

Transfer of Ownership and Preliminary Agreements*

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Abstract

This work aims to provide a contribution to the standardization of European law in the field of transfer of ownership. At first sight, the European scenario appears to present a very marked contrast between the French model of transfer of property based on the contract (*titulus*), and the German one, which is based on delivery (*modus*). Nevertheless, deeper analysis reveals that the differences are not as great as they seem. For instance, let us consider the Italian case, where, in spite of the fact that according to the *principio consensualistico* the transfer of property takes place at the very moment that agreement between the parties is reached, with the introduction of the preliminary contract, the transfer of ownership does not occur immediately, but only upon full payment of the agreed price. Under these circumstances, as far as immovables are concerned, the best solution from the European point of view seems to be to distinguish between the moment when the contract is signed and the moment in which the transfer of ownership takes place. Conversely, in the case of movable property, the need for rapid circulation of wealth makes the *principio consensualistico* approach more suitable.

I. An Historical and Comparative Perspective

In Roman law, a contract was not *per se* capable of producing real effects.¹ To this end, a subsequent act of fulfilment was required, namely the

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¹ F. Carnelutti, *Teoria giuridica della circolazione* (Padova: Cedam, 1933); E. Redenti, *Dei contratti di alienazione a titolo oneroso* (Padova: Cedam, 1935); G. Gorla, *L'atto di disposizione dei diritti* (Padova: Cedam, 1936); A. Dal Martello, 'La prestazione dell'obbligazione di dare' *Rivista trimestrale di diritto e procedura civile*, 214 (1947); V. Colorni, *Per la storia della pubblicità immobiliare e mobiliare* (Milano: Giuffrè, 1954); R. Sacco, 'Circolazione giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 1960), VII, 4; Id, 'Le transfert de la propriété des choses mobilières déterminées par acte entre vifs en droit comparé' *Rivista di diritto civile*, I, 442-487 (1979); Id, 'Consensualismo' *Digesto delle discipline privatistiche* (Torino: Giappichelli, 2009), 109; E. Russo, *La responsabilità per inattuazione dell'effetto reale* (Milano: Giuffrè, 1965); C.M. Bianca, 'Riflessioni sul principio del consenso traslativo' *Rivista di diritto civile*, I, 535 (1969); G. Palermo, *Contratto di alienazione e titolo dell'acquisto* (Milano: Giuffrè, 1974); G. Stolfi, 'Appunti sul c.d. principio consensualistico' *Rivista di diritto commerciale*, I, 1 (1977); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* (Milano: Giuffrè, 1990); L. Vacca, *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica* (Milano: Giuffrè, 1991); F. Ferrari, 'Principio consensualistico

traditio, the *mancipatio*, or the *in iure cessio*, which produced the transfer itself. Such acts were abstract insofar as the transfer of ownership was possible regardless of the existence or validity of the underlying relationship.² Consequently, the ownership was transferred only upon delivery, meaning that the agreement alone did not have value unless accompanied by delivery. In reality, the rigidity of this system began to break down in the course of the evolution of Roman law, thanks to the admission that its effect could be replaced by non material forms of *traditio*, such as, for example, the *constituto possessorio*.³ The *Digest*, however, reiterated the classical scheme of transfer of ownership, which focused on *traditio*, subject to the admission of non material forms of *traditio*. This system would be implemented by the *jus commune*, in which we note, however, the passing of the principle of abstraction. In particular, in the *jus commune* system, transfer of ownership requires both the existence of a valid contract (*titulus*), and an act of execution, such as the *traditio (modus)*, or other non material forms of delivery. This system still appears essentially unchanged in the Austrian Code (ABGB), which, for the purpose of transfer of ownership, requires both *titulus* and *modus*.

In French Law, the system of *jus commune* was, however, simplified by the practice of including a *constituto possessorio* in the contracts themselves. In this way, through the use of forms of non material delivery, the conclusion

e Abstraktionprinzip: un'indagine comparativa' *Contratto e Impresa*, 889 (1992); Id, 'Abstraktionprinzip, Traditionsprinzip e consensualismo nel trasferimento di beni mobili' *Rivista di diritto civile*, I, 729 (1993); G. Maccarone, 'Obbligazioni di dare e consenso traslativo' *Rivista del Notariato*, 1319 (1994); G. Vettori, *Consenso traslativo e circolazione dei beni* (Milano: Giuffrè, 1995); Id, 'I contratti ad effetti reali', in M. Bessone ed, *Trattato di diritto civile* (Torino: Giappichelli, 2002), XIII, 85; G. Gandolfi, 'Sulla sorte del contratto con effetti reali (nella prospettiva di una codificazione europea)' *Rivista trimestrale di diritto e procedura civile*, 1015 (1997); P. Gallo, 'I rimedi restitutori in diritto comparato', in R. Sacco ed, *Trattato di diritto comparato* (Torino: UTET, 1997), 207-229; C. Camardi, 'Principio consensualistico, produzione e differimento dell'effetto reale' *Contratto e Impresa*, 572-601 (1998); P.M. Vecchi, *Il principio consensualistico* (Torino: Giappichelli, 1999); N. Muccioli, *Efficacia del contratto e circolazione della ricchezza* (Padova: Cedam, 2004); P. Sirena, 'Il principio del consenso traslativo', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), III, 23; P.G. Monateri, *Contratto e trasferimento della proprietà. I sistemi romanisti* (Milano: Giuffrè, 2008); E. Ferrante, *Consensualismo e trascrizione* (Padova: Cedam, 2008); Id, 'Contrattazione immobiliare e trasferimento della proprietà', in G. Visintini ed, *Trattato di diritto immobiliare* (Padova: Cedam, 2013), VI, 699-746; I.A. Caggiano, 'Il denaro tra proprietà e credito: le logiche dell'appartenenza' *Contratto e Impresa*, 491 (2009); M. Cenini, *Gli acquisti a non domino* (Milano: Giuffrè, 2009); E. Russo, 'Vendita e consenso traslativo' *Contratto e Impresa*, 599 (2010); G. Donadio, 'Diritto privato europeo e trasferimento della proprietà' *Nuova giurisprudenza civile commentata*, II, 151 (2012); P. Spada, 'Consensus e indici di circolazione' *Rivista di diritto civile*, 393-401 (2014).

² The question of transfer of property in classical Roman Law has been widely discussed; for a deeper analysis of doctrinal opinions for and against abstraction see, in particular, the canonical text by F. Gallo, *Il principio emptione dominium transfertur nel diritto pregiustiniano* (Milano: Giuffrè, 1966), passim.

³ *Ibid*; P.M. Vecchi, n 1 above, 18.

of the contract (*titulus*) was considered sufficient to transfer ownership.⁴ This then marks the emergence of the *principio consensualistico*, which would then be incorporated into the *Code Napoleon*.⁵

In Germany, the system has evolved rather differently. Savigny in particular affirmed the principle of abstraction of delivery as well as its ability to produce the effect of transferring ownership even in the absence of an underlying relationship, clearly converging with the classical Roman system of transfer of ownership, focusing on *traditio*, as well as on other equivalent acts. From this perspective, exchange of consent alone may not be enough for the purpose of transfer of ownership if not accompanied by exterior events such as delivery or registration.

This has led to a deep rift in Europe between the French/Italian and the German/English models of transfer of property. Comparative studies, however, have demonstrated that the contrast is much less marked than might appear at first sight;⁶ suffice it to recall that in Germany, for example, the principle of abstractness has been subject to some criticism, with the consequent development of numerous techniques to neutralize it. On the other hand, in French/Italian law there are also many cases where delivery produces the effect of transferring property even in the absence of a supporting or underlying relationship; consider for example manual donation, the fulfilment of a natural obligation, or the conscious payment of an undue obligation.

II. Arguments for and against the *Principio Consensualistico*

The problem, however, remains as to which system should be adopted to govern the transfer of ownership, also from the perspective of the unification of European private law. In favour of the *principio consensualistico*, we might consider that, beyond the philosophical suggestions from natural law about the suitability of requiring consent alone in order to produce legal effect, the *principio consensualistico* has also evolved in response to the practical need to simplify procedures for the transfer of ownership. Let us consider once more that from an economic point of view it is desirable to try to reduce to a minimum the formalities required in order to conclude a contract, and thus to bring about the transfer of ownership.⁷ So it is possible to reduce the necessary requirements to a minimum, and as a further

⁴ R. Sacco, 'Le transfert de la propriété' n 1 above, 442.

⁵ A. Chianale, n 1 above, 69; G. Vettori, *Consenso* n 1 above, 4.

⁶ R. Sacco, 'Un cryptotype en droit français: la remise abstraite?' *Etudes offertes à Jean Rodière* (Paris: Dalloz, 1981), 273-287; P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 219.

⁷ Corte di Cassazione 8 April 1981 no 1996, *Giurisprudenza italiana*, I, 498 (1983).

consequence, the transaction costs. From this standpoint, the principle of delivery may seem old-fashioned and may appear to no longer meet the needs of a modern and dynamic economy, where trading and exchanges increasingly occur at a distance, via telephone, by exchange of letters, fax, and telegram, not to mention electronic trading via the Internet. Under these conditions, requiring delivery in order to transfer property would not appear suitable to the needs of a modern economy. What of a person who purchases a significant amount of goods in New York with a view to immediately reselling them in electronic form? Let us also consider the electronic market for securities, stocks and bonds, which could not physically be able to work if the transfer of ownership of the securities were subject to their delivery. In effect, sending an electronic order is sufficient for the purchase, which allows for immediate resale of securities without need for physical delivery. A similar reasoning can be applied to the payment of the price. It is true that to permit the transfer of property without payment, it may go against the interests of the seller to keep the property in the event of lack of payment. However, at the same time it promotes the circulation of wealth even if the seller has not yet been paid. The result is in accordance with the needs of a modern economy based more on credit than on cash payment. In any event, the contracting parties can modify this rule.

Under these conditions, it would obviously not be possible to return to the past. Modern bargaining requires speed, without which the process could be seriously hampered, resulting in a serious and unacceptable reduction in the volume of trade, where the fulfilment of the purpose of transfer of ownership requires something more than the exchange of consent. From this perspective, the emergence of the *principio consensualistico* must be considered to be closely related to the gradual reduction of the elements necessary for the valid conclusion of a contract.⁸ One example of this is the increasing use of the modern, purely consensual, contract and the progressively diminishing importance of formal and real contracts, once again influenced by principles of natural law philosophy. The *principio consensualistico* therefore promotes the circulation of goods, minimizing requirements for the valid conclusion of a contract, and allowing the buyer to immediately make use of assets of which he has not yet even come into possession and perhaps never will. At the same time, however, a buyer runs the risk that a seller who has retained possession of an asset may subtract, destroy, damage, consume, or alienate it to third parties, such as someone who, unaware of the earlier contract of sale, acquires property by virtue of possession (Art 1153 Italian Civil Code) or registration, regardless of his good or bad faith. The German system, based on delivery or registration, eliminates these risks, insofar as the buyer becomes the owner

⁸ Corte di Cassazione 10 November 1979 no 5813, *Massimario della Giustizia civile*, 11 (1979).

solely by virtue of delivery or registration. The German system, based on the Roman abstract *traditio* model, is also very protective of third party buyers, who are not at risk of losing the purchased asset as a consequence of the previous sale not coming to fruition. Under these conditions it is not easy to say which is the better system of property transfer, especially from the perspective of a future single European law. For some, an initial solution would be to return to the system of *jus commune*, which required both *titulus* and *modus*.⁹ This, however, makes trade unnecessarily complex and would not in fact be feasible in a number of markets such as, for instance, contracts concluded at a distance, or electronic securities trading.

On the one hand, the need for speed in trading and exchanges, typical of modern economic systems, tends to favour the *principio consensualistico*, which requires only the exchange of consent in order to transfer property, at least between the parties.

This does not mean, however, that delivery or registration loses all relevance to the transfer of ownership, especially in relation to third parties. English law is emblematic from this point of view. Here, delivery or conveyance is traditionally required for the purpose of transfer of ownership; in more recent times, under the pressure of commercial needs, English law has come to accept the *principio consensualistico* of French origin.¹⁰

It follows that in England, exchange of consent is currently sufficient for the purpose of transfer of ownership between parties, so delivery or conveyance is necessary for any kind of transfer of ownership. The *principio consensualistico* does not exclude the eventuality that in certain cases delivery can *per se* produce the effect of transferring the property, in spite of the invalidity or absence of an underlying relationship. English law is once again emblematic in this regard insofar as the admission of the *principio consensualistico* has not led to the undermining of the efficacy of delivery to transfer property.¹¹ However, we should also bear in mind the residual importance of *traditio* in French law, especially in the fields of manual donation, fulfilment of natural obligation, and conscious payment of an amount not due.¹² The affirmation of the *principio consensualistico* has not in fact completely done away with the role of delivery as an autonomous means of transferring ownership.

What has been said thus far concerns movable property. As far as immovable property is concerned, there is a preference in Italy for the parties to postpone the transfer of ownership to a later time.

⁹ F. Ferrari, n 1 above, 729-757.

¹⁰ J.P. Benjamin, *A Treatise on the Law of Personal Property, with References to the American Decisions and to the French Code and Civil Law* (London: H. Sweet, 1868).

¹¹ P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 207-215.

¹² R. Sacco, *Un cryptotype* n 6 above, 273-287; P. Gallo, 'I rimedi restitutori in diritto comparato' n 1 above, 225.

III. Transfer of Ownership in the Projects for Uniform and European Private Law

The plurality of models relating to the transfer of ownership, as well as the models' strong roots in different areas of Europe, at least in part explains the reluctance of European jurists to take a clear position in favour of one model or another. There is no reference to transfer of ownership in the draft of the International Institute for the Unification of Private Law (UNIDROIT) or in the Principles of European Contract Law (PECL). The situation is no different for the Vienna Convention, which merely regulates transfer of risk (Art 66).¹³ In particular, the transfer of risk takes place by virtue of delivery, except in the case of goods in transit, in which case the time of transfer of risk coincides with the conclusion of the contract. On the other hand, the European Contract Code is worthy of consideration. As far as chattels are concerned, the Code provides that, unless explicitly agreed otherwise, the contract produces real effects both between the parties and against third parties from the moment of delivery (Art 6, para 1). On the other hand, as far as real estate and registered movable property are concerned, it refers to the laws in force in the various States (Art 6, para 3).¹⁴

The transfer of ownership is also mentioned in the Draft Common Frame of Reference (DCFR). In particular, Art VIII.2:101 states that parties are free to agree on the time and manner of transfer of ownership; in the absence of a specific provision, the principle whereby the property changes hands by virtue of delivery operates as a default rule.

IV. Resistance to Accepting the *Principio Consensualistico*

Historically, the *principio consensualistico* introduced a great innovation that simplifies the procedure for transfer of ownership, making delivery unnecessary. The affirmation of the *principio consensualistico* was not painless however; indeed it has always met with great resistance, that has not yet been completely overcome.¹⁵

Suffice it to recall, for example, that even in the early twentieth century, Italian scholarship rejected the idea that the exchange of consent alone was sufficient for the purpose of transfer of ownership, resulting in the need for

¹³ C. Angelici, *Consegna e proprietà nella vendita internazionale* (Milano: Giuffrè, 1979); G. Vettori, *Consenso* n 1 above, 97.

¹⁴ G. Gandolfi, n 1 above, 1015.

¹⁵ R. Sacco, 'Circolazione giuridica' n 1 above, 4; C.M. Bianca, *Il principio del consenso traslativo*, in Id, *Diritto privato, I, Il trasferimento in proprietà* (Padova: Cedam, 1995), 5; A. Gambaro, 'Il diritto di proprietà', in A. Cicu and F. Messineo eds, *Trattato di diritto civile* (Milano: Giuffrè, 1995), 685.

delivery or additional requirements.¹⁶ In spite of this, the Italian Civil Code of 1942 stated that the conclusion of the contract is sufficient to transfer property (Art 1376, Italian Civil Code). Despite the clarity of the wording of Art 1376 of the Italian Civil Code. However, many doubts that remain; in particular the *principio consensualistico* is not easy to reconcile with the principles laid down in the field of registration.

V. Sales Producing no Real Effect

The exchange of consent does not always produce the immediate effect of transferring ownership, depending on the nature of the goods, or other circumstances; cases of this kind involve purchases which do not produce real effects.¹⁷

A. Alternative Sale. A first example can be found in the field of alternative sale (Art 1285 Italian Civil Code). Imagine, for example, a purchase agreement whose object is either a car or a motorcycle; in such cases the transfer of ownership takes place only through the exercise of the power of choice.

B. General Sale. A second example comes from the field of the sale of general goods. If the contract relates to certain things only in general, the transfer of ownership takes place upon identification (Art 1378 Italian Civil Code).¹⁸ The Code merely states that identification must be made by agreement between the parties or in the manner they establish, without specifying their nature. Many interpretative doubts have arisen about this topic; in effect the nature of identification can vary depending on whether the parties have already established the criteria for identification or not. In the first case, the act that relates to the fulfilment is executive, while in the second case it is only a part of the agreement.¹⁹

In principle, once they have been established, assets can no longer be substituted, except to the exclusive benefit of the buyer, for example when

¹⁶ F. Carnelutti, n 1 above, 72-89; G. Gorla, *La compravendita e la permuta* (Torino: Utet, 1937), 6-9.

¹⁷ F. Gazzara, *La vendita obbligatoria* (Milano: Giuffrè, 1957); A. Rizzieri, *La vendita obbligatoria* (Milano: Giuffrè, 2000).

¹⁸ F. Sensini, *La specificazione nella compravendita di genere* (Firenze: Casa editrice Poligrafica Universitaria, 1934); U. Majello, 'L'individuazione nella vendita di genere' *Rivista di diritto civile*, I, 181 (1957); L. Ricca, 'Individuazione' *Enciclopedia del diritto* (Milano: Giuffrè, 1971), XXI, 172; M. Orlandi, 'Sulla natura dell'accordo di individuazione nella vendita di cosa generica' *Giustizia civile*, II, 171 (1987); G. Vettori, *Consenso* n 1 above, 110; Corte di Cassazione 24 April 1982 no 2548, *Rivista di diritto commerciale*, II, 391 (1983); Corte di Cassazione 15 November 1995 no 11834, *Società*, 771 (1996); Corte di Cassazione 14 January 1985 no 31, *Giustizia civile*, I, 3126 (1985).

¹⁹ Corte di Appello Genova 30 June 1953, *Repertorio del Foro italiano*, 263 (1953); Corte di Cassazione 18 May 1960 no 1223, *Giurisprudenza italiana*, I, 600 (1961).

the goods are replaced by others of higher quality.

The methods of identification may indeed be very different; the choice can be left to the seller, the buyer, or to a third party. Normally, the sale of general goods takes place in the field of fungible goods, unless the quantity of goods to be transferred has already been established when the contract is entered into, as in cases where the subject of the contract is something like a bulk sale (Art 1377 Italian Civil Code).

A general sale can also take place in the field of real estate, provided that the properties are considered homogeneous;²⁰ for example, the sale of a certain quantity of land to be identified as part of a larger plot;²¹ the sale of a newly constructed apartment, left to the choice of the buyer²² and so on.²³ As specifically provided for by Art 1378 of the Italian Civil Code, if goods have to be transported from place to place, possession, and subsequent transfer of ownership and risk exist by virtue of delivery to the carrier.²⁴

C. Sale of the Property of Others. It is not essential to have ownership to sell property (Art 1478 Italian Civil Code).²⁵ The Italian Civil Code expressly contemplates situations where the seller is not the owner of the thing sold at the time a contract is entered into.²⁶ The contract is neither void nor voidable, but it is perfectly valid.²⁷ It may not, however, obviously

²⁰ A. Auricchio, *La individuazione dei beni immobili* (Napoli: Edizioni Scientifiche Italiane, 1960); D. Valentino, 'Note sulla vendita generica di immobili' *Rassegna di diritto civile*, 808 (1980); E. Perego, 'La vendita di immobili non individuati' *Rivista trimestrale di diritto e procedura civile*, 657 (1991); Corte di Appello Cagliari 24 June 1991, *Rivista giuridica sarda*, 601 (1993); Corte di Cassazione 4 February 1992 no 1194, *Giurisprudenza italiana*, I, 1, 1084 (1993); Corte di Appello Cagliari 4 March 2004, *Rivista giuridica sarda*, 41 (2006).

²¹ Corte di Cassazione 18 January 1979 no 367, *Giustizia civile*, I, 829 (1979); Corte di Cassazione 8 November 1983 no 6588, *Giustizia civile*, I, 49 (1984); Corte di Cassazione 24 November 1977 no 5113, *Foro italiano*, I, 1256 (1978); Corte di Cassazione 10 June 1991 no 6570, *Giustizia civile*, I, 1021 (1992).

²² Corte di Cassazione 29 July 1983 no 5225, *Foro italiano*, 1080 (1983).

²³ Corte di Cassazione 13 December 1977 no 5427, *Giurisprudenza italiana*, I, 1, 518 (1979).

²⁴ G. Valeri, 'Sulla teoria della specificazione nella vendita di genere da piazza a piazza' *Rivista di diritto commerciale*, I, 588 (1932); A. Toscano, 'La vendita con spedizione di cose determinate solo nel genere' *Rivista trimestrale di diritto e procedura civile*, 832 (1954); Corte di Cassazione 13 October 1970 no 1965, *Giurisprudenza italiana*, I, 212 (1971); Corte di Cassazione 18 May 1984 no 3064, *Foro italiano*, I, 2182 (1984); Corte di Cassazione 25 March 1995 no 3559, *Giustizia civile*, 691 (1995); Corte di Appello Milano 17 September 1999, *Banca, borsa e titoli di credito*, II, 174 (2001); Corte di Cassazione 26 March 2001 no 4344, *Giustizia civile*, 586 (2001); Corte di Cassazione 24 June 2002 no 91166, *Giustizia civile*, I, 2896 (2003).

²⁵ L. Cariota Ferrara, *I negozi sul patrimonio altrui* (Padova: Cedam, 1936); R. Cavallo Borgia, *Profili giuridici della vendita di cosa altrui* (Milano: Giuffrè, 1972); A.M. Musy and S. Ferreri, *La vendita*, in R. Sacco ed, *Trattato di diritto civile* (Milano: Giuffrè, 2006), 196.

²⁶ Corte di Cassazione-Sezione penale 15 March 1985, *Corte di Cassazione penale*, 1960 (1986).

²⁷ Corte di Cassazione 11 December 1992 no 13123, *Nuova Giurisprudenza civile commentata*, I, 1009 (1993).

produce an immediate effect of transfer of the property to the buyer, but compels the seller to obtain the promised good. In practice, for these purposes it is sufficient that the seller obtain the goods. According to Art 1478 para 2 of the Italian Civil Code, the buyer becomes the owner when the seller himself acquires ownership of the goods.²⁸ The same result can be achieved if the third party participates in the purchase, directly transferring the asset to the buyer.²⁹

The question becomes slightly more problematic when a property belongs to more than one person. In cases of this kind, the purchase agreement is not completed owing to the lack of consent by some of the owners,³⁰ unless alienation on a pro rata basis is envisaged.³¹ In this case, alienation has actual effect in proportion to the share that belongs to the transferee, and has binding effect with respect to the portion that belongs to the third parties.³²

Lastly, if the buyer has obtained possession in good faith, according to Art 1153 of the Italian Civil Code, he obtains ownership. This should obviate the need for the buyer to request the termination of the contract,³³ although on some occasions the Court has allowed termination.³⁴

D. Sale of Future Goods. In accordance with general principles, future goods may also be sold (Art 1348 Italian Civil Code), although the donation of future goods is not permitted under the Italian Civil Code (Art 771). The sale of future goods is specifically contemplated by legislature in Art 1472 of the Italian Civil Code.³⁵ In fact it is necessary to distinguish between two different hypotheses regarding the sale of future goods.

1) If the contract relates to future goods, such as the harvest of a field,³⁶

²⁸ Corte di Cassazione 26 November 1986 no 6977, *Foro Padano*, 229 (1988).

²⁹ Corte di Cassazione 25 January 1980 no 609, *Giurisprudenza italiana*, I, 1184 (1980); Corte di Cassazione 21 February 1986 no 1052, *Giurisprudenza italiana*, I, 674 (1986); Corte di Cassazione 5 July 1990 no 7054, *Giustizia civile Massimario*, 7 (1990); Corte di Cassazione 26 June 2006 no 14751, *Giustizia civile Massimario*, 1677 (2006); Corte di Cassazione 18 May 2006 no 11624, *Vita Notarile*, 802 (2006).

³⁰ Corte di Cassazione-Sezioni Unite 8 July 1993 no 7481, *Rivista del Notariato*, 1308 (1995).

³¹ Corte di Cassazione 12 November 1997 no 11154, *Foro Italiano*, I, 834 (1998).

³² Corte di Cassazione 24 October 1978 no 4801, *Giustizia civile*, I, 492 (1979); Tribunale di Lucera 9 January 1980, *Giurisprudenza di merito*, 510 (1980); Corte di Cassazione 10 March 1981 no 1341, *Foro italiano*, 508 (1982); Corte di Cassazione 27 June 1983 no 4405, *Giustizia civile Massimario*, 6 (1983).

³³ Corte d'Appello di Brescia 20 October 1983, *Vita Notarile*, 347 (1985).

³⁴ Corte di Cassazione 25 July 1977 no 3306, *Foro italiano*, I, 2164 (1977); Corte di Cassazione 6 December 1988 no 6626, *Foro Italiano*, I, 721 (1989).

³⁵ P. Perlingieri, *I negozi sui beni futuri, la compravendita di cosa futura* (Napoli: Edizioni Scientifiche Italiane, 1962); G. Furguele, *Vendita di cosa futura e aspetti di teoria del contratto* (Milano: Giuffrè, 1974); Corte di Cassazione 6 January 1981 no 61, *Foro Italiano*, I, 2246 (1981).

³⁶ Corte di Cassazione 21 March 1987 no 2827, *Giustizia civile Massimario*, 3 (1987); Tribunale di Reggio Emilia 18 November 2002, *Giurisprudenza di merito*, 1750 (2003); Tribunale di Locri 4 November 1982, *Giurisprudenza italiana*, I, 174 (1984).

2) the birth of an animal, an invention not yet finished, a book not yet written, and so on, it is perfectly valid and the purchase of the property occurs as soon as it comes into existence (Art 1472 para 1 Italian Civil Code),³⁷ but obviously only if the thing comes into existence. Otherwise the sale is considered void (Art 1472 para 2 Italian Civil Code).³⁸

3) However, it may happen that the parties wish to conclude a contract under uncertain conditions;³⁹ in this case, the contract is valid and binding even in the event that the good does not come into existence. It follows that the buyer is compelled to make full payment even if the harvest of the field is lost, the animal is not born, and so on (Art 1472 para 2 Italian Civil Code). In the case of immovable property, the contract must be made in writing.⁴⁰ The contract for the sale of future goods is liable to immediate transcription.⁴¹

E. The Donation of Future Goods. The donation of future goods is not permitted (Art 771 Italian Civil Code). A donation must be free and spontaneous, so it is not possible to dispose of an asset one will only own in the future. Traditionally, for the same reason the donation of the goods of others is also not permitted.⁴²

F. The Preliminary Contract. Although the preliminary contract appears to have the function of compelling parties to conclude a subsequent contract, in practice it has come to denote a sale which does not produce real effects, in some ways comparable to the German sale.⁴³

The success with which the preliminary contract has been welcomed in Italy is due to the fact that the seller does not intend to relinquish ownership immediately, so under these conditions the transfer of property only takes place when the parties formally conclude the final contract of sale. Generally speaking, on this occasion the transfer of ownership takes place only when

³⁷ Corte di Cassazione 21 March 1987 no 2827 n 36 above; Corte di Cassazione 18 May 2001 no 6851, *Vita notarile*, 829 (2001); Tribunale di Ancona, 22 February 1980, *Giurisprudenza commerciale*, II, 129 (1981); Corte di Cassazione 22 April 2003 no 6422, *Foro padano*, I, 19 (2004).

³⁸ Corte di Cassazione 15 June 1988 no 4094, *Archivio civile*, 39 (1989); Corte di Cassazione 10 November 1989 no 4772, *Vita notarile*, 136 (1989); Corte di Cassazione 10 November 1989 no 4772, *Giurisprudenza italiana*, I, 1, 1754 (1990).

³⁹ Tribunale di Locri 4 November 1982 n 36 above.

⁴⁰ Corte di Cassazione 29 May 1980 no 3538, *Massimario giustizia civile*, 1532 (1980); Corte di Cassazione 6 November 1991 no 11840, *Giustizia civile Massimario*, 1602 (1991).

⁴¹ Corte di Cassazione 10 July 1986 no 4497, *Rivista del Notariato*, 1216 (1987), with an annotation by L. Sebastiani, *Natura giuridica della vendita di cosa futura e sua immediata o meno trascrivibilità*; Corte di Cassazione 10 March 1997 no 2126, *Giurisprudenza italiana*, 648 (1998); Tribunale Ivrea 9 June 2003, *Giurisprudenza di merito*, 2173 (2003).

⁴² Corte di Cassazione, 20 December 1985, n. 6544, *Giustizia civile*, 12 (1985); Corte di Cassazione, 18 December 1996, no 11311, *I contratti*, 460 (1997); F. Rinaldi, *La donazione di beni altrui* (Napoli: Edizioni Scientifiche Italiane, 2012).

⁴³ A. Chianale, n 1 above, 39, 89; F. Delfini, 'Itinerari del contratto preliminare e derogabilità dell'art. 1376 c.c.', in A. Albisetti et al, *Scritti in onore di G. Cattaneo* (Milano: Giuffrè, 2002), I, 437.

the parties conclude the final contract of sale, respecting all the formalities. Generally speaking on this occasion the buyer also pays the amount due. In practice it is a matter of interpretation to distinguish whether a contract is preliminary or final.⁴⁴

Art 2645 para 1 of the Italian Civil Code, permits also the transcription of preliminary contracts. The transcription of preliminary contracts allows the prospective buyer to take precedence over subsequent assignees who may have registered their deed of purchase at a later time.

G. Sale with Reservation of Ownership. In the event of a sale with reservation of ownership,⁴⁵ the effect of transferral is subject to the suspensive condition of full payment. This kind of sale is widespread especially in the field of movable goods and is designed to increase consumption. The Courts have recognized, however, that the sale with reservation of title also applies to the sale of real estate.⁴⁶

H. Leasing. The lease contract also comes into this category⁴⁷ and plays a role very similar to that of sale with reservation of ownership – namely to allow those who do not have the money required to buy an asset, such as a vehicle, to immediately obtain it, upon payment of a regular instalment, with the option of purchasing or returning it upon expiry of the contract.

VI. The Preliminary of the Preliminary

A thornier question is whether it is possible to conclude a preliminary contract binding on the parties to conclude another preliminary contract.⁴⁸

⁴⁴ Corte di Cassazione 3 September 1985 no 4584, *Repertorio Foro Italiano*, 3245 (1985).

⁴⁵ G. Cattaneo, 'Riserva della proprietà e aspettativa reale' *Rivista trimestrale di diritto e procedura civile*, 965 (1965); S. Gatti, 'Le situazioni soggettive attive del compratore nella vendita con riserva di proprietà' *Rivista di diritto commerciale*, I, 483 (1965); R. Calvo, 'Situazioni di appartenenza e garanzia nella riserva di proprietà' *Rivista di diritto civile*, 863-877 (2015).

⁴⁶ Corte di Cassazione 3 Aprile 1980 no 2167, *Rivista del Notariato*, 1288 (1980); Corte di Cassazione 8 April 1999 no 3415, *Notariato*, 473 (2001).

⁴⁷ M. Bussani, *Proprietà-garanzia e contratto. Formule e regole nel leasing finanziario* (Trento, 1992); G. De Nova, 'Leasing' *Digesto delle discipline privatistiche, sezione civile* (Torino: Utet, 1993), X, 462; R. Clarizia, 'I contratti nuovi. Factoring. Locazione finanziaria', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999), XV; A. Frignani, 'Leasing finanziario internazionale (analisi comparata)' *Digesto delle discipline privatistiche, sezione commerciale, Aggiornamento* (Torino: Utet, 2000), 495; F. Mancuso, *Per la storia del leasing in Italia* (Bologna: Monduzzi, 2008); M. Serra, 'Il contratto di leasing', in E. Gabrielli ed, *Commentario del codice civile, Dei singoli contratti* (Torino: Utet, 2011), 471; B. Inzitari, 'Leasing nel fallimento: soddisfazione integrale del concedente fuori dal concorso sostanziale e necessità dell'accertamento del credito nel concorso formale' *Contratto e impresa*, 1369 (2012).

⁴⁸ M. D'Ambrosio, 'Contratto preliminare e contratto definitivo, contratto preparatorio e preliminare del preliminare' *Rivista del notariato*, 1546 (1980); P. Giammaria, 'Opzione di

In fact, although on some occasions the law has denied this possibility,⁴⁹ there is nothing to prevent parties doing so.⁵⁰

It is becoming increasingly frequent for the preliminary contract to be preceded by the signing of a document prepared by real estate agents and variously described as a purchase order or a so-called ‘preliminary of the preliminary’, and so on. Very often, when the buyer signs the firm offer, he pays a sum of money as a guarantee of the seriousness of the commitment. At this stage, one can normally withdraw from the contract, but this comports losing what has already been paid.

The meaning of this document, which precedes the conclusion of the

preliminare o preliminare di preliminare?’ *Giustizia civile*, II, 2813 (1993); L. Giorgianni, ‘In tema di formazione progressiva del contratto’ *Corriere giuridico*, 574 (1993); A. Ravazzoni, ‘Gradualità dei vincoli dell’alienante e conclusione del contratto’ *Rivista del notariato*, 35 (1994); G. Gabrielli, ‘Prassi della compravendita immobiliare in tre fasi: consenso a mani dell’intermediario, scrittura privata preliminare, atto notarile definitivo’ *Rivista del notariato*, 23 (1994); the same article appears in E. Marmocchi ed, *Dalle proposte di acquisto al preliminare formale* (Milano: Giuffrè, 1995), 123-139, with contributions by P. Vitucci, *Impegni assunti con il mediatore e proposta contrattuale*, 91-101, A. Ravazzoni, *Gradualità dei vincoli a carico dell’alienante e conclusione del contratto*, 103-121, P. Rescigno, *Dalla proposta di acquisto al preliminare formale: analisi di una prassi immobiliare*, 141-154; F. Tassinari, ‘Dalle proposte di acquisto al preliminare formale’ *Rivista del notariato*, 23 (1994); G. Malaguti, ‘Rilievi nell’ottica del proponente l’acquisto, su alcune clausole contenute nelle c.d. proposte d’acquisto’ *Rivista del notariato*, 61 (1994); F.A. Magni, ‘Puntuazione di contratto, preliminare e preliminare del preliminare’ *Giurisprudenza italiana*, I, 2, 539 (1997); F. Toschi Vespasiani, ‘Il preliminare di preliminare stipulato dalle agenzie immobiliari’ *Contratti*, 927 (2005); V. De Casamassimi, ‘Contrattazione immobiliare e preliminare di preliminare’ *Nuova giurisprudenza civile e commentata*, II, 248 (2008); G. Napoli, ‘Il contratto preliminare di preliminare’ *Rivista di diritto civile*, II, 81 (2010); A. Chianale, ‘Il preliminare di preliminare’ *Rivista del notariato*, I, 42 (2010); U. La Porta, ‘La salutare nullità del contratto inutile’ *Rivista del notariato*, I, 48 (2010); U. Stefani, ‘Il preliminare di preliminare e le intese precontrattuali nella contrattazione immobiliare’ *Rivista di diritto civile*, 1230-1251 (2015); G. Villa, ‘Mera puntuazione e puntuazione vincolante?’, in G. Gitti, F. Delfini and D. Maffei eds, *Studi in onore di Giorgio De Nova: Prospettive e limiti dell’autonomia privata* (Milano: Giuffrè, 2015), IV, 3213-3229; G. D’Amico, ‘Sul c.d. preliminare di preliminare’ *Rivista di diritto civile*, 40-65 (2016).

⁴⁹ Tribunale di Napoli 23 November 1982, *Giustizia civile*, I, 283 (1982); Tribunale di Napoli 21 February 1985, *Diritto e giurisprudenza*, 725 (1985); Tribunale di Firenze 19 December 1989, *Giurisprudenza di merito*, 466 (1990); Tribunale di Napoli 22 March 2003, *Giurisprudenza napoletana*, 265 (2003); Tribunale di Imperia 21 March 2005, *Il civilista*, 12 (2010); Corte d’Appello di Genova 21 February 2006, *Obbligazioni e contratti*, 648 (2006); identifying the parameters of *puntuazione non vincolante*: Corte di Cassazione 2 April 2009 no 8038, *Nuova giurisprudenza civile e commerciale*, I, 998 (2009), with a note by M. G. Salvadori, ‘La validità del c.d. preliminare di preliminare: una questione (non ancora) risolta’; with a commentary by G. Napoli, n 48 above, 81; see also: V. Roppo, ‘Causa concreta’ *Rivista di diritto civile*, 957, 971 (2013).

⁵⁰ Tribunale Napoli 11 January 1994, *Diritto e giurisprudenza*, 501 (1996); Tribunale Napoli 28 February 1995, *Diritto e giurisprudenza*, 463 (1995); Tribunale Nola 11 May 2010, *Giurisprudenza di merito*, 76 (2011); A. Chianale, ‘Contratto preliminare’ *Digesto delle Discipline privatistiche, Sezione Civile* (Torino: Utet, 1989), IV, 285; Corte di Cassazione 9 February 1998 no 1317, *Studium Juris*, 533 (1998).

preliminary contract, is the subject of much debate. A first interpretation is to assume that it is not yet a binding agreement, which would explain why it is possible to withdraw, while a second is to assume that it is a binding agreement which produces real effects.⁵¹ It could still be a preliminary of a preliminary, ie an agreement whereby the parties accept the commitment to conclude a preliminary, which will perhaps be more detailed in the presence of a lawyer. In any event, signing the purchase order does not give the right to seek specific performance (Art 2932 Italian Civil Code), and in this it differs from the preliminary agreement. Very often, the forms provided by real estate agents in fact allow withdrawal by the buyer with the understanding that in this case he will lose the amount that was paid when the preliminary of the preliminary was signed.⁵²

VII. Money

Generally speaking, the exchange of consent is not sufficient to transfer the ownership of money.⁵³ In fact, sale produces three main effects; a) the transfer of ownership of the property, b) the obligation to deliver to the purchaser, c) the obligation to pay the amount due. In other words, the exchange of consent does not produce the transfer of ownership of money, even if it has already been identified and set aside for payment. In fact, if the buyer loses the money an instant before payment, he would not be exonerated from payment. It follows, therefore, that in general the transfer of ownership of money can be fulfilled only by means of delivery.

VIII. Derogability of the *Principio Consensualistico*

Legal scholars long denied the possibility of derogation from the *principio consensualistico*, which was considered to be of public order. The

⁵¹ Tribunale di Firenze 19 December 1989 n 49 above, 466.

⁵² Corte di Cassazione-Sezioni Unite 6 March 2015 no 4628, *Giurisprudenza italiana*, 1064 (2015), with an annotation by A. Di Majo, 'Il preliminare torna alle origini', and a commentary by G. Palermo, 'L'atipicità dei procedimenti di formazione del contratto' *Nuova giurisprudenza civile e commentata*, I, 601 (2015), with a note by G. Buset, 'Le sezioni unite sul preliminare di vendita immobiliare' *Contratti*, 609 (2015); with an annotation by R. De Matteis, 'Accordi preliminari e modularità del vincolo a contrarre' *Nuova giurisprudenza civile e commentata*, II, 389 (2015); with an annotation by M. Capecchi, 'Riflessi operativi della sentenza delle sezioni unite sul preliminare di preliminare' *Nuova giurisprudenza civile e commentata*, II, 397 (2015); with an annotation by G. Napoli, 'Il riconoscimento giurisprudenziale del contratto preliminare del preliminare' *Rivista di diritto civile*, 1252-1277 (2015); with a commentary by G. Carapezza Figlia and O. Clarizia, 'Puntuazione vincolante o preliminare di preliminare?' *Contratto e impresa*, 874-883 (2015).

⁵³ A. Burdese, 'In tema di *consumptio nummorum*' *Rivista di diritto commerciale*, I, 269, 288 (1953).

same is also true of French law.⁵⁴ In reality there is no reason not to allow the parties to conclude a sale which does not transfer property.⁵⁵ In fact it may be in the interest of the seller not to relinquish ownership immediately; the immediate loss of ownership, regardless of the actual payment of the amount due, in fact exposes the seller to the risk of not obtaining anything in return for the property. This is the reason why the preliminary agreement has become so common in Italy.

However, if there is no immediate transfer of ownership, there is no contract of sale, but rather a preliminary agreement.⁵⁶ In spite of this, nowadays the preliminary contract is considered to be none other than a contract of sale in which the parties, in derogation from the provisions of Art 1376 of the Italian Civil Code, defer transfer of ownership until a later time, usually concurrent with the preparation of the deed of ownership and the payment of the amount due.

This solution obviously leads to a loss of the owner's prerogatives, as in the case of a mandate or fiduciary relationship. It is evident that the party who assumes the obligation to transfer ownership loses at least part of his powers of enjoyment and use of the property, of which he may avail himself solely in accordance with the commitments made in order to meet the expectations of the buyer (Art 1177 Italian Civil Code).⁵⁷

IX. The Obligation to Transfer Ownership

Signing a preliminary contract does not transfer ownership immediately, but gives rise to an obligation to do so. The obligation to give is typical of systems such as the Roman and German ones, where the difference between a binding contract and the act of transferral of ownership is clearly marked. The obligation to transfer does not seem to have any reason to exist in legal systems based on *consensualismo*, given that the transfer of ownership

⁵⁴ J. Ghestin, 'Riflessioni di un giurista francese sulla clausola di riserva della proprietà' *Rivista di diritto civile*, I, 440 (1981); G. Vettori, *Consenso* n 1 above, 5.

⁵⁵ F. Benatti, 'Il pagamento con cose altrui' *Rivista trimestrale di diritto e procedura civile*, 467, 481 (1976); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 48; F. Ferrari, n 1 above, 889, 892, 897; G. Maccarone, 'Obbligazioni di dare e consenso traslativo' *Rivista del notariato*, 1319, 1334 (1994); A. Gambaro, n 15 above, 687; C. Camardi, n 1 above, I, 572, 591; F. Delfini, n 43 above, 437, 438, 443; G. Vettori, *Consenso* n 1 above, 106; R. Sacco and G. De Nova, *Il contratto* (Torino: Utet, 3rd ed, 2004), I, 905; P. Sirena, n 1 above, 42; Id, 'Sulla derogabilità del principio consensualistico' in C.A. Graziani ed, *Colloqui in ricordo di Michele Giorgianni* (Napoli: Edizioni Scientifiche Italiane, 2007), 1071; Corte di Cassazione 4 March 1969 no 692, *Giustizia civile*, I, 748 (1969); Corte di Cassazione 29 July 1978 no 3807, *Massimario giurisprudenza italiana*, 897 (1978); Tribunale Lecco 21 September 1987, *Giurisprudenza italiana*, I, 2, 808 (1989).

⁵⁶ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 97.

⁵⁷ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above, 51; A. Gambaro, n 15 above, 687; P.M. Vecchi, n 1 above, 152.

takes place at the precise moment when the contract is signed.

Despite some resistance to accepting the *principio consensualistico* in the early twentieth century, which has led some commentators to remark on the centrality of the obligation to give, later scholars have largely ignored the issue. It is in fact only from the last decades of the twentieth century that a new interest in the obligation to give has come to the fore.⁵⁸ Numerous examples of the obligation to give are set out in the civil code; for example, we can consider the obligation of an agent without representation to transfer the ownership of real property not purchased in his own name but on behalf of his principal (Art 1706 para 2 Italian Civil Code), and so forth (Art 651 para 1, Arts 746, 769, 2041 para 2, Arts 2058, 2286 para 3, Italian Civil Code).

To these cases we must also add the preliminary contract, which does not immediately transfer ownership.

But once the obligation to give is accepted, there remains the question of the nature of the act of fulfilment of this duty.⁵⁹ The problem is certainly a delicate one, given that such an admission will collide with the traditional thesis concerning the typicality of the means of transferring ownership (sale and donation).

X. Double Selling

Considerable interpretative doubts have arisen with regard to the conciliation of the principle laid down in Art 1376 of the Italian Civil Code (*principio consensualistico*) with the principle of registration, which by common admission is not required for the transfer of property between the parties, but is important for the enforceability of the purchase against third parties. The conflict emerges in all its fullness in the event of double alienation of real estate.⁶⁰

Sellers of immovable property pursuant to the provisions of Art 1376 relinquish ownership, making it impossible to transfer the property to third parties; in fact, this conclusion collides with the existing provisions regarding registration. In fact, it is clear that in the event of conflict between multiple assignees, the one who registers first prevails, regardless of the date of the sale contract (Art 2644 Italian Civil Code).⁶¹

⁵⁸ A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above; P.M. Vecchi, n 1 above, 52.

⁵⁹ A. Chianale, *Trascrizione del contratto preliminare e trasferimento della proprietà* (Torino: Giappichelli, 1998), 45, 73; E. Navarretta, 'Le prestazioni isolate nel dibattito attuale. Dal pagamento traslativo all'atto di destinazione', in C.A. Graziani ed, *Colloqui in ricordo di Michele Giorgianni* n 55 above, 219.

⁶⁰ E. Ferrante, n 1 above; A. Vitucci, *La trascrizione nel procedimento traslativo* (Napoli: Edizioni Scientifiche Italiane, 2015).

⁶¹ G. Vettori, *Consenso* n 1 above, VII, 76, 77, 81, 85; Id, 'I contratti ad effetti reali' n 1

The regulation on registration seems to contradict the *principio consensualistico* and supports the thesis of those who argue that the transfer of ownership could be considered fully concluded only upon registration. Others speak of dissociation of ownership.⁶²

Prior to execution, the seller is subject to a duty of care regarding the property to safeguard the buyer, but at the same time he retains the option to dispose of it in favour of a third party.⁶³

From this perspective, the *principio consensualistico* would therefore not be able to completely disregard the importance of registration of the contract, at least for the purpose of its enforceability against third parties.

The unenforceability of the contract against third parties undoubtedly constitutes an important limitation of the *principio consensualistico* and reveals some similarities to the German system based on the effectiveness of constitutive registration in the land register.⁶⁴ The one who purchases first does not obtain ownership and can only rely on the contractual liability of the seller. Many solutions have been proposed to overcome these difficulties; according to some, registration may be considered invalid if knowingly infringing the rights of others.⁶⁵ This solution however has not been accepted. As of 1982, the *Corte di Cassazione* has finally concluded that in the event of the double alienation of real estate, if the second buyer is in bad faith, he may be required to restore the property to the first buyer under Art 2043 of the Italian Civil Code.⁶⁶

This solution undoubtedly benefits the first purchaser, who can thus take advantage of the contractual liability of the seller and the tortious liability of the second buyer.

XI. Invitation to Treat

An offer should not be confused with a mere invitation to treat.⁶⁷

above, 103.

⁶² R. Sacco, 'Modificazione soggettiva della proprietà e dissociazione del diritto' *Studi in onore di Giocchino Scaduto* (Padova: Cedam, 1970), III, 115; Id, 'Le transfert de la propriété' n 1 above, 485; R. Sacco and G. De Nova, n 55 above, 906; P. G. Monateri, *La sineddoche* (Milano: Giuffrè, 1984); A. Chianale, *Obbligazione di dare e trasferimento della proprietà* n 1 above; A. Gambaro, n 15 above, 672; C.M. Bianca, *Il principio del consenso traslativo* n 15 above, 5, 19, 23; F. Delfini, n 43 above, 444.

⁶³ P.M. Vecchi, n 1 above, 152.

⁶⁴ A. Gambaro, n 15 above, 690.

⁶⁵ Corte di Cassazione Napoli 25 June 1915, *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, II, 770-774 (1915), with an annotation by B. Brugi, *Nullità di trascrizione*; E. Ferrante, n 1 above, 198, 200.

⁶⁶ Corte di Cassazione 8 January 1982 no 76, *Foro italiano*, I, 393 (1982); Corte di Cassazione 15 January 1988 no 4090, *Foro italiano*, I, 1568 (1989); Tribunale di Ivrea 16 May 2003, *Giurisprudenza italiana*, 778 (2004).

⁶⁷ A. D'Angelo, 'Proposta e accettazione', in V. Roppo ed, *Trattato del contratto* (Milano:

Normally it is thought that sending catalogues which advertise goods or the insertion of advertisements in newspapers or magazines could not be considered an offer, but as a mere invitation to treat, with the result that any acceptance by the recipient of the message does not imply the conclusion of the contract. For example, someone who publishes an offer in a newspaper for an apartment to lease normally intends to choose from all the responses he receives; this would not be possible if the act were qualified as an offer, rather than as an invitation to treat.

It is also important to discuss the meaning of displaying goods in shop windows with an indication of the price. According to the traditional view, to do so would be a typical example of a public offer, considering the completeness of the offer irrespective of the person who buys. Obviously the clause ‘subject to availability’ is considered to be implicit. On the other hand, some authors believe that the display of the goods can only mean an invitation to treat, insofar as the dealer reserves the opportunity to check the availability of goods.

The common law tradition also favours this solution where the display of goods in shop windows is considered to be an invitation to treat; the same holds true as far as the United Nations Convention on Contracts for the International Sale of Goods (CISG) is concerned (Art 14 para 2).

We can also consider that if displaying goods in shop windows is considered an offer, not only may the shopkeeper default if he does not have sufficient stock to meet all requests, but in order to conclude the contract, and the subsequent transfer of ownership, a declaration of acceptance would be sufficient, even in the absence of payment. The result would be that the buyer can take his property and leave without paying, without prejudice to the right of the seller to claim the amount due. However, this does not correspond to the normal practice of business. Normally no one can take goods out of the shop without payment!

XII. Final Remarks

Under these conditions, it is not easy to draw definite conclusions. The transfer of ownership is one of the most complex issues in modern times, especially in view of the unification of European law. The age of codification has in fact broken the typical legal uniformity of the *jus commune*, opening the way for two different contrasting models: on the one hand the French

Giuffrè, 2006), I, 51; P. Gallo, *Contratto e buona fede* (Torino: Utet, 2014), VI, § 2; Corte di Cassazione 12 May 1941 no 1416, *Repertorio Foro Italiano*, ‘Obbligazioni e contratti’, 116 (1941); Corte di Cassazione 15 December 1982 no 6922, *Repertorio Foro Italiano*, ‘Contratto in genere’, 79 (1982); Corte di Cassazione 7 December 2004 no 22983, *Nuova giurisprudenza civile commentata*, I, 101 (2006).

model, which is founded on the *principio consensualistico*, and on the other the German model, which is based on delivery. In spite of the fact that these two models may at first sight appear very different, the study of operational rules makes it clear that the distances are less extreme than they might initially appear. In effect, it may be observed that even in Italy in the field of sale of real estate it is usual to postpone the transfer of property to a later time, normally coinciding with the full payment of the amount due. From this perspective we can conclude that, at least in the field of real estate sale, the best solution is to postpone the actual moment of the transfer of ownership.

The situation may be different as far as movables are concerned; in this area the need for rapidity appears to prevail, and can be better fulfilled by the *principio consensualistico*.