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3rd Central & Eastern European LUMEN International Conference  
New Approaches in Social and Humanistic Sciences | NASHS 2017 |  
Chisinau, Republic of Moldova | June 8-10, 2017

# **New Approaches in Social and Humanistic Sciences**

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## **Legal Notions of Contract. Fundamental Doctrines in Continental Law and Common Law**

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<https://doi.org/10.18662/lumproc.nashs2017.13>

How to cite: Codrea, C. (2018). Legal Notions of Contract. Fundamental Doctrines in Continental Law and Common Law. In V. Manolachi, C.M. Rus, S. Rusnac (eds.), *New Approaches in Social and Humanistic Sciences* (pp. 153-163). Iasi, Romania: LUMEN Proceedings.

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## Legal Notions of Contract. Fundamental Doctrines in Continental Law and Common Law

Codrin CODREA<sup>1</sup>

### *Abstract*

*The contract seems to be one of those self-explanatory legal notions, heavily relying on common-sense knowledge of everyday people involved in whirling spirals of polymorphic agreements, in both continental and common law legal systems. For a legal comparative endeavour, however, it is a dangerous pitfall, since it points to a misleading starting point – the common, practical understanding of contract is probably an effect of similar legal notions, and this may constitute a valid tertium comparationis. In spite of its intuitively powerful and broad everyday use, the contract is, nevertheless, a complex legal notion with detailed juridical articulations. It is from this specific legal angle of each continental and common-law legal family that the unifying common-sense understanding of the contract shows a pluralistic and at times irreconcilably divergent legal understanding of the very notion of contract. It is not the convergence of the legal doctrines of the continental and common-law legal families that this article intends to analyze, convergences which may very well be deduced from the common use of the notion and which find anytime support in most of everyday practice, but the specific differences in the two legal families which destabilize a potential unifying legal notion of contract. The article does not intend to refute nor correct the common European understanding of a contract, but merely to investigate the fact that, although there is a common everyday understanding of what a contract is, and although different legal systems get to similar results, it is not necessarily because identical legal notions are employed.*

**Keywords:** *contract law, doctrines of contract, common law, continental law, Roman law.*

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<https://doi.org/10.18662/lumproc.nashs2017.13>

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Selection and peer-review under responsibility of the Organizing Committee of the conference



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## **1. Introduction**

The general European understanding of a contract is that of a legally binding agreement between two or more parties, who consent to a set of rights and correlative obligations, or as the common law understands it, make a promise or a set of promises in exchange for the ones made by the other party. On the basis of this common understanding and following a Roman law tradition, at times without knowing or recognizing it, overarching projects such as UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law elaborated by the Commission on European Contract Law (“Lando Commission”), or the European Contract Code – Preliminary Draft by the “Pavia Group”, based on the work of the Academy of European Private Lawyers, are able to propose feasible legal notions of contract that can be successfully used across the European Union. If, however, there would have been a complete semantic overlap between the legal notions of contract in all European legal systems in the continental and common law legal families, the quest to create a unifying contract law for the European Union would not have been such a provocative task.

## **2. Any place for differences?**

Although the broad meaning of a contract is common to both European legal families, common law and continental law, although contracts in both legal families largely fulfil the same functions, are subjected to the same general legal rules and take similar effects, there are a couple of distinctions between the legal notion of a contract in continental law and the one employed in the common law legal system. The notion is precisely defined in each legal family, but the criteria used to delineate contracts from other legal acts or the operations that each legal system allows through contracts are distinct, typical to each legal system. The same particularities are in place when analysing certain contractual operations to which different legal systems respond in a similar manner, but with means internal to their own legal debate and as part of an internal legal process of reformation.

## **3. Is there a common European legal notion of contract?**

Beyond the similarities which spread very deep on matters concerning fundamental aspects of the contract, such as the effects of contracts, liability, formation or termination of contracts etc, there are a

couple of differences which may pass under the radar of an over-enthusiastically promoter of legal uniformity. There are certain unsettling differences between continental and common law legal families which are still in place regarding the basic aspects of the contract, such as what is and what is not a contract, and how is it possible that, since we can agree on a common definition, we cannot agree on what includes and what excludes that definition. On the other hand, there were some other distinctions which eventually disappeared as a result of internal processes of reformation and in this paper I will focus on the problem of *stipulatio alteri* in the English common law.

## 4. A common legal definition in continental and common law

### 4.1. *The contract in Roman law*

The genealogical background for the common understanding of contracts in continental European and common law legal family is the Roman law. Legal systems of the continental legal family, like the French and, through the acculturation of 1804 Code Napoleon, the Romanian legal systems, German and Italian, but also the legal systems of the common law legal family, like the English and American legal systems, found in the Roman principles of contract, through the work of Roman jurists, their main source of inspiration.

Particular to the Roman law is that, for what it is broadly referred to in continental law as contract, Roman jurists distinguished three distinct legal figures: *conventio*, *pactum* and *contractus*. *Conventio* is the most general term for any kind of agreements, which denotes only the fact that two parties have come to a common ground regarding a specific object. It is a borderline notion, since it is situated between the common understanding and the legal notion of contract with recognized legal effects. However, as Domitius Ulpianus showed, a *conventio* is not recognized legal force and, as such, it cannot be a source of rights and obligations of the parties [1]. *Pactum* is a *conventio*, which means that it implies an agreement of the parties, but, unlike a simple *conventio*, it is recognized legal effects. *Contractus* also is a *conventio*, but for which Roman law recognized full legal effects under *jus civile*. *Pactum* and *contractus* appear to be the only two types of agreements which found recognition in Roman law – indeed, both of them are recognized legal effects and give the parties actions deriving from their agreement. However, the difference between the two is that *contractus* is recognized under *jus civile*, while *pactum* is recognized under *jus honorarium*. If a *conventio* between the parties was not concluded in the form prescribed by the Roman law in order

to be a *contractus*, it was not recognized legal effects. As Julius Paulus stated, *Ex nudo pacto inter cives Romanos actio non oritur, actio non nascitur* [2]. *Pactum* appeared as an exception which presupposed that, although it was concluded without the required forms, the parties executed their obligations. During the Post-classical law, Justinian recognized three types of *pactum* – the legitimate, the praetorian and the accessory conventions [3].

Regarding the persons who were allowed to conclude contracts, the legal status of persons in Roman law following the criterion of *status civitatis*, the citizenship, plays an important role. *Cives romani*, those who had Roman citizenship, were recognized full political and private rights and, thus, they were the first ones entitled to conclude any type of legal acts sanctioned by *jus civile*, *jus Quiritium* [4]. It was especially the Roman citizens that could conclude a *contractus* and this was the only *conventio* for which *jus civile* recognized actions and exceptions for the parties. Later, the exclusive right of Roman citizens to conclude a *contractus* under *jus civile* was extended to *latini* and *peregrini* with *jus commercii*. *Latini* were those inhabitants of Latium who, without being Roman citizens, could have used *jus civile* to conclude a *contractus* with Roman citizens. *Peregrini* were the inhabitants of the Roman Empire who were not subjected to *jus civile*, were not recognized political or private rights. Their private affairs were subjected to *jus gentium*, and only as an exception some of them were recognized *jus commercii* with Roman citizens [4].

Until the end of the Classical law, contracts under *jus civile* were formal, which implied that, besides *conventio*, the agreement of the parties, certain formalities were required in order to be validly concluded. Contracts were either *verbis*, such as *sponsio*, *stipulatio*, *dictio dotis*, or *litteris*, such as *adversaria* or *nomina arcaria*. The contracts in the first category were concluded in verbal forms, while the latter were concluded in writing. For example, *sponsio* presupposed a formal promise which, regardless of the variable object of that which was promised, the verb *spondere* had to be said in order to conclude the contract. Also, *stipulatio* presupposed an exchange of verbal expressions, which implied a question with regard to the object of the promise and the answer, in the form of *spondesne mihi...? / spondeo*. Besides verbal and written contracts, which were formal contracts, Roman law recognized real and consensual contracts. Real contracts in Roman law presupposed that, besides *conventio*, the agreement of the parties, there had to be a concrete remission of the property object of the obligation from *tradens* to *accipiens*. Such contracts were *depositum*, *pignus*, *mutuum*, *comodatus*. Consensual contracts, such as *emptio venditio*, *locatio conductio*, *mandatum*, *societas*, were validly concluded through the mere agreement of the parties without any other formality and grew in importance only in the Post-classical law [5].

Roman law recognized different other classifications of contracts, around different criteria, which is broadly addressed in Roman law doctrine as *conventio divisio*. However, the common ground for the European non-legal understanding of what a contract is derives from a combination of semantic elements from Roman law: that a contract implies an agreement, which corresponds to the broad category of *conventio*, which was the general notion covering both *contractus* and *pactum*, that a contract presupposes a promise, which has its origin in the verbal and formal Roman law contract *sponsio*, and that it implies the commitment which derives from the notions of *contractus* and *pactus*, the two types of agreements to which the Roman law, under different mechanisms, offered a sanction to the parties in case of non-performance of the contract.

#### **4.2. Similar notions of contract in continental and common law**

Trying to define the contract on the common premises of continental legal family and common law legal family is not impossible. The definition would be so broad that it would leave aside all possible distinctions and it would fit the common perception of what a contract is. Such a minimal definition of a contract would consist in the acceptable assertion that a contract is a legally binding agreement. In order to produce legal effects, similar conditions must be respected in both legal families. Such conditions refer to the persons who are allowed to conclude contracts, to what type of contracts and under which conditions; they also refer to the will of the parties, to the consent or intention required to enter a legal relation, to the legal operation presupposed by the contract, to the purpose of the contract and so on. All of these aspects are strictly addressed by the law of each legal system of each legal family in a similar manner. Even though the particular legal notions employed by each legal system are different, they fundamentally serve the same purposes and they regulate the contract in a similar manner.

### **5. Divergences beyond the common definition of contract**

#### **5.1. What is and what is not a contract – the consideration doctrine**

If a broad definition of contract which would be accepted in both continental and common law legal families resumes to acknowledging the fact that a contract is a legally binding agreement, the particular notions of contract used in each legal family differ substantially. In French law, article 1101 of 1804 Code Napoleon states that *Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à*

*ne pas faire quelque chose. (A contract is an agreement which binds one or more persons, towards another or several others, to give, to do or not to do something).* The text of article 1101 remained unchained in the actual French Civil Code and it was the main source of inspiration for the article 942 of the 1865 Romanian Civil Code: *Contractul este acordul între două sau mai multe persoane spre a constitui sau a stinge între dânsii un raport juridic. (The contract is the agreement between two or more persons in order to constitute or terminate among themselves a legal relation).* The contemporary Romanian Civil Code states in article 1166 in a similar manner that *The contract is the agreement between two or more persons with the intention to constitute, modify or terminate a legal relation.*

Following the Roman tradition, the most important trait of the contract in these two legal systems is the agreement, the fact that the contract is formed through the will of the parties. Understood as an agreement formed through the manifestation of will from the contracting parties, all agreements, regardless of their objects, are contracts – the Roman *contractus* and *pactum* were merged in *conventio*, and the *conventio* was recognized full legal effects. This notion of contract may easily be extrapolated to the entire continental legal family, which borrowed the same notion through the acculturation of the 1804 Code Napoleon. Accepting the fact that the will of the parties is the essential element in defining the contract in the continental legal family does not imply that there is a monolithic perspective on the contract: there are still some debates regarding the importance or utility of certain legal notions that were required for the validity of contracts, such as notion of cause. The notion of cause is considered to be the mark of the French perspective on the contract, but even in French legal doctrine and judiciary practice the notion was subjected to severe criticism [6]. In French law, but also in French inspired legal systems, along with the consent, the cause of the contract is a structural part of the legal will and also a requirement for the validity of contracts, as it is explicitly provided in the articles 1131-1133 of 1804 Code Napoleon, in the 966-968 of the 1865 Romanian Civil Code and in the articles 1235-1239 of the contemporary Romanian Civil Code [7]. If in the French and Romanian civil codes the cause is one of the requirements for the validity of contracts, along consent, capacity and object, as stated in article 1108 of the French Civil Code and article 1179 of the Romanian Civil Code, the 1900 German Bürgerliche Gesetzbuch or the Dutch 1992 Civil Code do not mention the cause as a validity requirement. Also, neither the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law elaborated by the Commission on European Contract Law (“Lando Commission”), nor the European Contract Code – Preliminary Draft by the “Pavia Group”, based on the work of the Academy of European Private



Lawyers, do not mention the cause as condition for the validity of contracts and neither the common law legal systems.

Understood as a manifestation of the will of the consenting parties, French law classifies contracts as synallagmatical (bilateral) or unilateral in article 1102: *Le contrat est synallagmatique ou bilatéral lorsque les contractants s'obligent réciproquement les uns envers les autres* (The contract is synallagmatical or bilateral when the contracting parties bind themselves mutually some of them towards the remainder) and article 1103: *Il est unilatéral lorsqu'une ou plusieurs personnes sont obligées envers une ou plusieurs autres, sans que de la part de ces dernières il y ait d'engagement.* (It is unilateral when it binds one person or several towards one other or several others, without any engagement being made on the part of such latter). Also, French law classifies contracts as gratuitous or onerous in article 1105: *Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit.* (The contract of beneficence is that in which one of the parties procure for the other an advantage purely gratuitous) and article 1106: *Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose.* (The contract by onerous title is that which subjects each of the parties to give or to do something). These two classifications provided by the 1804 Code Napoleon were adopted by the 1865 Romanian Civil Code in articles 943 and 944 for the synallagmatical (bilateral) and unilateral contracts, and in articles 945 and 946 for the gratuitous and onerous contracts. Both classifications can be found in contemporary Romanian Civil Code in articles 1171 and 1172.

What is particular to the continental understanding of the contract as a manifestation of the will of the parties is that, by supporting these classifications, most of the conceivable agreements are considered contracts, being recognized legal effects. As such, in the continental legal family, the donation is considered a contract – an unilateral contract, since only the donor assumes an obligation, and also a gratuitous contract, since the donor does not expect anything in return from the donee. It is nevertheless a contract – although it is the will of the donor that is generally prevalent in this operation, the contract cannot conclude in the absence of the will of the donee, who can refuse the donation. In common law there is a strict separation between contracts and gifts, due to the specific understanding of contracts in this legal family. The common law gift and the continental European law donation share the same fundamental traits: firstly it is an *inter vivos* transfer, secondly it is a gratuitous transfer, thirdly there is a subjective element, *animus donandi*, the intention of the donor to give without expecting anything in return, and an objective element, the property or the right transferred from the donor to the donee [8]. Although also in the common law the gift implies two consenting parties, and although the donee can



refuse to accept the benefit, the gift is not considered a contract because the transfer is *without consideration*.

In defining a contract, the *consideration doctrine* is essential in common law; the notion of consideration was elaborated in the judiciary practice and in the legal doctrine. The meaning of consideration is that of a benefice which, in the case of bilateral contracts, is in the form of a promise of doing something in the future, a promise assumed by each party in exchange of the one assumed by the other. In *Currie v Misa* (1875) LR 10 Ex. 153 it was stated that *a valuable consideration, in the eyes of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other* [9]. The legal notion of the contract in common law is that of a promise or set of promises for the breach of which the party has access to a remedy [10]. The consideration doctrine allows only for certain promises to be enforced, while excluding those promises made without consideration, such as gifts, those made in consideration of a moral duty or a duty of honour, or any other promise assumed by a party without any intention of being legally binding [11]. Therefore, in order to qualify an agreement as a contract, there must be consideration, which presupposes two subsequent conditions: the legal detriment condition and the bargain condition. The first condition is fulfilled if the promise assumed by each party presupposes a benefit for the other and a collateral loss for the promisor, and the second condition is fulfilled if the promise of each party is the result of a bargain. The Second Restatement of Contracts 2d S 71 (2) states that *a performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise* [12].

## **5.2. What effects contracts can or cannot have – the privity doctrine**

In both continental European law and common law legal families a validly concluded contract can have binding effects only between the contracting parties. This principle originates in the Roman law *Res inter alios acta, aliis nec prodesse, nec obesse potest*, which remained fundamentally similar, but under different denominations in each legal family – in continental European legal family it is called the principle of the relativity of contracts, while in the common law it is called the privity of contracts.

This principle prevents a third party to gain a right or an obligation from a contract to which he was not part of. There were no disputes on the issue whether a third party can be imposed a duty arising from a contract concluding by other two parties – this solution was generally rejected even in the Roman law. The problems arose when asking whether a contract in

favour of third party should be recognized any legal effects, since it was clearly breaking the *Res inter alios acta, aliis nec prodesse, nec obesse potest* rule.

The Roman law solution was that *nemo alteri stipulari*, but with several practical alleviation of this strict rule, which made it possible through exactly the application of the *inter partes* effects of contracts to conclude a contract in favour of a third party [13]. The validity of *stipulatio alteri* as an autonomous institution was firstly admitted in Dutch private law in the 17<sup>th</sup> century, under the influence of the natural law legal theorist Hugo Grotius. The example set by the private law of Netherlands was followed by the Saxonian, Prussian and Bavarian codifications, which diverged from the Roman law *nemo alteri stipulari* [14]. The 1804 Code Napoleon, through article 1121, introduced two exceptions to the principle of relativity of contracts recognized in article 1119. The strict exceptions provided by the French Civil Code were expanded in the judiciary practice so that almost any kind of contract in favour of a third party was considered valid under 1121 [15]. Following the French model, all the continental legal systems recognized *stipulatio alteri* as an exception to the strict *inter partes* effects of contracts. The 1900 Bürgerliche Gesetzbuch, the German private law code, § 328 I, stated that *Durch Vertrag kann eine Leistung an einen Dritten mit der Wirkung bedungen werden, dass der Dritte unmittelbar das Recht erwirbt, die Leistung zu fordern.* (Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.), and in the contemporary continental European legal family almost every legal systems recognizes *stipulatio alteri*.

Although English common law recognized the contract in favour of a third party through the 1999 *Act to make provision for the enforcement of contractual terms by third parties*, the debates surrounding this institution were particular to the English legal system. The equivalent English common law legal notion of the continental European legal notion of relativity of contracts, the privity of contracts, was following the strict perspective of *inter partes* effects of contracts, in a manner resembling rather the Early and Classical Roman law than the continental European legal systems. Since the 17<sup>th</sup> century, when the Dutch civil law recognized *stipulatio alteri*, the English common law refused to contradict the privity doctrine. The privity doctrine presupposed two rules: the first one was that a third party could not gain an obligation from the contract concluded by other two parties, and the second rule was with regard to the right of a third party to demand the performance of the contract concluded by other to parties in his favour. The second rule of the privity doctrine was also grounded on the consideration doctrine: the third party of a *stipulatio alteri* was not providing any consideration and, as

such, he could not have been recognized an action to enforce a promise of another.

## 6. Conclusions

From a comparative point of view, the general notion of contract as the legally binding agreement of the parties accepted in both continental and common law legal families hides certain specific features of the contract in each legal system. The legal notion of the contract used in common law overlaps with a particular kind of contracts in continental European legal family, the synallagmatical (bilateral) and onerous contracts. Although the contract in common law also implies a mutual consensus of the parties, an agreement for its valid formation, this condition alone does not suffice to make the act of the parties a valid contract, while in the continental European legal family the contract is defined especially as an agreement of the parties concluded in order to have legal effects. In common law, without the existence of reciprocal and interdependent promises made by the parties to one another, according to the consideration doctrine, the act is without consideration and, as such, not a contract, but a gift. Unlike common law, which keeps a strict distinction between contracts and gifts, in continental European legal family the notion of the contract covers both the category of unilateral contracts, the ones in which only one party assumes an obligation, such as the donation contract, and the category of bilateral contracts, which corresponds to the notion of contract in common law. With regard to the effects of the contracts, the notions of relativity of contracts in continental European legal family and the privity of contract doctrine in common law are similar in the sense in which they recognize the Roman law principle of *inter partes* effects of contracts. However, if in the legal systems of the continental European legal family the recognition of the contract in favour of a third party as an exception to the *Res inter alios acta* started in the 17<sup>th</sup> century, the same result, but due to an internal process of reformation, occurred in the English common law in 1999 through an act passed by the Parliament.

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