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INDIVIDUAL WILL AND THE CIVIL LAW TRADITION

RETHINKING LEX PRIVATA

Edited by
Tommaso dalla Massara

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This volume sets out to explore the relationship between individual will (*voluntas*) and the legal rule. What unfolds in the following pages is a wide-ranging itinerary, moving between past and present, most notably ancient Rome and the contemporary world.
The guiding question is as radical as it is enduring: in what way can *voluntas* (a psychological impulse internal to the individual) come to determine the legal rule? European private law tradition rests on the premise that legally binding acts – contract and will, to mention only two paradigmatic cases – derive their force from individual will. From the Roman sources arises, with exemplary force, the notion of *lex privata*: the idea that private will itself may generate binding legal norms.
Such a premise immediately leads to further questions. Above all, it compels reflection on the authenticity of that will: what if *voluntas* is compromised? The law of defects (*error*, *dolus*, *metus*) opens the problem of whether distorted or corrupted will can truly sustain the validity and effects of a legal rule.
The reflections gathered in this book approach the European civil law tradition as a broad and unified phenomenon, one in which law is inseparably bound to the historical and cultural contexts in which it takes shape.

Tommaso dalla Massara is Full Professor of Law at Roma Tre University. His research has long focused on the foundations and models of the European civil law tradition; he is author of numerous monographs and essays in Roman law and private law. He also serves as editor of academic book series with leading publishers and sits on the editorial boards of several distinguished international journals.

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Rethinking Lex Privata

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Chapter 18

LIMITS TO THE WILL OF A PARTY, BETWEEN ARBITRARINESS AND POTESTATIVITY: THE CASE OF THE RUSSIAN ROULETTE CLAUSE

Martina D'Onofrio

ABSTRACT: *This essay explores the limits of parties' will in contractual integration when one party is granted the power to determine an essential term of the agreement. While Italian law regulates third-party determinations, it does not expressly address cases where such power is conferred on a contracting party. The analysis is prompted by the Italian Supreme Court's recent ruling on the Russian roulette clause, which allows one shareholder to set a price for shares, leaving the other to accept or reverse the transaction. The decision upheld the clause's validity, highlighting its structural reciprocity. The paper considers broader legal principles and comparative insights, particularly from German law, to define the boundaries of party's discretion in contract integration.*

KEYWORDS*: Will – Discretion – Potestative Condition – Arbitration – Contractual integration.*

SUMMARY: 1. The boundaries of arbitrariness: The case of the Russian roulette clause. – 2. Doubts with regard of the mere potestativity of the clause. – 3. Admissibility and limits of party arbitrage. – 4. The Russian roulette clause between *voluntas* and arbitrariness. – References.

1. The boundaries of arbitrariness: The case of the Russian roulette clause

Within Italian legal system there are several cases in which one of the elements of the contract is left to the will of only one party.

In such cases, the need felt by the Italian lawmaker is to delineate the boundaries within which such will has room to express itself: this need is indeed underlying, for example, the regulation of the merely potestative condition, as well as arbitrability. Some doubts, however, creep in between the meshes of the normative dictate, and it is worth reflecting on them in these pages.

In order to address these issues, it seems very useful to start from a concrete case that originates from a corporate law matter, but brings to the

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interpreter's attention a large number of private law problems (on the interpenetration that characterises civil and commercial law, Delle Monache 2012, 489 ff.; Mazzamuto 2019, 1205 ff.).

In July 2023, the Court of Cassation was called upon to assess the legitimacy of the so-called Russian roulette clause, *i.e.*, a clause – widespread mostly in Anglo-Saxon countries [1] – intended to resolve deadlock situations in which companies composed of only two partners with equal shareholdings might find themselves (Cass., 25th July 2023, No. 22375, in *Società*, 2023, 1207 ff.). According to the Russian roulette clause, upon the occurrence of a situation of impossibility to take decisions because of the irreconcilable disagreement between the two partners, the continuation of which would potentially lead to the dissolution of the company due to the impossibility of achieving the purpose, one of the two has the right to make an option to the other to purchase his share at a price determined by him, while the offeree has the option either to accept the proposal and thus sell his shareholding, or to reverse the situation and decide to purchase, at the same price, the other's share.

In this way, the partner who buys the other's shares will remain the sole head of the company, ensuring its continuation, while the one who sells the shares will leave the company (Cotillo 2023, 309 ff.; de Luca 2022, 863 ff.; Schneider, Fleischer 2010, 2713 ff.).

Over time, such an agreement has become so widespread that nowadays it has also entered into practice in Italian legal system. As noted by the Supreme Judges, common is in fact the phenomenon known in doctrine by the expression *contratto alieno* (alien contract), which is found when the agreement is drafted on the basis of models containing clauses deriving from other legal systems, mostly common law, whose compatibility with the principles of Italian legal system must generally be verified (De Nova 2008).

The essential features of the structure of this clause are represented by the full discretion in determining the sale or purchase price on the part of the partner activating the mechanism (unless, as a precautionary measure, the parties crystallise in the contract parameters for determining the price of the shareholding), and by the counterparty's entitlement to the right to choose whether to purchase the shares of the other, or – under the same conditions – to sell to the latter its own (about potestative rights, see Messina 1906). As mentioned above, according to its decision, one party will cease to be a partner, while the other will remain a sole partner.

This mechanism has given rise to a number of doubts as to its compatibility with various continental legal experiences: indeed, German, Austrian and French courts have already pronounced on this point, and have

[1] See Castronovo, in this volume, particularly 339 ff.

established the legitimacy of the clause, at least under ordinary conditions, but admitting that it can, in situations of economic imbalance, lead to abuse.

2. Doubts with regard of the mere potestativity of the clause

In light of the broad space that the Russian roulette clause leaves to the arbitrariness of a party, doubts have been raised as to its compatibility with Italian legal system with reference to the nullity sanctioned by art. 1355 of the Italian Civil Code: it could be hypothesised that the clause incurs a violation of that provision to the extent that it leaves to the free and unquestionable will of a party the power to determine a purchase or sale price of the share.

In this regard, however, there is no unambiguous criterion for determining the cases in which potestativity results in mere (and not allowed) potestativity.

In case law the notion of mere potestativity was always interpreted in a very restrictive manner, limiting itself to providing for nullity only when the condition consists in a voluntary act, the performance or omission of which does not depend on serious and appreciable motives, but rather on the arbitrariness of the party, unconstrained by any rational assessment of convenience (Cass. 18th May 2020, No. 9047).

Another opinion links the distinction between potestativity and mere potestativity to the presence or absence of criteria controllable by the other party on the basis of which the party must make the assessment on which the fulfilment of the condition depends (Maiorca 1998, 281 ff.).

Nevertheless, whatever benchmark is used to draw the borders of mere potestativity, this case does not appear to fall within the perimeter of that notion.

The existence of a willingness to bind on the part of the shareholder who has the power to trigger the clause and fix the price is certainly not questionable. Nor could it be held that no appreciable interests are involved in the determination of the price.

As to the presence of verifiable criteria, the matter becomes more complicated: in the case of the Russian roulette clause, very often the determination is not made on the basis of objective, pre-established criteria. Mere potestativity may, however, be denied insofar as the decision taken by the offeror is closely linked to rational and economic evaluations, which must take into account the fact that the choice whether to buy or sell the shareholding falls to the other shareholder, so that it is the offeree who decrees the final outcome of the procedure initiated by the exercise of the clause, whereas the role of the person who initiated it is limited to setting the price.

Criticisms are, however, also raised on this last point, insofar as the legitimacy of the choice to give one of the parties to the contract the power to determine the purchase or sale price in the absence of pre-established criteria is not accepted. But on this point it seems worthwhile to devote an in-depth examination to the issue of party arbitrage (relates the discipline of the merely potestative condition and the arbitrage provisions Marchetti 2022, 153 ff.).

3. Admissibility and limits of party arbitrage

As can be deduced from the above reconstruction of the legal structure of the Russian roulette clause, it delegates to one of the partners the determination of the price of the shares to be sold or purchased: this is clearly a case of arbitrage by one party (Ascarelli 1952, 205 ff.; Zuddas 1992; Gabrielli 2001, 291 ff.; Barenghi 2005; Gallo 2019, 1 ff.).

Arbitrage is expressly regulated by art. 1349 of the Italian Civil Code only with respect to the cases in which the integration of the contract is entrusted to a third party. In such cases, the Italian Civil Code distinguishes between *arbitrium boni viri* and *arbitrium merum*: in the former, the arbitrator is called upon to act in accordance with equitable discretion, whereas the latter case occurs when the parties expressly leave the determination of the subject matter of the contract to the mere will of the third party. The two cases also differ in terms of remedies, since in the latter situation the arbitrator's decision may be challenged only in case of bad faith, whereas if the arbitrage is based on equitable discretion, the judge's evaluation extends to cases of manifestly unfair or erroneous determination.

However, the legislature does not provide for the admissibility of the case that one of the parties acts as arbitrator and thus determines the subject matter of the performance under the contract.

The silence of the law in this regard should not, however, lead to the conclusion that such a possibility should be excluded: the fact that the Italian Civil Code only regulates the delegation of the determination of the subject matter of the contract to a third party does not seem to preclude the validity of various mechanisms for supplementing the elements of the contract when the parties themselves agree to that effect (Barenghi 2005, 156).

Although party arbitrage represents a case that interpreters have always viewed with suspicion, since it is a case in which the choice made is by definition partial, oriented towards the interest of the party making it and therefore potentially detrimental to the other party, doctrine and jurisprudence have long paved the way for the admissibility of this hypothesis, however not

without limits (Roppo 2011, 337). Indeed, it is held that to be valid the clause providing for arbitrage by one party must outline the objective criteria it should follow in determining the price, so as to safeguard the other party from the danger of abuse. In essence, the majority of interpreters accepts arbitrage subject to equitable discretion, while they censure the submission to mere arbitrariness (Gallo 2019, 7).

The tendency to allow party arbitrage, albeit within certain limits, is also found more generally at the level of European private law, so much so that some States have codified this rule: sometimes the boundaries within which arbitrariness finds room are fixed *ex ante*, while in other cases the rule simply imposes the criterion of reasonableness, but gives the judge a more penetrating subsequent control.

Examples of provisions that establish only the necessary preponderance of the criterion of reasonableness, while leaving the subsequent control to the judge, are to be found in art. II. 9:105 of the Draft common frame of reference, which provides for the substitution of the party's determination when it is «grossly unreasonable», or in § 315 of German Civil Code (BGB), which leaves the judge to make a fairness judgment on the same (Dalbosco 1987, 321 ff.).

In order to understand whether the Russian roulette clause is admissible in Italian legal system, it therefore seems necessary to ask whether it represents *arbitrium boni viri* or mere arbitrariness, since, in the latter case, it would be necessary to address the doubts raised by interpreters concerning party arbitrage in order to affirm the validity of the clause.

As mentioned above, an element that characterises this clause is precisely the possible absence of the provision of a minimum value that the shareholding must have, or of other parameters on which the party deciding to make use of the clause should rely in order to determine the purchase or sale price.

Nonetheless, the basis for the admissibility of this agreement has been traced by case law to the mechanism provided for by the structure of the clause itself, since the party that is subject to the determination of the price is in any event vested with the potestative right to choose between the purchase and sale of the shares. Thus, the other shareholder – at the time of the formulation of the proposal – is in a situation of uncertainty with respect to the other party's decision whether to buy or sell. It would be precisely the necessary ignorance as to the counterparty's future choice that would act as an 'antidote' against making disproportionate determinations and ensure that the price set more or less reflects the market price, or, if not, allow the counterparty to profit from the off-market price decided by the offeror.

Consider, moreover, that in other jurisdictions, too, it was precisely the

provision of 'checks & balances' that led to rulings on the legitimacy of the clause (*e.g.* OLG Nürnberg 20th December 2013, No. 12 U 49/13).

In fact, the circumstance that the party called upon to fix the price to be proposed must take into account multiple factors in its determination does not detract from the fact that he or she is free to follow non-objective criteria as well: it is not obvious that he or she will base himself exclusively on the market value; on the contrary, purely subjective reasoning could come into play, such as the interest in continuing the business activity, or the opposite interest in disposing of one's share to leave the reins to the other partner. On the basis of such considerations, the party exercising the clause is free to determine a price that deviates even significantly from the market value.

On the one hand, it could therefore be argued that its arbitrariness is not necessarily based on equitable discretion, but, on the other hand, it does not appear to be possible to consider that the choice is left to mere capriciousness either: the arbitrator's arbitrariness comes into play, since he or she is free not to rely on objective and controllable criteria; nevertheless, in the determination, he or she is called upon to weigh the amount to be indicated according to his or her own subjective assessment, in the knowledge that his or hers choice will influence the other party's behaviour. And, as already emphasised, it is precisely the potestative right that the clause attributes to the latter that acts as a counterbalance with respect to the remittance of the determination of the price to the free will of the offeror.

The Court's decision to admit Russian roulette, even though it does not provide that objective criteria constrain the party's arbitrariness, can be better understood if, instead of providing a binary reading of the opposition between *arbitrium boni viri* and *arbitrium merum*, it distinguishes between three different degrees of freedom of arbitrariness, which can be more clearly understood by recalling the reflections just made with regard to the mere potestativity of the condition.

Indeed, the set of arbitrage hypotheses free from objective criteria appears to be broader than the circle of cases that would be null and void if the parameter used to identify the mere potestativity of the condition were to be used with respect to party arbitrage.

In the latter case, as already anticipated, a restrictive interpretation of the case law prevails, so that the cases of nullity are limited to cases in which the fulfilment of the condition is left to the mere and irrational capriciousness of one of the parties, in the absence of other values or interests worthy of protection to be taken into consideration.

There are, however, a number of situations in which the arbitrating party's decision is not subject to pre-established objective criteria, but neither is it unconstrained by any criterion nor left to its mere capriciousness:

these are hypotheses in which the party's will is nevertheless guided by the logic of the economic transaction entered into.

The three levels of arbitrariness could thus be classified according to the narrowness of the criteria by which the will is bound: equitable discretion, where in the determination the arbitrator is subject to compliance with objective parameters; free discretion, where the arbitrator is also authorised to rely on subjective criteria for the decision, which take into account his own interest, but this arbitrariness is nevertheless limited by other elements in the economy of the operation; and, finally, the mere arbitrariness, unconstrained by any constraint, which – in accordance with the prevailing orientation on the subject of merely potestative conditions – comes into play when the determination is left entirely to the capriciousness of the person in charge.

In this regard, a reading of the above-mentioned § 315 BGB suggests further thoughts: there, the German legislator provides that, if nothing is specified, the determination of the party is to be understood as being left to the equitable discretion (*Bestimmung nach billigem Ermessen*), thereby implicitly admitting that – provided this is expressly stated – also the submission to the mere will of the party is permitted (Medicus, Lorenz 2015, 90).

It is precisely in German doctrine that a categorisation is widespread that mirrors the one we have just attempted to outline. German interpreters distinguish between *billiges Ermessen*, which corresponds to our equitable discretion, *freies Ermessen*, *i.e.* sole discretion and, finally, *freies Belieben*, which literally should translate as mere arbitrariness, but whose contours would not correspond in full with those of the notion of mere arbitrariness under art. 1349 of the Italian Civil Code, enclosing instead a narrower circle of cases, in which there is a total absence of parameters guiding the determination, left entirely to the mere will of one party (Lieder, Meyer 2023, 9 ff.).

The possibility of configuring these three degrees of arbitrariness also in our legal system emerges from a reading of art. 1349 of the Italian Civil Code on the subject of arbitrage that is in continuity with the precept in art. 1355 of the Italian Civil Code on the merely potestative condition.

In fact, the rationale of the two rules, which are also close in terms of their location in the Code, seems to be homogeneous: what is to be avoided is that one party holds the entire contractual balance in its hands and is thus given the power to determine the fate of the bond on the basis of its own will, in the absence of any criteria aimed at guiding the choices of the party (Marchetti 2022, 153 ff.; Barenghi 2005, 146).

In the above context, the aforementioned doctrinal and jurisprudential elaboration, which reads the prohibition in art. 1355 of the Civil Code in a very restrictive manner, seems to allow the identification of a sub-category of cases in which mere arbitrariness – in principle permitted under art. 1349

of the Civil Code – results in mere caprice, in mere potestativity, thus falling, when the arbitrator is one of the parties, within the spectrum of nullity imposed by art. 1355. Thus, when the arbitrator is one of the parties, it falls within the scope of the nullity imposed by art. 1355 of the Italian Civil Code.

Arbitrage by the party, as well as arbitrage by the third party, would therefore seem to be admissible, even if left to mere arbitrariness. However, since in the case of party arbitrage additional factors come into play with respect to the case where it is an outsider who must supplement the contractual content, the limit of mere arbitrability, governed by the law on conditions and narrowly interpreted by case law, applies.

Naturally, if the determination is entrusted to the mere arbitrariness of one of the parties, the *ex post* judicial review provided for by art. 1349 of the Italian Civil Code remains possible, which allows the arbitrator's decision to be censured if the latter's wilfulness emerges.

Accepting the reconstruction just proposed, it therefore appears that Russian roulette clause, as also affirmed by the Court of Cassation in the decision from which it took its cue, overcomes any objection of legitimacy, at least in ordinary situations.

The ascertainment of legitimacy of the clause in ordinary cases does not exclude the possibility that there may be cases in which the exercise of the clause actually results in an abuse of right (about abuse of right in the Italian legal system, see above all Rescigno 1965, 205 ff.).

Moreover, the very notion of abuse of rights presupposes the exercise of a right that would be per se lawful, but in a manner that is misleading with respect to the purposes for which it was intended.

In the present case, if the Russian roulette clause is to be considered worthy of protection insofar as it is useful to avoid the dissolution of the company in deadlock situations that cannot otherwise be resolved, in practice there may be cases in which the clause is used to force the other partner to resign from the company with unfavourable terms.

Consider, for example, the case where a large imbalance of economic strength arises between the two partners during the life of the company, such that one of them is in such difficulty that he is totally unable to purchase the other's shares, and the financially stronger partner wilfully creates an impasse by not cooperating with the other party and avoiding any compromise with respect to decisions concerning the management of the company. The 'strong' partner could at this point activate the Russian roulette clause and propose the purchase of the other's shares at a price well below their value, knowing that the latter would not in fact have the economic possibility of reversing the proposal and purchasing the other's shares.

In such a case, it is clear that the mechanism envisaged by the clause,

which makes it worthy of protection, would be altered: in effect, the 'weak' shareholder would only be the holder on paper of a potestative right to choose between the purchase and sale of the shares, but in reality, he would find himself in a position of mere subjection to the conditions dictated by the other shareholder.

It seems appropriate to consider that in such cases the economically disadvantaged shareholder should be provided with remedies to address the described abuse.

An effective means would appear to be the granting of the *exceptio doli generalis*, which – if raised by the weaker partner, who is in a position of subjection – would make it possible to paralyse the exercise of the clause by the prevaricating partner (with regard to *exceptio doli generalis* see Portale 2007, 155 ff.; Ranieri 1991, 311 ff.; dalla Massara 2023, 2917 ff.).

However, someone in the doctrine limits the use of this instrument only to cases in which not only is there an exploitation of an unbalanced situation of the other partner, but it is also found that the intention to harm the latter is the only purpose that prompted the offeror to activate the clause.

On closer inspection, this limitation seems to excessively reduce the range of action of this remedy, which has instead become widespread in its application in case law (as well as in doctrinal elaboration) regardless of an investigation verifying the exclusivity of the so-called *animus nocendi*; what has instead been given greater emphasis is the violation of the obligations of fairness and good faith, which are also found in the mere exploitation of the detrimental position of the other party (about violation of good faith, see Piraino 2015, 431 ff.).

In addition to the *exceptio doli generalis*, one could hypothesise the invalidity of the negative resolution giving rise to the deadlock situation. This remedy is in fact recognised by jurisprudence in cases where the decision of the shareholders' meeting – although formally legitimate – conflicts with the obligation of good faith and has led to a deviation from the pursuit of the company's interest.

Jurisprudence has addressed this issue in company law, in particular with regard to the species of abuse of rights represented by the vice of abuse of majority, which has been taken into consideration for the annulment of resolutions on several occasions: when the decision voted by the majority shareholders finds no justification in the company's interest, or when it has the sole fraudulent purpose of damaging the interests of the other shareholders, or is preordained to unjustifiably benefit the majority shareholders to the detriment of the minority shareholders (the judgment that paved the way for the abuse of majority is Cass., 26th October 1995, No. 11151).

The possible configurability of abuse of rights in pathological cases of use

of the Russian roulette clause is also recognised by German jurisprudence in a judgment of the Nuremberg Court of Appeal, which nevertheless reaffirms the legitimacy of the clause in ordinary cases. On this point, the German courts consider it more appropriate to carry out a subsequent check on the possible abusive exercise of the clause, rather than considering it null and void at all, since under ordinary conditions it does not appear to conflict with mandatory rules (OLG Nürnberg 20th December 2013, No. 12 U 49/13. In the German legal literature, see also Valdini, Koch 2016, 179 ff.; Schroeder, Welpot 2014, 615).

4. The Russian roulette clause between *voluntas* and arbitrariness

As a result of the foregoing, the subject of the Russian roulette clause has proven to be fertile ground for wide-ranging reflections on a number of topics such as the mere potestativity of the condition and the different degrees of arbitrariness to which the determination of the subject matter of the contract may be referred.

In particular, a conjoint reading of the rules on purely potestative conditions and arbitrability has made it possible to identify a range of cases in which the will of the party called upon to determine a contractual element is not bound by objective parameters, but neither is it unbound by any criterion. It is precisely in this space, which in German law is qualified as the sphere of *freies Ermessen*, that the agreement under consideration appears to be located.

Indeed, the peculiar mechanism envisaged by the clause, which, as a counterbalance to the right of a party to determine the price, attributes to the counterparty the potestative right to choose whether to sell or to purchase at that price, allows the Russian roulette clause to be placed within the set of cases that attribute to a party a level of arbitrariness that is intermediate between equitable discretion and mere arbitrariness: a free discretion, which allows the party charged with making the determination to avail itself not only of objective parameters, but also of its own subjective interests, while not leaving the choice to the mere capriciousness of the party, since an essential element of the economic transaction acts as a corrective and limit to the arbitrariness: the counterparty's potestative right.

This configuration also makes it possible to exclude the mere potestativity of the offeror's right to determine the price. Indeed, in his evaluations, the latter is not disengaged from any criteria. In fact, his judgment is necessarily guided by the characteristics of the economic transaction: the balancing of the weights and counterweights in the rights of the two parties provided for by the

Russian roulette clause guarantees the balance between the parties involved, at least under physiological conditions.

At the end of the day, therefore, the argumentative path of the Supreme Court seems worthy of support, which removes any doubts as to the admissibility of the agreement, thus granting this 'alien' clause full citizenship in Italian legal system, thus placing itself in line with the previous decisions of several courts in other European states, including Germany, Austria and France.

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