

# THE ENFORCEABILITY OF PROMISES IN SCOTLAND AND IN THE EUROPEAN CONTRACT LAW: A COMPARATIVE ANALYSIS FROM AN ITALIAN PERSPECTIVE

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*The enforceability of promise is one of the thorniest subjects of the law of contract, both in Civil and in Common law, even if for different reasons. At the same time, the question “When is the promisor bound to keep his word?” is still at the centre of the debate on European contract law. The Projects towards harmonizing European contract law seem to follow Scots law in the adoption of a concept of promise binding without acceptance and consideration. In order to verify the validity of this view, the Author analyses the enforceability of promise in the law of Scotland, in the PECL and in the DCFR. She concludes that bare promises and mere agreements never bind the promisor, neither in Scotland nor in European Projects. The enforceability of the promise is always based on an objective element, revealing the intention of the promisor.*

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## I. INTRODUCTION

In the course of history, judicial systems have generally adopted two main instruments to identify law-binding undertakings: promise and contract. These two solutions are based on a different concept of private relationship and on a different idea of *facultas deliberandi*. Therefore, while a contract is traditionally the result of parties' free deliberation<sup>1</sup>, a promise seems to evoke a moral rule that obliges the promisor to keep his word: *omne verbum de ore fidei cadit in debitum*<sup>2</sup>.

The jurists of the twelfth and thirteenth centuries were the main interpreters of this idea of a promise as *fidem dare* and of the promisor as a person obliged to tell the truth. It is well-known that their thought on the promise was influenced in particular by canonists. Medieval jurists considered promise itself, rather than the agreement of the parties, as a source of obligation: the promisor was bound because, by breaking his promise, he frustrated the promisee's reliance<sup>3</sup>.

The modern theory of contract formation, requiring an exchange between offer and acceptance, can be attributed to Natural law even though the concept of agreement, based on offer and acceptance, was not unknown to jurists during the previous centuries.

Among Natural jurists, Grotius was the first to distinguish between an accepted promise (*toezegging*) and an unaccepted promise (*belofte*). He changed the nature and function of the promise by sustaining that only the former had juridical effects. Thus, the promise became a part of the process of contract formation that ends with acceptance<sup>4</sup>.

Natural jurists prepared the ideal *homo* to introduce a different concept of contract founded upon the mutual agreement of the parties. This new idea of contract will influence nineteenth century codifications that indicate

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<sup>1</sup> G. Gorla, *Il contratto*, vol. I, 35 ff. (1955).

<sup>2</sup> L. Moccia, *Promessa e contratto*, in 6 Riv. Dir. Civ., 819 (1994).

<sup>3</sup> L. Moccia, *cit.*, 828-29.

<sup>4</sup> See H. Grotius, *De Iure Belli ac Pacis*, Kanter-Tromp (eds.), 335 (1993): "Ut autem promissio ius trasferat, acceptatio hic non minus quam in dominii translatione requiritur [...]"; H. Grotius, *The Jurisprudence of Holland*, translated in English by Lee, I, 295 (1926). On this subject see G. Gorla, *cit.*, 49.

agreement as the principal source of contractual obligations but do not specifically attribute binding effects to a promise<sup>5</sup>.

Today the enforceability of a promise is still one of the thorniest subjects of the law of contract, both in Civil and in English law, even if for different reasons. At the same time, the question “When is the promisor bound to keep his word?” is still at the centre of the debate on European contract law.

It is common knowledge that in Scotland a unilateral promise binds the promisor. The Scottish law of promises is explained by Stair in *The Institutions of the Law of Scotland*<sup>6</sup>, still a source of law together with the other institutional writings.

The Principles of European Contract Law (PECL) seem to answer to the above question in the same way as the Scottish system does. Article 2:107 of the PECL provides: “A promise which is intended to be legally bound without acceptance is binding”.

In note n. 1 to art. 2:107, we read that Scotland is a legal system where there are “[...] ‘unilateral’ promises for which no consideration is required and which are binding without acceptance”<sup>7</sup>. This note also mentions the Requirements of Writing (Scotland) Act 1995, section 1, and Prof. McBryde, according to whom “The Principles of European Contract Law follow Scots law in the adoption of a concept of promise, binding without acceptance.”<sup>8</sup>.

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<sup>5</sup> In the French civil code, the contract is based on agreement, and the (unilateral) promise is not expressly regulated. In the same way, in the 1865 Italian code, there was no provision on promise, and the agreement was stated as a fundamental element of contract. The §305 BGB identifies the contract as the only source of contractual obligations.

<sup>6</sup> Sir V. Stair’s *Institutions* was published in 1681. For this study I used the second edition, STAIR, *The Institutions of the Law of Scotland* (2nd. ed. 1693) following cited STAIR, *Institutions*.

<sup>7</sup> O. Lando and H. Beale, *Principles of European contract law*, parts I and II, prepared by the Commission on European Contract Law, 158 (2000).

<sup>8</sup> W. McBryde, *The Law of Contract in Scotland*, 17 (3th ed. 2007). On this point see H. L. MacQueen, *Scotland on the Road to the New Ius Commune*, in L. Farmer and S. Veitch (eds.), *The State of Scots Law: Law and Government after the Devolution Settlement*, 59 (2001); M. Hogg, G. Lubbe, *Formation of Contract*, in K. Reid and Z. Zimmermann (eds.), *Mixed Legal Systems in Comparative Perspective*, 64 (2004); Z. Zimmermann, *Diritto romano, diritto contemporaneo, diritto europeo: la tradizione civilistica oggi*, in 6 Riv. Dir. Civ., 703-37 (2001).

As a result, both in the law of Scotland and in the PECL the enforceability of promises seems to be based on the intention of the promisor to oblige himself, without asking any further element.

In the following article, in order to verify the validity of the above-mentioned view, I shall analyse the enforceability of promises in Scotland. Then, I shall focus on the Principles of European Contract Law and the Draft Common Frame of Reference.

## II. LOOKING AT THE SCOTS LAW OF PROMISES

In order to start our analysis of the Scots law of promises, we need to read institutional writings. It is common knowledge that these works, covering civil or criminal law, were written between the 1650s and the 1830s, and are sources of law.

Each single Scottish passage on unilateral promises refers to the distinction between promise and contract as stated by Stair in his *Institutions*.

In *Institutions*, title X, book I, Stair explains that a promise is pure and binding without acceptance, while a contract needs offer and acceptance. He derives the Scottish rule from the canonistic principle of keeping one's word. He explains that canon law overcame the Roman principle *ex nudum pactum non oritur action* and was accepted not only by Scotland but also by the common Custom of Nations<sup>9</sup>.

With regard to unilateral promises, Stair takes distance from Grotius' ideas. In his *Iure belli ac Pacis*, Grotius wrote that the formation of the obligation requires the promisee's acceptance<sup>10</sup>. In *Institutions*, Stair himself writes: "[...] in this Grotius differith, de iure belli, lib. 2, cap. II. §14. Holding, that acceptance is necessar to every Conventional Obligation in equity, without consideration of positive law [...]"<sup>11</sup>.

However, Stair's opinion is not completely supported by canonists' and civil lawyers' theories on *nuda promissio*<sup>12</sup>. Canon law on *nuda pacta*, at least in its

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<sup>9</sup> Stair, *Institutions*, III, X, VII.

<sup>10</sup> See note n. 4.

<sup>11</sup> Stair, *Institutions*, III, X, IV.

<sup>12</sup> P. Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico* (1964); P. Fedele, *Considerazioni sull'efficacia dei patti nudi nel diritto canonico*, in XI Annali dell'Università di

early developments, leaves the structure of the *pactum* out of consideration. At that time, the attention was mainly on the effects of *pactum*. We cannot forget that some authors questioned the validity of a promise without acceptance. However, we also have to point out that most of them denied it. In the same way, the structure of a promise was not considered by medieval jurists.

We need to get to Second Scholastic jurists in order to face the issue. They recovered the link between promise and *laesio fidei*, so well traced by San Thomas in the *Summa Theologica*, and conceived the promise as *fidem dare*<sup>13</sup>. According to them, by breaking the promise, the promisor committed injustice and frustrated the promisee's reliance. For this reason, the promisor was obliged to repair damages. Of course, *laesio fidei* took place without consideration of the promisee's acceptance. The fact that the promisor spontaneously and consciously promised, and then did not keep his word was a violation of the duty of telling the truth. On this point, jurists agreed. Nevertheless, they debated if, before the acceptance of the promisee, the promisor could revoke the promise. The main question about the value of acceptance was related to the interpretation of Lay Pare sciendo promulgated in Castille on 28 February in 1348<sup>14</sup>. In article 29, the statute provided: "If it appears that someone intends to bind himself to another through a promise, or through a contract or in any other manner, he is obligated to perform what he promised to do, and he cannot bring as a defence, that no stipulation had taken place, i. e. no promise was made in conformity with the formalities of the law, or that the obligation was entered into or the contract was concluded between absent persons."<sup>15</sup>

Some jurists thought that Lay Pare sciendo derogated from *jus commune* applied in Castille as provided by Las Siete Partidas. According to this statute, the stipulation was valid only if there was the presence of both stipulator and promisor.

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Macerata, 127-217 (1937); J. Roussier, *Le fondement de l'obligation contractuelle dans le droit classique de l'Eglise*, 178 (1933); A. Negri, *L'espressione unilaterale dell'impegno*, I, 110 (1998); as concerning the Medieval law see R. Volante, *Il sistema contrattuale nel diritto comune classico* 25 (2001) 25; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 48 (1991).

<sup>13</sup> L. Moccia, *cit.*, 827-28.

<sup>14</sup> A. Cavanna, *Storia del diritto moderno in Europa, Il pensiero giuridico e le fonti*, I, 420 (1982).

<sup>15</sup> R. Feenstra, "Panta Rei", in *Studi dedicati a Manlio Bellomo*, II, 208 (2004).

All this was based on the largely shared opinion that, during *jus commune*, promises without acceptance bound the promisor only in conscience<sup>16</sup>.

Grotius' ideas go as far as affirming that promises need acceptance to be binding both in civil law and in natural law<sup>17</sup>. The author then broke the link between promise and the duty of telling the truth. According to him, the obligation was based on the promisor's intention to limit his freedom. The promisor can act in his juridical sphere without interfering with the freedom of the promisee. The transfer of a *ius in personam* to the promisee involved his self-determination. For this reason, it was only with acceptance that the promisee acquired a right of action against the promisor.

Stair is clearly influenced by Grotius even when he departs from Grotius' ideas. On the one hand, Stair accepts the Natural law theory on contract formation based on offer and acceptance; on the other, he places promise beside agreement as two autonomous sources of obligation. In this way, he probably wants to preserve that principle recognised during *jus commune* that obliged the promisor to keep his word.

The majority of continental jurists, contemporary with Stair, do not fully support his distinction between promise and contract<sup>18</sup>. This distinction cannot even be traced in Scottish cases. Actually, until the end of the sixteenth century, the analysis of the structure of pacts was often disregarded by Scottish judges as well as by continental judges<sup>19</sup>.

<sup>16</sup> Molinae, *De contractibus*, in *De iustitia et de Iure*, II, *disputatio* n. 263, *questio* IX (1614).

<sup>17</sup> H. Grotius, *The Jurisprudence of Holland*, cit., 295.

<sup>18</sup> Let me cite my *La promessa in Scozia. Per un percorso di diritto contrattuale europeo*, 117 (2008).

<sup>19</sup> In the case *Sharp v. Sharp* Mor. 15562, 117, in particular, concerned a "[...] talzie done by way of contract, and perfected and subscribed by two parties scienter [...]". In the case we read that: "[...] a simple talzie made by any person in favours of another, that another not being contracter with the maker of the talzie [...] but being done by a simple bound, or by a voluntary charter, alterable and changeable as often as the maker pleaseth, as donatio mortis causa, which is ay ambulatory during the giver's lifetime [...]". See also Lord Cooper, *Regiam Majestatem and auld lawes*, in A.A. V.V., *An Introductory Survey of the Sources and Literature of the Scots Law*, I, 28 (1936) where Skene explains that: "I was thinking of the difference between a pact and a promise, for a promise is an undertaking given by only one person to another." A contract is different from a promise because it is based on mutual obligations. See also *The Practice of Sir James Balfour of Pittendreich*, I, 189 (1962); Mackenzie Stuart, *Contract and quasi contract*, in A.A. V.V., *An Introduction to Scottish Legal History*, XX, 251 (1958). See *Hope's Major Practicks*, J. Avon Clyde (eds.), III, II, 89 (1938), where Hope focuses on the distinction between *pactum* and *pollicitation*, and states that: "[...] a promise or

The difference between a promise and a contract, entirely based on the presence of the promisee's acceptance, would reveal its fragility in the following century. Trying to conciliate Stair's thought with the civil law theory of the eighteenth and nineteenth centuries, institutional writers affirm that unilateral promises respect the offer and acceptance scheme. In doing so, they recur to the *fiction* of the presumed acceptance of the promisee.

At the beginning of the twentieth century, Scottish jurists were in a quite different position from that of Stair even if his theory remains the most important point of reference for studies on promises.

For example, in *The Law of Contract in Scotland*, edited in 1913, Trotter writes: "Even gratuitous promise requires agreement between the promisor and the promisee to this extent at least, that it must be not expressly or impliedly rejected by the latter. Otherwise it is not binding in law."<sup>20</sup>

The Author distinguishes between an offer and a promise as follows: "[...] the offer is the expression by words or conduct of willingness to enter into a definite and legally binding transaction with some other person or persons, whether definite or indefinite. It requires acceptance, while in the case of the promise acceptance is presumed."<sup>21</sup>

Even Gloag, in *The Law of Contract*, whose first edition appeared in 1914, does not introduce unilateral promises as autonomous sources of obligation: promises are binding only if accepted. There is presumed acceptance if the promisee does not refuse the promise in a given reasonable time<sup>22</sup>.

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offer be a missive letter sustained, notwithstanding the promise was never accepted or refused"; however, the cases quoted in his Major Practicks do not completely sustain his thesis. For further details see my *La promessa in Scozia*, *cit.*, 126. In the seventeenth century case law of the Court of Session, the structure of a contract and a promise does not seem important for the validity of the obligation; see for example *Andrew Ker v. Constable of Dundee*, Mor. 9427, 5; *Auchmoutie v. Laird of Mayne*, Mor. 12126, 237; *Kintore v. Sinclair*, Mor 9425, 1; *Clakmann v. Nisbet*, [1624] Spottiswoode, 1 B sup 130; *Earl of Marr v. Lord Elphinston*, [1624] Spottiswoode, 1 B sup 130; *Yester v. Buccleugh*, [1624] Spottiswoode, 1 B sup 172.

<sup>20</sup> W. F. Trotter, *The Law of Contract in Scotland*, 1 (1913).

<sup>21</sup> W. F. Trotter, *cit.*, 9.

<sup>22</sup> W. M. Gloag, *The Law of Contract*, 25 (2nd. ed. 1929); on this point see H. L. Macqueen, *The Glory of Gloag or the Stake With Stair? T.B. Smith and the Scots Law of Contract*, in E. Reid, C. Miller and L. David (eds.), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law*, 138 ff. (2005).

These jurists seem to go a bit too far in respect to institutional writers. Institutional writers, in our opinion, tried to conciliate their tradition with the common Custom of Nations. To reach this result, they took into account Scottish Customs, according to which, the promisor, in some circumstances, was bound by his unilateral declaration. However, they enclosed their customs within the civil law theory developed during the seventeenth and eighteenth centuries. Thus, they dressed old institutes with new clothes. For this reason, the investigation on the agreement of the parties does not prove useful in order to answer the question “Is the promisor bound to keep his word?”. Jurists rather focused on the effects and on the evidence of the promisor’s deliberation.

For centuries in Scotland, the evidence of a promise was based only on a probate form or oath. All institutional writers sustain that bare promises are enforceable in Scots law even though they also add that the promisee cannot prove the promise by witnesses<sup>23</sup>. The difficulties in proving the promise reduced the promisee’s chances of winning the judgment. We also have to consider that Scots law provided many formal requirements in order to draw up a probative form.

In short, in Scotland a bare promise was valid, but in fact, if the promisor did not keep his word, the promisee had an action and could oblige the promisor to perform but only if there was written evidence or an oath by the promisor. Then, even if they were not essential for the constitution of the obligation, a probate form and an oath played a very similar role to the medieval *vestimenta*<sup>24</sup>.

The Scottish law of evidence derives from a principle commonly accepted during *jus commune*. The writing form was used both in England and in Continental systems until the eighteenth century<sup>25</sup>: the promisee’s claim was successful if he gave written evidence of the promise. The English and Continental laws seem to converge on this point. Some authors show the similarity between the prologues of contracts in England and Italy during the

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<sup>23</sup> Stair, *Institutions*, I, X, IV; Sir G. Mackenzie, *The Institutions of the Law of Scotland*, III, II, III (2nd ed. 1688); Sir J. Erskine, *The Principles of the Law of Scotland*, II, IV, II, XX (1754); A. M. Barkton Lord, *An Institute of the Laws of Scotland in Civil Rights*, I, IV, XXX (1993-1995); G. J. Bell, *Principles of the Law of Scotland*, I, I, VIII (2nd. ed. 1830).

<sup>24</sup> G. Gorla, *Il contratto*, cit., 444.

<sup>25</sup> P. Carlini, *Contratto e patto nel diritto medievale e moderno*, in Dig. It., disc. priv., sez. civ., I, 84 (1989).



early Middle Ages. They sustain that, at that time, in the English system, a written form was required as evidence, rather than as an essential element, of the contract<sup>26</sup>.

There is also a similarity between Scottish and some Continental statutes that limited evidence by witnesses. Furthermore, there is a similarity between these statutes and the Statute of Fraud 1677, which also limited evidence by witnesses in English law<sup>27</sup>.

In fact, the statutes mentioned above are part of the same ‘communicating world,’<sup>28</sup> that is, *jus commune*.

The law of evidence about promises was also applied to gratuitous contracts, that is, contracts that imposed obligations on either party. Thus, mere agreement was not sufficient to oblige the promisor to keep his word. The promisee’s successful suit against the promisor needed a counter-promise or a counter-performance from the offeree, or a written form.

#### 1. THE WORK OF THE SCOTTISH LAW COMMISSION AND THE REQUIREMENTS OF WRITING ACT 1995.

Nowadays, the Scots law of promises is quite distant from Stair’s theory. There are many reasons for that even though, here, we can only outline some of them.

The evolution of the Scottish system was influenced by the will theory developed in the Continent. Another influential factor was English law, especially after the Union of 1707<sup>29</sup>. Although the Treaty preserved the independence of Scots private law, a gradual convergence of Scottish law towards Common Law tradition was unavoidable. The Westminster

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<sup>26</sup> F. Brandileone, *Note preliminari sui documenti anglosassoni dell’alto Medioevo*, in G. Ermini (eds.), *Scritti di storia del diritto italiano*, II, 281 (1931-IX).

<sup>27</sup> G. Gorla, *Il contratto*, cit., 451, note 18; E. Rabel, *The Statute of Frauds and Comparative Legal History*, in 63 L.Q.R., 174 ff. (1947); G. H. Treitel, *The law of contract*, 181 (11th ed. 2003).

<sup>28</sup> The expression ‘communicating world’ is used by Gino Gorla. There are several works published by the Author on this matter, among them see G. Gorla, *Duck, Wood e Bell, fra i padri fondatori del moderno diritto comparato*, in *Cinquanta anni di esperienza giuridica in Italia*, 574, note 1 (1986).

<sup>29</sup> T. B. Smith, *The Union of 1707 as Fundamental Law*, in T. B. Smith (eds.), *Studies Critical and Comparative*, 1 (1962).

Parliament could legislate for Scotland<sup>30</sup>, and the House of Lords became a final court for Scotland, too. The Law Lords interpreted and judged Scottish cases from a Common Law viewpoint; they frequently ignored the peculiarity of Scottish private law, whose law of obligations mainly derived from Civil law. Then, Common Law principles overreached Scottish rules and deformed them, removing the *ratio* of Canon law or Roman law that originally inspired them<sup>31</sup>. The convergence of English and Scottish laws found a firm opposition only starting in the second half of the twentieth century when some jurists reaffirmed the autonomy of Scots private law, allowing it to go back to its civilian roots. Those jurists underlined the mixed nature of their system and the need to look not just at Common Law but also at Civil Law tradition as the essence of the law.

Studies on the hybrid nature of Scottish law flourished. T. B. Smith was the main scholar in this field. Starting in the 1950s, he wrote a series of essays on several subjects such as *Ius Quaesitum Tertio* and unilateral promises, where he demonstrates that the promisee's acceptance is not always essential for the constitution of obligations. Smith criticized the will theory and the artificiality of the expedient presumed acceptance, while underlying the importance of unilateral promises as a peculiarity of Scottish law that jurists must preserve from English law influence<sup>32</sup>.

Back in 1965, Smith was a civil law professor at the School of Law of Edinburgh and the President of the Scottish Law Commission.

In 1973, the Scottish Law Commission, guided by this eminent jurist, started research on the law of contract to recommend a law reform, which, however, failed to become a systematic legislative reform.

Nevertheless, since 1977, the Law Commission has published six Memoranda entitled *Constitution and Proof of Voluntary Obligations*. The first one explains that the Memoranda intend to analyse the constitution and proof of conventional obligations to rationalise the law<sup>33</sup>.

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<sup>30</sup> See C. Campbell, Paton, *The Eighteenth century and later*, in A.A. V.V., *An introduction to Scottish legal history*, XX, 50 (1958).

<sup>31</sup> C. McDiarmid, *Scots law, the turning of the tide*, in 3 Jur. Rew., 158 (1999).

<sup>32</sup> T. B. Smith, *Strange Gods: Crisis of Scots law as Civilian System*, in T. B. Smith (eds.), *Studies Critical and Comparative*, cit., 73; T. B. Smith, *English influence on the law of Scotland*, *ibid.*, 123.

<sup>33</sup> Scottish Law Commission, *Memorandum n. 34, General Introduction*, 2 (1977).

In these Memoranda, the Law Commission describes the actual state of law on: unilateral promises, the formation of contract, *Ius Quaesitum Tertio*, the validity of obligations, and the proof of obligations. These topics are strictly connected to each other, so these Memoranda have to be read together taking into account their reciprocal influences.

The Law Commission traces the law back to its origins, trying to follow the route mapped by Stair.

In the Memorandum on Unilateral Promises, the Law Commission distinguishes a promise from a contract in order to preserve the autonomy of a promise. The promisee's acceptance - as the Law Commission explains - is the element of distinction between a contract and a promise: "At least since the time of Stair, the law of Scotland, diverging in this respect from the laws of most other civil law systems of Western Europe, has not required, before an obligation is recognised as coming into being, that the promisee accepts the benefit of the promise made in his favour; it has consequently seen no need, as other systems have, to resort to the device of a presumed acceptance by the beneficiary in order to hold the promisor to his undertaking."<sup>34</sup>

The theory of presumed acceptance is completely denied, but some problems on the distinction between a promise and a contract remain. As mentioned above, Stair used the acceptance of the promisee to distinguish a promise from a contract; however, the Commission itself admits that the presence of acceptance is not always a useful element of distinction: "In some cases it may be difficult in Scots Law to decide whether a statement or proposal made by a party should be classified neither as a binding promise nor as an offer which will give rise to a legally enforceable obligation only if accepted."<sup>35</sup>

The problem of distinction between a promise and a contract was not definitely solved by the Requirements of Writing (Scotland) Act 1995, which only concerns the evidence of a promise. The Act implements, even if not

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<sup>34</sup> Scottish Law Commission, *Memorandum n. 35, Constitution of Proof and Voluntary Obligations: Unilateral Promises*, 5 (1977); see also Scottish Law Commission, *Memorandum n. 36, Constitution of Proof and Voluntary Obligations: Formation of Contract*, 2 (1977).

<sup>35</sup> Scottish Law Commission, *Memorandum n. 35, cit.*, 7.

completely, the recommendations of the Law Commission in the 1988 report entitled *Requirements of Writing*<sup>36</sup>.

The reform abolishes the rules on the proof of promises and states that gratuitous promises are binding only if made in writing, with two exceptions. The first one concerns obligations undertaken in the course of business, which are binding even if oral. Section n. 1 (3) states the second exception: the promisor is bound if the promisee acted or refrained from acting in reliance on the promise with the knowledge and acquiescence of the promisor. Section n. 1 (4) specifies some conditions that must be verified to oblige the promisor to perform: “[...] the position of the first person [the promisee] (a) as a result of acting or refraining from acting as mentioned in the subsection has been affected to a material extent; and (b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.”.

In Scots law, an oral promise is binding when there is an objective requisite that attributes judicial value to the promise, such as the writing form or the reliance of the promisee. Under this light, the reliance of the promisee constitutes a surrogate of the writing *vestimentum*.

The enforceability of unilateral promises does not seem to need a *vestimentum* only if promises are undertaken in the course of business. These obligations seem to respect the canon principle *omne verbum de ore fidei cadit in debitum*<sup>37</sup>. In any case, this rule is scarcely applied. It is difficult to find examples of valid bare promises in law reports<sup>38</sup>. The absence of case law in this field makes the interpretation of “obligation undertaken in the course of business” difficult.

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<sup>36</sup> Scottish Law Commission, *Memorandum n. 37, Constitution of Proof and Voluntary Obligation: Abortive Constitution*, (1977) and *Memorandum n. 66, Constitution and Proof of Voluntary Obligations and Authentication of Writing*, 65 (1985): “If writing is required, we think that there would be advantages in requiring it as a condition of constitution. There is something of unsatisfactory in the notion of an obligation which is admitted to exist, but which cannot be proved because of a technicality of the law of evidence.” The reform was criticised by Scottish jurists. First of all, the text is difficult to interpret. Secondly, the Act was considered as a denial of the Scottish rule on unilateral promises, according to which promises are valid without acceptance and consideration, See W. D. H. Sellar, *Promise*, in R. Zimmermann and K. Reid (eds.), *An History of Private Law of Scotland*, 280 (2000).

<sup>37</sup> W.W. McBryde, *Promises in Scots Law*, in 42 I.C.L.Q., 48 ff. (1993).

<sup>38</sup> See, for example, *Morrison v. Leckie* [2005] GWD 40, 734.

Therefore, bare promises do not give the promisee a cause of action in Scotland, neither before nor after the Requirements of Writing (Scotland) Act 1995.

Finally, the section n. 1 (2) (ii) of the Requirements of Writing Act 1995 requires a writing form for the constitution of a “gratuitous unilateral obligation”. The Act uses the word *obligation* instead of *promise* with some problems of interpretation concerning the enforceability of contracts imposing obligations on either party. It is doubtful if the term *unilateral* refers to the structure or to the gratuitous nature of the obligation. The presence of an agreement between the parties should be sufficient to avoid the writing form in the first case but not in the second case. There is no unanimity among Scottish authors on this point<sup>39</sup>. If the term obligation is used as a synonym for promise, then the mere agreement of the parties is sufficient to enforce a gratuitous contract.

Along this way, every oral unilateral promise would be valid recurring to the fiction of the presumed acceptance. As a result, the distinction between a promise and a contract would be still a problem in Scots law.

### III. THE ENFORCEABILITY OF PROMISES IN THE PRINCIPLES OF EUROPEAN CONTRACT LAW

Even though unilateral promises have always played a very marginal role in national systems, they are a source of law in some Projects toward harmonizing European contract law.

The first of these Projects was the 1927 Italian-French Code of Obligations<sup>40</sup>, which was created as an attempt to rebuild the idea of *communitas gentium* that characterized Europe for centuries until the advent of codification.

Article 60 of the Project provides: “Unilateral promise, if constituted in writing and for a limited period of time, binds the promisor as soon as it is noticed by the promisee unless he refuses it [...]” [my translation].

The introductory text to the Project explains that the article does not radically innovate national laws but simply offers a solution to problems caused by

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<sup>39</sup> See W. D. H. Sellar, *Promise, cit.*, 280.

<sup>40</sup> *Relazione sul Progetto di codice delle obbligazioni e dei contratti, comune all'Italia e alla Francia*, in Riv. Dir. Civ., I, 107 ff. (1928).

obscure rules<sup>41</sup>. The Project also aims to fulfil the need to give a juridical answer to some cases where obligations arise even without the acceptance of the offeree or a notice of acceptance by the offerer.

The Principles of European Contract Law follow in the wake of this previous experience and also go a step further<sup>42</sup>: on the one hand, consideration and cause are no longer regarded as essential elements of a valid contract; on the other, the PECL expressly recognises the validity of unilateral promises (art. 2:207).

In most cases, the abolition of cause and consideration as indexes of a legally binding intention facilitates the attribution of judicial effects to unilateral promises. Nevertheless, the validity of unilateral promises is not always a consequence of this abolition. Some legal systems actually require the promise to be accepted even if they respect neither consideration nor cause<sup>43</sup>.

In order to verify the enforceability of unilateral promises in the Principles of European Contract Law, it is necessary to go beyond the literal meaning of art. 2:107. Thus, we need to investigate if the validity of a promise is, in fact, based on the mere intention of the promisor. In this light, it may be useful to analyse the articles on contract formation that could be applied to unilateral promises with appropriate modifications (see art. 1:101 PECL).

Along this line, article 2:101 provides: “A contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement. [...]”

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<sup>41</sup> For example art. 36 of Italian code of commerce, see C. A. Graziani, *La promessa unilaterale*, in P. Rescigno (eds.), *Trattato di Diritto Privato*, IX, I, 640 (1984).

<sup>42</sup> Or a step backward, see P. Vitucci, *L'atto unilaterale nei Principles e in altre compilazioni sul diritto europeo dei contratti*, in 4 Eur. Dir. Priv., 943 (2002).

<sup>43</sup> South Africa is an example. See D. Hutchison, *Contract Formation*, in R. Zimmermann and D. Visser (eds.), *Southern Cross, Civil Law and Common Law in South Africa*, 165 (1996); R. H. Christie, *The Law of Contract*, 23 (4th ed. 2001); VAN RENSBURG-LOTZ, VAN RHIJN, *Contract*, in W.A. Joubert and J.A. Faris (eds.), *The Law of South Africa*, I, 215 (2nd. ed. 2004); In other projects on the harmonization of European contract law, there are no articles similar to article 2:207 of the PECL even though consideration and cause principles are not essential elements of a contract. See Unidroit Principles art. 3.2; Code Européen des Contrats, art. 5.

An agreement is reached when the acceptance and the offer coincide on terms “[...] sufficiently defined by the parties so that the contract can be enforced [...]” (art. 2:103 PECL).

The validity of a contract, which in Common Law and Civil Law traditions requires other elements than agreement, is thus reduced to the latter. Everything seems to orbit around the parties’ deliberations. If, in accordance with article 1:101, the above-described rule is applied to unilateral promises, then the only element required for the validity of a promise is the intention of the promisor to bind himself<sup>44</sup>. The PECL seems based on a voluntary system, thus refusing any further control test on judicial binding.

However, most Italian jurists disagree with this interpretation<sup>45</sup>. According to these authors, the promise is enforceable only if the intention of the promisor to bind himself is accompanied by an objective element. In article 2:107 of the PECL, this objective element peeps out of the need to check the real intention of the promisor in binding himself. In this article, the phrase “A promise which is intended to be legally binding [...]” asks for an investigation on the intention of the promisor. The intention is to be verified using the reasonableness test: the promisor is bound by the promise only if, under the same circumstances, a reasonable man should think that promise binding. The investigation then is not merely subjective but also objective: the declaration of the promisor must become externally binding.

Article 1.302 of the PECL states: “[...] reasonableness is to be judged by what person acting in good faith and in the same situation as the party would consider to be reasonable [...]”.

It is the good faith that determines what reasonable behaviour is according to the circumstances<sup>46</sup>. In this way, a bare promise is not enforceable, but the promisor is obliged to keep his word only if the promise is accompanied by an

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<sup>44</sup> C. Castronovo (eds.), *Principi di diritto europeo dei contratti*, Prefazione all’edizione italiana, XXVIII (2001).

<sup>45</sup> G. B. Ferri, L’“*invisibile*” presenza della causa del contratto, in 3 Eur. Dir. Priv., 897 ff. (2002); U. Breccia, *Morte e resurrezione della causa: la tutela*, in S. Mazzamuto (eds.), *Il contratto e le tutele: prospettive di diritto europeo*, 241 (2002), according to these Authors, the Principles omit any reference to cause, only to opt for a neutral solution between Common Law and Civil Law; the thesis is criticised by some common lawyers, see for example J. Smits, *The making of European Private Law*, 207 (2002).

<sup>46</sup> C. Castronovo (eds.), *cit.*, XXXI.

objective element that testifies the intention of the promisor to oblige himself. In the PECL this element is the reliance of the promisee, who thinks in good faith that the promise is valid. Then, the reliance of the promisee is a sort of *vestimentum* of the promise.

#### IV. THE ENFORCEABILITY OF PROMISES IN THE DRAFT COMMON FRAME OF REFERENCE

The previous considerations may also be applied to the Draft Common Frame of Reference, whose rules about the formation of contract are quite faithfully drawn from the Principles.

The Project recognises the validity of a unilateral promise even if it does not give a definition of a promise. The notion of a juridical act in art. II. – 1:101 also covers unilateral promises<sup>47</sup>: “A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.”.

The first edition of the Draft mentioned unilateral promises in article II 1-1:103, entitled *binding effects*. The expression “a valid unilateral promise” disappears from the last edition of article II - 1-1:103, but promise is still recalled by the presence of the term undertaking, as explained in the comment: “There is no essential difference between a ‘unilateral promise’ intended to be binding without acceptance and a unilateral ‘undertaking’ intended to be binding without acceptance. [...]. The difference is simply linguistic.”<sup>48</sup>.

The core aims inspiring the Project support the idea of the presence of promises in the Draft as well. The freedom of contract, as we read in the Draft introduction, is not the only principle the Project wants to promote<sup>49</sup>. The freedom of contract has to be balanced with other principles such as solidarity, social responsibility, and Aristotle’s idea of ‘corrective’ justice. These aims are more related to promise itself than to agreement.

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<sup>47</sup> A promise is described as a type of juridical act in the Draft’s introduction, see Draft Common Frame of Reference, *Introduction*, 31 (2009).

<sup>48</sup> Draft Common Frame of Reference, *ibid.*, 126.

<sup>49</sup> Draft Common Frame of Reference, *ibid.*, 13-15.



Moreover, the possibility of the promisor binding himself unilaterally comes out from several modal rules such as those concerning firm offers, stipulations in favour of third parties, and donations.

The discipline of firm offers is stated in article II- 4:202, where we read that: “[...] a revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; (b) the offer states a fixed time for its acceptance; or (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”

In these cases, the promisor binds himself unilaterally to not withdraw the offer. Thus, his declaration is not a simple pre-contractual statement that needs to be accepted by the promisee. The enforceability of the promisor’s word does not depend on the acceptance of the promisee<sup>50</sup> but on an objective element such as a fixed time or an expressed declaration of irrevocability, or the reliance of the promisee.

As regards stipulations in favour of third parties, art. II- 9:301 provides: “The parties to a contract may, by the contract, confer a right or other benefit on a third party [...]”.

The following article specifies: “[...] the third party has the same rights to performance and remedies for non-performance as if the contracting party

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<sup>50</sup> Draft Common Frame of Reference, *ibid.*, 135, 300; From this perspective, there is a very interesting Scottish debate about the nature of the promisor’s declaration, whether it is a unilateral promise or a unilateral obligation to keep the offer open for a period of time collateral to a bilateral contract. This analysis does not have mere theoretical value but evident consequences on the form required for the validity of promise; see Scottish Law Commission, *Memorandum n. 35, cit.*, 13; M. Hogg, *Obligations*, 47 ff. (2nd ed. 2006); H. L. MacQueen, *Offers, Promise and Options*, in *The Scots Law Times* (news), 187 ff. (1985); B. Beinart, *Offers Stipulating a Period for Acceptance*, in *Acta Juridica*, 200 (1964). A similar debate also exists among Italian jurists, although Italian civil code expressly disciplines firm offers: some authors consider firm offers as unilateral promises, see M. Bianca, *Il contratto*, in *Trattato di diritto civile*, III, 234 (2000); G. Mirabelli, *Dei contratti in generale*, in *Commentario al codice civile*, II, II, 75 (1980); F. Carresi, *Il contratto*, in A. Cicu and F. Messineo (eds.), *Trattato di diritto civile*, XII, II, 761 (1987); A. Marini, *Osservazioni sul termine nella proposta irrevocabile*, in *Giust. Civ.*, I, 1558 ff. (1965); this opinion is criticised by other authors, see Salv. Romano, *Proposta irrevocabile e promessa unilaterale (studio sulla formazione del contratto ex art. 1333 c.c.)*, in *Studi in Memoria di T. Ascarelli*, IV, 1934 (1969); G. Tamburrino, *I vincoli unilaterali nella formazione progressiva del contratto*, 59 (2nd ed. 1991).

was bound to render the performance under a binding unilateral undertaking in favour of the third party [...]”.

Thus, the obligation of the contracting party has its source in a unilateral promise.

Donation is described as a special contract. As derived from article IV H-1:101, the rise of the donor's obligation needs the presence of an agreement between the donor and the donee. However, the rules on donation apply also to other juridical acts, as clarified by article IV H-1:104, where donation is referred to as a gratuitous unilateral undertaking of the donor. Confronting the disposition with art. II 1-1:103, it emerges that donation may also have the nature of a unilateral promise of the donor.

What is more, in the modal rules mentioned above, the promisor's free deliberation is not sufficient to bind him; it must be accompanied by the promisor's intention to bind himself. The presence of this intention is demonstrated by some external element: concerning firm offers, the offerer is bound either if the irrevocability is expressly stated or if the offeree reasonably relied upon the irrevocability of the offer. In stipulations in favour of the third party, the third beneficiary definitely acquires a right when he receives from one of the parties a notice that the benefit has been conferred. Before that time the parties may revoke the beneficiary's right. Finally, in the case of a unilateral promise to donate, the promisor is bound only if the promise is in textual form on a durable medium signed by the donor (art. IV H-2:101).

While the Draft does not ask any form requirement for contracts, a textual form is asked for donations<sup>51</sup>. The Project clarifies how to distinguish a donation from other contracts: it is a donation when the donor's undertaking is gratuitous, and the donor intends to benefit the donee (art. IV H-1:101). Gratuitousness does not necessarily exclude a reward for the donor: contracts not entirely gratuitous are donations if one party has the intention *inter alia* to benefit the other party and if the values to be conferred by the performances are regarded by both parties as not substantially equivalent (art. IV H 1:202). Moreover, the intention to benefit the donee is presumed in the absence of a reward, and it is compatible with the donor's moral obligation to transfer or with his promotional purpose.

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<sup>51</sup> The form requirement governs only the undertaking of the donor, whereas the acceptance by the donee can be in oral form; see Draft Common Frame of Reference, *cit.*, 2828, B.

This definition of donation is very wide. It covers nearly all contracts in which one party does not receive a counter-performance. As a result, these contracts must be in textual form.

The previous short remarks seem to support two considerations. First, bare promises are never binding in the Draft, as the promisor's deliberation must be accompanied by some external element to become binding. Second, bare agreements will not be deemed sufficient to bind the parties because the offerer (promisor) is bound either if he receives a benefit for his undertaking or if the contract is made in textual form. This interpretation reduces the value of the mere agreement, in contrast with the Draft's definition of a contract (II.-1:101).

## V. CONCLUSION

On the basis of the previous analysis, let us try to answer the key question: "When is the promisor bound to keep his word?"

Bare undertakings never bind the promisor, neither in Scotland nor in European Projects. The words of the promisor are binding only if accompanied by an objective element revealing his intention. This element may be in the form of a promise, the reliance of the promisee, a counter-promise or a counter-performance, etc<sup>52</sup>. From this viewpoint, the mere agreement of the parties is neither a sufficient index of the validity of the obligation nor a useful element of distinction between a promise and a contract.

The same principle is also recognised by Stair and other institutional writers despite their apparent acceptance of the will theory; it has been shared by the western legal tradition for a long time<sup>53</sup> and still seems valid today.

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<sup>52</sup> This principle is well expressed by G. Astuti, according to whom in all juridical experiences and at all times, the promisor's words are always binding only when supported by an objective element, see G. Astuti, *I contratti obbligatori nella storia del diritto italiano*, 462 (1952).

<sup>53</sup> See G. Gorla, L. Moccia, *A "revisiting" of the comparison between "continental law" and "English law"* (XVI-XIX century), in *Journal of Legal History*, 143 ff. (1981); L. Moccia, *Notes on Historical comparative law in Gino Gorla's works*, in R.H. Helmholz and V. Piergiovanni (eds.), *Relations between the Ius Commune and English Law*, 113 (2009).

As a result, from a European perspective, the Scottish experience is interesting for its very legacy well preserved in institutional writings rather than for the existing law in force.