good faith interpretation (Art 1336 civil code). In this case, supplementation and interpretation interact, even though they are two distinct processes. Hence the phenomenon of *supplementary interpretation*. In this sense, the judge's interpretation certainly goes way beyond merely identifying the literal meaning of words used in the transaction, to the extent of potentially altering the dealing. Often a (supplementary) interpretation is required to reconcile new circumstances arising since the conclusion of the contract with the outcomes intended by the parties. Supplementary interpretation thus becomes a means of realising the basic intent of the transaction, that is, its object, allocating contractual risk between the parties according to what the parties had originally contemplated.

It should be obvious that supplementation affects the conclusion of a transaction, and not only its consequences.

7.12. Valid and invalid transactions. Efficacy and inefficacy

In common use, the expressions *validity* and *efficacy* refer to a desirable attribute of a relationship. In legal language, however, these terms and

their opposites (*invalidity* and *inefficacy)* have a precise technical meaning. A transaction is not valid when it does not comply with requirements laid down by law, such as requirements as to form, or when it has been concluded in circumstances that vitiate the formation or declaration of will (for example, material mistake, or duress exerted upon a party who did not intend to accept the proposed terms).

An invalid transaction is **void** if it is contrary to the public interest and **voidable** if it offends a private interest of the contracting parties that is protected by law. The categories of invalidity are thus voidness (**nullity**) and **voidability**.

The transaction is **ineffective** when it produces no effects, that is, does not work in the way the parties intended. For example, the ship does not arrive from Asia and the transaction, subject to this condition precedent, is of no effect. If the ship does arrive from Asia the condition is satisfied and the transaction produces its effect (namely, A pays B).

7.13. Nullity and voidability

7.13.1. Concepts

The legal order accords importance to the deeds of private persons when they are *deserving of protection*, are not *contrary to fundamental principles* and are *calculated to accomplish lawful aims*. In this situation the interest to be protected transcends those of the parties and is a **public interest**, namely, the principle that binding arrangements should be enforceable.

There are, however, cases where the law protects *one party as against the other*. In such cases, the protected interest is only incidentally public (for example, in the suppression of moral duress), because the aim is to settle the various situations that the parties find themselves in and to protect a **private interest**, that of one party as against the other.

In the first series of situations considered the sanction is severe: the **nullity** of the transaction. A void transaction retains no value whatever, it is not binding and is void from the moment it was concluded. In the second series of situations, however, the sanction is lighter: the transaction **can be avoided** at the request of a party who stands to benefit from such a course of action, and the effects that the transaction has produced so far are not all annulled.

The cases where a transaction is void are listed exhaustively and comprise the following.

(a) the *absence of an essential element* (agreement, object, subject matter, form where this is required *ad substantiam*) (Arts 1321, 1342, 1351, 1346 civil code);

(b) the unlawfulness of the object, of the reasons, of the subject matter, or of the condition (Arts 1343, 1345, 1346, 1354 civil code);
(c) the impossibility of a condition precedent (Arts 1346, 1354 civil code);
(d) a merely potestative condition (Art 1355 civil code);
(e) the uncertainty or the inascertainability of the subject matter (Arts 1346, 1349 civil code);
(f) any other case expressly provided by law (Art 1418 civil code).

In general, a transaction is void if it infringes mandatory rules.

The cases where a transaction is voidable are also listed exhaustively. They comprise:

(a) legal incapacity (Arts 414ff, 1425 civil code);
(b) natural incapacity as defined in the code (Art 428 civil code);
(c) defects of consent (mistake, moral duress, fraud) (Arts 1427ff civil code).

7.13.2. Differences in the regimes

Nullity and voidability have such widely differing consequences that the extensive differences in their judicial treatment are justified.

Nullity is not within the judge's discretion to disapply. He must pronounce it if the course of the case makes it clear that to do so is the appropriate course, irrespective of whether either party has in fact requested it. Voidability, on the other hand, depends on a party requesting annulment (Arts 1421, 1441 civil code).

Nullity may be partial, that is, applying to individual clauses (Art 1419 civil code). The nullity of individual clauses does not entail the nullity of the whole transaction when the clauses are replaced by the terms provided by mandatory rules (*automatic substitution*, Art 1339 civil code). The nullity of individual clauses does, however, entail the nullity of the whole transaction if the parties would not have concluded it but for the void clauses (Art 1419(1) civil code). For example, if a local authority entrusts a group of designers with a project for the design of an educational establishment, and when the project is complete it finds that one of the designers was not a member of the relevant professional body (and is therefore prohibited from pursuing this kind of activity professionally in his own name); the nullity of the relevant clause vitiates the entire contract because the local authority would not willingly have entrusted such a project to anyone not qualified to practice in the profession. The principle that the transaction fails even where one sufficiently important clause is void is

an exception to the principle of conservation of transactions (Art 1367 civil code).

But how is the *will of the parties* to be ascertained? It is impossible to reconstruct a hypothetical state of mind that never actually existed. The court must therefore approach the matter objectively, without arbitrarily adding clauses to a privately concluded agreement, and ascertain whether in the context of the opposing interests the transaction can be saved with the void clause excised.

Who can invoke nullity, and who voidability? That is, who has the requisite *standing* in the respective situations? Nullity can be sought by anyone who has an interest in so doing (Art 1421 civil code), whereas a voidable transaction can be avoided only by a party whose right of action is established by law (Art 1441 civil code).

This difference too is justified by the different principles on which the two types of invalidity are based. In the case of nullity it is in the public interest that transactions contrary to law are struck down immediately and so the power to bring this about is extended to all.

7.14. Agency

7.14.1. Concepts

In economic affairs, an individual cannot always personally and directly undertake various types of operation. A businessman cannot personally conclude all the contracts for sale of all the products of his or her enterprise. The director of a supermarket company cannot take personal charge of stock acquisition and still less of selling to customers. There thus needs to be a way for others to be able to express the will of the entrepreneur or director or private individual who cannot or does not want to conclude transactions directly. The case is met by **agency**, a means of manifesting the will via a representative (an *agent*) who brings about effects on behalf of the person represented.

The agent is not limited to a mechanical expression of the principal's wishes. The mere communication of wishes by a spokesperson does not amount to agency; the spokesperson is just a *messenger*. In agency the agent forms his own intentions having reached agreement beforehand with the principal, and then completes the transaction according to his *own* will.

A distinction must be made between cases where the agent concludes a transaction in his own name and where he concludes it in the principal's name. The former is *indirect agency*, or *intermediation* (between the third party and the principal), the latter *direct agency* effected in the principal's name.

A commercial traveller, although often popularly called an agent, is not in fact strictly one. His or her role is to 'drum up' business for the

principal, to procure contracts without concluding them on his or her behalf.

It is not every operation that can be carried out through an agent. Those in which the individual's direct intention is essential (for example, making a will, family business) are excluded.

Agency can be *legal* or *voluntary*. It is *legal* when imposed by law (see, for example, Art 320 civil code, and for other cases, Art 357, and Art 311 of bankruptcy law) and a parent's representation of a minor child. It is v*oluntary* when conferred of the principal's free will (Art 1387 civil code). Agency is normally conferred in the principal's interest, but there are situations where it can be conferred in the agent's interest or indeed a third party's.

Business agency is particularly important, and is characterised by the *factor*, the *proxy* and the *representative* (Arts 2203ff civil code).

There are two elements of direct agency: (a) the power of representation, or mandate; and (b) acting in the name of the principal (the so-called *contemplatio domini*).

The **power of representation** is made up of the mandate accorded to the agent of the principal's free will to act in his or her name. This can sometimes arise by operation of law, such as in a parent's legal representation of a minor. It is not a power properly so called, but more of a concession, a duty arising from a covenant or from a function.

Acting in the principal's name usually entails giving effect to an interest of the principal and is important vis-à-vis third parties (*protection of reliance*).

Agency does not create an autonomous relation between the parties, but it is an instrument (or *managerial relation*) by means of which particular legal effects can be accomplished vis-à-vis the third parties the agent deals with.

7.14.2. Power of attorney

The **Power of attorney** is the deed by which the powers of agency are conferred. A *relation* arises between agent and principal that is defined as *internal*, meaning it regards only the two of them, as opposed to the *external* relation, which is that obtaining between the agent and third parties with whom he enters into contract.

The power of attorney has consequences for the external relation. If A charges B with the sale of his house to C, the relation between B and C is *external* and is based on the power of attorney in the sense that B only has the power to sell A's house to C by virtue of being formally charged with the task by A's power of attorney. The relation between A and B is, however, *internal* and can take various forms. For example, B can be A's employee, or proxy, or so on.

The two relations are thus mutually independent, but there are points of contact. If B ceases to be A's employee, the power of attorney conferred by A ceases to operate as well.

The power of attorney can be *general*, covering all of the principal's business affairs, or *special*, if restricted to a single matter. It consists in a deed which must have the same form as that of the contract that must be concluded by the agent (Art 1392 civil code).

In the power of attorney the principal may include instructions to the agent and limit his or her powers. The third parties who deal with the agent can thus have notice of the terms of the agency, so as not to enter into contracts that exceed those powers, and which would not be binding on the principal (Art 1393 civil code).

So as not to prejudice third parties who deal with the agent, the law provides that 'modifications to and revocation of the power of attorney must be brought to the third party's notice by appropriate means' (Art 1396 civil code). In default, the third party can challenge them, in which case the principal would have to prove that third party did in fact know of them at the moment the contract was concluded.

The mandate is extinguished by *expiry of term*, *completion of the business* for which it was conferred, by *extinction of the internal relation* (by death, disqualification or incapacity), through *renunciation by the agent*, by the *death*, *disqualification*, *bankruptcy* or other cause of *incapacity of the principal*. In the case of bankruptcy, the trustee in bankruptcy becomes the principal's legal representative.

The power of attorney can always be revoked by the principal, unless it has been agreed that it shall be irrevocable or it has been concluded (not necessarily exclusively) in the agent's interest.

7.14.3. Defects of consent. Conflicts of interest

Since the will of the agent is the important factor in relations with third parties, it is the **agent's will** which has to be examined in the event of defects impairing the validity of the transaction. Article 1390 of the civil code states that 'the contract is voidable if the will of the agent is vitiated.' Defects of the principal's consent are immaterial, unless he predetermined any terms (price, for example) of the transaction subsequently concluded by the agent.

As to the capacity to exercise rights, it is sufficient that the principal possesses it. Therefore, a principal can avail himself of an agent who simply has natural capacity (Art 1389 civil code).

What happens if there is a *conflict of interest* between principal and agent? The transaction may be avoided at the principal's request, but if this happens the interests of a third party who has contracted with the agent must also be protected. The contract will be avoided only if

the third party knew or should reasonably have known about the conflict of interests (Art 1394 civil code).

The most important situation where conflict of interest might arise is a *contract with oneself*. If A, who is B's agent, instead of selling to C sells to himself, or sells to himself as D's agent, the contract is voidable unless the principal authorised the agent to act as he did, or the contract excludes the possibility of a conflict, such as in the case where the salesman for a department store buys a standard-priced product. This is provided by Art 1395 civil code.

7.14.4. Indirect agency

The code contains rules applying only to direct agency. In **indirect agency** the agent acts in his own name, but for the account of others (the *principal*). Agency is characterised by the behaviour of the representative (the a*gent*) towards third parties, and not the internal relation. Thus the element of acting for the account of another (*contemplatio domini*) prevails over the power of representation.

Direct and indirect agency share an element of *identity*, arising from the fact that the dealing undertaken by the agent is another's (the principal's) dealing. But the *difference* is in the names employed. In direct agency, third parties deal with the principal through the agent, whereas in indirect agency they do not know the principal, and the agent buys or sells for himself and subsequently accounts to the principal.

7.14.5. Agency without authority. Ratification

If A purchases from B by a contract for the account of C, but C has not given him a mandate to do so, what becomes of the contract? There is no meeting of minds between A and B, because B intended to sell to C, through A; and none between B and C, because the manifestation of will came from A. The contract is ineffective, but B can claim damages from A 'having in good faith placed his trust in the validity of the contract' (Art 1398 civil code). A transaction concluded by an agent who acts without power, or who goes beyond the limits of the power he has been given, is therefore without effect.

The principal, while not bound by such transactions, may come to the conclusion that it was after all to his advantage and can accordingly ratify it, and thereby assume its terms, by a unilateral deed (of *ratification*) directed to third party.

Ratification has retrospective effect, but third-party rights are safeguarded (Art 1399(1) and (2) civil code). Ratification may be solicited by the third party inviting the principal to decide within a stated

amount of time. If the principal remains silent, it is assumed he has no wish to ratify.

7.14.6. Agency and mandate

Agency entails an intermediation in the activity of another. Such intermediation can also take the form of a transaction by which a person is *asked* to undertake actions of legal import for the account of the requester. The transaction is known as a **mandate**. The mandate is the contract by which one party assumes the task of performing one or more jural acts for the account of the other (Art 1703 civil code). The jural activity may be performed in the name of the mandator or of the mandatee entrusted with the task. If it is in the name of the former it is a *mandate with agency*, and if the latter is not discloded, it is a *mandate without agency*. In the totality of relations which the intermediation gives rise to, the jural mandate regulates the internal relation and, if there is an agency, the power of attorney the external relation.

In the *mandate without agency* (Art 1705 civil code) the mandatee acts in his own name. He assumes the rights and obligations arising from the dealings with third parties, even if these have no notice of the mandate. The third parties have no relation with the mandator.

The jural mandate is a *contract founded on trust* (or, as it is known, *intuitu personae*). The mandatee cannot put another person in his place without the mandator's consent (Art 1717(1) civil code). It is extinguished by *death*, *disqualification*, or the *incapacity of the mandator* or *mandatee* (Art 1722 civil code). It is always revocable, unless the parties have stipulated otherwise (Art 1723 civil code). Revocation can be implied, if the mandator carries out the task himself or if another person is mandated to carry out the same piece of business (Art 1724 civil code). The mandate will be extinguished also on *expiry of term*, on *completion of the business* for which it was conferred, or through *renunciation* by the mandatee (Art 1722 civil code).

The mandate is assumed to be for reward (Art 1709 civil code) but it can be gratuitous. The mandatee is under a duty to carry out the mandate with reasonable diligence. If the mandate is gratuitous, liability for failing to do so is less onerous (Art 1710(1) civil code).

Duties of the mandatee include, in addition to diligently carrying out the mandated task: to convey any information which might in the circumstances of the case cause the mandate to be revoked or modified (Art 1710(2) civil code); not to exceed the terms of the mandate (Art 1711 civil code), in defiance of which the mandatee must take personal responsibility for any transactions that the mandator does not choose to ratify; to communicate the completed performance of the task (Art 1712 civil code); to account for the performance of the task and for

any profit he has made as a consequence of the mandate (Art 1713 civil code); to reimburse interest on any sums held for the mandator's account (Art 1714 civil code); and to keep custody of items delivered to him for the mandator's account (Art 1718 civil code). The mandatee has, however, no liability in respect of the performance of obligations assumed by the persons with whom he has contracted, unless he was aware before entering the contract that they were insolvent (Art 1715 civil code). The mandator, for his part, is under a duty to provide the mandatee with the necessary means to execute the mandate and to perform obligations he has to this end assumed in his own name (Art 1719 civil code). He must reimburse the mandatee's out-of-pocket expenses, together with interest at the legal rate, and pay the amount agreed for the service rendered; otherwise he is liable in damages to the mandatee for sums due (Art 1720 civil code).

By Arts 1742ff civil code, a contract by which one party undertakes to promote (but not conclude) contracts for the account of another in a specified geographical area is not a mandate, but a **territorial agency contract**. Payment is on a commission basis, and the implied risk distinguishes this kind of agent from an employee. The agent has nonetheless right to commission on all dealings concluded thanks to his intermediation as well as the right to a bonus when the relation comes to an end. A **finder** is a different kind of person altogether. He or she lacks the decision-making power of an agent or mandatee over the range of dealings that might benefit the principal's commercial interests. **Mediation** (Arts 1754ff civil code) is a contract by which the mediator brings two or more parties together to conclude a deal, thereby earning a commission (usually a percentage of the value of the deal) if the matter comes to fruition. Mediation is the preserve of professionals registered to practice it, and mediators undertake a range of duties and obligations, especially those connected with respecting the confidence of the contracting parties. **Agency on commission** (Arts 1731ff civil code) is a specific form of mandate whereby the commission agent is entrusted with buying and selling property on the principal's behalf but in his own name, for which he receives a commission which is higher if he undertakes responsibility for the third party's performance of contractual obligations, an arrangement known as a 'del credere' agreement. In some cases the commission agent also supplies the items to be bought or sold. Another species of mandate is **forwarding** (Arts 1373ff civil code), in which the forwarding agent undertakes the duty of concluding a transport contract in his own name and for the mandator's account and to perform any necessary incidental operations. He can organise the transportation personally, but in any case must assume the carrier's duties. **Franchising**, on the other hand, is a diffuse form of contract by which a business person (the *franchisor*) confers the right to sell his

products on another (the *franchisee*) using the trademark and other distinctive signs, and affording commercial assistance, in return for a periodic rent, or *royalty*. This is different from **merchandising**, a contract whereby a party pays the owner of a name, logo or trademark for the privilege of using them to promote and sell products of a different type from that produced by the grantor.

7.14.7. Management of others' business (agency of necessity)

It is common in practice for a person to undertake the management of the affairs of another without having been given the task. A comes into contact with B who lives in a state of need, and feeds and looks after him in the place of the parents whose duty it is; C cultivates the field that D has left untouched since he emigrated; and so on. In these situations a de facto relationship obtains to which the law adds de jure effects, with obligations arising not from contract but from a de facto relationship akin to contract. The obligation arises from operation of law.

Thus Art 2028 civil code provides that: 'whoever, without being obliged so to do, knowingly assumes the management of affairs of another, is under a duty to continue with it and bring it to a conclusion insofar as the interested party is not in a position to do so himself.'

There is thus no intention of protecting persons who meddle without cause in the business of others, if the latter can look after it themselves, and the provision also specifies that the intervention be useful. If it has no useful purpose, the intermeddler, having wasted time and money, can seek nothing. The usefulness need, however, apply only at the outset. If the matter is not brought to fruition, despite the manager's diligence, no liability will attach to the failure. The manager must have acted in the knowledge that he is intervening in another's business.

The manager must have the capacity to enter into contracts (Art 2029 civil code).

The management of affairs gives rise to obligations on the part of both the manager and the other (whom we shall refer to as the beneficiary). The manager must fulfil the same obligations as a mandatee (Art 2030 civil code). The court may, however, in view of the circumstances which induced him or her to intervene, may limit the damages to which he or she renders himself or herself liable (Arts 1710ff civil code).

The beneficiary must, if the management has been embarked on usefully, fulfil the obligations that the manager has assumed in his or her name, and must account to the manager for any obligations assumed in the latter's own name, and reimburse all necessary or useful expenses with interest from the day they were incurred (Art 2031 civil code).

This rule does not apply if the manager has acted against the beneficiary's wishes, unless to comply with them would have been against the law, or public order or public morals (Art 2031 civil code). If the beneficiary's wishes to the contrary were legitimate, the manager is liable to compensate for any damage occasioned and the beneficiary will not be bound by any relation with third parties, nor will the manager be able to claim reimbursement of any expenses.

7.15. Specific types of transaction

A transaction is a general abstract entity. It includes both transactions undertaken by a single party, known as unilateral, and those (respectively, bilateral and multilateral) undertaken by two or more parties. Transactions may involve property, and thus economic relations – examples are sale, promise to sell, etc – or they may not: an example is marriage. The most important types of transaction are *family transactions*, *wills*, *unilateral promises* and *contracts*.

7.15.1. Family transactions

Transactions that concern *family relations* exhibit particular features. According to those who support the thesis that family law is part of public law, private parties have no autonomy when it comes to family transactions. This thesis is without foundation, however. Family law belongs to private law, and is to a large extent concerned with relations that can be freely entered into and modified by private persons.

7.15.2. Judicial transactions

The idea of a legal transaction, set forth in the nineteenth century, has also been applied in the area of civil procedural law, and specifically to ex parte applications, whether requests for a ruling or disclosure.

Judicial acts, in contrast to private transactions, are effective normally only within the scope of the proceedings and apply only until the ruling which brings the case to an end.

7.15.3. Fundamental transactions and assignments

Transactions that are self-contained in terms of creation of obligations and their fulfilment are termed **fundamental**, in contrast to **assignment** transactions, which affect a transfer of property in order to fulfil a pre-existing obligation. They give effect to an obligation contained in another contract or unilateral act and thus their sole object is the

satisfaction of that obligation, for example, the transfer of goods obtained by an agent to the principal (Art 1706 civil code).

7.15.4. Constituent and confirmative transactions

Transactions which create new rights and obligations are termed **constituent**, while those that do not, merely serving to clarify already existing legal positions and to remove uncertainty, are termed **confirmative** (for example, the division of an inheritance or recognition of a natural child).

Confirmative transactions are characterised by their object of eliminating uncertainty from an existing situation or legal relationship, by having its essence, content and effects precisely set out.

7.15.5. Compromise and assignment for the benefit of creditors

In contrast to confirmative transactions, which modify a pre-existing situation (with constituent effects), the parties to a contract of **compromise** (Arts 1965ff civil code) make reciprocal concessions and thereby put an end to pending litigation (or prevent potential litigation) and may create, modify or extinguish various relations other than the subject of the dispute. It is a non-aleatory contract of prestations for consideration which may be effective even after judicial proceedings or arbitration. The parties must have the capacity to dispose of the disputed rights (Art 1966) and cannot avoid the transaction through mistake of law (Art 1969) or rescind on grounds of disproportion of prestation (Art 1970). Unless agreed otherwise, it cannot be discharged for non-performance in cases where the pre-existing relation is extinguished through novation (the so-called novative compromise, Art 1976). But it can be avoided if, among other reasons, one of the parties was knowingly a vexatious litigant (Art 1971), or it was concluded on the basis of false documents (Art 1973), or if it turns out that the litigation had already been concluded by a court judgment (Art 1974). It is void if it relates to an unlawful contract (Art 1972).

Assignment for the benefit of creditors (Arts 1977ff civil code), by contrast, does not confirm a relation, nor put an end to litigation. The debtor charges his creditors to liquidate all or part of his assets to satisfy their claims. The power of administration and disposition passes from the debtor to the creditors, but the debtor retains a power of control and may withdraw from the arrangement, by offering payment of debts with interest. If, however, the debtor conceals assets, or fabricates non-existent debts, the contract can be avoided.

7.15.6. Unilateral transactions. Wills

Wills have already been dealt with in the context of succession. The will is the basic means of providing for succession on death (*testamentary succession*). Here the will is considered as a *deed*, simply as a legal instrument capable of expressing the intentions of its maker (the *testator*).

A will is defined in Art 587(1) as 'a revocable deed by which the maker disposes, for the time in the future when he is no longer living, of all or part of his property'.

The will is not confined to dispositions of property, however, and clauses not relating to property are equally effective (Art 587(2) civil code). Even if it contains only clauses not relating to property, these are still effective (Art 587(2) civil code). The features of a will which make it a particular kind of unilateral legal transaction derive in their entirety from a basic principle, the protection of the testator's **wishes**.

In this sense a will is by definition a *revocable deed*: a testator cannot be bound by his or her own wishes, but may have second thoughts, change the dispositions, or cancel or destroy the document (Art 587(1) civil code).

A will is a *personal deed*, in that it must be drawn up by the testator himself without the intermediation of agents or third parties. It is a *unilateral act*, relating only to the testator. The *principal* and other *legatees* have no legal relation with the testator and the declaration of *acceptance* by the principal heir is a simple unilateral act.

The testator's wishes cannot be coerced or conditional, which is why *covenants of succession*, by which the testator undertakes to make a bequest to a specific person, are void, as for the same reason are *mutual wills*, whereby two persons in the same deed name each other the principal heir of the other or jointly dispose of their estates in favour of third parties (Arts 458, 589 civil code).

The **form** of a will is also subject to specific rules. The only trace of the principle of freedom of form is to be found in the fact that the current regime is much more liberal in this respect than was previously the case (and more so than Roman Law, where formalism was taken to extremes). A will is still a solemn deed, however.

It can be in *holograph* form, that is, wholly handwritten, dated and signed by the testator's own hand (Art 602 civil code) or by *notarised deed*. A holograph will is not a public document, but counts as a *private written instrument* and so has probative value unless proved *fraudulent*. A will by notarised deed is either a public or a secret deed (Arts 601, 603 civil code). It is *public* if notarised in front of two witnesses. In this case the testator declares his wishes in the presence of the witnesses and the notary writes them down. A *secret*

deed can be written by the testator himself or by a third party. If written by the testator, it must be signed by him below all the dispositions. If it is written wholly or in part by others or by mechanical means it must signed by the testator on every half folio sheet, whether these are joined or separate. The paper containing the clauses and any insertion must be stamped with a seal in such a way as to prevent the will being opened or a part being removed without damage or breakage. The testator, in the presence of two witnesses, personally delivers the sealed paper to the notary and declares that it contains his will. On the paper containing the will is written the deed of receipt (Art 605 civil code).

The testator may, because of developments in his life or else through sheer caprice, alter his wishes and make several wills. Of these, only the one bearing the *most recent date* is valid. Additions to the original text of the will may be made, in the form of a *codicil*, which, if duly written, signed and dated by the testator, becomes part of the holograph will by incorporation.

Less solemn form is required in certain circumstances in which the will is made, if these may make it difficult to comply with prescribed formalities:

(a) in the presence of contagious diseases, public emergencies or disasters;
(b) where the will is made on board ship or on an aeroplane;
(c) by servicemen and -women in time of war.

In these circumstances a special will can be made, but they become invalid three months after the state of danger has passed, or when the journey is completed, or once the person has returned to a place where a regular will can be made (Arts 609ff civil code).

A will not in the prescribed form is **void**. Thus a holograph will is void if not *signed* or written *in the testator's hand*, or in the case of a notarised will, if the notary's written endorsement of the testator's declaration or the signature of either is missing (Art 606(1) civil code). It can be avoided by other formal defects at the instance of an interested party, in which case the action for annulment must be brought within five years of the execution of the will (Art 606(2) civil code). A secret will which lacks any of the formal requirements takes effect as a holograph will if it meets all the formal requirements of the latter (Art 607 civil code).

A will can be avoided also on grounds of *mistake*, *duress* or *fraud*. An important type of mistake in this regard is one vitiating the intentions of the testator, when these are revealed by the will itself and are the only reason why he or she made the dispositions in question (Art 624(2) civil code).

This confirms the principle that an individual's wishes are more critical in a unilateral act than in other types of legal transaction.

The will is **interpreted** according to this same principle. Interpretation *must ascertain the testator's wishes*. Thus the trust principle does not operate, but *internal*, *subjective* wishes, as expressed in the text of the will, prevail. The meaning of words is also construed not objectively, but according to the testator's subjective intention. The rules of supplementation can never be applied.

A will can contain dispositions of both a *universal* and a *particular* character. The former are those which concern the principal heir and refer to the whole of the estate or a defined portion of it. Particular dispositions concern a legatee (Art 588 civil code).

Anyone except those lacking legal capacity may make a will. That incapacity (to exercise rights) is in this instance known as *testamentary incapacity* and affects those who have not yet reached the age of majority, people disqualified through mental illness, and those who do not come into this category but have demonstrated an inability, albeit perhaps temporary, to form the necessary intention at the time the will was to be made (Art 591 civil code).

Testamentary incapacity must be distinguished from the *disqualification from benefiting from a testamentary disposition*. Into this category of persons fall a tutor, once appointed, the notary, witnesses and an interpreter or translator who has written or received a secret will, persons intervening in place of persons with capacity, and non-recognised entities (Arts 596–600 civil code). Children born out of wedlock cannot receive more than they would have been entitled to by law in the event of legitimate succession; they cannot, in other words, receive more favourable treatment than legitimate children (Art 592 civil code).

A will is a revocable deed. There is no means of renouncing the right to revoke and to alter testamentary dispositions. Any clause purporting to provide otherwise is ineffective (Art 679 civil code).

Revocation may be express or implied. *Express revocation* can only be affected by a new will or a notarised deed. The revocation may in turn be revoked (Arts 680 and 681 civil code). *Implied revocation* occurs when the testator makes a later will containing dispositions that are incompatible with those thereby revoked (Art 682 civil code). A holograph will is deemed revoked, wholly or in part, if it is destroyed, torn, or erased wholly or in part unless it can be proved that the destruction or erasure was carried out by third parties, or that the testator had no intention to revoke (Art 684 civil code).

If the testator has no children when he commits his will to paper, but subsequently has them, it is assumed that he would have disposed of his estate differently had he known of this circumstance, producing a *revocation by operation of law* (Art 687 civil code).

7.15.7. Unilateral promises

In common parlance, the expression 'promise' is fairly generic. It can indicate an undertaking to assume and perform a specified prestation, or indeed the deferment or forbearance of a prestation. In legal language, however, 'promise' denotes a *manifestation of will* that is binding upon the declarer, and so has legal significance. Various types of promises may be distinguished: the promise to conclude a contract (more correctly referred to as a *pre-contract*), a promise to sell, a promise in marriage, a promise to lend money, and so on.

Among these categories of promise, some bind only the declarer, the person who makes them (the *promisor*), placing a duty on him towards the person (the *promisee*), in whose favour the promise was made. Others, however, acquire legal significance only when they are matched by a promise made by the other party, upon which both are bound.

Promises that bind only the promisor are known as **unilateral promises**, because they are indeed unilateral legal transactions which place obligations only upon the promisor and create rights in favour of the promisee. Unlike contracts, of which there can be an infinite variety, there can only be a limited number of types of promise. Individuals must conform to a few standard types of promise and cannot create new ones. Article 1987 civil code provides that 'the unilateral promise of a prestation does not produce effects of obligation beyond those recognised by law.' Only in cases recognised (that is, *regulated*) by law are promises binding. In other cases the promisor is not bound, legally at least, although there may of course be an effective social or moral suasion.

The reasons for *standardising* the types of unilateral promises are twofold. The law wishes to protect the promisor, who makes the unilateral undertaking. Thus, to avoid exposure to the risk of incurring unexpected obligations, it provides that a promise can be only of one of the types legislated for. Also, the law does not look favourably on gratuitous acts, those involving no corresponding consideration. The promise must be based on a lawful object worthy of protection. The object may be an undertaking assumed for no reward, but this entails that promises must be made in a certain manner, otherwise there would be a detraction from the principle that gratuitous obligations should be subject to formal legal control.

A feature of unilateral promise is *abstraction of object*. The recipient of the promise does not have to demonstrate to the court why he received it, that is, the reason of the relation (the fundamental relation) from which the promise flows. The promisor must, however, demonstrate that this fundamental relation is void, or the absence of a cause for the promise and hence its nullity (Art 1988 civil code).

The most important unilateral promises are *negotiable instruments* and the like commonly used as *methods of payment* (bills of exchange, cheques, policies, etc) and, in commercial law, as *documents of title to goods*.

It is usually maintained that the promise becomes binding insofar as the promisor shows a *willingness* to be bound. This principle derives from the dogma of will, and should be viewed from this perspective. The promisor is bound to his obligation not because he wishes to be, but because he has created expectations which need to be protected.

One type of unilateral promise is the *promise to the public*, not to be confused with an *offer to the public*. The latter is a proposal for a contract made to unascertained persons, and becomes binding only when it is accepted by someone, while the former is already binding on the promisor before acceptance, indeed from the moment it is made public (Art 1989 civil code).

A typical example is an announcement in a daily newspaper promising a sum of money for whoever returns a lost dog to its owner. Whoever turns up with the animal has the right to the *reward*, the promised sum of money. By way of *protection of the promisor*, the promise does not stand for ever: if there is no stated time limit, or is not implied by the terms of the promise, it expires after one year if meanwhile no one has come forward with relevant information or carried out the terms of the promise (Art 1989 civil code).

Being binding from the moment it is made public, the promise may be revoked in the same form as that in which it was originally made (in the example, by announcement in a daily newspaper), or in an equivalent form, and only if there is 'just cause', such as the animal in question coming home by itself.

Other unilateral promises include a *promise to pay* and *recognition of debts*. The promise to pay is a declaration of will. Its object arises from a pre-existing relation by which the promisor has already undertaken to make a payment to another party, now the promisee. If the pre-existing relation is specified, the promise is termed *qualified*, otherwise *pure*.

Recognition of debts is a declaration by which a pre-existing legal situation is acknowledged and evidenced.

7.15.8. Negotiable instruments

The necessity for the secure and rapid circulation of credit, avoiding the forms (and risks) of simple surrender by exploiting rules favourable to the possession of moveable goods, was met by the 'incorporation' of credit in, and its representation by, a document designed to be circulated. The simplification of the rules for transfer and exercise of rights was guaranteed by the principle of *literality* (by which a debtor is only

required to provide the prestation represented in the document), *autonomy* (by which every transfer is independent of any that preceded it) and *abstractness* (meaning that the relation between the title-holder and the debtor is independent of whatever occasioned the issue of the document). For example, if Titus buys a television and pays by cheque, and the vendor endorses it in favour of a supplier, the latter may require Titus to pay him the sum indicated (literality); Titus cannot plead the absence of any debt owed by himself to the supplier (autonomy); nor can he pray in aid any defects in the goods originally acquired (abstractness: note that not all negotiable instruments have this characteristic).

Negotiable instruments (Arts 1992ff civil code) can be divided into *registered* instruments (those whose acquisition needs to be entered on a register before the transfer is effective), instruments *to order* (such as bills of exchange and bank cheques, transfer of which is effected by endorsing the document and handing them over) and *bearer* instruments (such as savings bank pass books, transfer of which is effected simply by handing them over).

A **bill of exchange** (decree no. 1669 of 14 December 1933) is a negotiable instrument to order consisting of an order (bill of exchange properly so-called) or promise (a promissory note) to pay at the time and in the place indicated on the document. As an example, if Titus borrows a certain sum of money from Gaius, the obligation to repay can be put in the form of a promissory note (also known as an 'IOU') with the sum and payment date indicated. If in the meantime Gaius endorses the note in favour of his creditor Sempronius and he in turn does likewise in favour of Mevius, it will be the last-named who can on the due date require payment from Titus. Gaius could, on the other hand, have required his debtor Titus to pay the sum on the due date to Sempronius. This instruction would have taken the form of a bill of exchange (which Sempronius could equally have endorsed in another person's favour).

If payment is not made on the due date, the last endorsee may report ('protest') the fact to a public official. This gives him the right of recourse to the people through whose hands the instrument has passed.

A **bank cheque** (decree no. 1736 of 21 December 1933) is a means of payment containing an order to a bank with whom the drawer has a relation (such as funds in an account or credit sufficient to 'cover' the cheque) to pay a specified sum to a specified person, who can endorse it in favour of another. In order to have a right of recourse if the bank refuses to honour the cheque because the drawer has not got sufficient funds or credit, the endorsee must first, as with bills of exchange, register a 'protest'.

A **banker's draft** is on the other hand a promise to pay made by a bank on behalf of a specified person to whoever is nominated on the document. In practice, banks issue such instruments only after the

specified person has deposited a sum equivalent to that ordered to be paid to the beneficiary.

Credit cards are not negotiable instruments but documents legitimising the right of the holder to obtain goods and services on credit from businesses which have agreed to accept them. The supplier will then obtain payment from the organisation that issued the card, which will in turn obtain payment from the cardholder, usually by deduction from his or her current account.

7.15.9. Bilateral and multilateral transactions. Contract

Among the different kinds of bilateral transaction, the most important and commonly met is contract, defined in the code as 'an agreement between two or more parties to create, regulate or terminate a legal relationship concerning property' (Art 1321 civil code).

Contract, in common parlance too, is synonymous with an *economic dealing*. Contract is indeed an affair between private persons to regulate private interests. Individuals avail themselves of their freedom of contract in concluding such dealings. A collective labour agreement, on the other hand, is a manifestation of collective autonomy.

Contract law today has three separate aspects. It continues to play its essential role in the private dealings of the parties, but the rules are also concerned to protect third parties and the public interest as well.

With a contract the parties *plan* an economic operation, or several connected operations. Economic affairs entail *risk*. The parties, through negotiation and definition of the content of the agreement, apportion the risk of the operation and plan the results, each according to what he or she expects to gain from the arrangement. Because each party has reasons for deciding to conclude the contract, it may be that these reasons are particularly evident, or presupposed. They thus acquire an importance, belying the irrelevance attributed to them by dogma. A contract is nonetheless assessed objectively, hence interpretation according to the parties' common intention, and not according to a reconstructed *inner will* (Arts 1362ff civil code). And hence the apportionment of risk mistake (Arts in the case of 1427ff civil code) and that of *simulation* (as in sham transactions) (Arts 1414ff civil code), and the rules on voidability (Arts 1421ff civil code).

A contract is an operation that produces legal effects between the parties (Art 1372 civil code). Third parties are, however, protected by the *reliance principle* (for example, where a person buys property from a non-owner, or from creditors in a sham transaction, or a third party's right to challenge avoidance of a contract). Although a contract is a private matter, the law protects third parties who come into contact with the parties.

Finally, a contract produces effects only if the legal order so permits. The law exerts two types of control over economic operations.

(a) the *merits of the interest* pursued by the parties (Art 1322(2) civil code): the parties are free to conclude contracts belonging to different types from those indicated by law, *provided they are in pursuit of interests that deserve protection*;
(b) the *lawfulness of the operation* (Arts 1343ff civil code on object, subject matter, etc).

7.16. Current aspects of freedom to contract

7.16.1. Private autonomy and freedom to contract

Freedom of contract has many facets: the decision to effect a contract or not, the choice of other party, choice of legal configuration, that is, the guise (technically, *type*) of the contract, choice of form and content of the contract, and finally choice of the way in which the contractual declaration will be communicated.

There is thus a wide area of choice which is usually free. But for many different reasons connected with the way commercial relations have evolved with market mechanisms, or for legal reasons pertaining to the law's objectives, sometimes the contracting parties are not at liberty to exercise these choices.

A company that has a de facto or de jure monopoly cannot refuse a prestation to whoever requests it and on consistent terms which assure parity of treatment for consumers (Art 2597 civil code). The choice of the other contracting party is thus limited, and there are instances where there is no choice at all because the law lays down that the contracting party must be introduced by a third party (such as the job centre in employment contracts) or by the public administration (such as in rent-controlled tenancies which are allocated by a system based on relative need that must be adhered to).

Sanctions for infringing the duty to contract are rather weak. A civil court hearing a complaint may make an order that substitutes a new contract with the same effects as that which was not concluded (Art 2032 civil code). Otherwise, the consumer may seek damages (Arts 1223ff civil code).

The parties may freely choose the legal configuration, that is, type of transaction (Art 1322 civil code). They may also invent types of contract not specifically regulated by law (for example, *leasing*, or *franchising*, with which the parties give legal form to important economic or commercial operations, such as port construction, satellite towns). But there are

sectors in which contract types not specifically regulated by law cannot be employed. This is the case with *company formation contracts* (which must constitute only the kinds of company recognised by the civil code) and with agrarian contracts (law no. 756 of 15 September 1964).

As far as content is concerned, parties cannot agree prices at variance with those fixed by law (in the past, essential sugar, tobacco, bread and milk). If they do, the legal fixed price is *substituted* in automatically or the **conditions** are controlled (as in lettings: law no. 392 of 1978 and Arts 1339, 1419(2) civil code). When enterprises such as insurance companies, banking institutions and large corporations contract only on their standard form conditions, the other party effectively has no choice over the content. Form is free – there is a *principle of freedom of forms* – but there are specified cases where it is stipulated by law (Art 2643 civil code).

Each party may also avail himself of the assistance of third parties to express their will (agency), but there are cases, such as gift (Arts 777 and 778 civil code) and family transactions, in which the deed must be executed in person and substitution is not permitted.

7.16.2. Individually negotiated and standard form contracts. General contract conditions

The idea of contract which emerges from the code is that usually associated with *individually negotiated contracts*, those in which two parties make reciprocal concessions so that their negotiations result in an agreement. The model on which a large part of the general rules on contract are based, and which is the historical precedent for contract in general, is that for (individual) *sales*.

In practice, however, this phenomenon has been modified by the extension of standardisation, that is, the working into various pro forma layouts of the planning process that leads to transactions and makes an enterprise's contracts identical when concluded with their clients, the consumer. These contracts, known as *standard form* contracts, are today ubiquitous, because they can be presented to an unlimited number of persons in the same way to smooth the *distribution of products* (such as white goods), *services* (water, electricity and gas supply, etc) and also fairly complex *specific activities* (relating to insurance, banking, transport, etc). *Standard form contracts* are easy to recognise because they are usually produced in very small print by the company supplying the product or providing the service.

This type of contract is also called an *adhesion* contract as the other party, the client (or consumer), cannot challenge or modify it as would be possible if it were an individually negotiated transaction. Neither can the enterprise discuss terms with clients individually, the standardisation of

production imposes an imperative to save time and expense, and contractual relations are identical output from a production line. The consumer must 'take it or leave it'.

Adhesion contracts are not, however, imposed solely on consumers. There are standard forms of contract with uniform clauses which structure relations between businesses (for example, the relations between vehicle manufacturers and component suppliers who provide tyres, lamps, accessories, etc). There are also contracts drawn up in standard form by third parties and adopted by the parties. Tenancies are usually concluded using pre-printed forms which can be bought in tobacconists'; the parties, the landlord and tenant buy a copy and complete it and use it as if they had drawn it up themselves.

Contracts such as this, full of uniform clauses, are said to contain *general contract conditions*. This use of the word 'condition' should not be confused with its technical use in relation to contingency, nor with the *general principles* that are used in interpreting the law.

Adhesion contracts are not a contractual *type*. They are a *mode* of contract formation, making use of standard, uniform models. The important feature is that usually one party has drawn up its terms, and it is rapidly produced because the other party adheres to those terms without negotiation. It can be adapted to any a contractual type: sale, transport, supply, current accounts, lettings, insurance and, obviously, also to special types such as leasing, etc.

Because the enterprise has usually drawn it up, they normally contain clauses more favourable to that party, the *proponent*, than to the consumer, or *adherent*. The fact that the consumer is obliged to take or leave the product or service is the basis of the proponent's strength: he can impose whatever terms he chooses, however disadvantageous to the other. Hence the expression *diktat* often employed to denote this state of affairs vis-à-vis the consumer, amounting to a kind of *regulatory power*, as if the proponent were a kind of legislator, laying down mandatory and non-negotiable terms. The Italian civil code was the first of its kind to expressly regulate this sort of general contract term. It is claimed that it does so by protecting the 'weaker party', the adherent, but a close examination of the law reveals that the opposite is in fact the case: the privileged party is the proponent enterprise.

There are essentially three principles set out in Arts 1341 and 1342 civil code:

(a) the effectiveness of clauses depends on whether they can be known (and not on the actual knowledge of the general conditions);
(b) the requirement of the adherent's explicit acceptance by signature of terms that are particularly disadvantageous to him;

(c) the precedence of inserted clauses over the standard ones (a special case of the principle of interpretation against the proponent, as already met in Art 1370 civil code).

7.16.3. Consumer contracts

A significant modification of this state of thing has been brought by the implementation of the widespread EU legislation on consumer contracts. Starting from contracts concluded outside commercial premises and continuing to consumer credit, package tours, timesharing contracts, unfair terms, consumer sales the Italian legal system has gradually brought itself in line, from this point of view, with the other European countries with a consumer protection tradition. The bulk of consumer legislation has recently been consolidated in a Consumer Code (decree no. 206 of 2005).

7.17. Classification of contracts

7.17.1. Criteria

Contracts can be classified according to parties, subject matter, form, type and the effects they produce.

Contracts are *unilateral*, if they lay obligations on only one party (such as a loan for use, Art 1803 civil code); *bilateral* if the obligations are undertaken by both parties (sale and purchase, employment, transport, etc); *multilateral* if they confer obligations on more than two parties. It is debatable whether contracts for associations, companies, etc are multilateral insofar as the parties have a unity of purpose.

The following classification of contracts can be applied to legal transactions in general.

- contracts with mutual consideration, or **synallagmatic** (from the Greek *synallagma* meaning 'exchange') or **exchange** contracts, where one party's prestation (for example, selling an item) is in consideration of the other party's prestation (for example, paying the purchase price);
- **aleatory** or **commutative**, depending on whether they respectively do or do not entail the assumption of an abnormal risk by one of the parties (see below);
- **instantaneous**, in which the effects are produced immediately, such as when one buys something in a supermarket; **for continuous** or **periodic execution**, in which the execution is extended over a period of time, such as in the supply of gas;

- **fixed term** (such as seasonal work or subscription to a magazine) or **for an indefinite period** (such as 'permanent' employment);
- **for deferred execution**, in which the effects are produced only after an elapse of time, such as a sale contract where the delivery of the subject matter is for several months hence;
- **for reward**, if the prestation of one party corresponds to a detriment on the part of the other, such as the sale of an item in which one party is deprived of the item and the other has to pay the purchase price; or **gratuitous** if the prestation of one party is not matched by a detriment on the part of the other (such as a gift);
- **typical**, if the contract corresponds to one of the types regulated by law (such as sales and transport); or **non-typical**, if they are of a type created by the parties and have no prescribed status (franchising, leasing, etc).

As to effects, contracts can be divided into: **consensual**, if they are brought about by simple consent, or agreement; **real**, if delivery of goods, and not consent alone are required to make them effective – examples are loans for use, other loans, deposits and pledges; **for performance of obligations**, if obligations are all that is assumed thereby; **for assignment**, if the property in the subject matter is thereby transferred, such as by a conveyance.

As to form, contracts can be **solemn form**, if a particular form is prescribed. Otherwise they are **non-solemn** or **free form**.

As to content, they are **conditional** if they depend on the occurrence of a future event or **simple** if they do not.

If they contain terms that are identical for a whole class of consumers they are known as **standard form**. Otherwise they are **individually negotiated**.

7.17.2. Contingency and aleatory contracts

Every contract carries its margin of risk. A might buy a building and afterwards a law is passed imposing a heavy tax burden on it. B might buy a number of shares in company X and the share price collapses the next day because the company has lost the confidence of the market. C might buy a racehorse, only to see it sicken and die.

A contract is a form of risk planning. The parties distribute it weighing up the possible advantages and disadvantages they might derive from the economic operation as well as circumstances that might intervene. In all these situations there is a risk, a contingency that has to be distributed between the parties.

There are, however, different forms of contingency. *Economic contingency* is to be distinguished from *legal contingency*. Economic

contingency is the risk implied in every dealing and activity, for example, in undertaking any act of entrepreneurship, or activities that may cause harm to others. Legal contingency is the risk that the law may intervene to affect a person's interests, be it one of the parties to a contract or the perpetrator or victim of a wrongful act.

Aleatory contracts include **insurance policies**, **gaming** and **betting**, and **life annuities**.

Insurance contract (Arts 1822ff civil code), generally in the form of standard policies issued by the insurance company and concluded with the client via an agent, is a consensual contract based on the risk inherent in the occurrence of a future event (such as property being burnt, or a flat being burgled, or knocking down a pedestrian), which would give the policy holder the right to be compensated by a capital or periodic sum. Insurance is in some cases optional for *individuals*, who may choose whether or not to take out a policy, but there are instances where the public interest makes it compulsory, such as motor and marine insurance. In either case they can be grouped into various categories, such as insurance against loss, against liability, or life insurance.

Insurance *against loss* covers the risk of losing goods, property or an expectation, for example, through fire, damage or theft. The sum paid by the insurer cannot exceed the maximum (or 'ceiling') provided by the policy, which also provides for a regular sum (or 'premium') to be paid by the client.

Insurance *against civil liability* covers the risk of loss, damage or injury caused to third parties as a result of certain activities. In this case too a sum of money will be paid to the client, in an amount corresponding to the loss, damage or injury caused. In the case of insurance of vehicles and boats, the third party may claim directly from the insurer.

Life insurance has on the other hand a prudential function, and provides upon the death of the policy holder or on the survivorship of a stated person for the payment of a fixed or periodic sum to the beneficiary named in the policy, or if none is named, to the principal heir of the deceased.

Gaming and **betting** are covered by the civil code only in one significant respect. It provides that they give rise to no action for recovery of a debt. A debtor who loses a game or fails to win his bet cannot recover the stake (*soluti retentio*), which he paid in fulfilment of a natural obligation; nor can a winner oblige the loser to pay out (Art 1933 civil code). Certain types of game (games of chance) are permitted only in designated places. Playing them elsewhere is illegal and punished as an offence by the criminal law. The winner of a lottery, or other similar authorised competitions and contests, has a right of action to secure payment of winnings. The same rule applies to sports competitions.

A *life annuity* is a contract by which one party undertakes to pay the other a periodic sum for the rest of the life either of the payee or of some other person. The payer may be motivated by feelings of generosity, or there may be consideration in the form of use of a building or assignment of property by the payee. The contingency relates to the uncertain economic advantage that the payment represents. *Life expectancy* is one of the contractual risks (Art 1872 civil code). The other risks relate to the amount of the payment and depreciation in the value of money. A *subsistence annuity* is a form of life annuity that guarantees only material support in return for surrender of property. Life annuities are a contract in favour of third parties if payment must be made to someone other than the non-paying party. It is a continuing and severable contract (Arts 1873, 1875 civil code). Just because it is aleatory, a life annuity does not allow the payer to discharge the debt by payment of a capital sum equivalent to the periodical payments. He or she is obliged, in the absence of any agreement to the contrary to pay the income for the entire period contemplated, however onerous this obligation may become (Art 1879 civil code).

A type of contract different from a life annuity is a **perpetual annuity** (Arts 1861ff civil code) by which one party confers on another the right to demand in perpetuity the payment of a sum of money or the supply of fungible goods, in return for the transfer of immoveable property or upon assignment of a capital sum. The debtor always has the right, any agreement to the contrary notwithstanding, to redeem the annuity – this is done by paying a sum equivalent based on statutory interest to the capital value of the annual payment – and may even be bound to redeem it if payments become delayed or promised guarantees are not forthcoming.

7.17.3. Gratuitous contracts. Gifts and acts of liberality

According to the definition in the code, a gift is 'a contract by which, in a spirit of liberality, one party enriches another by conferring a right on him or her or assuming an obligation towards him or her' (Art 769 civil code). The gift is thus a *contract*, and not the unilateral act it might appear to be from the way it is carried out. It is a unilateral contract, because it creates obligations for only one party (the *donor*) and benefits for the other party (the *donee*). It is gratuitous because the donor receives nothing in return, and the donee need incur no detriment in order to obtain the property given.

Specific capacity is required to make a gift. No one who lacks the capacity to dispose of his own property can make a gift. Gifts made by people who, although not disqualified, are for any reason incapable at the moment of making the gift or forming the requisite will or intention

are voidable at the instance of the donor, his heirs or assigns (Arts 774 and 775 civil code). A gift by a person in care is also voidable (Art 776 civil code). Because the donor's intention is of the essence, a gift cannot be made by proxy. Any mandate purporting to allow others to designate a donee or determine the subject matter of a gift is void (Art 778 civil code). To give effect to the principle of equality both as between spouses, and as between spouses and unmarried individuals (Arts 29(2) and 3(1) Constitution), the Constitutional Court has abrogated Art 781 civil code which provided that gifts between spouses were void.

A gift must be made in *solemn form*, in order both to control gratuitous acts of disposition and to impress on the donor the seriousness of the act he is contemplating. In the absence of solemn form, the gift is void (Art 782 civil code). *Acceptance* may be effected in the deed itself, or by a subsequent public document. This can be revoked before it has been perfected (Art 782(3) civil code). Grounds for revocation of the gift are the ingratitude of the donee and the birth of children (Arts 800ff civil code).

As well as ordinary gifts there are various types of gift in which the donor's *motivation* is important. Gifts in contemplation of marriage are perfected without acceptance by the spouses and are the only kind of gift that is not a contract, but a unilateral act (Art 785 civil code). *Onerous* gifts impose on the donee a burden closely connected with the gift itself (Art 793 civil code). A gift in recognition of past services is made in consideration of the donee's qualities or as a special reward (Art 770 civil code). A gratuity, a casual everyday occurrence, is characterised by the small value involved (Art 783 civil code). This last type of gift does not require a public document and is different from *conventional gratuities* such as gifts to professionals, tips and gifts to relations (Art 770 (final) civil codes).

7.17.4. Contracts that modify obligations for obligor and obligee

7.17.4.1. Modification of obligations by obligee. The obligee is the creditor and the obligor the debtor. If one creditor is substituted by another, the obligation as between the debtor and the first creditor is terminated and arises between the same debtor and the new creditor. Such modification comes about by means of a *party novation* whereby the original obligation must be fulfilled by the debtor for the benefit of a different creditor from the one originally contracted with.

Obligee modification also occurs when the debt is assigned or passes by succession or by delegation of assets.

In legal and commercial exchange, **assignment of debt** is a frequent occurrence. It is an agreement between a creditor and another person to transfer the benefit of the debt. The original creditor is the assignor and the other person the assignee. Assignment can be upon consideration or gratuitous (Art 1260 civil code). It is an agreement between assignor and assignee in which the debtor plays no part and can take place against the debtor's wishes (Art 1260 civil code) since debt is not strictly personal in nature or else assigning it would not be permitted by law.

Assignment takes effect vis-à-vis the debtor once he has notice of it or has accepted it (Art 1264 civil code). Even before notice is given, if the debtor pays the assignor, this does not discharge his obligation to the assignee if the latter can show that the debtor in fact knew of the assignment (Art 1264 civil code).

If A assigns the same debt to B and then to C, who becomes the assignee? The determining factor is not the order of events, but the debtor's knowledge: 'the assignment first notified to the debtor, or the one he first accepts, is effective' (Art 1265 civil code).

A non-standard type of contract known as **factoring** is often encountered. An enterprise undertakes to transfer present and future debts owed to it by clients to another enterprise, which acquires them at a price equal to their nominal value. It is considered that the structure and function of the contract is not predetermined, but depends on the actual choices made by the parties. However, 'assignment of business debt' is subject to regulation by law no. 52 of 21 February 1991, which derogates from Art 1267 civil code (by requiring the assignor to guarantee not only the existence of the debt, but also the debtor's solvency) and Art 1264 by making the assignment effective vis-à-vis third parties not only when notice has been given or the debtor has accepted it, but also when the assignor has been paid for it.

Transfer of debt by succession occurs when the main heir acquires the deceased's property, including all his assets and liabilities.

Delegation of assets, finally, occurs when a creditor delegates the collection of a debt. The creditor substitutes others in his place, to whom payment becomes due.

7.17.4.2. Modification of obligations for obligor. The debtor, through a *delegation of liabilities*, assigns a new debtor, who undertakes to the creditor to pay him the debt (*delegation of payment*). Or else the debtor can delegate payment of the debt to a third party, who promises the creditor to pay him the debt at a future date (*delegation by promise*).

In both cases there is a trilateral relationship involving the old and new debtors and the creditor. The relation between the old and new debtors is termed a *provision relation* because the delegator must provide the delegatee with the means to pay the sum of money due, or the latter

must already owe a debt to the former. The relationship between the creditor and the old debtor is termed a *currency relation*.

If the creditor releases the delegator, the delegation is termed *substitutive*. If the delegator remains under an obligation, as well as the delegatee, until the debt is paid, the delegation is *cumulative* (Art 1268 civil code).

If the promise made by the delegatee to the creditor refers to the provision or currency relation, the delegation is termed *instrumental* or *objectual*, because the 'object' of the payment is revealed. Otherwise it is termed *pure* or *abstract*. This is one of the very rare instances in which the existence of an abstract transaction, whose object is 'removed', is conceded. The importance of whether the delegation is instrumental or pure relates to the defences available.

The rules on **defences** are as follows. The delegatee may move, as against the creditor, defences that regard their mutual relation. Unless the parties have agreed otherwise the delegatee may not move, as against the creditor, objections that he could have made as against the delegator; neither may the delegatee make objections concerning the relation between the delegator and the creditor. If the delegation is instrumental, the delegatee may oppose the nullity of the currency relation and he may in any event oppose the nullity of the provision relation. If, however, either the currency or the provision relation is void the delegatee may refuse payment (Art 1271(2) civil code).

If the third party has not been delegated by the debtor, but spontaneously assumes the debt to the creditor, then there is **debt novation**. The *novator* (the third party) becomes responsible jointly with the *novatee* to the *novation creditor*. Novation is thus cumulative, unless the creditor declares a willingness to release the original debtor, the novatee (Art 1272(1) civil code). Novation cannot ignore the currency relation between the original debtor and creditor. The novator can make, as against the creditor, the objections that he could have made as against the original debtor, unless these are personal to the latter and do not depend on facts arising after the novation. He cannot, however, claim any set-off the original debtor could have claimed, nor any objections concerning the relation between the novator and the novatee, that is, through the provision relation (Art 1272 civil code).

Finally, if there is an agreement between the debtor and a third party (a contract that differs from novation, where the agreement is between the third party and the creditor), then **assumption** of debt takes place. By assumption, the third party (the *assumer*) undertakes an obligation vis-à-vis the debtor (the *assumee*) to pay his debt to the *assumption creditor*. *Assumption* is an internal agreement between debtor and third party (internal assumption). If, however, the creditor adheres to the agreement it becomes an external assumption, and in doing so renders the

arrangement in his favour irrevocable (Art 1273 civil code). It is substitutive if the creditor releases the debtor by an express declaration, or if this is an express term of the arrangement (Art 1273 civil code). Otherwise it is cumulative, and the original debtor remains liable along with the assumer.

7.17.5. Contracts for services

Contracts for services can be defined as all contracts having as their subject matter not the transfer of an object, but a piece of work, a prestation formed by activity. Among the principal kinds are **independent** contracts, **contracts for work and skill**, and of **transport**.

Independent contracts consist of the performance of work or a service undertaken by one party (the contractor) in return for a money consideration paid by the other (the customer). The contract can, depending on the kind of work and the customer, be private or public. If the latter, special rules apply. The main features of independent contracts (Arts 1655ff civil code) are that the contractor is generally a business enterprise and the personal trust (*intuitus personae*) that the customer places in the contracting enterprise's fitness – sub-contracting this type of contract requires authorisation (Art 1656 civil code). The money consideration is agreed by the parties, or in default is according to a price list or trade usage (or as a last resort, is set by the court (Art 1657 civil code)) and can be global or by measure. The prestation is performed by the contractor, who can make changes to the work only with the customer's consent (Art 1659 civil code). The latter may, however, in addition to being able to prescribe variations (for a corresponding increase of price, and within the limit of one-sixth of the total contract amount: Art 1661 civil code) withdraw from the contract not only if the necessary changes are considerable (in which case the contractor must be compensated accordingly: Art 1660 civil code), but also at any time, provided that the contractor's expenses are met along with payment for work already carried out and loss of profits (Art 1671 civil code).

The customer's powers are thus quite wide. He can, among other things, check the work as it is carried out and set appropriate time limits for any work required for compliance with contract terms, in default of which the customer may rescind and claim damages (Art 1662 civil code). He may also check the work before it is delivered; if he does not do this, or accepts delivery unconditionally, he is deemed to have approved the work and the contractor has the right to payment (Art 1665 civil code).

If unforeseeable circumstances arise during the execution of the contract which raise or lower the costs of performance by more than one-tenth of the contract price, the parties may request a revision of the

price (only to the extent of the difference: Art 1664 civil code). If, however, for a reason beyond the control of either party, execution becomes impossible, the customer must pay for work already carried out, to the extent that it is useful to him (Art 1672 civil code). If, again for reasons beyond the control of either party, the work produced deteriorates or is destroyed before it has been accepted, the risk falls on the contractor if he has provided all the materials. If they have been provided wholly or in part by the customer, the latter assumes a proportionate amount of the risk (Art 1673 civil code).

The death of the contractor does not terminate the contract unless a relationship of *intuitus personae* is thereby extinguished (Art 1674 civil code). In such a case, however, the customer must pay the principal heir the value of work carried out and reimburse expenses, as far as these have been usefully incurred (Art 1675 civil code). The law provides that employees and agents of the contractor can seek moneys owed to them from the customer (Art 1676 civil code).

The contractor must guarantee the work against defects, but not once the customer has accepted the work or if he knew of the defect (or should have done, in cases where the defect was not concealed by the contractor). The customer has 60 days from discovering the defect in which to report it (though any action can be brought within two years: Art 1667 civil code). The conditions of the guarantee are the elimination of defects at the contractor's expense or through a corresponding reduction in price, with damages payable if the contractor was at fault. If, however, the defects render the whole work unacceptable, the customer may seek rescission of the contract (Art 1668 civil code). Where buildings are concerned, there is a 10-year guarantee against collapse and other serious defects, and the time for reporting defects and bringing an action are different from those mentioned above (Art 1669 civil code).

Since the subject matter of an independent contract is a periodical or continuous prestation of services, it is also subject to rules covering **supply**, one of several types of contract akin to independent contracts, the difference in this case being the periodical or continuous prestation of *things* for consideration.

Law no. 192 of 18 June 1998 has recently regulated **sub-contracting between businesses**. These contracts involve one business undertaking to add value to raw materials supplied or part-worked by the customer, or themselves to supply products or services to be used by the customer as part of his business; suppliers of components to motor manufacturers, or of electronic circuits to computer manufacturers, come to mind. The relationship is a form of economic dependency in favour of the customer enterprise (as the other party is in business largely to serve its needs), particularly when market conditions make it difficult to find other partners. The law imposes the sanction of nullity on any agreement in

which this situation is abused, such as by imposing oppressive contract conditions or arbitrarily severing contractual relations, etc.

A **contract for work and skill** (Arts 2222ff civil code) is characterised by work or services undertaken for payment usually by an individual not employed by the other party. It is a residual type, distinguished from independent contracts by the usually personal nature of the work, typically carried out by an artisan or similar sole undertaking. It is, mutatis mutandis, regulated in the same way as independent contracts.

The subject matter of a contract of this type can be **intellectual work**, and this has its own regime found in both the civil code (Arts 2229ff)) and statutes regulating the exercise of professions (such as lawyers, architects, financial advisers, etc). The rules – a constant topic of plans for reform – are intended mainly to uphold the reputation and prestige of the liberal professions, whose members must be enrolled in the appropriate professional register. Any non-enrolled person purporting to provide a professional service cannot sue for payment (Art 2231 civil code). The level of payment reflects not only the amount of work carried out, but the standing of the profession (Art 2233 civil code). If the professional service involves resolving problems of 'special difficulty' the provider can only be held liable for loss or injury to the client caused by fraud or gross negligence (Art 2236 civil code).

In a **transport** contract (Arts 1678ff civil code) the carrier undertakes in return for payment to move people or goods from one place to another. In *passenger* transport (Art 1681 civil code) the carrier is liable according to the general law for lateness and non-performance, as well as for accidents to the passenger during the journey and loss or damage to personal possessions. This last is stricter than normally obtains – the carrier can only escape liability by demonstrating that he had taken all the measures that could reasonably have been expected to avoid the injury, loss or damage – and applies also to transport that is *free* in the sense that no money technically changes hands, for example, transport of employees to their workplace, but does not apply to *courtesy* or '*friendly*' transport where the carrier has no interest and there is no contractual relationship, such as when a person gives a lift out of friendship or (perhaps to a hitchhiker) out of courtesy. In transport of *goods*, on the other hand, the carrier is liable in any case where loss or damage occurs to the goods unless he can prove that it was caused by natural events or factors beyond his control, or by defects in the goods themselves or the way they were packed, or by the fault of the consignor or consignee (Art 1693 civil code). The civil code rules cover transport by land. They are supplemented by statute and provisions of the navigation code for *sea* and *air* transport.

7.17.6. Bank contracts

Because banking, the taking of deposits and issue of credit, is so fundamentally a matter of public interest, it is kept under rigorous control by the supervising authority, the Bank of Italy, but the new Single Text (legislative decree no. 385 of 1 September 1993) has dropped the features of a public monopoly that characterised its predecessor and has opened the system to competition. The rules on banking contracts are complex and scattered between the civil code, the Single Text and numerous statutes. An important role is played also by banking practice, subject to self-regulation through the Italian Banking Association (ABI), which issues model contracts to which the various institutions adhere. Statute has sought to improve the position of the client, subjecting banking operations to the principle of transparency. One example of this is the duty to show the effective overall annual service charge (TAEG), in practice the total cost of the operation to the consumer, including interest, fees and other charges, expressed as a percentage of the amount of credit granted in any **consumer credit** operation, or of credit advanced to a consumer for professional or commercial purposes in the form of deferred payment or other financing.

The main kinds of banking operation include a **bank deposit** (Art 1834 civil code) by which the bank acquires the property in a sum deposited by the client and undertakes to repay it on request or at the end of a specified term. Typically, deposits and withdrawals will be recorded in a *savings deposit book*, which can be a bearer document or usable only by the account holder (Art 1835 civil code). By an **advance of credit** (Art 1842 civil code), the bank undertakes to provide the client with access to a sum of money in excess of any amounts deposited, for a fixed or indefinite period of time. By a **securities deposit** (Art 1838 civil code), the bank provides the client with an administration service covering his or her securities (shares, government bonds, debentures, and so on), organising payment of dividend, interest and cash-in receipts. A **safe deposit box** (Art 1839 civil code) allows a customer to deposit documents and valuables and, in return for payment for the service, the bank guarantees the security of these items, limited to an agreed amount which can be increased upon payment of a higher premium.

The most common form of relationship between bank and customer is the **current account** which allows the account holder to withdraw previously deposited sums at any time, usually by means of a *cheque*. This last should not be confused with a similarly named contract, regulated by Arts 1823ff civil code, which obliges both parties to keep an account of reciprocal credits, considering them unavailable until the account is closed.

7.17.7. Employment contracts

The contract of employment is, along with competition and the free market, one of the keystones of the capitalist system, and hence of democracy and the modern economy. This importance is enough to justify protection at the level of the Constitution (Arts 36ff Constitution) and in addition to rules in the civil code (Arts 2060ff) employment relations are subject to a raft of statutory provisions at every stage, including job training, apprenticeship and dismissal. An entire sector of regulation covers the *social welfare* aspect, including assistance in case of death, illness, accident and old age.

The contract of employment is an exchange contract in free form whereby work, in the form of duties specified by and for the employing enterprise and varying according to category and qualifications, is carried out by the employee in return for payment, in the form of *wages* for a blue-collar and *salary* for a white-collar worker. Payment is hourly or monthly and can be augmented by supplements such as productivity and other bonuses depending on the kind of contract. Given the special nature of employment contracts, the legislation is heavily concerned with protecting employees, particularly when it comes to dismissal. Fixed term contracts come to an end on expiry of the stated term; indefinite contracts can be terminated for good cause (as determined by the court) or a worker can be dismissed for specific reasons concerned with the requirements of production, work organisation and serious breaches by the worker. Termination of an employment contract gives the worker the right to compensation proportional to length of service, which is payable in case of the worker's death to his or her spouse, children or close relations, and in default of these, according to the rules of legitimate succession. Such compensation is paid to the worker's family *as of right* and not by succession.

Individual freedom to contract is severely limited by *collective agreements* concluded between employers and workers' representatives, which can only be varied by measures more favourable to the worker. They set general conditions of employment for entire categories of worker, such as metalworkers, lorry drivers, etc. Such agreements are one of the main areas of activity of *trade unions*, associations created for the protection of workers, along with exercising the constitutionally protected right to call a *strike*, when the participants refrain from working in support of various claims, such as pay rises and improvement of working conditions.

7.18. Contract formation

7.18.1. Offer and acceptance

Among the requisites for contract *consent*, the meeting of minds of the parties is essential. There may be two or more parties, all of whom

assume obligations (in bilateral and multilateral contracts) or the obligations may be assumed by one party alone (in a unilateral contract).

Consent is formed when a promise is matched by acceptance. Contractual promise is known as an offer.

Offer is a unilateral act which binds the person who makes it even before it is accepted by the other party. The party to whom it is made may accept, refuse or ignore it, but the offeror is bound until the offer is revoked, accepted or refused. **Acceptance** is also a unilateral act. It must be communicated to the offeror before a contract can be considered effective.

What is the exact moment when a contract comes about; when can it be said to have been concluded? In abstract terms, many answers are possible. One can choose a solution that binds the contracting parties from the moment acceptance is issued (*the issuance theory*). Or it can be placed at the moment *acceptance is sent* (the crucial moment in English and North American law). Or it can be placed at the moment the offeror *reacts to acceptance*, that is, when receipt of notice can be inferred, or, finally, at the moment of *actual notice of acceptance*.

Legislation has adopted an intermediate point between the last two: 'the contract is concluded at the moment that the offeror becomes aware that the offeree has accepted the offer' (Art 1326 civil code). It is, however, presumed that the offeror had such notice at the moment that the communication reached his address (Art 1335 civil code). *Late acceptance*, received after the expiry of a time limit set by the offeror, may be recognised as effective if the offeror immediately notifies the acceptor that such is his intention (Art 1326 civil code).

If the offeror requires acceptance in a specified **form** (for example, in writing), acceptance is invalid if it does not comply (for example, if made orally). The **means** (telephone, telegraph, telex, letter) is, however, not significant, even if the offeror has specified one.

For a contract to be concluded, the acceptance must match the **terms of the offer** (as when A offers B 10,000 chickens at €0.50 apiece and B replies, 'I accept'). If the acceptance purports to vary those terms (as when B replies, 'I'll take 5000 chickens at €0.45 apiece') the acceptance is not valid as such; it becomes a counter-offer, and the original offeror, now the putative acceptor, has to decide whether to accept or refuse. If he accepts, the contract is formed when the other party has notice of his acceptance (Art 1326 (final) civil code).

Acceptance does not have to explicitly state but can be inferred from sufficiently *conclusive conduct*, so if the acceptor begins carrying out the terms of the contract, this constitutes unequivocal conduct clearly indicating his acceptance and so the contract is concluded. In this case, if the offeror so requests, or if the nature of the dealing so permits, or such is the custom, and there is no reply to the contrary, the contract is

concluded in the place where and the time when execution begins. In this case the acceptor must communicate to the party, not acceptance as such, but the fact that execution has begun. If he does not he can be liable for damages (Art 1327 civil code).

These rules apply to bilateral and multilateral contracts. In the case of unilateral contracts, the offer leads to a concluded contract once the offeree has notice of it (Art 1333 civil code). Unilateral acts (such as proxy) are effective as soon as the person to whom they are directed has notice of them (Art 1334 civil code).

The demands of the modern economy have imposed very simple and rapid practical rules for the conclusion of contracts. Self-service establishments are a prime example: the customer serves himself, chooses the products and goes to the till to pay. There is no express declaration of any wish to purchase, all is implied. The important thing is the customer's conduct, which is unequivocal. By choosing the product and going to the till with it, he or she has shown an intention to buy.

This then is one instance of *conclusive conduct*. Another is when the customer gets on a bus to go home. In boarding the bus, he or she manifests the intention to use the public transport service, and is thus accepting the *offer to the public* comprised by the bus running and thereby offering the service to the community at large.

Contracts can also be concluded rapidly in other situations, for example, when use is made of technologies like telephone, telegraph and the internet. Contracts concluded by these means are also said to be made by 'absent parties'. They are not, however, considered absent and distant by the rules; they are deemed present to make the law simple and facilitate relations. The use of pre-drafted forms also speeds contract formation. When an insurance company presents a customer with a standard form of policy for the compulsory insurance of his car that it has already drawn up, the customer has only to accept the conditions as stated or else refuse them. Usually he accepts, and signs the form. With his signature the contract is concluded.

There are now rules in place to protect consumers who have consented to contracts hurriedly due to 'aggressive' sales techniques (such as door-to-door selling) or technologies employed by the vendor (such as tele-sales and e-commerce) by allowing them to revoke, within quite short time limits, the consent they have already manifested. These cooling-off periods are often supplemented by other legal provisions. To these various measures are added other forms of protection of non-professional contracting parties, including a duty to inform, prescribed forms; these generally feature short time limits, applicability only in favour of the consumer, and their irrenounceability on the part of the latter. These various provisions are now comprised in the Consumer Code (Decree no. 206 of 2005).

Silence is *legally significant only when the law so provides*, such as is the case with tacit acceptance of an inheritance (Art 476 civil code) or extension of a contract beyond its term (automatic extension of lease and lodging, Art 3 of law no. 392 of 1978), and so on.

There are, however, cases where silence is *omissive conduct*, and is significant from the point of view of resultant harm: if one party fails to disclose in such circumstances, the other party can seek the discharge of the contract. Such is the case with insurance policies, where the insured person fraudulently withholds information material to the insured risk (Art 1892 civil code). Or else damages may be sought for incurred where circumstances vitiating the contract have been concealed (Art 1338 civil code on negotiations). If fault by the other party and prejudice arising from his silence can be demonstrated, an action for damages also lies: suppose A lends money to B having been solicited to do so by C, then is unable to recover the money because C has not told him that B is insolvent, dishonest, or on the verge of bankruptcy.

Once the contract is concluded the parties may still go back on their decision and decide to undo it. This is termed **mutual dissent**, but is actually a contract whose content is the precise opposite of what the original contract provided. Since it cancels the terms of the previous contract it is a substitutive contract.

7.18.2. Negotiations, steps to the formation of contract

The conclusion of the contract, the meeting of minds arising from offer and acceptance, is sometimes, though not necessarily, preceded by a phase of negotiation. Information on the economic operation is exchanged, proposals are made and modified, the prestations are discussed and refined, agreement is postponed, and the negotiations may take a long time because the matter is complicated or because large amounts of money are at stake. This will apply, for example, to redevelopment contracts in which an enterprise undertakes to build a whole neighbourhood, a port or industrial installation.

Within the negotiation process certain phases can also be discerned, from the first contacts between the parties to the final stage where a memorandum may be drafted outlining the most important terms of the eventual contract.

Negotiations, even in this final phase, do not bind the parties to the points set down in the memorandum. If the parties wish to be bound at this stage, they can conclude a contract incorporating the points agreed on, and supplement it later with the terms as yet unresolved. This point-by-point memorandum, therefore, has only documentary value in evidencing a contract already agreed on when it contains the essential elements of such a contract and it can be shown that the parties definitely

intended to be bound, and if their subsequent conduct demonstrates an intention to turn the memorandum into a concluded agreement.

The fact that negotiations do not bind the parties does not mean that the parties in the course of negotiations are free to behave as they wish. The law provides that the parties must conduct negotiations in *good faith* (in an objective sense, that is, according to the principles of fairness and propriety: Art 1337 civil code). This general principle applies to the situation where, for example, one party explicitly engenders legitimate expectations and reliance on the part of the other and then breaks off negotiations without good cause; or where, without informing the various parties, he conducts simultaneous negotiations with more than one person, and then chooses the most advantageous offer, thus betraying the trust of the party who, in ignorance of the true state of affairs, thought he was about to conclude a contract.

Freedom of negotiation, in other words, must be exercised with sincerity. If a justified trust is created and then the other party withdraws from negotiations without good cause, he incurs *liability*. It is debatable whether this liability is contractual or extra-contractual in nature. The debate matters because of practical issues such as prescription and burden of proof. The prevailing view, based on the argument that since there is no contract no contractual liability can arise, holds that liability is thus extra-contractual.

Damages do not compensate for the entire loss suffered by the wronged party, otherwise there would in effect be no freedom to negotiate and people could be dissuaded from negotiating for fear that the costs of withdrawing could be excessive. Instead, they reflect the so-called *negative interest*, that is, the expenses resulting from the unjustified withdrawal and any loss of property suffered.

This is a different situation from the one governed by Art 1338: 'a party who knows, or ought to know, of any impediment which would make the contract void and does not inform the other party, is liable to pay damages for loss incurred by another party who through no fault of his own has put trust in the validity of the contract.' In this case too, the other party must be without fault, but breach of fair dealing is not in this case manifested as insincere or arbitrary behaviour (such as withdrawal from negotiations), but, more seriously, in the awareness of a reason, not communicated to the other party, why the contract is void. Such reasons could include the sale of an item not belonging to the purported vendor, or sale as 'building land' of land on which building is not in fact permitted, in order to increase the sale price. In this case too, therefore, damages are limited to the extent of the negative interest.

Until a few years ago the public administration had no pre-contractual liability for negotiations with private parties. Case law held that the public administration was incapable of unfair or insincere

behaviour, because its institutional role was the pursuit of the common good, and it could thus not be bound in the process of putting a contract together. Recently, however, the potential liability of the public administration has been affirmed in cases where the private party's reliance has been disappointed in an unjustified manner. The private party can claim nothing, however, if the contract is not finalised by reason of obstacles to realisation (such as a supervisory body withholding approval) which become apparent during the course of the administrative procedure designed to lead to the decision to accept an offer. The private person is deemed to be familiar with the administrative process, and any misplaced belief is his own fault.

7.18.3. 'Delivery' in real contracts. Deposit, sequestration, loan for use, loan

'Real' contracts (not to be confused with contracts producing real effects such as sale) are a heterogeneous and residual category, almost an exception in the classification of contracts. They are 'real' in the sense that they concern the use of a thing (Latin *res*) and in forming them the delivery of the thing is central.

So long as the thing remains undelivered, the contract is not concluded. Delivery is thus a sine qua non of the contract: it is this feature that makes this category of contract exceptional, as the Italian system bases conclusion of a contract on simple consent and consent can have the effect of transfer of property (such as in sale and purchase).

The other important aspect of this category is that, just because of this anomaly, real contracts are *typical:* none can be formed in a manner different from that prescribed by the code. Thus an exception is made to the principle of the parties' freedom of transaction in the creation of new configurations and types of contract (Art 1322(2) civil code). The tangible contracts are *loan for use*, *loan*, *deposit* and *pledge*, to which many would add *sequestration* and *bank advances*.

Deposit (Arts 1766ff civil code) is a contract whereby a party takes an item of moveable property into his custody and assumes the duty of safe-keeping and to return it intact on request, without being allowed to use it. So-called *irregular deposit* (Art 1782) is different in that the item deposit is money or fungible goods, so the bailee may use them and they become his property. His duty is to return only items of the same type and quality (tantundem eiusdem generis). A deposit contract is presumed to be gratuitous unless the parties' contrary intention can be inferred. If for reward, it is a contract for paid services. If it is gratuitous, however, any blame attaching to the bailee for loss or deterioration of the object is less severely penalised (Art 1768). If on the other hand the bailee took the object in as a matter of pure courtesy (*courtesy deposit*), he can only be

liable in the event of fraud or gross negligence. A special set of rules, that cannot be derogated from, applies to *deposit of objects in a hotel* (Arts 1783ff civil code). The hotelier (in common in this regard with managers of theatres, cinemas, discotheques, bathing establishments, restaurants, etc) is responsible for the loss, theft or damage to possessions the customer has brought, so long as this was not caused by the customer or his companion(s) or force majeure. Liability is unlimited if the hotelier is at fault or if the item had been committed to his safe-keeping (or if he refused to accept custody of items such as money and valuables that he was under a duty to accept). Liability is limited in other circumstances to one hundred times the cost of one day's stay.

Sequestration is a means of protecting rights as part of the judicial process. It is a precautionary measure, designed to protect parties who fear that the property that is the subject of litigation may deteriorate or perish or be sold. In other situations it is applied to a debtor's property to guarantee a debt.

When used in the first case above, it is termed '*preservative*'. The creditor may seek preservative sequestration of the debtor's goods; he may also seek it in relation to goods acquired from the debtor by third parties (Art 2095 civil code). Once the creditor has obtained an order he is not bound by any alienation of the sequestered goods (Art 2906 civil code).

Sequestration can be *consensual*, by the consent of both parties, outside the ambit of legal proceedings. It is 'a contract by which two or more persons entrust a thing (or more than one thing) that is the subject of dispute to a third party, who will keep it in his custody and return it to whichever of the parties is entitled to it when the dispute has been resolved' (Art 1798 civil code). The stakeholder must keep the thing safe, and is under a duty to administer it. He has the right to remuneration, reimbursement of expenses and disbursements in connection with the safe-keeping and administration (Arts 1800, 1802 civil code).

Loan for use, together with gift, is the most important kind of gratuitous contract. Whereas gift transfers the property of the subject matter, the loan for use (also called a *gratuitous loan*) simply involves the owner's consent to another using the borrowed item.

It is not, however, a mere 'licence' because loan for use is a contract 'by which one party delivers to another moveable or immoveable property, so that the borrower can use it for a time, or for a stated purpose, with a duty to return the same item; it is of the essence that loan for use is gratuitous' (Art 1805 civil code).

The importance of the gratuitous element is that, it impinges on the way loan for use is regulated. It is the object of the contract, which has been said to consist of the willingness to provide for the contingent need of another by allowing the personal use, temporary and free of charge, of a thing.

Loan for use, a typical unilateral contract, imposes duties only on the borrower. He or she must keep the thing safely with the diligence of a reasonable person and may only put it to uses laid down by the contract or to which the thing is normally put. Otherwise the lender may seek the immediate return of the thing together with damages (Art 1804 civil code). The borrower is also responsible for loss of the thing if it could have been avoided or made less likely by his using an item of his own instead, or if he has subjected the thing to a different or longer period of use (Art 1805 civil code). The borrower has no right to reimbursement of expenses unless they are unusual expenses incurred to preserve the thing (Art 1808 civil code). He must return the thing at the time stipulated in the contract, or if no term is stated, then upon request by the lender (Art 1809 civil code).

The lender must make good loss or damage incurred by the borrower through defects in the thing, if he knew of them and did not warn the borrower (Art 1812 civil code).

Since loan for use is based on the reliance that the lender places in the borrower, the death of the latter does not permit his heirs to continue the contract. The lender may demand the immediate return of the thing (Art 1811 civil code).

Sometimes the loan comes accompanied by conditions. If these detract from the gratuitous nature of the prestation, there is created a non-standard contract *on sufferance*. This usually consists of the free use of immoveable property, with costs of maintenance being paid by the borrower.

The most important tangible contract in commercial life is the **loan**. It is a contract whereby one party delivers to another a specified sum of money or other fungible, and the other undertakes to return equivalent things of the same kind and quantity (Art 1813 civil code).

A loan contract entails the transfer of property in the money or goods, and so has real effects (Art 1814 civil code).

This derives from the fact that the things lent are fungible and their use entails alienation and circulation.

A loan is presumed to be for reward. Unless the parties agree otherwise, interest (not usurious) must be paid on the loan. It may be gratuitous, however, in which case any term for repayment is presumed to operate in the borrower's interest. If defects in the things cause loss or damage to the borrower, the lender (if the loan is gratuitous) is liable only if he knew of the defects and did not warn the borrower (Arts 1816, 1821 civil code). Loan is also a unilateral contract. The duty that arises is that of returning the property.

It is a matter of debate whether delivery must be actual, or whether it can simply consist in legal availability to the borrower, for example, whether the sum of money has to be delivered directly or whether it can

be deposited in the borrower's current account. For practical reasons, case law adopts the latter view.

In commercial and banking practice, there are contracts that closely resemble loans, but cannot be so described, for the important reason that if the delivery is not actual the contract is not concluded. This gives rise to uncertainty and many contractual disputes in the courts.

If one party undertakes to provide capital repeatedly, for example, to finance the construction of buildings or installations, and the other party undertakes to pay interest, and possibly divide the profits, this is not a loan, but a *finance contract*.

The *purpose loan* is quite widely used. It is a kind of financing that banks extend to businesses in economic difficulties, or in the process of modernisation, or just starting up.

7.18.4. Preliminary contract

A preliminary contract is one in which the parties undertake to conclude a future contract. It is called 'preliminary' because it leads to a 'definitive' contract. It should not be misconstrued from this as only 'half a contract' akin to negotiations, or as one in which only certain points are agreed, leaving the rest to be determined in the definitive contract – it is different from the memorandum described above. It is a fully fledged contract; only obligations arise from it. The duty undertaken by the parties is that of concluding another contract with the same subject matter. The code is concerned with the preliminary contract only to the extent of providing that it must be concluded in the same form as the definitive contract (Art 1351 civil code).

In practice the preliminary contract is in wide currency. It is used when one party does not have immediate access to the funds necessary to conclude the definitive contract, but does not want to 'let the deal slip', or when he wants to make checks that will take time to carry out.

The preliminary contract can also be unilateral, that is, imposing obligations on only one party. This is to be distinguished, however, from an option contract (Art 1331 civil code), because the latter operates automatically whereas a preliminary contract requires a new manifestation of will (namely, the definitive contract).

If one of the parties does not in fact intend to conclude the definitive contract, the aggrieved party can seek *enforcement* of the duty to conclude one (Art 2932 civil code). The court will be asked to make an order of specific performance which produces the same effects as the missing contract. For example, if A is under a duty arising from the preliminary contract to sell his house to B but has since changed his mind and refused to conclude a definitive contract, B can seek specific performance to obtain transfer of the house. It is for this reason that

the preliminary contract must be in the same form as the definitive contract; otherwise the effect of transfer cannot be produced by the court order. It must also contain all the essential elements of the definitive contract, as the judge cannot use his discretion to resolve aspects of the subject matter that have not been resolved by the parties.

The right of action is dependent on the claimant having himself offered to conclude the contract he seeks to impose on the other party. Such offer can consist of a simple letter in which the offeror invites the offeree to present himself before a notary to conclude the definitive contract. No precautionary notice of delay is required and the offer can be made in court itself. Specific performance cannot be obtained against the public administration, because an ordinary judge cannot force the public administration to suffer the effects of a contract that it, in the exercise of its discretionary powers, did not wish to conclude.

7.19. Effectiveness of the contract

7.19.1. Effects of the contract

A contract has the force of law between the parties. This means that once the contract has been concluded the parties have imposed rules on themselves that must be respected (Art 1372(1) civil code).

The contract produces effects only as between the parties, a rule that tends to be expressed in the form of a principle, the *principle of privity of contract*. The exact meaning of this principle must, however, be understood: the law does not mean that strangers to the contract cannot in any way be interested parties in the activities arising from a contract.

For example, if A and B conclude a cartel agreement, it will suit them because they will be able to sell their products at the same prices in different territories. It will not, however, benefit their competitor, C who will be hampered in competing with them and so suffer a reduction in demand for his products.

Thus the agreement between A and B is valid only as between them, but it has an effect also on C's profits.

So the rule means that third parties cannot be bound by an agreement concluded between two other parties. Nor can they dispose of property or legal relations belonging to third parties. The rule allows the contract to produce effects on others (legal effects, that is, and not purely economic effects as in the example) only when the law so provides (Art 1372(2) civil code).

The law allows the parties to extend the remit of the contract to third parties in certain situations.

Among the most significant exceptions are the contract in favour of third parties, the promise of a third person's act, and prohibition of sale.

7.19.2. Repudiation

The parties are usually free to establish which of them may, and in which ways, repudiate, or 'withdraw' from the contract, thus no longer being bound in any way. This is known as unilateral repudiation (Art 1373 civil code).

The right to repudiate effectively creates a power for the benefit of the repudiator. He has repudiated of his own free will and the other party must cede to his will. The power to repudiate can be exercised until the moment that the execution of the contract begins (Art 1373(2) civil code). Sometimes the parties might agree that one of them may repudiate in return for a payment made to the other (a *repudiation penalty*) or a promise of payment (a *repudiation fine*). In such cases the penalty is agreed by the parties as a 'payment for withdrawal'; the repudiator forfeits the sum or has to refund double what he has received (Art 1386 civil code).

The repudiation penalty must be distinguished from an *earnest* and from a *penalty clause*.

The effects produced by the contract between the parties are not only those intended. There are also effects resulting from *interpretation*, from *supplementation*, from *substitution* and from *partial nullity* of the contract.

The parties may suspend the effects of the contract using a condition precedent, or may cancel them altogether with a condition subsequent. Sometimes effects are suspended by operation of law, such as in future sales, where the property can only be transferred once the subject matter has come into existence (Art 1472 civil code).

7.19.3. Prohibition on alienation

Covenants by which the parties limit their right to alienate a thing are quite common in commercial practice, where 'exclusive zones' are often created. Business A sells ice creams of type X. It makes an agreement with its retailers that they will, in return for payment, sell exclusively this brand of ice cream and not any produced by enterprise B. Or business A might require distributor B to sell only through retailers, and not direct to the public.

Covenants prohibiting alienation were once very common among noble families, and other social strata in which a need to maintain the family heritage intact led the father to ban the sale of certain property. In this way the prohibition of alienation came close to resulting in a *family trust*.

There are cases in which prohibiting alienation does not arise from agreement but by operation of law. For example, assignees of rent-controlled dwellings cannot resell them until a specified time has elapsed.

Prohibition of alienation, when effected by agreement, is subject to limitations. It is after all in the public interest that property should be able to circulate freely and not accumulate in an unproductive manner, and that it should not be overburdened with encumbrances. So the law provides that an agreement prohibiting alienation is only valid if reasonable time limits are set and there is a meritorious interest at stake (Art 1379 civil code).

7.19.4. Contracts for the benefit of third parties

Contracts for the benefit of third parties are the most obvious exception to the principle of privity of contract, and to that which confines the effects of contracts to the parties themselves. A contract for the benefit of a third party is made between a *promisor* and a *stipulant*. The promisor undertakes a prestation for the benefit of the third party, thus assuming an obligation not only towards the other party to the contract, as is usual, but also towards the third party, a stranger to the contract.

The relation between promisor and stipulant is a *provision relation*; the stipulant usually pays the promisor for undertaking the obligation. The relation between stipulant and third party is a *currency relation*.

There are numerous kinds of contract for the benefit of third parties in commercial practice: transport and life insurance are examples. A entrusts a ton of grain to B so that he can transport it to C, who has a food business. The contract is for C's benefit, as the prestation is carried out for C's benefit (the delivery of goods to him). There is a transport contract between A and B of which A and B are the only parties. A has paid for the transport and B has undertaken to deliver the goods to the third party (C). A further example: H wants to leave to his wife when he dies not only his existing property, but also a substantial sum of money. So he takes out a life insurance policy and pays a monthly sum to I (the *insurer*). On H's death, the sum provided in the policy will be paid to his widow.

As the examples show, the contract for the benefit of a third party is not a contractual 'type', not recognisable in terms of a precise economic operation, but is more a *framework* to be adapted to numerous kinds of economic operation. Thus the object of a contract for the benefit of a third party can vary from one instance to the next according to the type of economic operation that the parties wish to embark on.

7.19.5. Contract for person to be named

One party may at the moment the contract is concluded reserve the right to subsequently name the person who is to assume the rights and obligations arising from the contract (Art 1401 civil code). A finds a flat

for sale at a very affordable price, so he buys it, reserving the right later (when he has found a client) to name the person who will be the effective purchaser. This is not a simple 'reservation', but a genuine purchase made for the person to be named. This avoids a double transfer from the vendor to A and then from A to the client.

The purchase cannot remain uncertain, however. Within three days (or such other period as the parties agree) the person who is to become the purchaser must be named. The declaration is ineffective if not accompanied by the acceptance of the named person, or if a proxy has not been effected prior to the contract (Art 1402 civil code). When the naming declaration is validly made, the named person assumes the rights and obligations arising from the contract, with effect from the moment it was agreed (Art 1404 civil code).

If the naming declaration is not validly made within the time laid down by law or agreed by the parties, the contract is effective as between the original contracting parties (Art 1405 civil code). In the example, if the client refuses the flat, it will remain the property of A.

Contracts for persons to be named are usually categorised in indirect agency (purchase for the account of another).

7.19.6. Contract for the account of whom it may concern

Sometimes the person who is a party to the contract is not named, or remains unknown, because he or she will be determined subsequently. Over time, however, the prestation may become impossible; the promisor is then authorised to perform it for third parties for the account of the effective beneficiary or person entitled. For example, if A entrusts a consignment of bananas to B, and B is not able to identify the consignee C (because he has changed address, for example), he may sell the goods to the highest bidder for the account of C, transferring the selling price when C has finally been identified. Such contracts are *for the account of whom it may concern*.

7.19.7. Assignment of contract. Sub-contracting. Succession and contract

It may happen that one of the parties who have concluded a contract wishes to transfer the dealing to another. In this case, rather than repudiating the contract (supposing this can be done) and suggesting to the other party that he concludes an entirely new contract with the third party, he may himself substitute the third party. There is then a trilateral agreement, which gives rise to an assignment. The participants in the agreement are the assignor, the other party to the original contract and the third party, the assignee.

Assignment of a contract differs from assignment of a debt in two important respects. It involves the acquisition of rights and obligations, because the assignee takes the place of the assignor completely, whereas in assignment of a debt he takes over only a credit relation. Moreover, a third party participates in the agreement and his willingness is a sine qua non of the assignment of the contract, while in assignment of a debt the original debtor expresses no wish and has no say in the agreement.

Assignment is not always possible. The contract must be for reciprocal obligations which have not yet been carried out (Art 1406 civil code). A sale contract, for example, cannot be assigned by the purchaser if he has not yet paid the purchase price while the vendor has already delivered the goods. Obviously, gratuitous contracts, not containing reciprocal obligations, cannot be assigned.

Assignment of contract is by its nature releasing. Once the agreement is concluded, the assignor owes nothing more to the original counterparty, unless the latter declares that he does not release the assignor. In that case an action lies against the assignor for the assignee's breach (Art 1408 civil code).

Assignment of contract is distinct from *sub-contracting*, by which one of the contracting parties agrees a separate contract with a third party, transferring all or part of the prestations contained in the original contract. Subletting is fairly common; the lessee lets out to other parties rooms that he has himself rented. A sub-contract depends on the original contract: termination, nullity or avoidance of the principal contract act on the sub-contract and deprive it of its effects.

Succession operates on a contract when one of the parties dies. The effects of the contract pass on to the heirs, the successors of the deceased. The civil code contains no general rules on the effects of succession on a contract, because a contract, as a relation creating rights and obligations between the parties, becomes another part of the assets and liabilities of the estate, like any of the deceased's other sources of earnings, property and liabilities.

There are, however, special rules governing succession in particular kinds of contract, and regulating particular types of relation. For example, personal contracts, made *intuitu personae*, are not transferred by succession and do not therefore affect the successors, as they are based on certain personal qualities which might well not apply to any successor. An example is mandate (Art 1722 civil code). Proxy is not transferable either; it terminates on the death of either principal or agent. Offer and acceptance are ineffective if either of the parties dies before a contract has been concluded.

There are cases where succession is provided by law to facilitate the carrying on of *business activities*. A mandate having as its subject matter action concerning the exercise of a business is not extinguished if that

business continues to operate, though the parties or the heirs may repudiate (Art 1722(4) civil code). The same applies to offer and acceptance on the part of the entrepreneur (Art 1330 civil code).

7.19.8. Added covenants

The regime governing contract, as well as that of other sectors such as succession, business contracts and relations between enterprises, provides various rules covering **covenants** made by the parties. It is not these rules, however, that usually regulate such covenants expressly, but rather custom and usage within commercial practice. When the law intervenes it does so to limit freedom of contract. A *covenant*, or *added clause*, is any agreement that the parties add to the contract or to any specific aspect of it, even after the contract has been concluded.

There are many types of covenant. The most common concern the content of the contract, but they may also relate to evidence or effects of the contract, etc. The code specifically covers covenants that are *unlawful* because they give an excessive advantage to one of the parties, or because they infringe a legal principle.

These are types of unlawful covenant.

(a) A **covenant of forfeiture** (Art 2744 civil code) which has been inserted into pledge and mortgage contracts, but is also unlawful if found in an antichresis contract (Art 1963 civil code), 'a contract by which a debtor or third party undertakes to deliver immoveable property to the creditor to guarantee the debt, so that the creditor may take the income therefrom and apply it to the reduction of any interest due and then to the principal'. To sterilise the prohibition a clause is inserted by which the transfer of property attached in a creditor's favour is effected by a cause other than failure to pay on the due date, such as occurs when the transfer arises from a freely concluded contract between the attachment creditor and debtor for a price determined upon the considered assessment of a third-party. The third-party assessment precludes any arbitrariness on the creditor's part and does not prejudice other creditors.
(b) An **agreement of inheritance** is prohibited because it limits the freedom of the testator (Art 458 civil code: 'any agreement to dispose of one's succession is void; any act by which a person purports to dispose of or renounce rights which he may expect to acquire by a future succession is also void').
(c) An **exclusion agreement** violates the principle of protection of members, partners and shareholders (Art 2265 civil code: 'any agreement whereby one or more members, partners or shareholders is excluded from participating in profits or losses is void').

(d) A **burden-shifting** agreement hinders one of the parties in the exercises of his or her rights (Art 2698 civil code: 'any agreement which purports to modify or invert the burden of proof is void when it concerns non-alienable rights of a party or when the effect of the modification or inversion is to make it excessively difficult for one of the parties to exercise his or her rights').
(e) An **exoneration clause for fraud or gross negligence** (Art 1229 civil code).

Some covenants are **admissible within limits**. Some examples are:

- provisions in **restraint of alienation** (Art 1379 civil code) as mentioned above;
- covenants in **restraint of competition** (Art 2596 civil code) which are valid if confined to a specified limited geographical area or to a specified activity, and are for a term not exceeding five years;
- stipulations as to **reservation** (or retention) **of title**, by which the vendor reserves to himself title in the property up until the moment the purchaser has paid the last instalment of the purchase price, with the purchaser assuming the risks at the moment of delivery; such reservations can be raised against the purchaser's creditors only if made in writing on a specified date which preceded any attachment of assets (Art 1524 civil code);
- **covenants of redemption** whereby a vendor reserves the right to buy the sale goods back by refunding the purchase price and reimbursing any necessary expenses (Art 1500 civil code); any agreement stipulating a redemption price higher than the original purchase price is void for excess (Art 1500(2) civil code);
- **resale covenants** whereby a vendor agrees resale terms with the purchaser; the limits applicable to prohibition of alienation apply;
- **agrarian** covenants, relating to agricultural activity;
- **shareholders' covenants**, whose subject matter is the way the shareholders of a company intend to conduct themselves concerning the activities or organisation of the said company. After a prolonged debate about the validity of certain of these (such as voting trusts designed to influence the outcome of members' meetings, or resale syndicates which place limits on transfer of shares) legislative decree no. 56 of 1998 has come into force to impose forms of announcement and time limits, at least where quoted companies are concerned.

Among covenants that are freely admissible are fiduciary covenants, and *pre-emption agreements*. **Pre-emption** is a form of preference. Preference is set by laws on rural property and the laws on rural leases, which

provide a form of *legal* pre-emption, designed to promote agricultural development and protect the party who actually cultivates the land, so helping to make farming land affordable (Art 47(2) Constitution).

The kind of pre-emption that concerns us here, however, comes about through *agreement*, freely arrived at by the parties. By a pre-emption agreement one party promises to give first refusal to the other when he decides to sell the property. The preference implies equal terms. If A makes a pre-emption agreement with B and later decides to sell his property he must give preference to B – on equal terms – over other prospective purchasers. The agreement gives rise to obligations only as between the parties: if A sells to C in breach of the agreement, he is liable to pay damages to B for non-performance, but C's purchase remains valid and B cannot have the sale revoked. There is a duty to inform owed by A to B regarding his intention to sell.

Exoneration clauses are very frequent. They can be incorporated into individually negotiated contracts or in standard terms imposed by an enterprise. In the latter case, clauses which exonerate or limit liability or guarantee are considered oppressive (Art 1341(2) civil code) and are ineffective unless countersigned by the other party (in B2B von). Agreements which exonerate or limit liability are different from those limiting or restricting *risk*. The latter do not impinge on liability, but allocate risk in advance among the parties.

Except in consumer contracts, clauses which exonerate or limit liability are admissible without limit, except when they purport to nullify the legal process. The debtor cannot exempt himself from liability for fraud or gross negligence; if he could, he would be in a position of being able to act entirely according to will, amounting to 'I'll pay if I feel like it'. Any agreement with such an outcome is void. By the same token, exoneration clauses are void if they are contrary to public order.

Specific rules apply to the *guarantee of proper functioning* (Art 1512 civil code) which is widely used in practice, especially in sales of moveable goods, such as white goods, vehicles, etc. According to common opinion, guarantees of proper functioning are much more effective than the law recognises.

The guarantee of proper functioning is distinguished from ordinary guarantees by the more supple and clearly expressed way it works. The purchaser is not required to identify the defects in the goods; he merely needs to show that they do not work. The amount of time the purchaser has to report these defects is longer than with an ordinary guarantee, while the prescription period is shorter, as befits the nature of the guarantee, designed as it is to remedy a situation in which the goods are unusable. This guarantee does not operate only in cases of serious non-performance: a minor defect, so long as it impedes the use of the goods, is sufficient to invoke the vendor's responsibility, but only to the

extent of 'substituting' or 'repairing' the faulty goods. The contract is not terminated, and so the dealing is saved, and the vendor runs a smaller risk than he would under an ordinary guarantee.

A further difference from an ordinary guarantee lies in the duties that it imposes in certain circumstances upon the vendor. These can be discharged at the vendor's discretion by substituting the faulty goods (or a part or component) or repairing them at his own expense.

7.20. Execution of the contract and fulfilment of obligations

7.20.1. Concepts

Making a contract brings with it obligations which each party on concluding it undertakes to fulfil. Just as negotiation, conditions and interpretation are subject to the legal rule requiring conduct to be in good faith, so is the phase of execution: 'the contract must be executed in good faith' (Art 1375 civil code).

It is not always easy to ascertain if the parties' conduct has met the requirement of fairness. Consider this case: A has an exclusive right to sell a certain product. At the expiry of the contract it is normal that A can continue to sell a few of the products as the rate at which they sell is slower than during the period of the contract. Is it, however, fair dealing for the exclusive concessionaire, just as the contract is about to expire, to order a large quantity of the product, more than the amount ordered previously? This conduct does not seem to constitute fair play, because it implies that even after expiry the concessionaire continues to enjoy the right to sell the product, though he no longer in fact has that right.

Not executing the contract or doing so tardily amounts to **non-performance**.

Execution of the contract is one of the most important aspects of fulfilment of an obligation relation, that is, the realisation of the creditor's interest through the debtor's conduct. In a bilateral contract both parties are respectively debtors of one prestation and creditors of another. In unilateral contracts and unilateral acts the prestation is undertaken by only one of the parties (unilateral promise).

In each case, the obligation undertaken in the contract must be fulfilled. The civil code contains detailed rules for the performance of obligations.

7.20.2. Performance

Performance of the obligation and *fulfilment of the obligation relation* are similar expressions referring to the same situation, that is, the execution of the prestation which is the subject matter of the obligation.

Whether the prestation involves doing or giving, executing it performs the obligation assumed by the debtor. If the debtor has assumed the (negative) obligation to refrain from doing something his conduct constituting performance will lie in not doing that thing during the required period (for example, not adding a storey to a building, not opening lights and prospects, not exercising a right to use the sources of energy for the adjoining property, and so on). The opposite situation is non-performance, or the non-fulfilment of the obligation relation. In this case the debtor is liable to the pecuniary sanction that the law imposes on the debtor to compensate the creditor.

Performance is owed to the creditor or to a person nominated by him, or to a person nominated by the court. The creditor is not normally interested in whether the debtor carries out the obligation personally, as his interest lies in the debt being paid.

Only in exceptional cases must performance be carried out personally by the debtor and no one else. This occurs when the debt is of a highly personal nature, such as a duty to maintain, or if the obligation arises from a contract *intuitu personae*, that is, has been concluded because of some specific and infungible quality of the debtor (for works of art or other artistic production, professional services, etc).

In other cases performance can be through the work of third parties, even against the creditor's wishes if the latter has no actual interest in requiring the debtor to carry it out in person (Art 1180 civil code). The creditor may, however, refuse a prestation by a third party if the debtor does not agree because he has an interest in carrying it out personally (Art 1180(2) civil code).

If no time has been agreed by which the prestation must be performed, the creditor may demand it immediately. Whenever usage or the nature of the prestation, or the manner or place of execution, require a period of time to be stipulated for performance, the court may set one if the parties do not agree on one (Art 1183 civil code).

If the time for performance is left to the debtor's discretion, there may also be circumstances in which the court will set the time (Art 1183 civil code). The judge will take usage or the circumstances into account. For example, if by the terms of the contract the prestation is to be performed 'in the shortest possible time' the debtor cannot allow an elapse of time in excess of that normally required in the circumstances. If the time for performance is at the creditor's discretion, it can be set at the instance of the debtor who wishes to have the business completed (Art 1183 civil code).

If the parties have fixed *time limit*, this is presumed to be in the debtor's favour (Art 1184 civil code), if it was not in fact fixed in favour of the creditor or of both parties. The creditor cannot demand performance before the time limit has expired (for example, he cannot present a bill of exchange prior to its due date) unless the time limit is not

fixed in his favour (Art 1185 civil code). If the debtor pays before the due date, he cannot reclaim what he has paid (Art 1185 civil code). If, however, the early payment produces a financial gain for the creditor the debtor is entitled to reclaim the equivalent of any sum lost (Art 1185 civil code). Finally, if the time limit is fixed in the debtor's favour, but he becomes insolvent before the due date, the creditor may demand immediate performance (Art 1186 civil code). The same remedy is available if the debtor's actions result in a diminution of the guarantee he has made, for example, by selling a mortgaged property, by making large gifts, by selling moveable property, or if he does not give promised guarantees (Art 1186 civil code on lapse of time limits).

The *place* for performance is that stipulated in the document giving rise to the obligation (contract, unilateral act, will, etc) or as established by usage. In default of these, the nature of the prestation or the circumstances may indicate which place is appropriate. If not, the law distinguishes three situations: either the obligation was to give a specific, ascertained thing; or it was to pay a sum of money; or it was a situation distinct from either of these two. In the first case the place is wherever the thing to be given is located (a so-called *collectable* obligation). In the second case the place is the creditor's domicile at the moment the payment term expires; if, however, this is a different address from when the obligation arose, the debtor may pay at his own domicile, provided the change is not too burdensome for him (a so-called *portable* obligation). In other cases, the place is the debtor's domicile at the moment the payment term expires (Art 1182 civil code).

7.20.3. Payment

The code accords particular importance to the way an obligation to give, that is, **payment**, is performed.

In practice, obligations to give are the most common: one has only to think of those undertaken by a purchaser, who must pay for what he has bought. Payment must be made to the creditor, to his agent or to a person he nominates or a person authorised by statute or by the court to receive it. If made to another person not authorised to receive it, payment releases the debtor if the creditor ratifies (that is, gives his consent to) it, or if he profits from it (Art 1188 civil code). If the debtor makes the payment to somebody who has apparent authority to receive it, he is released from his obligation, so long as he acted in good faith – this means in a subjective sense, in the absence of any intention to infringe the rights of others – and believed he was doing what was required. Such would be the case if he paid a person representing himself as the creditor's agent and producing false documents, or paid the apparent creditor, and so forth (Art 1189 civil code). Whoever receives a payment

without entitlement has a duty to restore the sum to the creditor. Otherwise the creditor would be prejudiced, since payment to an *apparent creditor* releases the debtor (Art 1189(2) civil code).

Payment to a *creditor lacking capacity* does not discharge the debt. The debtor could take advantage of the incapacity to perform the obligation inadequately or late. He is only released if he can show that the payment did in fact benefit the person under a disability (Art 1190 civil code).

The debtor can also pay with something belonging to another (provided, obviously, he is in effective possession: see sale of others' property, Art 1480 civil code). The debtor cannot, however, challenge (that is, seek to avoid) a payment made with another's property that he is not able to dispose of, unless he offers to provide the prestation with means that are at his disposal (Art 1192 civil code).

Specific rules govern *payments of several debts* (Art 1193 civil code), *interest payable on debts* (Art 1194 civil code), *receipts* (Art 1195 civil code) and *expenses* (Art 1196 civil code).

Instead of performing the original obligation, a debtor can discharge it by performing a different prestation from the one agreed, but only if the creditor consents to it as suitably serving his interest. Consent is necessary even if the 'new' prestation is of a value equal to or greater than the original. The obligation is discharged when the replacement prestation has been performed (so-called *substituted consideration* or *agreed alternative performance*, Art 1197 civil code). The debtor may, rather than perform the prestation directly, assign a debt of which he is the proprietor. The obligation is then discharged once the amount due is met if the parties have not agreed otherwise (Arts 1198, 1267 civil code). Once the debt has been paid, the debtor has the right to have the fact acknowledged by the creditor in the form of a receipt. The creditor in turn must agree the release of any guarantees, such as a mortgage or pledge, that covered the debt, and of any other restrictions that impair the debtor's ability to dispose of his property (Art 1200 civil code).

Payment may also be substituted (or to use the statutory wording, *payment with subrogation*). The subrogation may come about at the instance of the creditor, who receives payment from a third party (Art 1180 civil code). In such a case, if the creditor wishes, the third person may take over his rights as against the debtor (Art 1201 civil code). It may also come about at the instance of the debtor. A owes a sum of money to B, so he borrows the amount from C and pays B. In so doing he may arrange for C to take over B's rights, whether or not B agrees. B cannot object, because he has received payment (Art 1202 civil code).

To these examples of voluntary subrogation may be added cases where it is provided for by law (legal subrogation, Art 1203 civil code). Such a case is when a creditor pays another creditor of the same debtor in order to take over rights from the latter. By so doing he may eliminate a

creditor who would have been preferred over him by virtue of a privilege, mortgage or pledge, for example.

7.20.4. Undue payment. Recovery of undue payment

It may happen that a debtor may pay a sum not owed, either because the debt does not exist or because it arose from an invalid transaction. Or else he may have paid it to someone who is not the true creditor. These situations, respectively where *no payment is due* and the *payee is unentitled*, are two causes of unjust enrichment. Any monies paid unduly may be recovered by the debtor, through an action for *restitution* (in Italian, 'ripetizione' from Latin *repetere*, 'seek restitution'). The law relating to undue payment and restitution is somewhat detailed, though it adheres to principles corresponding to these practical considerations.

Where *no payment was due* the code provides that 'whoever has made an undue payment has the right of action to recover it. He further has the right to revenues and interest from the date of payment if the receiving party has acted in bad faith, or from the date of request of repayment if the receiving party has acted in good faith' (Art 2030 civil code).

The onus is on the debtor to show in court that the sum paid was not due, in other words, that there was no object for the payment ('*causa solvendi*'). The creditor on the other hand must show that the payment was made on the basis of a valid contractual relationship. Payment can still be undue even when the debtor owed a different, and extant, debt to the person to whom the payment was made in satisfaction of a non-existent obligation. There must thus be a connection between the payment and the settlement of the debt for which it was made.

An action for restitution of undue payment is effectively an *action for nullity* designed to render the payment deed ineffective. Nullity arises from an absence of object; there is no need, given the objective nature of nullity, to inquire whether the debtor's error was excusable.

These aspects of undue payment make it somewhat different from *unjust enrichment*. An action for unjust enrichment does not of itself exclude there being a reason for the enrichment; rather, the reason is gratuitous and hence unfair, because the beneficiary has provided no consideration. The creditor must have suffered loss corresponding to the other party's enrichment. However, the action for enrichment is of an entirely subsidiary character, in the sense that it can be brought only if no other remedies – contractual, tortious or at law – are available.

Restitution cannot be sought when payment was made for an object contrary to public morals (an *immoral prestation*) since the objective was common to both parties. The person in possession of the sum paid is preferred (Art 2035 civil code). This rule derives from an old tradition: so-called public morals is not restricted in scope to the principles that

together make up sexual morality, but rather the more general ethical principles on which social morality is based.

Undue payment should not be confused with *performance by a third party*. This occurs where someone spontaneously pays another person's debt, knowing the debt to be another person's, and such performance justifies a request to the original obligor for reimbursement, but not an action for restitution against the creditor he has paid.

7.20.5. Unjust enrichment

Anyone who without just cause is enriched at the expense of another is obliged to indemnify the other for loss of property up to the amount of the enrichment (Art 2041 civil code). There should be no misunderstandings about this law: it is not concerned with pure good fortune, or lack of awareness by one of the parties, or fortuitous circumstances such as favourable market conditions, or economic difficulties, or a state of war which benefit the businesses of certain parties. Nor is it concerned with any disproportion between the two prestations, whereby one of the parties derives more benefit from the transaction than the other. Because the Italian system has no doctrine of equivalence of prestation, enrichment from such transactions is perfectly lawful. The law concerns only unjust enrichment, not justified in that a basic requirement for entitlement is absent.

This action only lies when no other is available to the person to whose detriment the unjust enrichment has occurred (Art 2042 civil code). It may be that the limitation for other forms of action has expired, or the thing he should have received has been lost. Often, the code prescribes an indemnity for the person to whose detriment the unjust enrichment has occurred, for example, when he is the person in possession or beneficiary of a right of usufruct in a case involving improvements made to property.

When the subject matter of the enrichment is a specific thing, the person who has received it is obliged to return the thing itself if it is still in existence at the time the request is made (Art 2041(2) civil code). If the thing no longer exists or has been alienated, the person enriched must pay a sum corresponding to its value.

7.21. Non-performance and contractual liability

7.21.1. Concepts

Non-performance of a contract occurs when the debtor does not carry out the required prestation, or does so tardily or inadequately. Non-performance of obligations amounts to non-performance of a contract.

To identify the exact connection between non-performance of an obligation and non-performance of a contract, the former is usually examined in the light of a lack of execution of the contract. Together with *supervening impossibility* and *unconscionability*, *non-performance* is one of the grounds for *discharge* of a contract.

The defaulting party has *personal liability* for non-performance. If a debtor does not pay what is due, the creditor may look to the debtor's property for satisfaction (*patrimonial liability*, Art 2740 civil code).

This is another area in which the problem to be resolved is one of distribution of risk. There are three quite distinct situations:

(a) the parties may have considered the question of risk, in which case the parties' wishes will prevail if they deserve protection;
(b) so-called *pre-supposition*, where the parties could have considered the question of risk, but have not done so;
(c) the risk may have been unforeseeable, because of supervening impossibility of prestation and supervening unconscionability.

The criteria for distribution of risk are provided for by civil code provisions. Interpretation must seek to adapt the terms adopted by the parties for distribution of risk to the new circumstances that have arisen. The basic rule is that the debtor is not to be held liable for acts of *third parties*, nor for *force majeure*, nor for *accident*, that is, unforeseeable events or events that nothing can be done about.

7.21.2. Impossibility, diligence, fault

There are numerous laws that need to be taken into account, among which Arts 1218 and 1176 civil code are significant.

These two provisions are expressed in a way that indicates apparently divergent tendencies. The former states that 'a debtor who does not perform exactly the prestation required is liable to pay damages unless the non-performance or late performance is due to the impossibility of the prestation arising from causes that were not his fault.' This provision, according to a rigorous interpretation, leads to the conclusion that in any case of non-performance the debtor is liable unless he proves an intervening cause that hinders the prestation, a cause moreover not dependent on his will or for which he is to blame.

Article 1176 states that 'in performing the obligation the debtor must employ the diligence of a normal prudent person.' Therefore, the debtor is not required to do everything in his power to avoid non-performance, but only to conduct himself in line with the norm of due diligence. There are other rules that need to be taken into account, especially Art 1175

civil code by which 'the creditor and debtor must behave according to the rules of fair dealing'.

Diligence (Art 1176) is thus the measure for establishing **how** the debtor should behave in executing the contract: performance should be carried out with diligence. Good faith or fairness indicate **how much** can be asked of the debtor, the extent to which he must exert himself in performance to prevent non-execution of the contract.

Thus the principle stated in Art 1218 is mitigated. According to a more relaxed interpretation, the debtor is not liable for everything short of impossibility, but is obliged only to act within the limits of diligence and propriety.

The problem of liability for non-performance is very delicate and much debated. In Germany, after the First World War, inflation had so ravaged the economy that, to temper the rigours of the debtor's liability regime (holding him liable in all cases short of impossibility, that is, 'fortuitous event'), the theory of *demandability* was introduced. The court could from time to time consider, taking into account the circumstances of the instant case, whether the debtor could in good faith be required to comply with the prestation set out in the contract. The civil code, reflecting its compilers' intentions, adopted the opposite approach in 1942, requiring the debtor to comply even if to do so would require excessive sacrifice up to the limits of impossibility.

Among the exceptions to the principle of fault-based liability is the situation of *custody*. In some contracts, involving, for example, deposit of property in a hotel, or safe deposit boxes, it is not sufficient just to show diligence in performance. The responsible party can be liable unless he can prove that non-performance was due to a fortuitous event or to the fault of the other party or the intervention of a third party. These are stricter rules that derive from the Roman principles on *receptum*.

The stricter principle again applies if there is a *pecuniary* or *generic obligation*. The debtor can always find the necessary money to pay, and things answering to a generic description, grain, for example, as the classic rule that 'genera never perish' applies. For prestations to do or give something specified, however, the rules are less rigid. There are also exceptions that benefit the debtor, such as in the situation where a prestation is gratuitous, free loan or deposit, for example, and cannot therefore result in too severe a liability for non-performance.

As regards contractual liability there is certainly a situation in which the debtor can be liable without fault. If to realise performance he uses the services of third parties he is liable for any negligent or intentional wrongdoing on their part (Art 1228 civil code). In these situations *vicarious liability* applies to the acts of others such as employees and collaborators, etc. There are equivalent provisions in the rules covering non-contractual liability (Art 2049 civil code), as will be seen below.

Professional liability is governed by the general principle of diligence (Art 1176(2) civil code). In this case the duty of conduct of a reasonable person translates as professional competence and even slight fault may result in liability. If, however, the prestation involves solving particularly difficult technical problems, Art 2236 civil code provides a reduction in the usual liability threshold and the professional is liable only in cases of fraud or gross negligence. Recent case law tends, however, to interpret this dispensation in a more restrictive light than previously.

7.22. Discharge of the contract

7.22.1. Non-performance

Non-performance results in discharge of the contract, that is, its dissolution and the cancellation of its effects. Discharge, like rescission, applies to contracts for mutual consideration. When one of the parties does not fulfil his obligations, the other may request that he do so or that the contract be discharged. In any case, he has the right to damages (Art 1453 civil code).

The requirements for discharge are the following.

(a) Performance on the part of the complainant. So A, the purchaser of a television, cannot seek discharge of the sale contract on the grounds of non-delivery if he has not yet paid the purchase price. Article 1460 civil code provides that 'in a contract for mutual consideration, either party may refuse to perform his or her obligations if the other party does not perform his or hers, or offer to do so concurrently.' This rule bears the tag *inadimplenti non est adimplendum*.
(b) Non-performance by the party against whom discharge is sought. As stated above, non-performance can mean outright failure to perform or doing so tardily; such is the case where A must return a deposited item but the item is destroyed or he has sold it on, or he returns it after the stipulated date because he has been away. It is not non-performance if the responsible party shows a serious intention to carry out his obligations, neither can the contract be discharged if the non-performance is not *serious*, if it does not cause appreciable harm to the interests of the other party (Art 1455 civil code).
(c) The request for discharge. If the creditor would still rather the contract be performed than discharged, he will ask the debtor to perform it, but he cannot do this once a request for discharge has been made. He can, however, request discharge after having requested performance (Art 1453(2) civil code). Once a request for discharge has been made, the debtor cannot then belatedly decide to avoid it by performing the obligation (Art 1453(3) civil code).

Thus far we have assumed it is a party who will seek discharge from the court. When pronounced by a judge, discharge is *judicial*, but there are also cases where it is not necessary to go to court to bring about a discharge. In some situations the contract can be discharged automatically. There are three of these, namely, *express cancellation clause*, *time of the essence* and *invitation to perform*.

7.22.1.1. Discharge of contract by express cancellation clause. A contract can expressly stipulate that it will be discharged if a specified obligation is not performed in the prescribed manner. In such cases discharge comes into effect when the affected party declares to the other his intention of invoking the *cancellation clause* (Art 1455 civil code). The party invoking the cancellation clause is exercising a power. Case law does not consider cancellation clauses oppressive.

7.22.1.2. Discharge of contract where time is of the essence. Time limits have already been examined. Time is not always of the essence, that is, a term of the contract that must be complied with exactly in order for the other party's interest to be satisfied. Time sometimes has no bearing on the transaction, and a stipulated time may be merely indicative of a due date for performance, non-compliance with which does not necessarily amount to non-performance. A creditor is often lenient with a late-paying debtor. Time limits are thus of the essence when the parties themselves so stipulate in the contract, or where the nature or subject matter of the contract implicitly make it so.

7.22.1.3. Discharge of contract by invitation to perform. To avoid a party not performing his obligations until after the agreed time limit has expired, the other party may request in writing that he perform them within the appropriate time, at the same time giving notice that if the request is not met, the contract will be treated as discharged without further notice (Art 1454 civil code). The time limit thus set is known as a *caution* and it is designed to set out the parties' positions clearly relating to execution of the contract. It places the dilatory party on notice that the other is no longer prepared to tolerate delay and that if the obligation is not performed within the time the contract will be treated as discharged without further ado. A caution is an unilateral declaration, for which no form is prescribed. It is sufficient that the declaree has effective notice of it. The time limit set by the caution cannot be less than 15 days. The parties may, however, agree a longer or shorter period, or usage can be followed. It is clear that the stipulated time limit is of the essence. A clearly stated limit is also a sine qua non of the caution; it is not acceptable to use an expression like 'within the shortest time possible'.

Discharge, like rescission and avoidance, has *retrospective effect*. It only affects the parties, and so the retroactivity pertains only to the obligations (Art 1458 civil code). There is no undoing of effects already produced by severable or continuing contracts, because prestations already performed as part of these types of contract cannot be annulled.

7.22.2. Supervening impossibility

We have already considered supervening impossibility in the definition of non-performance (Arts 1175, 1176, 1218 civil code). The code considers supervening impossibility as one of the causes of discharge because if one of the prestations cannot be performed the other party should not be forced to perform his own or, if he has already performed it, suffer the loss of an advantage that the dealing would have conferred. In contracts for mutual consideration the party released by supervening impossibility of the prestation cannot require the counter-prestation and must refund whatever he has already received (Art 1463 civil code).

7.22.3. Supervening unconscionability

A contract does not always have a limited duration and immediate effects. In severable or continuing contracts or those where execution is deferred, it may be that with the passage of time one of the prestations may become so onerous as to make it unconscionable to expect the party to have to fulfil it. In such cases it is expedient to allow that party the opportunity of release from it by seeking discharge. Discharge is not available in this way if the burden is within the normal range of contractual vicissitudes, nor if the contract is in itself aleatory. There would be no reason in this event to protect the party in question (Arts 1467, 1469 civil code).

The events which make a prestation more onerous must therefore be abnormal, unforeseeable and out of the ordinary, such that the parties could not have been expected to take them into account when concluding the contract. Unforeseeability is not restricted to the existence of the phenomenon, but can also apply to its size and quantity. They must be such as to transform the original aspect of the contract: its balance, not in an objective proportion between the respective prestations, but the balance subjectively assigned to it by the parties. The economics of the deal must, in other words, be completely upset. For example, if A concludes a contract with B to transport a consignment of crude oil via the Suez Canal the price is based on a short journey. The burden becomes excessive if B is not able to use the Canal because it is closed owing to a war and has to go all the way round the Cape. In traditional terms, it is said that the original situation contemplated by the parties has ceased to

exist and there is a clause *rebus sic stantibus* 'providing and to the extent that conditions remain as they are'.

7.22.4. Effects of discharge of contract

Discharge of a contract is retrospective as regards the parties and does not affect rights acquired by third parties (Art 1458 civil code). The retrospective effect of discharge therefore applies only to obligations. In contracts where exection is immediate and those for reciprocal consideration discharge has a twofold effect: it releases the parties from prestations that have not yet been performed only from the moment that discharge is pronounced; and it entails an obligation to refund anything acquired since the contract was concluded. All consequences of the execution in whole or part of the contract are to be extinguished. For continuing and severable contracts, on the other hand, discharge does not disturb the effect of prestations that have already been performed.

The party who has sought discharge can protect his right by registering the request for discharge. If this is done third parties cannot rely on the validity of anything acquired from the other party because they have notice of contentious proceedings involving the original parties (Art 1458(2) civil code).

If the debtor is *at fault*, he can also be held liable in damages for the other party's loss. This aspect of the matter needs to be interpreted broadly. An action for discharge is subject to the ordinary limitation period.

7.23. Contractual and non-contractual liability. Damages

7.23.1. Concepts

To be answerable, that is, liable for loss or damage, comes down to compensating for it. Liability amounts to an obligation to pay damages. Depending on whether this obligation arises from binding contractual terms (such as between debtor and creditor) or whether it arises from two people coming into contact (resulting for example in collision damage) without any contractual connection between them, there arises correspondingly either *contractual* or *non-contractual liability*. The latter arises from a civil wrong being committed. The two types of liability differ in many respects.

1. Contractual liability can arise either from contract or from a *unilateral relation* or *unilateral promise*. Non-contractual liability is the outcome of a *civil wrong*.

2. Burden of proof in contractual liability lies with the respondent to any claim. A debtor, for example, will have to show that he is not at fault, that he has acted with diligence, or that any non-performance is due to circumstances beyond his control (such as fortuitous events, force majeure, actions by third parties). Burden of proof in non-contractual liability lies with the claimant, the person who alleges loss or damage. He must prove fault on the part of the defendant, with some exceptions where principles of strict or objective liability apply.
3. Notice of delay may be a prerequisite for contractual liability, but never for non-contractual liability.
4. The normal limitation period of 10 years applies to contractual liability (with some exceptions such as one year for sales guarantees and five years for perpetual annuities, lettings, maintenance annuities and compensation for loss of employment), but a shorter period of five years applies to non-contractual liability, and is sometimes shorter still: two years for road accidents.
5. A wider range of damages can be recovered in non-contractual liability, because it is not limited to foreseeable loss or damage (Art 1056 civil code). The rule on damages in contractual liability can be found in Arts 1223ff civil code. Damages for non-performance or late performance cover the loss suffered by the injured party including loss of profit insofar as it is a direct and immediate consequence of the breach (Art 1223 civil code). The defendant cannot be held liable for every single consequence of a breach, otherwise no one would ever take on obligations or would do so with a reluctance that would block or severely hinder commercial exchanges.

   The rule is not, however, applied to the letter. Case law applies in a fairly broad way. Mediated and indirect damages are recoverable when they are attributable to the breach by the normal rules of causation. Even *future* loss or damage may come into the equation if they are based on an objectively inevitable situation. Damages are limited to consequences that could have been predicted at the time the obligation arose (*foreseeable* loss: Art 1225 civil code). This rule does not apply, however, when there has been fraud on the defendant's part.

   How much is payable by way of damages? Damages consist of *immediate* and *consequent loss*. If A fails to send raw materials to B's factory and work must come to a halt – this is immediate loss – and B's workers continue to draw their wages and the plant continues to consume energy, which constitutes consequential loss, a profit that will not now be made. B could, if the deal had been executed as it should have been, have made a profit of Y from the sale of X

quantity of products made out of the raw materials. To calculate consequential loss it is enough to calculate what the operation would have been expected to produce.

Liability for damages is a standard debt for *value*, so in calculating the amount, the effects of inflation must be allowed for.

If the unfulfilled obligation is pecuniary, interest at the legal rate is due from the first day of delay (Art 1224 civil code). Damages may be reduced to take into account any fault of the creditor that has contributed to the non-performance. Damages are not payable for any loss that the creditor could have avoided by exercising ordinary care (Art 1227 civil code).

If the exact amount of loss or damage cannot be proved, the court will substitute a sum based on quantum meruit (Art 1226 civil code). This is one of the cases where the law (and not the parties) confide in the judge a power to decide based on equitable principles. The judge cannot be arbitrary in his or her decision, but must apply pragmatic rules based on what generally happens. Reference may be made to specific aspects of the case, but the judge need not account in minute detail for how his or her figure was arrived at. He or she need only take all the evidence into account.

6. The amount of damages payable in contractual liability can be limited by agreement by the parties, by the use of a *penalty clause*.

7.23.2. Penalty clauses, penalty payment, part payment

A penalty clause is one that stipulates an agreed prestation which one party must perform if the contract is performed late or not at all. Damages are limited to the promised prestation, unless the parties agree that additional damages will be payable (Art 1382 civil code). The penalty is payable without proof of damages, but the creditor cannot seek both penalty and damages, unless the penalty was stipulated only for late performance (Art 1383 civil code). If the obligation is part-performed, or the penalty payable is excessive, the court may reduce it to a reasonable sum (Art 1384 civil code).

Penalty clauses should be distinguished from a *penalty payment*, which is payable on withdrawal from an agreement (Art 1386 civil code). They should be distinguished also from a *part payment*, made by one party to the other on conclusion of the contract in the form of money or fungible goods. If the party who made the payment fails to perform his contractual obligations, the other may withdraw and keep the part payment; the converse applies if the party who received the payment fails to perform his contractual obligations (Art 1385 civil code). Part payment does not limit damages, and the other party may seek execution, or the discharge of the contract with damages. Agreed limitation of

damages in non-contractual liability is dealt with in the paragraph on exemption clauses.

7.24. Rescission of a contract

7.24.1. Situations where rescission can occur

'Rescission', 'discharge', 'cancellation' and 'dissolution' are popularly supposed to be synonymous, but in technical use, rescission and discharge refer to two situations that are different from a dissolution because they entail the cancellation of all effects of the contract and of the parties' legal obligations. These two outcomes – rescission and discharge – also differ considerably from each other, however. The former applies where a contract was concluded in a state of need or danger, the latter where the creditor's interest has not been realised, be that through the debtor's non-performance, supervening impossibility or supervening unconscionability.

Rescission is a *remedy obtainable through a court action*, which protects one party from being exploited by the other. In the Italian legal order there is, however, no principle of equivalence of prestations. The parties are free to contract on whatever terms they see fit, and that can include bargains that are unfavourable for one or other party; the law does not normally concern itself with this and allows the parties to conclude their own agreements. Only in exceptional cases does the law intervene and rescission is an example of this.

The two situations in which the question of rescission can arise are mutually distinct.

(a) Contracts concluded in a state of danger. Article 1447 civil code provides that any contract by which one party has undertaken obligations on iniquitous terms by reason of his or her need, known to the other party, to save himself or others from a present danger of serious personal harm can be rescinded at the request of the person who has undertaken such obligations. The conditions in which this rule applies are circumscribed by specific requirements. The state of necessity may have come about through imprudence, by the victim's own fault, through error such as attempting a difficult leap on a mountaineering expedition, or through natural disasters such as flooding or the results of war or guerilla activity, etc. The danger must be present – if it were future, the intervention of the court would not be justified – and the harm 'serious'.
(b) Actions for rescission where there is *gross disparity of prestation*. If there is a gross disparity between the prestations due from the respective parties and this has been procured as a result of one party

abusing the other's state of necessity for unfair gain, the exploited party may seek rescission of the contract (Art 1448(1) civil code). In this case too, the availability of rescission is subject to detailed rules. One of the parties must be in a *state of need*. Need here must be distinguished from the necessity that applies in the previous case, because the contract here could also have been entered into not out of immediate necessity. An example is where A wishes to acquire some money to enable him to move abroad. He sells off his house to B, who knowing of A's haste, has made him a very low offer. A could equally have obtained the money by taking out a loan or by some other means, so the contract was not concluded out of strict necessity. Nor does a *state of need* mean a *state of poverty*. It should be understood as a situation of economic difficulty which impinges psychologically on the person concerned to the extent of making him less astute in the conduct of his affairs and so susceptible to accepting unfavourable offers. And the situation must have been *exploited* by the other party. Exploitation of a situation is more than merely knowing it exists: there must be an intention to derive undue advantage from it.

As can be seen from the above, different rules apply to the two situations of necessity and danger. In the former case, profiting from an abuse is not a prerequisite for rescission, but the other party must have been aware of the situation. In the latter case there needs also to be an undue disparity of prestation.

7.24.2. Characteristics and effects of rescission

The action is subject to a short limitation period: it must be brought within a year after the contract is concluded (Art 1449 civil code). The party against whom the action is brought may avoid rescission by offering to modify the contract in a way sufficient to render it equitable (with the market value of the prestations serving as a guide: Art 1450 civil code). A rescindable contract cannot be confirmed (Art 1451 civil code). Rescission has retrospective effect, but only as regards the parties' reciprocal obligations, and does not prejudice rights acquired by third parties (Art 1452 civil code).

7.25. Guaranteeing a debt and debtor's property liability

7.25.1. Concepts

When a debtor assumes a debt, he also assumes a risk of not paying it on the due date. The law protects creditors and provides various means for

them to obtain satisfaction. In particular, there are procedures (*executory procedures*) expressly designed by the civil procedure code. The creditor may also find other means such as pursuing in the event of non-performance property the debtor has since alienated to third parties (the *action to obtain revocation*, Art 2901 civil code). He may also substitute himself for the debtor where the latter is a creditor vis-à-vis others but has not chosen to enforce the debt (the action in *subrogation*, Art 2900 civil code). He may acquire rights of guarantee over the debtor's property in the form of a pledge or mortgage. The law may establish criteria for giving one creditor priority (in the form of a *lien*) over other creditors of the same debtor.

The basic principle is that all a debtor's property, present or future, is disposable to meet liability for non-performance of obligations (Art 2740 civil code). **Liability** attaches only to property. The creditor cannot coerce the debtor in person, neither directly by way of threats or duress, nor by having him imprisoned as used to happen up until the nineteenth century. However, recourse to a debtor's property is not always sufficient to satisfy the creditor, and so to reduce the risk of a debtor failing to pay the debt, when an obligation (such as to repay a loan) is undertaken, it is common for the debtor to be required to furnish suitable guarantees. The guarantees are *in rem* if they are attached to the debtor's property as is the case with a pledge or mortgage, and *in personam* if they take the form of an undertaking by a third party to pay the debt if the debtor fails to do so. A guarantee can be contained in a separate contract (a contract of guarantee) or can form part of the principal contract, for example, a contract for sale containing guarantees as to the debtor's solvency. In the latter case, the different limitation periods provided by law for liability and for guarantees need to be taken into account (Arts 1229, 1341, 1342, 2740 civil code).

7.25.2. *Contracts of guarantee: antichresis, surety, credit guarantee*

The contracts of guarantee are antichresis, surety and credit guarantee.

Antichresis is a contract whereby the debtor or a third party undertakes to transfer possession of land to the creditor to guarantee the debt, in such a way as to allow the creditor to profit from rents and profits that derive from the land, in payment first of any interest on the debt, and then of the principal (Art 1960 civil code). Antichresis does not transfer ownership of the property – that would be a trustee transaction with the creditor or else a sale by way of guarantee – but is just a means of reinforcing the obligation. The creditor pays the taxes on the land and must maintain it and manage it with due diligence (that expected of the prudent man, according to Art 1961 civil code). The antichresis remains

in force until the debt has been paid off in its entirety, but it cannot last for more than 10 years, so as not to impede the free circulation of property and the owner's enjoyment of it (Art 1962 civil code). Any purportedly longer term will be reduced to 10 years, without thereby making the whole contract void. As mentioned above, antichresis is different from the (unlawful) covenant of forfeiture.

In a contract of **surety** one party takes on a personal obligation towards another, the creditor, to guarantee the performance of another person's obligation (Art 1936 civil code). There is thus a relation between surety and creditor distinct from that between debtor and creditor. The former is ancillary to the latter, which is called the principal relation. If it is invalid (for example, for uncertainty of subject matter) the surety contract automatically fails with it (Art 1939 civil code).

The amount of surety cannot exceed what the debtor owes, nor can surety be subject to more onerous conditions. It may apply to only part of the debt (Art 1941 civil code). The principal debtor and the surety are jointly and severally liable: the creditor may seek payment from whichever of them he chooses, but the parties may agree that the creditor will seek payment from the surety only once the principal debtor's ability to pay has been exhausted (Art 1944 civil code). Because the surety contract depends on the principal debt, the surety can raise any defence (other than incapacity: Art 1945 civil code) that would be available to the debtor himself. A surety can relate to a future obligation, but the maximum amount to be guaranteed must be specified (Art 1398 civil code).

A surety who has paid debts takes the place of the creditor in exerting rights against the debtor (Art 1949 civil code) and may take an *action in contribution* against him. The surety is dissolved when the creditor's conduct results in the surety no longer being able to subrogate the creditor's rights (or pledges, mortgages or privileges) (Art 1955 civil code).

Specific types of surety include the **guarantee of bills of exchange** (Art 35 of the law of exchanges) and **assumption of a composition with creditors** (Art 124 of the insolvency law).

If one person undertakes an obligation towards another, who has given him the task, to extend credit to a third party in his own name and for his own account, the instigator becomes a surety for the future debt. The contract that arises is a **credit guarantee** (Art 1958 civil code). If after the task has been accepted – acceptance cannot be withdrawn, though the task itself can be repudiated by the guaranteed – the financial situation of the third party or the instigator has changed in a way that makes it significantly more difficult for the debt to be satisfied, the person who has accepted the task can no longer be obliged to perform it (Art 1958 civil code).

7.25.3. Means of protecting credit. Subrogation. Actions to obtain revocation

It might be that a debtor has other parties who are indebted to him, but has no intention of calling these debts in or he neglects to do so. His inaction harms the creditor's interests, since the property that the debtor could procure by exercising his rights would then be available to satisfy the creditor's claim. For this situation a mechanism exists that allows the creditor to be substituted for the debtor for the purpose of realising the uncollected debt. This cause of action is known as **subrogation**, another expression for 'substitution'. In other words the 'creditor, in order to ensure that his interests will be realised or protected, may exercise the rights, including rights of action, that the debtor himself enjoys against third parties but chooses not to exercise, because such rights and actions are proprietory and their nature is not such as to make them exercisable only by the holder of the right in person' (Art 2900 civil code).

There are thus certain requirements attaching to a subrogation action:

(a) locus standi depends on being a creditor;
(b) the debt must be shown to exist and be due for payment;
(c) there must be an available property right that the creditor can raise against a specified third party;
(d) the original debtor must be neglecting to pursue the debt;
(e) the creditor must show harm sufficient to justify his intervention: acting to protect his property from a real risk of bankruptcy resulting from the debtor's failure to act would be sufficient justification for intervention (Art 1740 civil code).

A subrogation action gives rise to a genuine *substitution of parties*. The creditor is not exercising his own rights, but those of another, the debtor, and his intervention impinges in an exceptional manner on the debtor's freedom to take court action. A subrogation action has the effect of restitution, as it seeks to restore the debtor's property so that it can be made available to satisfy the creditor's interest. This benefits not just the instant creditor, but also other creditors of the dilatory debtor.

There is another action, somewhat different from subrogation, designed to nullify, vis-à-vis the creditor, the effects of dispositions of the debtor's property to third parties that prejudice the creditor's interests. This is the action to **obtain revocation** (Art 2901 civil code). It may happen that, in order to avoid execution against him, the debtor alienates his assets or part of them to third parties with the result that they are no longer available to the creditor and the cash obtained for them is easier to conceal. Such dispositions are valid in themselves and the third party who

acquires does so validly, but there is nonetheless prejudice to the creditor. It is therefore necessary to resolve the conflict that arises between the creditor's interests and those of third parties to whom the disposition is made. The code achieves this by providing certain conditions for the action to obtain revocation:

(a) the debtor must be aware of the prejudice his disposing of assets causes the creditor, or if the disposition predated the debt, he must have fraudulently intended to deprive the creditor of a recourse (so-called *scientia damni*);
(b) moreover, if the disposition was made in return for consideration, the third party must have been aware of the prejudice, or if the disposition predated the debt, he must have been party to the fraudulent intent (Art 1901 civil code) (so-called *consilium fraudis*).

The action to obtain revocation may lie also for a debt that post-dates the disposition in issue. It is indeed true that in this case the debt arose after the property had been alienated by the debtor, and so the creditor could not at the time have relied on it for the satisfaction of his interests. For this reason it has to be shown that the debtor entered into the transaction in the full knowledge that he would not be in a position to discharge his obligations under it, having previously deprived himself of assets that the creditor could otherwise have had recourse to. In this sense, a fraudulent intent on the debtor's part is required, to which must be added an awareness and similarly fraudulent intent by the third party; it is not enough that the latter merely knew of the other's intention.

The effects of an action to obtain revocation are not restorative. The action is not designed to return the alienated assets to the debtor, but only to declare the disposition ineffective vis-à-vis the present creditor (*partial ineffectiveness*).

The normal action to obtain revocation is to be distinguished from the action in bankruptcy to obtain revocation (*insolvent revocation*). This is designed to realise the interests of all creditors and covers dispositions made, both gratuitously and for consideration, by the bankrupt in the period of his insolvency (Art 64 of the insolvency law).

Chapter VIII: Wrongful Acts and Civil Liability

8.1. Civil liability, wrongful acts, loss, damage and injury

8.1.1. Concepts

In daily life we encounter numerous instances where loss, damage or injury is incurred: motor accidents, accidents at work, damage to the environment, harm suffered by consumers, mental anxiety, suffering resulting from crime, loss arising from faulty information, and so on.

The expressions **loss**, **damage** and **injury** have different legal meanings from those used in everyday speech. Such loss, damage or injury that the law regards as worthy of its notice is distinct from *economic loss* or *damage*. Only such loss, damage or injury that attracts redress is of concern to the law, and its features depend on the civil wrong that caused it.

The person who causes the harm, known as a *tortfeasor*, acquires an obligation as the result of his act or omission. The obligation to compensate the *claimant* or *victim* by means of damages is provided by law (Arts 1173, 2043 civil code) because such harm arises where the parties have no contractual relations. The circumstances that have brought them into contact form a simple *causal relation*.

The obligation to provide redress is an aspect of **civil liability**, which expression encompasses a series of principles which regulate questions of compensation in the absence of either contractual relations – it can thus be opposed to *contractual* liability – or commission of an offence, which distinguishes it from *criminal* liability. Harm is usually the material, physical and visible manifestation of dangerous behaviour. It is one of the elements of a complex of conduct and products of human will to which the law is concerned to assign legal consequences, and to which the global term **unlawful act** is applied. In the technical sense, an unlawful act is any act that causes harm to third parties and thereby creates an obligation to redress. It is thus distinct from an 'unlawful transaction' and from any action permitted by law.

The law provides just a few rules on civil liability, but this does not mean that it is an unimportant legal area. Indeed, in a technologically

advanced society the occasions where harm can be suffered proliferate. Case law has developed rules and principles by which these novel problems can be resolved in the absence of statutory provision.

It should further be noted that cases based on civil liability are the most numerous to be brought before the civil courts on any typical day.

8.1.2. The traditional functions of civil liability

What are the *functions* of civil liability? There are traditionally four of them: (a) affirmation of statutory power; (b) sanction; (c) prevention of harm; and (d) compensation.

As soon as harm is established, *civil society*, which outlaws resorting to private revenge, to arms or any violent means of resolving private disputes, *cannot but involve itself directly in the issue*. The harm will attract redress only if the law so permits. So, where there is compensable harm, there is a **sanction**. In ancient Rome the sanction consisted of inflicting on the perpetrator the same harm as the victim had suffered (retaliation) but later, and thus in every civil society, the sanction is purely pecuniary in nature. The harm that must be compensated can be evaluated in money terms.

Sanctions reinforce the **preventive function** of civil liability. Deterred by sanctions, individuals will do all they can to avoid causing and spreading harm. Finally, civil liability aims to redress the victim, or claimant, by awarding him a sum of money as **compensation** for the harm wrongly suffered.

Today, these matters are not always the exclusive arena of civil liability. Harm can be assessed and compensated without going to court, as potential victims can arrive at prior agreements with those who might suffer it. Often the assessment is made through arbitration or by reference to a competent committee operating outside the ambit of the courts. The sanction, being pecuniary, is not as effective a deterrent as the measures taken in earlier times might have been, and so is not as effective as it might be in preventing harm from occurring. Often it is more in the perpetrator's interest to cause the harm than to take the expensive measures needed to prevent it happening. An example is industries which prefer to pollute the environment and then compensate neighbouring landowners rather than instal expensive anti-pollution equipment or change their production processes.

The resort to insurance against civil liability arising from use of vehicles, accidents at work, undertaking dangerous activities and in the area of product liability negate the deterrent effect of civil liability. An individual has greater freedom of action when he knows that any cost will be met by a third party, the insurer.

The main function today is thus redress. The rules on civil liability are interpreted so as to extend redress as far as possible to all victims. This function is closely connected with private insurance, or in some areas, such as sickness and accidents, with social insurance.

The civil liability system is based on a rule of very wide application: so much so that it is often referred to as a *general principle* of liability. Article 2043 civil code provides that whoever deliberately or negligently causes undeserved harm to others has an obligation to provide redress.

In this rule are incorporated two principles that have evolved over the centuries. The first is 'no liability without fault' and the other is that harm to be actionable must derive from 'infringement of a right'.

8.2. The subjective elements of a civil wrong

8.2.1. Fault and intent. Responsibility

Article 2043 civil code imposes an obligation of redress on whoever has caused harm by a *deliberate* or *negligent* act. Intent and fault are thus *subjective* elements of an unlawful act. The objective elements are the harm it causes and the causal nexus between the act and the harm.

Case law has clarified the meaning of fault: it is any form of imprudence, negligence or incompetence on the tortfeasor's part in performing the act or activity from which the harm arises. Liability through fault attaches to the party at fault in a negative way: through a failure to employ such care and attention as everyone is under a duty to observe in their daily lives. Thus, people are required to exercise ordinary diligence, the standard of the normal prudent person (Art 1176 civil code). There are no graded distinctions in fault, as was the case in the nineteenth century, when fault was designated fairly or very slight, on one hand, or moderate or severe on the other, and the person at fault would be liable in any case. The rule that developed in Roman Law that imposed liability on persons no matter how slight the fault has no place in the modern system, which will apply sanction to fault only if it is ordinary, that is, at least moderate. *Gross* fault is subject to its own sanctions, different from those for ordinary fault, only in exceptional cases, and will be reflected in the quantum of damages.

The author of the act is at fault therefore if in like circumstances an ordinarily diligent individual would have acted differently and not caused the harm, or would have foreseen or avoided it. The *foreseeability* of the event is thus one of the criteria by which the alleged tortfeasor's conduct is judged.

Fault may be *subjective* or objective. It is subjective if the personal circumstances of the author of the act when it was committed are taken into account; in the nineteenth century there was a tendency to invoke

subjective fault to equate unlawful acts with immoral acts. It is objective if it arises from the simple infringement of a rule (for example, violation of the Highway Code).

Further, fault is *of commission* if it involves a positive act on the author's part (for example, colliding with another vehicle while distracted), and *of omission* when the author fails to carry out some act that he should have carried out, whether obliged by law to do so or by general principles of living with others, for example, failing to come to a person's rescue. Unlike faults of commission, which can occur in any situation, case law has tended – and may be criticised for having done so – to restrict faults of omission to situations where the tortfeasor has not carried out actions specifically required by a relevant law and this has caused the harm. This position has been justified (with arguments that appear to be inspired by a selfish individualism) on the grounds that an individual should be free to act as he wishes, including not to act. If everyone were under a duty to act where to do so might avoid harm, the argument runs, the cost of activities would be excessive and would impose a burden of vigilance on individuals that would impinge on personal freedom.

There may be fault by the tortfeasor, but also by the victim himself (*contributory negligence*). Where contributory negligence occurs, it has the effect of excluding or reducing the level of damages.

If the tortfeasor's behaviour was deliberate, then the situation is one of **intentional wrongdoing**. In non-contractual matters, this means an intention to inflict, to cause harm to others. It is a widely held view that cases where harm is intentionally caused are subject to specific provisions adopted for that purpose, but this thesis is undermined by the wording with which Art 2043 begins: 'any act, whether negligent or intentional . . . '. The meaning is clearly that both negligent and intentional acts are subject to the same regime of liability and the general principle does not admit of limitations designed to confer any special status on intentional wrongdoing.

The intentional tort of inducing breach of contract occurs when an employer offers a person employed by someone else better terms and conditions than other competitors so as to acquire his fund of experience. The offeror is liable if he was aware that there was a binding contract in existence and that the wronged party's interests were defensible. Inducing breach of contract is nowadays subsumed under the heading of *unfair competition*. For this tort to be actionable there must be, in addition to the knowledge that the action will harm the interests of the other enterprise, an intention to cause harm, '*animus nocendi*' and to bring about the result foresee.

Another relevant situation is *negligent statements*. It is not in every case where a person negligently furnishes false information that he has to

make redress. The obligation arises where there is a contract between informant and recipient, such as contract to inform made with an investigation agency. Where no contract exists, or where no duty of courtesy binds the parties, passing false information only gives rise to compensation where it was deliberate. This is the case where a bank gives false information about a debtor's solvency to an intending creditor, or where detrimental allegations are made about a business enterprise.

Another intentional tort is seduction with a promise of marriage. There must be a causal link between the consent to sexual relations and the promise, otherwise the relations are of themselves an expression of individual freedom.

8.2.2. The risk principle. Objective liability

The doctrine of liability through fault was undermined as long ago as the end of the nineteenth century when jurisprudence inserted into the civil code of the time instances where liability could be incurred without fault. Employers and principals became liable for the actions of, respectively, their employees and agents. It is nowadays commonly agreed that an action does not necessarily require fault or intention to be unlawful. There are many cases where a person is liable, not because he has negligently or deliberately caused harm, but because the risk inherent in the act or activity adheres to him. The criterion of risk takes its place alongside fault and intention among the criteria for liability.

From a historical perspective, this is a relatively recent criterion. At the end of the nineteenth century it was advocated by proponents of the 'juridical socialist' tendency, but did not attract wide support, precisely because the principle of 'no liability without fault' guaranteed businesses a kind of immunity for harm inflicted on the outside world (including consumers, neighbours and the environment) as well as on their own employees. In advanced capitalist society, with refinements in production techniques, such immunity can no longer be conferred on business. Businesses can stand a greater apportionment of the risks to society arising from their activities: but what exactly is meant by '*risk*'?

There are those who hold that, since it derives from economic and not legal concepts, it cannot be used as a criterion for allocating liability. There are others who maintain one can only speak of risk in situations involving a business enterprise (the so-called risks of enterprise). Yet others regard it as impossible to split liability in two, dividing it between the kind that arises from negligence or intent and the kind due to risk, but prefer to impute liability on multiple criteria (negligence, intention, risks of enterprise, carrying on dangerous activities, ownership of something that causes damage, and so on).

Which of these views is to be preferred can also be debated from the standpoint of rational distribution of risk. Some argue for attributing all risk to him who has created it, others for attributing it to whoever is in the best position to avoid it. Yet others would place it upon the parties most able to distribute it among their associates. Finally, proceeding from an economic analysis of legal rules, it has been argued that risk should be allocated to those who can most easily minimise the costs of accidents (and not their frequency, which appears intractable). For example, a factory that manufactures products, a proportion of which are defective, can realise this objective. Even though case law has retained a preference for construing liability on the basis of fault, sometimes presumed, it is now undeniable that Italian law admits alongside negligence and intentionality forms of no-fault, that is, objective, liability.

On a first reading of the law, there appear to be only two rules based on no-fault liability. Article 2049 civil code raises an irrebuttable presumption that principals and employers are liable for harm caused to their agents and employees. Article 2054 (final) civil code provides that owners, usufructuaries, acquirers with stipulation as to retention of title and drivers of vehicles are *in every case* liable for harm caused by structural defects or defective vehicle maintenance. One may add Art 2047 civil code which gives the court the power to order a defendant who is incapable of forming will or intention (and thus not normally subject to civil liability) to pay just compensation to a claimant who has not been able to obtain damages from the party responsible for supervising the person under a disability.

8.2.3. The objective elements of an unlawful act

Alongside intention and negligence the elements of an unlawful act are the capacity to form will and intention, the causal nexus, the harm done and the tortiousness of the act.

Article 2046 of the civil code states that a person who lacked the capacity to form will and intention at the time he performs an act is not liable for its consequences unless the incapacity itself is a result of his fault. The law protects persons under a disability (see Art 428 civil code). In this case the protection extends to persons whose incapacity is natural but not to those who have brought it on themselves, for example, through getting drunk or using narcotics. If the incapacity is natural, liability for that person's harmful act devolves onto the person responsible for supervising him (Art 2047 civil code). If, however, the person responsible for supervision can demonstrate that they could not have prevented the harmful act, no damages are payable. When the claimant is unable to recover damages, either because the person under a disability was unsupervised or the person responsible for supervision was unable to

prevent the harmful act, the court may order just compensation to be paid by the author of the act. This is *compensation* and not damages, because the value attributed to the harm is only paid in part, not in full.

There are situations where a person is not held liable for harm he or she has caused. These occur where a *justification* can be shown to exclude it. Harm caused in *self-defence* or defence of others does not give rise to liability (Art 2044 civil code). In this instance, the rules in the penal code on self-defence apply (Cassation decision no. 4487 of 1976). By the same token, necessity can be invoked as a defence. When the harm was caused because one was constrained by the necessity to *save oneself or others* from the present danger of severe harm to the person, and one has not oneself wilfully caused the dangerous situation, nor was it avoidable in any other way, the claimant has the right to compensation at a level set by the judge at his or her discretion (Art 2043 civil code). The danger must, however, have been real and not merely imagined. This rule is frequently applied in traffic cases, where a collision results from an attempt (for example, by braking or swerving suddenly) to avoid a more serious collision.

There is, furthermore, liability if the claimant has, knowing the risks involved, given his consent to the defendant's activity (*victim's consent*, Art 50 penal code). This defence is not available, however, if the right that has been damaged is inalienable (such as personality rights). Consent, with compensation, is a frequent feature of cases of nuisance affecting a neighbour's land.

There is no liability either for harm caused by the *exercise of a right*; but can there be an *abuse* of a right such as to make damages payable?

Because the tortfeasor is liable for harm suffered by the claimant, there must be a causal link between the former's (intentional or negligent) act and the event that caused the harm. A **chain of causation** is thus the criterion for distinguishing harm for which there is redress from that which attracts no redress. If events can be reconstructed so that, starting with the harm and working back through all the prior events linked to it by cause and effect, there operation is known as 'seeking the material cause'. From a legal viewpoint, however, it is not necessary to go so far back in time: applying the principle of regularity of events, one need only go as far as the act that was sufficiently causative of the event precipitating the harm (so-called *legal causation*).

The principle of causation is part of the technical armoury of all systems of law, and every legal order has a relatively similar set of rules and terminology (*causalità*, *lien de causalité*, *Kausalzsammenhang*). The civil code contains provisions on causation that are in part derived from the rules on contractual liability (Arts 1223ff civil code) and only one of the rules on non-contractual liability makes reference to the preceding provisions (Art 2056 civil code).

The interpretation of these rules and the construction of a system of regulation designed to ascertain the type and nature of harm that the law will recognise encounters problems of *legal causation* (to say nothing of more general problems of causation) that must be resolved in all aspects connected to the chain of events causing the harm and the physical relationship between them.

There are two particular techniques used in applying the principle of causation. One is concerned with the link between *event* and *harmful consequence*; the other concerns the 'foreseeability' of harm.

As to the former, Art 1223 civil code states that 'redress for harm must include the loss suffered by the claimant in the form of loss of profit, to the extent that such loss is an immediate and direct consequence' of the unlawful act. The link between event and consequence must thus be close enough to separate those of the latter that follow *immediately and directly* from the rest.

As to the latter, Art 1225 civil code states that 'redress is limited to the harm that could have been foreseen at the time the obligation arose.' And the foreseeability of harm, not to be confused with the foreseeability of the event, is to be assessed as seen through the eyes of a reasonable, normally prudent person.

Finally, Art 2056 civil code on 'assessment of harm' stipulates that 'the quantum of damages payable to the claimant shall be calculated according to the provisions of Arts 1223, 1226 and 1227 civil code.' Since there is no reference here to Art 1225 civil code, there is a widely held view that in non-contractual liability damages can also be awarded for unforeseeable harm. This view is based on the interpretative maxim 'whereof the law does not speak, thereof must we also remain silent' (*ubi lex non dicit, nec nos dicere debemus*).

Case law seems now to prefer the theory of *sufficient causation*. Decided cases are the source of the tendency to interpret penal code Arts 40 and 41 as an embodiment of the theory of *equivalence of causes* or the *sine qua non condition*, while moderating its severity in cases where 'an intervening cause, because it is sufficient unto itself, breaks the chain of causation and becomes the sole determinant cause'.

Finally, the element of *harm*. This is the element on which case law and legal commentary have focused their attention, especially since redress has been seen as the main function of civil liability. It has been stated that for the assessment also of harm a distinction must be made between economic and legal loss. Economic loss has ramifications on property, and applies to any human activity, but not all economic loss can be recovered by a claimant: it must be considered as legally significant, hence *legal loss or damage*. It is legally significant when it is *wrongful*. On this expression is built the whole system of civil liability.

8.3. 'Wrongfulness' of loss or damage. Standard and non-standard torts

Article 2043 civil code provides that the tortfeasor must provide redress for any harm he causes to others that is *wrongful*. Wrongful in this context does not merely mean *unjustified*. Reasons for justification in this sense have been examined above. Wrongful harm is a term with a much broader legal meaning. Case law currently interprets it in the sense of harm both *non iure* and *contra ius*. *Non iure* implies without any right and *contra ius* means in infringement of a right. The expression 'wrongfulness of harm' is a general principle and has been interpreted in different ways. The principle that predominated virtually as dogma until a few years ago held wrongfulness of harm to be a criterion for selecting which interests were deserving of protection. Only harm that arose from an infringement of an *unqualified* right was to be considered wrongful and hence redressable.

It is a complex and unresolved issue. Article 2043 civil code does not specify what constitutes 'wrongful' harm.

The Italian civil code, in contrast to the German civil code, is silent as to which kinds of harm admit of redress and as to what kinds of interest could be considered 'deserving of protection'. This silence is not interpreted as entailing the non-standard nature of civil wrongs, but rather as expressing a rule that, adapting to the traditional concept, limits the scope of redress of harm to the situation where an unqualified right is infringed.

Systems of torts are standard or non-standard according to whether they are based on *general principles* (such as provided by Art 2043 civil code) or on a *rigid delineation* of those interests infringement of which give rise to liability. **Non-standard** tort systems (such as the French and the Italian) allow the court to decide on a case-by-case basis whether the interest infringed deserves protection and hence whether liability arises. **Standard** tort systems (such as Germany's) expressly protect specified individual interests and those not listed cannot be regarded as deserving protection.

This distinction is, however, rather mechanistic. The development of civil liability has seen a broadening of the scope of redressable harm in standard systems and at the same time in non-standard systems case law has made a selection among interests, on the basis either of the causal nexus or of formal arguments relating to the legal nature of the qualified or unqualified rights attaching to the interests. Thus the two models tend to converge.

Currently, the expression *wrongful harm* tends to be understood as referring to constitutional principles. Any interest directly or indirectly protected by the Constitution (such as the right to health and the right to

own property) may be wrongfully harmed, as can any interest protected by statute and any interest regarded as more deserving of protection than the tortfeasor's.

8.4. Interests protected in the sphere of civil liability

Since the Italian civil liability system is non-standard, there is no point in trying to list the types of interest it protects. Any interest is potentially regarded as deserving protection. Case law, however, has advanced very cautiously, and has departed only in seventies of the twentieth century from the principle that regarded only unqualified rights as deserving protection. It is nonetheless useful to summarise the interests that are most frequently protected.

8.4.1. Personal rights

The main rights enjoying protection are those relating to the person and property. We have already discussed personal rights. In this regard it should be repeated that a recent development in the law has recognised for everybody a **right to health** that is capable of protection, and is a right to have one's physical integrity safeguarded and to prevent acts and activities that can endanger it. The Cassation has tended to accord the right to health priority over the right of enterprises to freely exercise their economic activities. So in the area of nuisance and environmental protection, activities that harm public health must be prevented.

8.4.2. Biological harm and damage to health

The history of biological harm is typical of the fortunes of those concepts which arise for particular ends and in the course of time and usage lose their original connotation and are adapted to serve different purposes from those originally intended. They undergo a kind of genetic mutation so that the observer who is aware of their origins has trouble recognising them in their new guises.

The original purpose was to give effect to the constitutional right to health within the system of redress for harm to the person. Since the right to health is guaranteed to everyone, without discrimination or reference to earning capacity, the criteria for quantum of damages were identical for everyone. And this was not all. 'Biological harm' was assigned a simplifying role, so that it became a kind of catch-all heading under which judges could subsume all the new types of claim that their creativity or the circumstances impelled them to admit – damage to personal appearance, to personal relations, and a general loss of capacity

to work are some examples. Altogether, in the mid-1970s the situation regarding compensation for personal injury was one of jungle-like confusion in which awards appeared random, but which permitted the slate to be wiped clean to a state of pristine order and equity. Alongside general damages, in the strict sense of those awarded for physical and mental suffering, and special damages such as *actual* loss of earnings, there now stood this new all-embracing formula which could be tabulated in a more modern way than had hitherto been the practice in the insurance industry and which resulted in awards more favourable to the claimant and more expensive for tortfeasors (and therefore their insurers). This new formula of 'biological harm' was developed by forensic medicine and adopted to apply to everyone equally according to the effects on their health.

The development of biological harm is one of the most complex items confronting the chronicler of civil liability, with detours, advances and retreats, and interventions from the Court of Cassation and the Constitutional Court, and divergences of practice between the various Italian courts which can now be reconstructed in detail using the tables for liquidating damages adopted by each Court to settle claimants' awards.

Biological harm is now understood as damage to physical or mental health viewed independently of the individual's earning capacity. It is of the nature of breach of an absolute right, yet it combines in practice elements for which both general and special damages are payable. It is recognised as giving rise to damages for anyone irrespective of their age and social position and these rights are transferable by the rules of inheritance provided the victim did not die instantaneously.

8.4.3. Mental suffering

Compensating for the mental suffering caused to the widow or widower of an accident victim is more problematic. Legal theory is divided on the issue of whether mental suffering deserved to be redressed on the same terms as physical injury. Some have stated that this type of suffering should be considered as 'ricochet damage' to use the felicitous phrase coined in French case law. Others reject the idea that mental suffering can be a head of general damages or thus fall within the scope of Art 2059 civil code. It has also been argued that general damages should be payable to spouses where the victim has suffered grave but not fatal injury.

8.4.4. Harm arising from childbirth

Another type of civil wrong has just appeared in the Italian system, named from its common law origins as *wrongful birth* or *wrongful life*.

The former refers to the harm suffered by parents who, through medical error or the inefficacity of contraception, are forced against their will to bring a child into the world. The latter refers to the harm occasioned by a hereditary illness before birth being passed from parents to offspring.

8.4.5. Property

Civil liability can also attach to interests involving property. Property can be protected through an *action to recover land*, but the breach of any other property interest is redressable by way of damages, based on Art 2043 civil code. Many rules on property, however, make provision for this general action in response to specific situations, for example, where harm is caused to neighbouring property through breaches of building regulations (Art 875 civil code) or excavation work (Art 840(1) civil code) and so on (Arts 890, 909, 915, 917 civil code). Harm to property does not need to be demonstrated over and above the simple verification of the circumstances.

Possession can also be protected through the liability action in Art 2043 civil code.

8.4.6. Nuisance and environmental pollution

Among the limits placed on the use to which an owner puts his land are rules against *nuisance* in the wide sense of any discharge of smoke or heat, noise, vibrations, inundations of water or other fluids originating on one parcel of land and causing harm to another (Art 844 civil code). The limit is for the benefit of private interests. The rules are designed to protect a property owner from harm caused by the actions of his neighbour and to enable him to claim *damages in tort* (Art 2043 civil code) and if necessary to prevent the harmful activity (by seeking an *injunction*) or to restore the status quo ante.

The landowner may on the other hand agree a sum by way of indemnity for activities which the neighbour intends to pursue, thus allowing the discharges to continue and be voluntarily acquiesced in for an appropriate price. The law thus provides derogatable rules for the benefit of private interests.

Discharges are prohibited only insofar as they are intolerable, that is, exceed the criteria of *normal tolerability*. This is a factor that may be taken into account at the court's discretion and is commensurate with 'that level normally recognised by society as being allowed in a particular place at a particular historical moment'. The court must be guided by 'an objective assessment of a just mean taking into account the nature, cause and content of the nuisance' as well as the place where it occurs.

The condition of the place is to be understood not merely topographically or according to nature, but also from a social perspective, that is in relation to the type of activity normally carried out and the way of life and habits of the population.

The problem of nuisance is particularly acute where *industrial activity* is concerned, and it is precisely in this context that the issue usually arises. An enterprise that undertakes activities that involve nuisances such as discharges has an interest in continuing those activities, an interest in conflict with those of its neighbours who would have the discharges reduced or eliminated. If the two parties fail to come to an agreement, the law provides various criteria for resolving the matter (Art 844 civil code).

The first criterion is that of *normal tolerability*. Discharges will only be prohibited if they constitute a nuisance going beyond the norms of tolerability outlined above. They may, however, still be permitted if the respective landowners arrive at an agreement for compensating for the nuisance. The second criterion is the *juxtaposition of interests*, pitting property interests against those (namely, the national economy) favouring production. If the productive activity that produces the nuisance is important to the national economy, the landowner cannot prevent it; he can only obtain compensation.

The court may also seek to restore the status quo ante by forcing the tortfeasor to adopt specific measures involving installation of purifying equipment and so on to avoid the discharges or at least to reduce them and mitigate their effects.

The final criterion, employed only as a last resort, is *first use precedence*. Where two interests are in conflict the court will favour the one which has been enjoyed the longest.

The system that reconciles conflicting interests, whether between two landowners, one landowner and a business enterprise, or two enterprises where one is creating a nuisance to the other's detriment, is governed by Art 844 civil code in accordance with private law principles. It could not be otherwise, given that these rules are designed to protect private property.

It is, however, useful to mention the fact that these rules contain elements not all of which are in line with the protection of private property. The ideology of the time they were introduced preferred *dynamic property* (business enterprise) to *static* (agrarian) *property*, because it was necessary to facilitate and not hinder the country's industrial development. So the courts have to set the landowner's interest alongside that of the national economy, and if the economic activity causing the nuisance is deemed socially useful the mere fact that it harms its neighbour cannot be allowed to stand in its way.

8.4.7. Choses in action, rights of enjoyment, expectations, legitimate interests, class interests

The problem of civil liability and the protection of choses in action has stimulated much debate.

Case law has for a long time approached the question restrictively and declined to admit the possibility of redress. In the famous case where the question was first raised the Torino football club sought damages from the airline company who organised the flight in which the plane carrying the football squad tragically crashed in 1947 killing all the members of the team. The Court of Cassation excluded any right to claim damages, stating that the interests raised by the football club did not merit protection (Cassation decision no. 2085 of 1953).

The position taken by the courts has changed since then. In a case involving the death of a footballer in a car accident Torino football club won damages on the argument that the services the player had rendered were not fungible (Cassation joint session no. 174 of 1971). This curious outcome was reversed several years later, however, when the football club was unable to demonstrate that they had suffered substantial harm. Since the gate receipts the following season did not fall – in fact they rose – there was no right to damages.

The traditional theory, which denied any right to damages for infringement of a chose in action because no unqualified right has been breached, had been rebutted by academic commentators.

Two aspects of choses in action need to be distinguished. One is intrinsic to the relationship between creditor and debtor and is relative or *dynamic*, in that the creditor can exercise the right against the debtor who in turn has an obligation to realise the creditor's interest. The other is extrinsic and static, considered as a *value* attaching to the creditor's property. This right must be respected by all and, being assertable against the whole world, is unqualified. Breach of such a right (or, more accurately, of this aspect of a chose in action) certainly amounts to a wrongful and actionable harm.

As to **expectations**, where *legal* expectations are concerned, damages are recoverable. This has been decided in cases of right to maintenance, which the victims' parents raised against the person who by killing their child had deprived them of this revenue.

The most recent case tends towards allowing damages for breach of **legitimate interests**, that is, an expectation towards the public administration which is frustrated because an unlawful administrative action has impeded or delayed the realisation of that interest.

Therefore where an administrative decision is illegitimate and quashed by an administrative court the proposition the public administration is liable provided that causation and damage can be proven.

Another much-debated topic, particularly in recent years, has been the possibility of obtaining redress through the civil liability rules for damage to **class interests**. Can the inhabitants of a neighbourhood campaigning against the environmental degradation caused by a local industrial installation take the company to court and claim a remedy for the damage caused by the pollution? One Cassation decision has held that redress is available only where the right to health or a property right has been breached.

Some other decisions have taken a new perspective on property law, the importance of private property and the balancing of conflicting interests. Initially it has been held that when siting nuclear power stations the right to health of the inhabitants of the area must be protected. However, the importance of this right was recognised only insofar as it was connected with a property right enjoyed by the potential claimants. In following cases, however, concerning the conflicting interests of a group of landowners opposed to the construction of a purification plant for industrial waste and local inhabitants seeking to defend their right to health by seeing that the plant was built, it was held that the latter right prevailed and created a veritable 'class interest in the environment'.

The issue is complicated, however, by the question of procedural competence. Who can legitimately bring a case on behalf of a class of claimants? An environmental protection group, local councillors, an action committee, etc? In the current state of procedural practice, groups do not have standing in the civil courts except where specifically so provided by law, while law no. 349 of 8 July 1986 now expressly recognises the standing of the Ministry for the Environment to seek remedies for 'environmental harm', but as a matter of general principle this does not appear to exclude other interested parties bringing actions individually or collectively against acts of damage to the environment.

8.5. Specific situations in civil liability

8.5.1. Liability of employers and principals

Article 2049 civil code provides that masters and principals are liable for harm caused by their servants and agents in the exercise of tasks conferred upon them. The expression *masters and principals* is archaic and derives from the previous code.

This law is intended to affirm the objective liability of those who give directions to others and who are materially responsible for the harm. There does not have to be a strict relationship (such as an employment or agency contract): a task or duty undertaken as a matter of courtesy or for family reasons would be enough. What is important is the exercise of tasks conferred upon a *servant* or *agent*.

The task may have been conferred on one business by another. In this case we speak of a *subsidiary undertaking*, which has a modest capital and its activities are narrowly dependent on the principal enterprise. The risk can be attributed to the latter. This principle is intended to avoid high-risk activities being undertaken without affording a guarantee of redress to potential claimants.

8.5.2. Exercise of dangerous activities

The exercise of **dangerous activities** is governed by Art 2050 civil code by which the person who undertakes such activities is liable for harm he causes if he cannot prove that he adopted all appropriate measures that could have avoided it.

Dangerous means involving a high degree of risk with a significant likelihood of causing harm to others. The courts used to interpret this expression restrictively, and only applied it to activities expressly so described by law. But in more recent years the scope has been widened to embrace any activity that is intrinsically dangerous by virtue of the means or procedures used to carry it out.

Being obliged to adopt all appropriate measures to avoid harm means that liability can arise from pure misfortune as well as from any event that occasions harm, be it an accident on a building site lacking adequate safety measures, the manufacture of gas cylinders, etc.

There are also specific situations where business activity is not involved, but are incidents of daily life, like taking custody of objects, the use of animals, or living in dangerous premises.

Everyone is liable for harm caused by *objects* in their *custody*, unless they can prove that it was a result of inevitable accident (Art 2051 civil code). The term *custody* must be understood in a broad sense. It does not need to derive from a contractual arrangement such as a deposit or loan for use, but can be 'any relation between the object and a person such as to make a duty to exercise control over it imputable to that person'.

The event need not depend on any act of the 'custodian'. The harm can be caused by some property of the thing itself, but it must always relate to a risk assumed by the person who has effective control over the object and could have exercised it more attentively. Cases of liability arising from possession occur frequently. Examples involve harm caused by a slippery staircase, a faulty drainage pipe, a carelessly parked car or in inflammable materials.

8.5.3. Harm caused by animals

Liability for harm caused by **animals** was frequently incurred in the days before mechanisation was widespread and much production depended on

animal power. Today it is mostly confined to animals used in the countryside and harm caused by domestic animals in towns. It is not restricted, however, to the result of direct acts of the animals (such as attacking people) but also to any accident attributable to the animal. In this connection too the code provides that an animal's owner, or the person who for the time being has the use of it, is liable for harm caused by the animal, whether it was in his custody at the time or had been lost or had run away, unless he can prove inevitable accident (Art 2052 civil code).

In Arts 2051 and 2052 civil code a defendant can avoid liability by showing that the event amounted to *inevitable accident*, by which is meant any unforeseeable and unpreventable natural incident that causes harm. The evidential burden of inevitable accident lies with the defendant, not the victim. If the defendant cannot substantiate it, he cannot escape liability. He is also liable for harm resulting from an *unknown cause*.

The owner of a building or other construction is liable for harm caused by its ruinous state, unless he can show that this state is not a result of inadequate maintenance or defective construction or repair (Art 2053 civil code). *Ruinous* here means 'having things falling off' either the building or objects attached to it, including ornaments or anything manufactured or there by chance which becomes detached or even snow falling from it. The owner is liable even if the ruinous state is the fault of whoever constructed or restored the building. He does in this case have a right of recourse against the person responsible for the harm (for example, a contractor).

8.5.4. Circulation of vehicles

Certainly the most fertile area for civil liability claims is the **circulation of vehicles**. From the earliest days when vehicles first appeared on the roads there was a body of law to regulate traffic (law no. 739 of 1912). This law was modified in 1928, then in 1933, and some of it survives in the civil code. Article 2054 civil code imposes a presumption of liability on the driver of a vehicle. To rebut this presumption the driver must show that he did everything he could to avoid the accident (Art 2054(1) civil code). The operative principle is, unlike in many other European countries, not the custody but the use of the vehicle. The user of a vehicle assumes the risk of liability for any harm he causes. It is debatable whether this is an example of strict liability or merely of presumption of fault.

When vehicles collide it is rebuttably presumed that both drivers are equally responsible for the damage caused to their respective vehicles. The owner of the vehicle (or in his place the usufructor or a person who

has acquired it with a stipulation as to retention of title) is jointly and severally liable with the driver, unless the former can show that the vehicle was being driven against his will (Arts 2054(2) and (3) civil code). Strict liability adheres to these defendants for any defects in construction or maintenance (Arts 2054(final) civil code), though in this case issues of consumer protection could arise (see below).

The presumption of fault does not operate in favour of a passenger in the vehicle, but applies for the benefit of third parties who have nothing to do with the use of the vehicle in the face of the risks and dangers inherent in such use. By the same token it does not operate in favour of a person who is a passenger because they are related to the driver or who have been given a lift out of courtesy (for example, a hitchhiker). These parties would need to prove fault to obtain a remedy from the driver.

The system in force today is rather dislocated and mechanistic. It thus promotes litigation instead of avoiding it, does not protect victims properly and is altogether inadequate for a modern society. In 1973 the Council of Europe approved the *Strasbourg Convention* providing for *strict liability* on the part, not of the driver, but of the *keeper* of the vehicle. Even the system of compulsory insurance, introduced very late into Italy compared to other European countries (law no. 990 of 1969), attracts justified criticism. The *guarantee fund* provided for victims of unidentified vehicles is too small. The system makes no distinction between very serious and trivial injury, and there are many cases where the scheme does not apply as a result of the impositions and contractual power of insurance companies.

8.6. Producers' liability for consumer goods

Consumers often suffer damage to property or personal injury as a result of defects in the planning or manufacture of consumer goods or inadequacies in the instructions for their use. The victim may seek a remedy against the *vendor* using the laws on guarantee provided in Arts 1490ff civil code, but as stated above, this is not a fruitful course of action as the guarantee and contractual liability are often limited and in any case the vendor may have had no knowledge of the state of the product and so may escape liability by demonstrating his own good faith. Instead, the consumer may turn directly to the manufacturer for redress, invoking Art 2043 civil code. Here, too, there are serious problems, because he or she has to prove fault on the part of the manufacturer and this is a difficult thing to do, often fatal to the consumer's claim. As a result, legal science has made many attempts at judicial constructions that would ease the evidential burden on claimants, sometimes involving strict liability of manufacturers (Arts 2049, 2051 civil code) and sometimes presumption of fault.

Of the earlier cases, the most important is a judgment that affirmed for the first time the liability of a manufacturer that released defective products onto the market. This is based on the manufacturer's 'presumed' fault – the actual case was one of biscuits adulterated before purchase causing stomach upsets and fever. So, in the absence of actual evidence of the manufacturer's negligence the court can infer it on the basis of 'res ipsa loquitur'.

Case law has also invoked other rules on liability to defend consumers' interests. One of these is Art 2050 civil code which provides that the manufacture of certain products, such as gas cylinders, aerosols, cosmetics and medicines, is intrinsically 'dangerous'. Another is Art 2049 civil code applying to defects in manufacture or in the accompanying planning process.

The code provides specifically for one area of product liability: defective vehicle construction (Art 2054(final) civil code).

8.6.1. Legislative intervention: consumer protection

Protection of consumer rights is without doubt one of the principal areas of involvement of European community law, which has had a stimulating effect on the development of domestic law, particularly in countries like Italy where the existing legislation was incomplete, defective and so offered inadequate protection to consumers.

Presidential decree no. 224 of 24 May 1988 gave effect to the EU directive of 25 July 1985 on manufacturer's liability. Italy, after great Britain which adopted the directive in the form of the Consumer Protection Act 1987, was one of the first countries to put it into effect. The decree substantially reproduces the principles established in the directive, namely, strict liability for manufacturers and, in the case of goods entering the EU from outside, importers of products, to which is added the liability of intermediaries who put products of unidentifiable origin onto the market. Liability, though not fault-based, is not 'absolute' either, as it admits of numerous exceptions. The manufacturer can demonstrate that the product is typical of others on the market, or that they have abided by the relevant laws on manufacturing and safety, or that the risk was not foreseeable because of the state of knowledge or technology obtaining at the time the product was marketed (so-called development risks).

Manufacturers are jointly and severally liable together with other participants in the chain of manufacture, for example, producers of raw materials.

The consumer must show that harm has occurred, that the product is defective and a causal link between the two. A product is defective when it does not meet the level of safety that the purchaser might reasonably expect.

Redress can be obtained only in respect of physical damage or personal injury occasioned by the defect, and not of the cost of the product itself.

Standard form clauses purporting to exclude liability are void, whether they are proposed by the manufacturer or by an intermediary.

Currently, therefore, the gaps between Italian law and the most advanced European nations in implementing the directive have been narrowed, especially as there are also special laws covering aspects of consumer protection, such as:

(a) means of manufacture of products, their marketing and labelling;
(b) advertising products and services;
(c) sales methods;
(d) consumer credit;
(e) savings contracts;
(f) travel and tourist organisations.

8.7. Liability of the public administration

8.7.1. Introduction

The history of public administration liability is a very interesting chapter of the law. For a long time it was held – and case law served to consolidate the view – that the public administration could not be liable for the harm caused by its employees to third parties, and that if liability has to be attributed it fell on the individual employee.

The public administration enjoyed a kind of *immunity* both on *ideological* grounds, namely, that the public administration served the good of the citizens and was thus incapable of causing them harm, and on the *practical* grounds that it was expedient to shield the administration from the costs of redress that would deplete the wealth of the community.

More recently, however, the opposite principle has been progressively affirmed.

8.7.2. The current situation

Article 28 of the Constitution has sought to reconcile these two demands, foregrounding the direct responsibility of public employees and civil servants. These are held 'directly responsible in criminal, civil and administrative law for actions they carry out in breach of the rights of others'. Civil liability, the article continues, 'extends to the state and to public bodies'. The interpretation of this article has given rise to many

problems. It can be said that it duplicates direct liability, sharing it between the body and the individual employee. An aggrieved citizen is, however, served in either case, as the employee, knowing that he can be held personally to account for harm he causes to third parties, will be prompted to pay due attention to the possible effects of his actions on their rights.

It should be pointed out that the direct liability of the public body will apply only insofar as the employee's actions were within the scope of the duties he owed to that body. Thus harm caused by employees pursuing their private affairs is excluded as is harm occasioned by employees in performing their functions but doing so in a way deliberately calculated to procure them an illicit gain.

The current phase of development of legal theory and case law on public administration liability shows signs of ferment. On one hand, concepts used in interpretation are being reviewed: a general distinction is made between *external* liability, for harm to third parties attributable to actions, conduct and decisions of the public administration, and *internal* liability, for harm attributable to the conduct of individual employees. At the same time, the 'privileges' hitherto enjoyed by the public administration are being progressively whittled down. Case law is revisiting old and new areas of public administration responsibility, from road maintenance and carrying out public works generally (for example, where an apparently adequate road surface concealed hidden dangers for the user) through the exercise of dangerous activities (for example, railways), liability for illegal occupation (of land) and delay in implementing decisions (in one case, late settlement of a question relating to pensions) to the promulgation of unlawful decisions (where the 'fault of the public administration is', 'manifest ipso facto in the breach of the law').

Now, therefore, it is beyond dispute in both case law and legal theory that 'the actions of the public administration, even where it exercises its unfettered discretion, must respect not only the limits established by law, but also the primordial principal of *neminem laedere*' in regard to which the judge must 'ascertain whether the administration has conducted itself in a blameworthy way so as to cause, contrary to the aforementioned injunction to harm no one, the breach of an individual right' and so give rise to a remedy as per Art 2043 civil code.

The liability of the public administration for breach of good faith in negotiations has been affirmed, and for giving out false information that caused harm to others. There is, however, a tendency to exempt the public administration from the presumption of liability provided by Art 2050 civil code in connection with dangerous activities, usually by reference to the public utility of the activity, for example, the activities of the armed forces, and an ordinary judge cannot question the suitability

and adequacy of the means and measures by which the public administration organises its services. The public administration is most often found to be liable in cases involving road maintenance and resultant traffic accidents. In these cases, too, the court requires clear evidence before it will find the public administration to be at fault: the road must be in a parlous state, and any level of neglect falling short of that will not give rise to liability.

8.8. Redress in non-contractual liability

Non-contractual liability has been mentioned above and its rules compared with the rules applying to contractual liability. We will now consider the topic of redress.

The remedy can consist of a sum of money (*damages*) which the party at fault is obliged to pay, or take a *specific form*, where the tortfeasor has to substitute the damaged object with a replacement of an identical quality.

8.8.1. Criteria for evaluating harm and assessing damages

The issue of redress in non-contractual liability is a matter of deciding not merely *when* a remedy is available, but also *to what extent* the harm is redressable and *how much* that in turn amounts to.

Legal theory and case law are at odds on the latter problem, especially where personal injury is concerned. How are a victim's injuries and death to be assessed? Non-material values are at stake, and yet the harm has to be reduced to an expression in monetary terms.

8.8.2. Specific form remedies

Article 2058 of the civil code provides that the claimant may request restitution in specific form, insofar as this may be wholly or partly achieved. However, the court may stipulate that damages alone are payable if restitution in specific form would be excessively burdensome for the defendant. The application of this rule is complex.

The principle followed in case law is that the claimant cannot profit by redress in specific form, that is, obtaining something of a higher value than was destroyed by the defendant. Restitution in specific form will, however, be granted if it is not excessively burdensome for the defendant.

8.8.3. Mental suffering

It is widely debated whether in addition to harm caused by physical injury or to property it is possible to admit redress for harm consisting of

an undue disturbance of the mind caused to the victim or his or her family. In the absence of specific provisions, legal theory and case law defended opposite positions under the previous code. Some sought as far as possible to limit the extent of redress obtainable and admitted damages for pain and suffering (*pretium dolori*) only in exceptional cases. Others sought to widen the range of admissible heads of claim and apply more generous remedies. The controversy has not been brought any closer to a solution by the provision in the current penal code (Art 185) that *non-economic* harm is redressable only if caused by the commission of an offence.

Judgments in decided cases tended to support the restrictive thesis, only admitting damages for mental suffering where, typically, a crime has been committed, although the formulation of *mental suffering* employed goes further than psychic disturbance to include also the effects of bereavement and the shock incurred through suffering grave harm. In recent years, however, it has shifted towards a more open view: non-pecuniary damages will be compensated whenever they are the consequence of violation of constitutionally protected rights (such as life, health, personality).

Chapter IX: Protection of Rights

9.1. Protection of rights

9.1.1. Means of defending a legal position

Some of the means of defending a 'legal position', that is, any situation where an individual may assert a right or interest of any kind, are covered by the civil code and collected in Book VI and rather imprecisely labelled 'protection of rights'. There are many different provisions to be found in the various Books devoted to the protection of claims that an individual may present in the contexts of: the person and the family (for example, the rules on injunctive relief, Art 10 civil code, on actions against directors of associations, Art 22, and on actions to claim, repudiate or dispute legitimacy, Arts 244ff); succession (for example, an estate petition, Art 533 civil code); property (for example, an action in defence of property, Arts 948ff, and for possession, Arts 1168ff); obligations (for example, actions for avoidance and nullity, discharge and rescission of contracts, and so on); and employment (actions for administrators' liability, to take one example).

The various means of protection differ considerably among themselves, because they concern the existence and defensibility against third parties of actions and court decisions and procedures, and because they apply variously according to whether a party seeks relief before a court or through arbitration.

9.1.2. Notification

Notification of judicial actions means the ways in which notice is given of legally significant acts, orders and decisions. For immoveable property such as land there is a system of entry in various registries, whereby any transfer of property or minor interests is recorded.

Entry on a register does not affect the transfer and hence its validity. It merely serves notice on third parties of its existence and content. A transfer cannot be binding on third parties unless they have notice of it, so where Titus sells to Gaius a piece of land over which Sempronius

enjoys a right of way not referred to in the deed of transfer, if Sempronius has not registered his interest in timely fashion before the transfer, he cannot assert his right of way against Gaius, who is not bound by it. If Titus sells his property first to Mevius and then to Gaius, but only Gaius registers the transfer, Mevius, even though he purchased first, cannot assert his property over the claim of Gaius who registered before him.

For registrable moveable goods a similar system applies. There is a Public Vehicle Registry (PRA) and one for boats (RINA).

Notification thus has a merely *declarative effect*. When it has been carried out it may, however, have a stronger, legally significant or *constitutive effect*, when the act of notification itself gives rise to a right. This is the case, for example, when a mortgage is registered. It may also have a *curative effect*, as when a void or voidable deed has been registered before the court order declaring it void or annulling it (Art 2690).

The code lists deeds and orders that require registration (Arts 2463, 2465, 2646ff). It also declares the principle of continuity of registration (Art 2690) and provides rules for registering judgments (Arts 2652 and 2653).

There is a further type of notification, which has less extensive effects than that mentioned above. This concerns deeds and orders that should be made public but whose validity is not impaired if notification is not made or is defective (for example, banns of marriage, Art 93).

9.1.3. Evidence

To assert a right before the court one must prove the facts on which the assertion is based. This is the principle of burden of proof (Art 2697) which can be discharged by documentary and parole evidence.

There are two kinds of documentary evidence, public and private. Article 2699 provides that public documents must be formally attested before a notary or other public official authorised to give it public credit in the place where it was transacted. This then constitutes proof, unless and until an action alleges it has been falsified, of the document's origin, underwritten by the person who notarised it, and of the declarations made by parties and other acts that the public official attests to have been carried out by him or others in his presence.

A private deed is any written document created by the relevant parties. It has a lesser probative effect, because it proves, unless and until an action alleges it has been falsified, the origins of the declarations made in it by the signatories and these can be asserted legally against anyone who recognises the fact of signature.

Signature of a private deed attested before a notary or other authorised public official is deemed to have been recognised by the parties (Arts 2702 and 2703).

The date of the deed is certain in the case of a public document. The date of a private deed is ascertainable as the moment when it is registered for tax purposes or by indirect means (such as being formally stamped).

Parole evidence is adduced in court proceedings or in arbitration. It cannot be called if the facts it is sought to prove have already been established documentarily.

An admission (Art 2730) is an affirmation of facts that are unfavourable to the party making it and favourable to his opponent.

An oath (Art 2736) may be submitted to by one party vis-à-vis the other. The so-called decisory oath is one made in respect of specified circumstances in such a way as to settle the issue. A refusal to make an oath is deemed to resolve the issue in favour of the other party who has submitted to one.

9.2. Actions to protect rights and interests

9.2.1. Actions and trials

Rights and interests held by individuals and groups can be infringed in various ways by other persons. Since taking the law into one's own hands is not permitted, in order to ensure social order and the equal application of rights and interests, the legal order puts various means of obtaining justice at the disposal of individuals and groups.

There are civil code rules which indicate how rights and interests are to be balanced, for example, in regard to nuisance Art 844(2) provides that the demands of production are to be balanced against those of property. Article 1380 provides that where interests relating to the enjoyment of the same object conflict, the right that has existed for the longer time shall prevail, and so on.

In most cases, when conflicts between neighbours arise, or contracts are not performed, or civil wrongs are committed causing harm to third parties, or in any other case where rights or interests are interfered with or infringed, the aggrieved party can go to court or to the appropriate tribunal provided by the State for the resolution of particular types of dispute (arbitrational justice). If the dispute arises between a citizen and the public administration concerning breach of legitimate interests or abuse of power, violation or wrongful application of laws, the matter is referred to an administrative court (administrative justice).

The Constitution guarantees the right to bring an action, and the protection of individual rights and legitimate interests, and to defend

them in court (Art 24). The procedure for defending such rights and interests in court is as provided by the competent judge, and the case cannot be removed from the court's jurisdiction (Art 25).

Judicial protection of a right is itself the subject of a right, that of bringing an action.

We have already mentioned the actions that the civil code authorises individuals to bring. Most of these are of standard form, insofar as the claims they are brought in respect of have certain features and are subject to certain time limits (for example, petitions and actions for possession, etc). Non-standard forms of action are also recognised, for example, an injunction action to put an end to an injurious activity.

Actions are distinguished from one another by the purpose they serve.

Declaratory actions are brought before the court in order to establish that a claimed right exists or else to clarify the legal relations that obtain between parties (for example, an action to establish boundaries, or for the division of common property). Actions for relief are brought before the court so that a legal relationship can be instituted, modified or extinguished (for example, divorce, or discharge of a contract for non-performance). Actions for satisfaction are brought before the court so that a sanction provided by law (for example, damages) can be applied.

The procedure triggered by the bringing of an action, that is, by the deposition of a claim at the court office, will be the one appropriate to the type of action. The process is concluded by a judgment.

Once the procedure is complete and judgment (declaration, or relief, or sanction) pronounced, or the legal relationship has been ascertained or the substantive rights do not need to be adjudicated, the party may now seek to realise the right that has been established. Enforcement proceedings now begin.

If the court's intervention is sought as a matter of urgency, because any delay in setting up and completing the procedure would prejudice a defensible right (*periculum in mora, fumus boni juris*), this can be achieved through ex parte or preventive proceedings.

Civil court judges are categorised according to the type of case they are competent to hear. A justice of the peace hears actions concerning: moveable property (to a value not exceeding € 2500); damages claims involving traffic and nautical incidents to a limit of € 15,000; setting time and distance limits; nuisance in relations between landowners or others in possession of land; services in common ownership. All the other cases are brought in front of a Court of First Instance, in which a single judge or a three member panel hears the arguments of the parties following an adversarial procedure.

9.2.2. Principles governing trials

There are many principles governing trials. The following are the most important.

(a) the principle of request, whereby any person seeking to assert a right must make a request to the competent judge (Art 99 civil procedure code). To make or oppose a request it is necessary to have a relevant interest. An individual must therefore take positive action to obtain a right and not count on the outcome of official procedures set in motion by the judge (which only apply in exceptional cases, such as a declaration of insolvency);
(b) the evidential principle, whereby the judge can reach a decision only on the basis of evidence (as mentioned above) adduced or presented by the parties (Art 115 civil procedure code);
(c) the adversarial principle, by which a judge can take no measure against a party who has not been validly summoned or informed of the application to do so (Art 101 civil procedure code);
(d) the principal of correspondence with relief sought, whereby the judge can only make an order within the scope of the remedy sought and not go beyond it (Art 112 civil procedure code);
(e) the principle whereby the judge must reach his decision on the basis of law unless the parties have requested that he or she reach it on the basis of equity (Art 113 civil procedure code).`

An action begins with the lodging of a request (statement of claim) by the person bringing the action (the claimant), to which the person against whom the action is brought may lodge a reply (answer, or defence). The judge sets the investigatory process in motion to establish the relevant facts and, once these are completed, the parties are permitted further pleadings of fact and law (concluding arguments). The judge decides the outcome of the case if he or she is sitting alone, or otherwise refers it to colleagues. The decision is in the form of a judgment.

The judgment is in two parts: the order, in which the outcome of the trial is stated (a declaration, creation or modification of a relationship, a sanction); and the reasons, stating the arguments and reasoning on which the order was based.

The judgment is registered in the court office and the more diligent (or more interested) of the parties notifies the other. It becomes immediately effective unless the appeal judge decides, on serious grounds, that it must be suspended.

A first appeal lies to the next higher judicial level (from a justice of the peace to the Court of First Instance, and from the Court of First

Instance to the Court of Appeal). It is an appeal on the merits of the case and so the evidence can be repeated.

Once a first appeal is completed, there may be a further and final appeal to the Court of Cassation in Rome. Reasons justifying the further appeal may include errors or inconsistencies of interpretation or application of legal rules on the part of the appeal judge.

The Court of Cassation may reject the further appeal and thus affirm the result of the first appeal, or else uphold the further appeal and remit the decision to the appeal judge so that the correct principle can be applied. The revised judgment on appeal can also be challenged in Cassation.

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