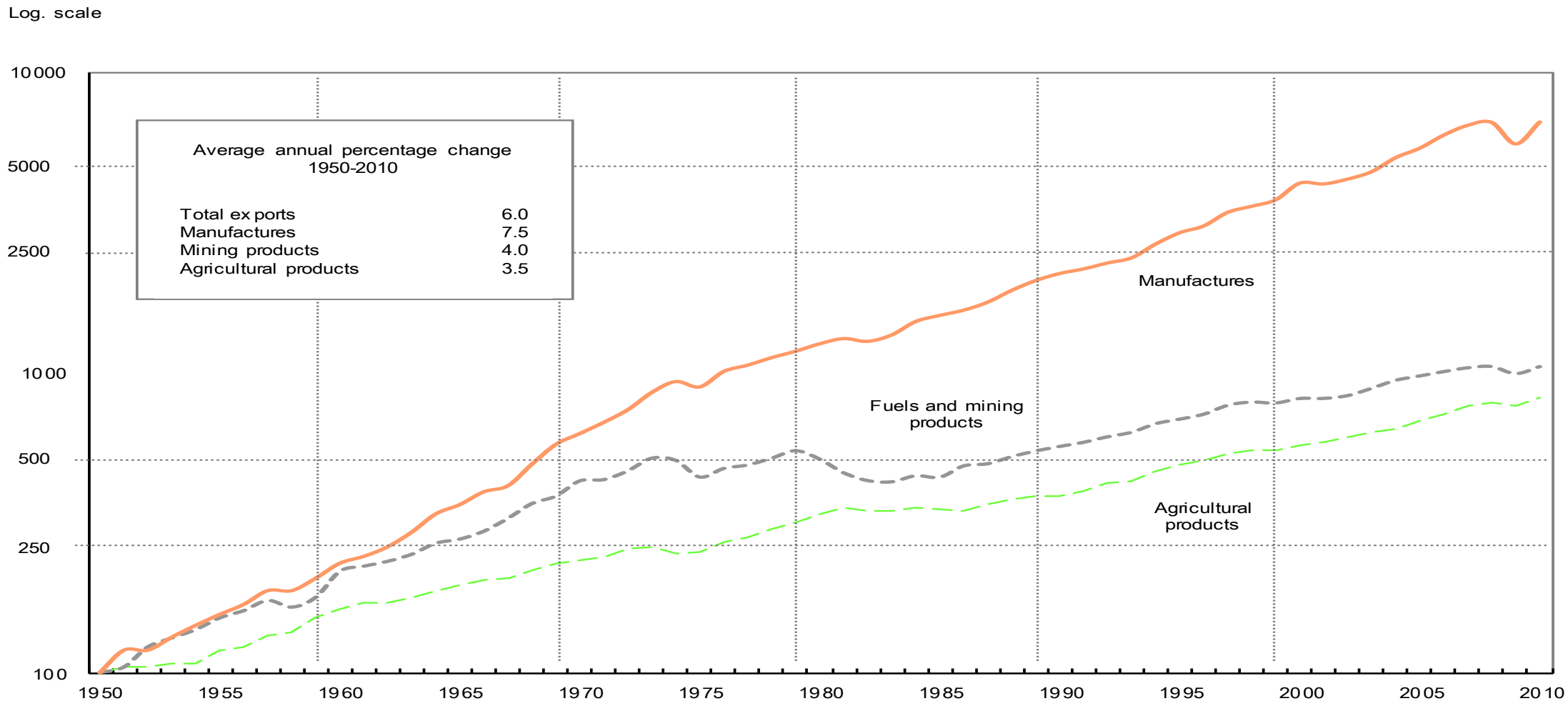
Vestimenta pactorum and contracts…

Juridical "Systematics" and Socio-economic Needs

World merchandise trade volume by major product group, 1950-2010

(Volume indices, 1950=100)



How may contracts did you stipulate so far today?

Sources of International Law: An Introduction by Professor Christopher Greenwood (https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf)

Where does international law come from and how is it made ?

These are more difficult questions than one might expect and require considerable care. In particular, **it is dangerous to try to transfer ideas from national legal systems to** the very different context of **international law**.

There is no "Code of International Law". International law has no Parliament and nothing that can really be described as legislation. While there is an **International Court of Justice** and a range of specialised international courts and tribunals, **their jurisdiction is critically dependent upon the consent of States and they lack** what can properly be described as a **compulsory jurisdiction** of the kind possessed by national courts.

Sources of International Law: An Introduction by Professor Christopher Greenwood (https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf)

The result is that **international law is made largely on a decentralised basis by the actions of the 192 States** which make up the international community. **The Statute of the ICJ, Art. 38** identifies five sources:

(a) Treaties between States; [several **taxonomies** can be used such as bilateral/multilateral]

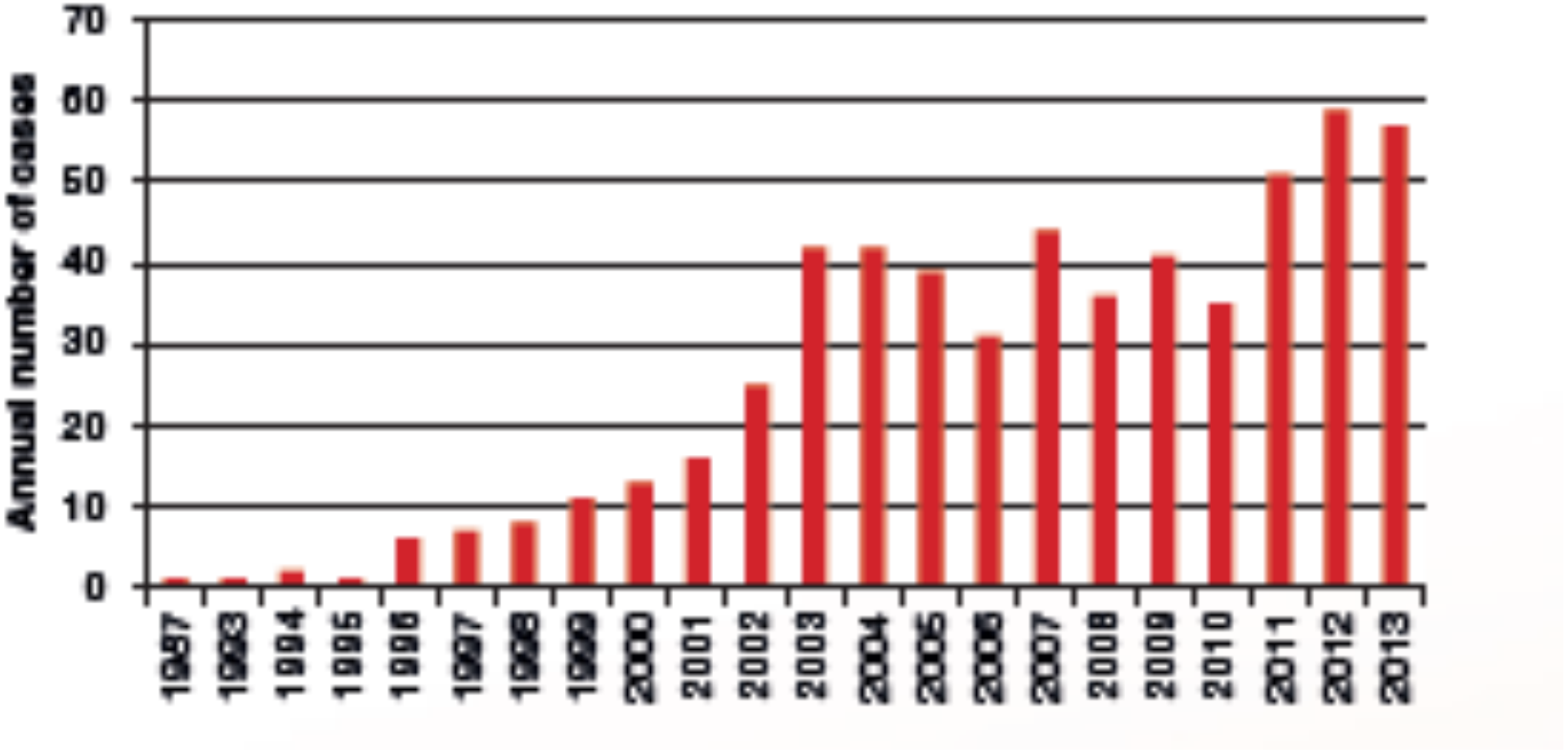
(b) Customary international law derived from the practice of States; [the rule n. 1 here]

(c) General principles of law recognized by civilised nations; and, **as subsidiary means** for the determination of rules of international law:

(d) Judicial decisions and the **writings of "the most highly qualified publicists"**.

This list is no longer thought to be complete but it provides a useful starting point.

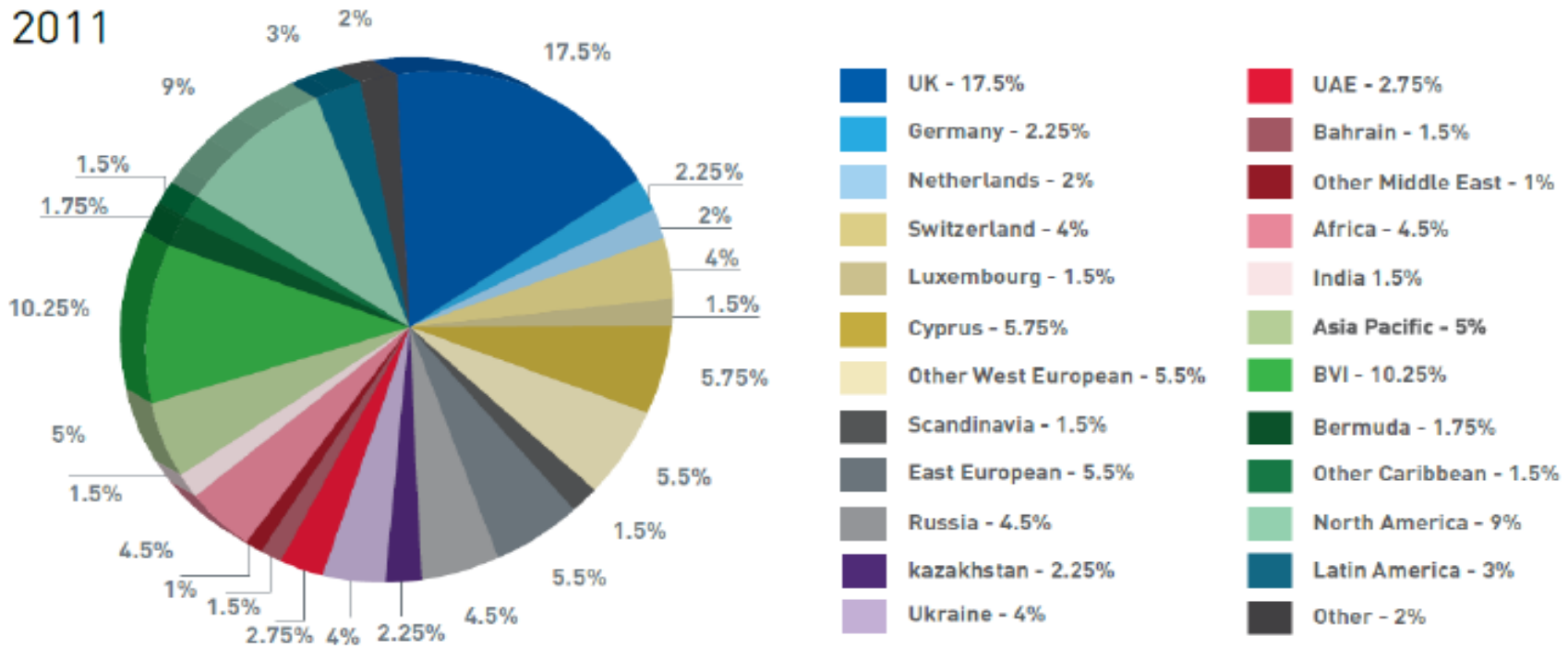
Figure 1. Known ISDS cases, annual (1987-2013)



NUMBER OF INTERNATIONAL CASES ADMINISTERED BY ARBITRAL INSTITUTIONS

Arbitral Institution	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
AAA-ICDR (USA)	510	649	672	646	614	580	586	621	703	836
ICC	541	566	593	580	561	521	593	599	663	817
CIETAC (China)	543	562	468	422	461	427	442	429	548	560
LCIA (UK)	87	71	88	104	87	118	133	137	213	272
SIAC	37	39	34	23	39	29	47	55	71	114
BAC (China)	11	20	19	33	30	53	53	37	59	72
JCAA (Japan)	8	16	8	14	15	9	11	15	12	17
SCC (Sweden)	66	68	50	77	45	53	64	81	74	88

Origin of the parties - official statistics of the LCIA



Total disputes referred for arbitration in 2011 - 224

ICC ARBITRATION

2011

- 796 Requests for Arbitration were filed with the ICC Court ;
- Those Requests concerned **2,293 parties from 139 countries and independent territories**;
- In 10,2% of cases at least one of the parties was a State or parastatal entity;
- The **place of arbitration was located in 63 countries** throughout the world;
- **Arbitrators of 78 nationalities** were appointed or confirmed under the ICC Rules;
- The amount in dispute was under one million US dollars in 22.7% of new cases;
- 508 awards were rendered.

2010

793 Requests for Arbitration were filed with the ICC Court

Those Requests concerned **2,145 parties from 140 countries and independent territories**

In 10% of cases at least one of the parties was a State or parastatal entity

The **place of arbitration was located in 53 countries** throughout the world

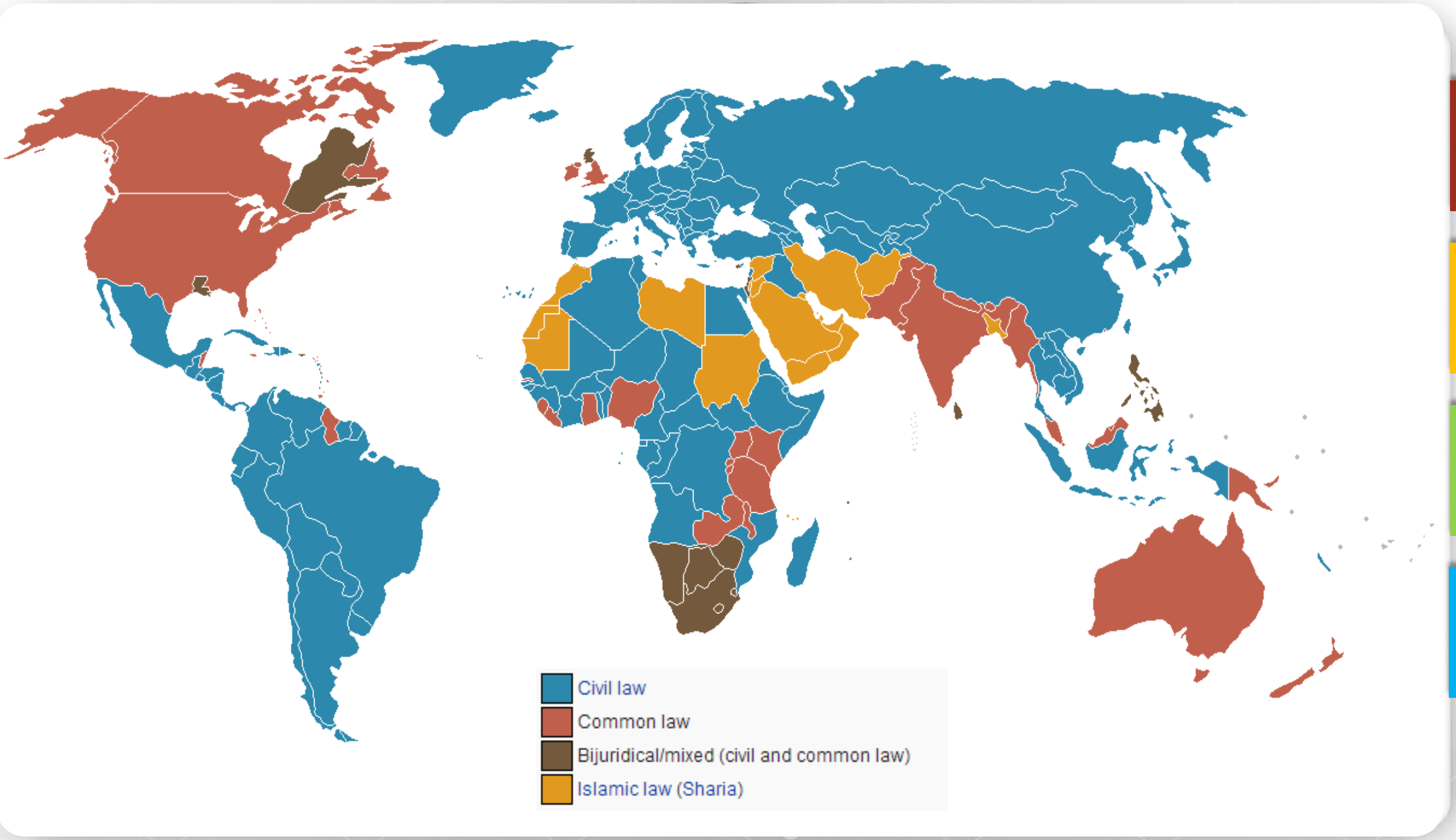
Arbitrators of 73 nationalities were appointed or confirmed under ICC Rules

The amount in dispute was under one million US dollars in 24.1% of new cases

479 awards were rendered

Applicable Law in ICC Arbitration Clauses

	2005	2006	2007	2008	2009
National Law	79,30%	82,70%	79,30%	84,00%	86,80%
Other Rules	1,70%	2,00%	0,50%	3,00%	1,20%
Applicable Law Not Specified	19,00%	15,30%	20,20%	13,20%	12,00%


Civil law
Common law
Bijuridical/mixed (civil and common law)
Islamic law (Sharia)

Among the most significant differences:

Stare Decisis

VS

System

Parol Evidence Rule

(*inclusio unius est exclusio alterius* - assumption of exhaustiveness)

VS

More Relevance to what Extrinsic to the Document itself

(civilian judge will not refrain from extending, by analogy or otherwise, the scope of the written contract)

Is it just a matter of language?

Sacco already in 1991 was warning that:

Sometimes a choice of law clause refers to a legal system with a language that does not correspond to the one in which the contract is written.

Or an arbitration clause may permit an arbitrator to be chosen from a third country, and the **same word** may therefore have **three different meanings for three arbitrators**.

However, the first step to move is to give an answer to a very simple – apparently too simple – question:

WHAT IS A CONTRACT?

Article 464 A contract refers to an agreement between the parties to civil legal relations for the establishment, modification, and termination of civil legal relations.

第四百六十四条　合同是民事主体之间设立、变更、终止民事法律关系的协议。

Agreements concerning personal relations such as marriage, adoption, and guardianship shall be governed by the provisions of laws on the relevant personal relations; or absent such provisions, this Book may apply mutatis mutandis according to their nature.

婚姻、收养、监护等有关身份关系的协议，适用有关该身份关系的法律规定；没有规定的，可以根据其性质参照适用本编规定。

Art. 1321.
Nozione.

Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale.

… Synecdoche …

(Are all the agreements contracts?)

I sette colli di Roma


OCEANO ATLANTICO
GALLI
ITALIA
MAR NERO
MACEDONIA
Pydna
EPIRUS
Cynoscephalae
ASIA
Magnesia
Massilia
Roma
Capua
CORSICA
SARDEGNA
HISPANIA
Saguntum
Cartagena
Gades
SICILIA
CRETA
Utica
Carthago
Zama
MAR MEDITERRANEO
NUMIDIA
MAURETANIA
CIRENAICA
LEGENDA
Repubblica romana dal 201 a.C.
Aggiunte
ESPANSIONE DI ROMA
attorno al 2° secolo a.C.
N
SCALA IN MILIA
0 100 200 300 400 500 600


HIBERNIA
BRITANNIA
Oceanus Germanicus
Oceanus Ibericus
Mare Suebicum
Popoli baltici
Slavi
OCEANUS ATLANTICUS
Mare Britannicum
Mare Cantabricum
GERMANIA
Venedae
Sarmatia
BELGICA
Lugdunensis
GALLIA
RAETIA
NORICUM
PANNONIA
DACIA
Alani
AQUITANIA
Lusitania
HISPANIA
Baetica
Mare Ligusticum
ITALIA
DALMATIA
MOESIA
PONTUS EUXINUS
Caucasus M.
Iberia
ARMENIA
MAEDIA
THRACIA
MACEDONIA
GALATIA
CAPPADOCIA
REGNUM PARTHORUM
MESOPOTAMIA
ASSYRIA
SYRIA
PALMYRENE
ARABIA
Mare Hadriaticum
Mare Tyrrhenicum
Mare Balearicum
Mare Iberum
MARE INTERNUM NOSTRUM
Mare Siculum
Mare Libycum
Sicilia
CRETA
ACHAIA
Cyprus
MAURETANIA
NUMIDIA
Gaetuli
AFRICA
PROCONSOLARIS
CYRENAICA
AEGYPTUS
Garamantes
NABATAEI
Arabia
Sinus Arabicus
Ottaviano Augusto: 31 a.C. - 14 d.C.
Territori appartenenti a Roma prima del 31 a.C.
Annessioni e conquista di Ottaviano:
dal 31 al 19 a.C.
dal 19 al 9 a.C.
dal 9 a.C. al 6 d.C.
Regni clienti di Roma con Ottaviano:
Fortezze legionarie: nel 6 d.C.


117 AD
Caledonia
Hiberni
Eburacum
Deva
Britannia
Camulodunum
Londinium
Novionagus
Colonia Agrippina
Frisii
Chauci
Langobardi
Cherusci
Chamavi
Suebi
Tencteri
Chatti
Burgundiones
Lugii
Hermunduri
Buri
Mogontiacum
Augusta Treverorum
Argentoratum
Marcomanni
Quadi
Cotini
Costoboci
Gaul
Vesontio
Augusta Raurica
Raetia
Noricum
Pannonia
Jazyges
Carpi
Bastarnae
Dacia
Roxolani
Aquitania
Lugdunum
Dalmatia
Moesia
Italia
Rome
Neapolis
Tarraconensis
Hispania
Lusitania
Baetica
Tingis
Carthage
Sicilia
Mauretania
Numidia
Africa
Mauri
Gaetuli
Musulamii
Garamantes
Macedonia
Thessalonica
Epirus
Achaia
Athens
Creta
Thrace
Byzantium
Bithynia
Pontus
Cappadocia
Galatia
Asia
Ephesus
Cilicia
Pamphylia
Lycia
Antioch
Cyprus
Cyrene
Lepcis Magna
Tripolitania
Cyrenaica
Paraetonium
Alexandria
Maeotae
Aorsi
Siraci
Alani
Bosporan Kingdom
Sarigae
Abasgi
Apsilae
Colchis
Laxi
Iberia
Albania
Armenia
Gordyene
Adiabene
Osrhoene
Assyria
Parthian Empire
Mesopotamia
Tripolis
Emesa
Palmyra
Ctesiphon
Seleucia
Babylon
Babylonia
Susa
Charax
Sidon
Tyrus
Bostra
Judaea
Jerusalem
Petra
Aila
Leuce Come
Hegra
Hegra Come
Myus Hormus
Memphis
Oxyrhynchus
Ammonium
Ægyptus
Ptolemais
Thebae
Syene
Berenice
Hierasycaminus
Nasamones

IMPERATOR CAESAR FLAVIUS IUSTINIANUS ALAMANNICUS GOTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS PIUS FELIX INCLITUS VICTOR AC TRIUMPHATOR SEMPER AUGUSTUS

CUPIDAE LEGUM IUVENTUTI

Imperatoriam maiestatem non solum armis decoratam, sed **etiam legibus oportet esse armatam**, ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostilibus proeliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam iuris religiosissimua quam victis hostibus triumphator.

The Imperial Majesty **cannot be only honored by arms, but it must be also armed with laws**, so that government may be justly administered in time of both war and peace, and the Roman Sovereign not only may emerge victorious from battle with the enemy, but also by legitimate measures may defeat the evil designs of wicked men and appear as strict in the administration of justice as triumphant over conquered foes.

Stefano Porcelli

Emperor Justinian laid down as a first statement with regard to the teaching of law students that the **magnificence of Rome was…**

NOT JUST RELATED TO THE WAR BUT with the same relevance ALSO TO THE LAW

The law was systematically arranged through the work of the jurists (the opinions of some of them were sources of law!) that created a **LOGIC BASED SYSTEM in order to ACHIEVE JUSTICE which represents the AIM OF THE LAW**

D. 1.2.41 (*POMPONIUS libro singulari enchiridii*) *Post hos QUINTUS MUCIUS Publii filius pontifex maximus ius civile primus* ***constituit generatim*** *in libros decem et octo redigendo*.

After these came Quintus Mucius, the son of Publius, the Pontifex Maximus, who first made up the civil law **by arranging it <in a logical way> on the basis of the *genera* <and *species*>** in eighteen books

(διαλεκτικὴ τέχνη and in particular **διαίρεσις)**

- The aim of the law is justice – **D. 1.1.1 pr.** (*Ulpianus libro primo institutionum*)

Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. **Est autem a iustitia appellatum**: nam, ut eleganter Celsus definit, **ius est ars boni et aequi.**

Who is about to deal with law should know, in the first place, from where the name "Law" <(*ius*)> is derived. **The law obtains its name from Justice <(*iustitia*)>**; in fact, as Celsus elegantly states, **law is the art of what is good and what is equitable.**

Cardilli

ius* - *iustitia*: no *ius* without *iustitia*, no *iustitia* without *ius

Gallo:

***Ars* = human activity**

***Bonum* = best possible solution**

***Aequum* = treating identical things in the same way, different things in different ways (treating different things in the same way will therefore provide injustice!)**


EQUALITY


EQUITY

The person is at the core of the system and therefore it is **structured in a UNIVERSALISTIC perspective** since it was for ALL THE PERSON without differentiations among them - no space/time limits: research of principles and rules to achieve justice for human beings:

We read in D.1,5,2: (Tit 5 "de statu hominum") that

hominum causa omne ius constitutum sit

The **universalistic perspective was pushing towards the elaboration of principles and versatile rules** which allowed the law to be in condition to keep pace with the expansion of Rome by being in condition to put in place an **INCLUSIVE** (not exclusive!) approach

Methodological remark:

Relationship between

«***istituto e funzione***»

制度与它的功能之间的关系

It is necessary to devote attention also to the social – political – economic aspects

The *damnas esto*, *iudicatus*, *nectere*, *oportere* and the birth of the obligations (Cardilli)

- The ***oportere*** was expressing a legal-religious «**duty to do something**» and it has been adopted by the *pontifices* as a mean to provide a «legal form» to assure the enforcement of commitments (descending from different reasons/*causae*/*原因*) which could not have been handled through an immediate legal effect, but which should **have been performed in the future**. A core element was the ***fides*** between the two paterfamilias.

- **Personal liability schemes:**

Nexum **(personal liability already in place)**

Iudicatus **(short time before personal liability in place - subjection)**

Damnas esto **(short time before personal liability in place - subjection)**

The *Damnatio* was expressing a **personal liability** arising from the fact that a certain *paterfamilias* was **condemned** (the origin of the word is this one) by the community (the city and its citizens) to the **possible unilateral aggression** by another *paterfamilias* **without the need of a judgment**. Its **origins** may be related to when a **paterfamilias was caught red-handed while in the act of doing something illicit**. The *damnas paterfamilias* could however **redeem himself**. It evolved into a **scheme by which a certain period of time was added to perform something before becoming *damnatus*** (legatus per damnationem).

From XII tables on, a *damnatus* and a *iudicatus* could redeem themselves within 30 days

A *nexus* was already under a liability (restraint) but if he would not perform the restitution on time the community would consider it *damnatus*

In the III-II century b.C.

The ***oportere*** **scheme became the model** for legal situations featuring a legal outcome where a *paterfamilias* who was **'bound' to give something continued being autonomous until when he was due to perform** and in case of **non-performance the creditor still needed to obtain a favourable judgment** for the enforcement of his rights

In the formulae in ius conceptae of the actiones in personam the oportere was employed with regard to both, 'contracts' and 'torts'

Quintus Mucius Scaevola

The legal schemes protected with *actiones in personam* and arranged on around the category of *oportere* had been related to the word *obligatio* as metaphorically intepreted

Obligatio* = *ob* + *ligare

***Ob* = towards**

***Ligare* = to tie, to tie up, to bind**

Edictum perpetuum (129 a. D.) the *obligatio* was **not yet used as a foundation of the systematic architecture**

Gaius *Institutiones* III, 88: «*Nunc transeamus ad obligationes, quarum summa divisio in duas species diducitur:* ***omnis enim obligatio vel ex contractu nascitur vel ex delicto***»

Gaius *Res cottidianae sive Aureorum* (liber II) in D. 44.7.1 pr. «***Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris***»

Iustiniani *Institutiones* III, 13 pr. «*Nunc transeamus ad obligationes.* ***Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei****, secundum nostrae civitatis iura*»

Iustiniani *Institutiones* III, 13, 2 «*Sequens divisio in quattuor species deducitur:* ***aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio*** […]»

《中华人民共和国民法总则》

第一百一十八条

民事主体依法享有债权。

债权是因合同、侵权行为、无因管理、不当得利以及法律的其他规定，权利人请求特定义务人为或者不为一定行为的权利。

The civil law subjects enjoy obligations in accordance with the law

An obligation is the right, arising from contracts, torts, *negotiorum gestio*, unjust enrichment, and other provisions of laws, of the creditor to request that a specific debtor does perform or not perform a certain conduct.

Difference between ***Schuld*** and ***Haftung***:

the **liability is not the obligation itself but it is a consequence of non performing an obligation** – as we just saw the obligation developed as a tool to ensure someone would do something in the future by allowing him to stay free from liability until when the performance is due

- the **liability arises in case the obligation from the contract, to compensate damages etc. is not performed…**

- **AND AFTER SUCH A NON PERFORMANCE IS 'DECLARED IN A JUDGEMENT'!**

«Contractus» – The Term

- Rare until Pomponius (II Century) and Gaius
- First developed from the neuter «*contractum*» (*quid contractum* – something which has been contracted), for instance *negotium contractum*
- *cum-trahere* = to bring together / tie – tighten – gather etc.
- Bonfante: *contractum* can be considered as a «*vincolo*» (chain – tie - bond); as the result of the action of *contrahere* (tiying).
- *Ob-ligare* – *ob-ligatio*: to tie / to bind up – something tied («*vincolo*») / common semantic ground with *cum-trahere* (?!)
- Contrahi (quid-what?!) obligationem (how?) **re, verbis, litteris, consensu**

- Possible path of the development (during the centuries):

A. (*quid* -) *negotium contrahere* / (*quid* -) *negotium contractum* (still past participle)

B. *Contractum* (from past particple to neuter adjective) and then *contractus* (the male noun: category)

C. *Contractus* = category to group the (specific kind of) ***obligationes*** **which were** ***contractae re, verbis, litteris, consensu*** as opposed to those obligations descending from torts (which were not the result of a *contrahere*, but still representing cases in which an *oportere* to do a certain performance was existing among persons)

I sette colli di Roma

THE RITUALISTIC PERIOD

At this time the most "versatile" form to give rise to obligations was the ***stipulatio***

The way the *stipulatio* was working: one of the parties who was having interest to create an obligation was soliciting the promise of the other party who was in a free way accepting the commitment the other party was asking to assume.

As remarked by scholars (Brutti, Talamanca etc.): **the words themselves were creating the legal effect** and were arranged in a strict formal order

Within this scheme the parties were allowed to insert many different kind of transactions or different promises as a content

Grosso was talking about "**causalità formale**" – it is not the "function or content" of a certain juridical scheme which is typical, but it is the 'ritual', the form to be typical

- from a system based on a "***causalità formale***" (the abiding to **formalities** was at the basis of the possibility of the rise of an obligation)
- to a system based on a "***causalità sostanziale***" (the possibility for an obligation – and we are in particular talking about those deriving from transactions - to receive legal protection was related to the fact that it had a certain 'content' related to a certain '**standardized objective function**')

For instance, the fact that A *datio* started having relevance in order to give a foundation for an *oportere* as recognized by the *Lex Silia*, is showing us that a new relevance of the *causa* was not anymore based on the form, but it started shifting towards the "**type**" (**and the related 'standardized contents - functions'**)

In the above-mentioned case, we are talking about a **transaction scheme based on giving something in order to receive something back** made possible by a contractual application of the *condictio*

It is still Gaius telling us (Institutiones IV, 30) that:

Sed istae omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum, qui tunc iura condiderunt, eo res perducta est, ut vel qui minimum errasset, litem perderet; itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones, effectumque est, ut per concepta verba, id est per formulas, litigaremus.

But all these *legis actiones* gradually became hated. The subtlety of the ancient legal authorities went lost and the result was that anyone who committed the slightest error lost his case. Hence, by the *Lex Aebutia* and the two *Leges Juliae*, these *legis actiones* were abolished, and another form was substituted for them; so that at present in litigation we make use of terms created for this purpose, that is to say, *formulas*.

Gai IV, 11:

Actiones, quas in usu veteres habuerunt, legis actiones appellabantur vel ideo, quod legibus proditae erant, quippe tunc edicta praetoris, quibus con plures actiones introductae sunt, nondum in usu habebantur, vel ideo, quia ipsarum legum verbis accommodatae erant et ideo immutabiles proinde atque leges obseruabantur. **Unde eum, qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, quia debuisset arbores nominare**, eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

These actions which the ancients employed were so designated, either for the reason that they were provided by the law — although at that time the edicts of the Praetor, by means of which many new actions were introduced, had not come into use — or, because they followed the words of the law, **and therefore, like the law itself, were observed without any alteration**. Hence, it was decided that, a person who brought an action against another for cutting his vines, and **in the pleadings called them "vines", should lose his case, as he ought to have called them "trees"**, because **the Law of the Twelve Tables, under which the action for cutting vines was brought, speaks in general terms of the cutting of trees**.

The *ius gentium* contracts and the *oportere ex fide bona*

Gaius Institutiones I. 1: *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur: Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis;* ***quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur****. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur* [...].

All people who are ruled by laws and customs partly make use of their own laws, and partly have recourse to the laws which are common to all men; for what every people establishes as its law is its own and is called the *ius civile* <(the law of the citizens)>, just as the law of their own city; **and what natural reason establishes among all men and is observed by all peoples alike, is called the *ius gentium* <(the law of peoples)> as being the laws which all nations employ.** Therefore, the Roman people partly make use of their own laws, and partly avail themselves of the laws common to all men […].

The ***ius gentium*** was representing the rules and legal structures felt like existing among all the people, it was therefore possible to be employed to the relationships between Romans, Romans and foreigners and between foreigners among themselves.

These rules and legal structures of the *ius gentium* were not put in force *legibus*, by the means of statues, but *moribus* **through the contribution of the jurists by taking into consideration not only the 'will' of the Romans but also the 'will' of the foreigners**, from all the *gentes*

… and by **employing the good faith as a "guiding principle" given its suitability in operating under circumstances of lack of a government of the economy and where it is necessary to find criteria which allow to keep a contract within the *bono et aequo* (justice) just by relying on the contract itself** even if in the transactions were involved people speaking different languages, having different cultures etc.

Thanks to that what is defined as an osmosis between the praxis of the *praetor urbanus* (handling cases among Roman citizens) and *peregrinus* (handling cases among foreigners or Romans and foreigners), **the *oportere* which represented the obligation became *ex fide bona***

Cicero, De officiis, III, 17, 70

Nam quanti verba illa: UTI NE PROPTER TE FIDEMVE TUAM CAPTUS FRAUDATUSVE SIM! quam illa aurea: UT INTER BONOS BENE AGIER OPORTET ET SINE FRAUDATIONE! Sed, qui sint "boni" et quid sit "bene agi", magna quaestio est. Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur EX FIDE BONA, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret.

How relevant are the words: "THAT I HAVE BEEN DECEIVED OR DEFRAUDED THROUGH YOU OR MY FAITH IN YOU"! How precious are these "AS BETWEEN HONEST PEOPLE THERE OUGHT TO BE HONEST DEALING, AND NO DECEPTION"! But who are "honest people," and what does it mean "to behave honestly" is a really significant question. It was Quintus Mucius Scaevola, the *pontifex maximus*, to state that an enormous power pertains to the *arbitria* in which is added "AS REQUIRED BY THE GOOD FAITH". He held, in fact, that the notion of "good faith" is reaching very far and it is employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting, < by simplifying, in all the relationships > in which is contained the fellowship of life; in these, he said, an eminent judge is required to decide the extent of each individual is obliged for to the other, especially when as it happens in the most of cases counter-claims are admissible.

Cardilli

The context: philosophical discussion on the relationship between what is “useful” and what is “honest”

Therefore, the *magna questio*: **who are "honest people," and what does it mean "to behave honestly”?**

Here comes the link between the philosophical discussion, the older *formulae* quoted at the beginning of the Cicero`s fragment and the legal conceptualization ascribed to Quintus Mucius

The “enormous power” remarked by Cicero is a **“power” which generates meanings, which provides models of behavior**, which allows to bridge the abstract notions recalled by the *concepta verba* (the standardized terms) of the *formulae* with the case at the hand

The **common element** in these *formulae* was the **latent reference to the concept of the good faith** which (*manare latissime*) **"is reaching very far"**:

Either:

- in the older *formulae* which Cicero mentioned at the beginning (where the expression "*ex fide bona* is not appearing"), or
- in those like the one for the sale where such an expression is instead appearing, or
- in the others, where in the most of cases counter-claims are admitted (*plerisque essent iudicia contraria*)

Quintus Mucius, the jurist whose systematic skills as we saw were still recalled centuries after for instance by Pomponius (II century), pointed out that:

The **concept of good faith has the tendency to pervade all the relationship where the "fellowship of life" (*societas vitae*)** among human beings is revealing… Including many others beside those mentioned in the text

The theoretical foundation for further changes also on the side of the procedural law (the *agere praescriptis verbis*) had been built!

Who was in charge of bridging the abstract concept of the good faith and a real case?

The **eminent judge** (*magnus iudex*) when connecting the facts regarding the case to the parameters which the *praetor* gave in the *formula* was then evaluating the behavior of the parties in the light of the concept of *fide bona*, *vir bonus*, *bene agi* etc.

These concepts were not possible to be formulated in advance but the judge under the guidance of the jurists should have 'materialized' them, eventually even by intervening in and integrating the content of what the parties agreed on

Cicero, de Officiis III, 16, 65-67

[65] Ac de iure quidem praediorum sanctum apud nos est iure civili, ut in iis vendendis vitia dicerentur, quae nota essent venditori. **Nam, cum ex duodecim tabulis satis esset ea praestari, quae essent lingua nuncupata, quae qui infitiatus esset, dupli poenam subiret, a iuris consultis etiam reticentiae poena est constituta**; quicquid enim esset in praedio vitii, id statuerunt, si venditor sciret, nisi nominatim dictum esset, praestari oportere.

Cicero, de Officiis III, 16, 65-67

[65] In the laws pertaining to the sale of real property it is stipulated in our civil law that when a transfer of any real estate is made, all its defects shall be declared as far as they are known to the vendor. **According to the laws of the Twelve Tables it used to be sufficient that such faults as had been expressly declared should be made good and that for any flaws which the vendor expressly denied, when questioned, he should be assessed double damages**. **A like penalty for failure to make such declaration also has now been secured by our jurisconsults**: they have decided that any defect in a piece of real estate, if known to the vendor but not expressly stated, must be made good by him.

[66]

Ut, **cum in arce augurium augures acturi essent iussissentque Ti. Claudium Centumalum**, qui aedes in Caelio monte habebat, **demoliri ea, quorum altitudo officeret auspiciis**, Claudius proscripsit **insulam vendidit**, **emit P. Calpurnius Lanarius. Huic ab auguribus illud idem denuntiatum est**. Itaque Calpurnius cum demolitus esset **cognossetque Claudium aedes postea proscripsisse**, quam esset ab auguribus demoliri iussus, **arbitrum ilium adegit, "QUICQUID SIBI DARE FACERE OPORTERET EX FIDE BONA. M."**

[66]

For example, **the augurs were proposing to take observations from the citadel and they ordered Tiberius Claudius Centumalus,** who owned a house upon the Caelian Hill, **to pull down such parts of the building as obstructed the augurs' view by reason of their height**. Claudius at once **advertised his block for sale, and Publius Calpurnius Lanarius bought it.** The same notice was served also upon him. And so, when Calpurnius had pulled down those parts of the building and **discovered that Claudius had advertised it for sale only after the augurs had ordered them to be pulled down**, he summoned the former owner **before a court to decide "what the owner was under obligation 'in good faith ' to give or to do to to him."**

Cato sententiam dixit, huius nostri Catonis pater (ut enim ceteri ex patribus, sic hic, qui illud lumen progenuit, ex filio est nominandus) — is igitur iudex ita pronuntiavit: **“cum in vendendo rem eam scisset et non pronuntiasset, emptori damnum praestari oportere.”**

[67]

Ergo ad fidem bonam statuit pertinere notum esse emptori vitium, quod nosset venditor…

The verdict was pronounced by Marcus Cato, the father of our Cato (for as other men receive a distinguishing name from their fathers, so he who bestowed upon the world so bright a luminary must have his distinguishing name from his son); he, as I was saying, was presiding judge and pronounced the verdict that **“since the augurs' mandate was known to the vendor at the time of making the transfer and since he had not made it known, he was bound to make good the purchaser's loss.”**

[67]

With this verdict he established the principle that it was essential to the good faith that any defect known to the vendor must be made known to the purchaser…

… **Then, later on, it became a default rule related to the sale (typical) contract etc**…

The Dongfeng truck case

TO SUMMARIZE:

The economy scale was further increasing and becoming even more sophisticated; the 'old remedies' were not suitable anymore – in the ***ius gentium*** were 'required' other models which were suitable for all the *gentes*, and the jurists had to find a way to 'identify' them

The *legis actiones* had been gradually took over by a less ritualized procedure

The formality and 'community control' based legal schemes were not suitable and the attention started shifting from the form to the contents which were anyways '**typical contents**' – the *causa* on the basis of which to protect a transaction could have been the fact that it was a sale, a lease, etc.

It was also necessary to find common (and therefore versatile with regard to the different cultures, languages etc.) parameters in order to make sure that the law was still aiming at justice: the **good faith**, 'immanent' in **all** the **relationships where the fellowship of life is revealing** could serve this scope

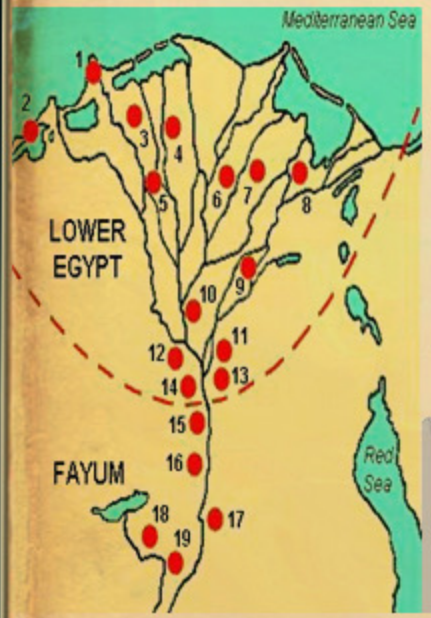
- In order to identify in the single case and given the relative circumstances, what was good, honest, etc.
- From the procedural point of view because it was possible to be matched with the 'newly introduced' *formulae* which were regarding the *oportere* based – multi-lateral - legal schemes (the obligations)

Tebtunis Papyri n. 105

(Sub) Lease of land contract in Kerkeosiris (**Fayum - Egypt**)

Stipulated in **103 b. C.**

The parties were: an **Egyptian, a Macedonian and a Persian**



noteworthy features are the elaborate series of penalties for different breaches of contract, and the provision against the contingency of the lessee incurring liabilities of the lessor or the original owner, whose property seems to have become *κατόχιμος* (cf. l. 48).

Ἔτους ιε τοῦ καὶ ιβ Φαῶφι κδ ἐν Κερ(κεοσίρει) τῆς Πο(λέμωνος) με(ρίδος).
ὁμο(λογεῖ) Πτα(λεμαῖος) ὃς καὶ Πετεσοῦχος Ἀπολλω(νίου) τοῦ καὶ Ἁρυώτου Πέρ(σης) τῆς ἐπι(γονῆς) Ὡρίωνι Ἀπολλω(νίου) Μα(κεδόνι) τῶν περὶ [τὸν
στρα(τηγὸν) μαχαιροφόρων) μεμισ(θῶσθαι) παρ' αὐτοῦ ὃν καὶ αὐ(τὸς) τυγχά(νει) μεμι(σθωμένος) Μάρωνος τοῦ Διονι(σίου) κα(τοικικὸν) κλῆ(ρον εἰς (ἔτη) ε ἀπὸ τοῦ ιε τοῦ καὶ ιβ (ἔτους) ἐκφο(ρίου) πα(ντὸς) κατ' ἔτος ἑκα(στον) πυ(ροῦ) (ἀρταβῶν) ρκ
ἀνυ(πόλογον) πά(σης) φθο(ρᾶς) ἐφ' ὡι χερσοκα(πήσει) τὴν ἐν τῶι κλή(ρωι) χέρσον πλὴν τῆς γει(τνιώσης) Θοώνει καὶ Παι(σίρει) γῆι ἐκ τοῦ ἰδίου εἰς ἣν δώσει Ὡρίων χα(λκοῦ) (τάλαντα) δ Γ,
ἀφ' ὧν ἔχει Πτα(λεμαῖος) παραχρῆ(μα) (τάλαντα) β Γ, τὰ δὲ λα(ιπὰ) (τάλαντα) β ἐν (ἔτεσι) β ἀπὸ τοῦ ιε (ἔτους) κατ' ἔτος ἐμ μηνὶ Παχών, καὶ ἀναπαύ(σει) κατ' ἔτος τὸ (ἥμισυ) καὶ τελέ(σει τὰ ἐσθ(μενα)
ἐπὶ τῆι ἄλῳ ἀνηλώματα καὶ λογευ(τικὰ) πυ(ροῦ) (ἀρτάβας) γ, καὶ τοῦ κατὰ τὴν μίσθω(σιν) χρό(νου) διελθθ(ντος) παραδεῖξει) τὴν γῆν καθαρὰν ἀπὸ θρύου καλά(μου) ἀγρ(ώστεως) [ἄλλης
δείσης πάσης, ἐὰν δὲ αἱρῆ(ται) χερσοκο(πῆσαι) ἄλην τὴν γῆ(ν) ἐν τῷ β (ἔτει) διδό(τω) αὐτῶι τὰ β (τάλαντα) ἐν μηνὶ Παχὼ(ν) τοῦ ιε (ἔτους).
ἀπο . . . ι . . ( ) χ . ( ) δι( ) . . . . . ε . . . [
[. . . .] . . . ( ) . . . . . ( ).
συ(γγραφοφύλαξ) Τιμόστρα(τος).

βασιλευόντων Κλεοπ[ά]τρας θεᾶς Εὐεργέτιδος καὶ Πτολεμαίου τοῦ ἐπικαλουμ[ένου] Ἀλεξάνδρου θεῶν Φιλομ[η]τόρων ἔ[τους πεντεκαιδεκάτου τοῦ καὶ δ[ω]δεκάτου ἐφ' ἱερέως Ἀλεξάνδρου καὶ τῶν ἄλλων τῶν γραφομένων ἐν Ἀλεξανδρ[είαι] μηνὸς Ἁνδικο[ῦ
τετράδι καὶ εἰκάδι Φαῶφι τετράδι καὶ εἰκάδι ἐν Κερκεοσίρει τῆς Πολέμωνος μερίδος τοῦ Ἀρσινοίτου νομοῦ. ὁμολογεῖ Πτολεμαῖ[ος
[δ]ς καὶ Πετεσοῦχος Ἀπολλωνίου τοῦ καὶ Ἁρυώτου Πέρσης τῆς ἐπιγονῆς Ὡρίωνι Ἀπολλωνίου Μακεδόνι τῶν περὶ τ[ὸν σ]τρατ[ηγὸν

μαχαιροφόρων μεμισθῶσθαι παρ' αὐτοῦ ὃν καὶ αὐτὸς τυγχάνει μεμισθωμένος
Μάρωνος τοῦ Διονυσίου περὶ τὴν κ[ώμην
κατοικικὸν κλῆρον ἐν τρισὶ σφραγῖσι ὧν γείτονες τῆς μὲν πρώτης ἀνὰ
μέσον οὔσης διώρυγος νότου Μεστασύτμιος [θεοῦ
μεγάλου γῆι καὶ Ὥρου τοῦ Πεκῶθτος καὶ Θοώνιος καὶ Παυσίριος βασιλικὴ
γῆι βορρᾶ Πτολεμαίου τοῦ Ἀπολλωνίου κλῆρ[ος λιβὸς
καὶ ἀπηλιώτου διῶρυξ, τῆς δὲ δευτέρας νότου καὶ βορρᾶ καὶ λιβὸς γύης
ἀπηλιώτου Ἀπολλοδώρου κλῆρος, τῆς δ' ἄλλης [σφρα(γῖδος)
νότου τοῦ προγεγραμμένου Ἀπολλοδώρου κλῆρος βορρᾶ καὶ ἀπηλιώτου
Ἀσκληπιάδου κλῆρος λιβὸς γύης. ἡ μίσθωσις [ἥδε
[ε]ἰς ἔτη πέντε ἀπὸ τοῦ πεντεκαιδεκάτου τοῦ καὶ δωδεκάτου ἐτους ἐκφορίου
τοῦ παντὸς κατ' ἔτος ἕκαστον πυρῶν ἀρταβῶν
ἑκατὸν εἴκοσι ἄνευ σπέρματος ἀκίνδυνον παντὸς κινδύνου καὶ ἀνυπόλογον
πάσης φθορᾶς ἐφ' ᾧι χερ[σο]κ[ο]πήσε[ι
Πτολεμαῖος πᾶσαν τὴν ἐν τῶι κλήρωι χέρσον πλὴν τῆς γειτνιάσης τῆι
Θοώνιος καὶ Παυσίριος γ[ῆι] ἐκ τ[ο]ῦ ἰδίου, τ[ο]ῦ
Ὥρίωνος τελοῦντος αὐτῶι εἰς τὴν χερσοκοπίαν χαλκοῦ τάλαντα τέσσαρα
καὶ δραχμὰς τρισχιλ[ί]α[ς] [ά]ναπόδοτα, ἀφ' ὧν
ἔχει ὁ Πτολεμαῖος παραχρῆμα τάλαντα δύο καὶ δραχμὰς τρισχιλίας, τὰ
δὲ λοιπὰ τάλαντα δύο προσλήψεται ἐν ἔτεσι δυσὶ
ἀπὸ τοῦ προκειμένου πεντεκαιδεκάτου τοῦ καὶ δωδεκάτου ἔ[το]υς κατ' ἔτος
ἐμ μηνὶ Παχὼν χαλκοῦ τάλαντον ἕν,
καὶ ἀναπαύσει Πτολεμαῖος κατ' ἔτος ἀπὸ τοῦ δευτέρου ἔτους τῆς μισθώ-
σεως τοῦ κλήρου τὸ ἥμισυ γένεσιν οἵ[ς] ἐ[ὰ]ν αἱρῆτ[αι
πλὴν ἐλαικῶν φορτίων, καὶ τελέσει κατ' ἔτος πάντα τὰ ἐσόμενα ἐπὶ τῆι
ἅλῳ ἀνηλώματα καὶ λογευτικὰ πυρῶ[ν
ἀρτάβας τρεῖς ἐκ τοῦ ἰδίου. καὶ τοῦ κατὰ τὴν μίσθωσιν χρόνου διελθόντος
παραδειξάτω Πτολεμαῖ[ο]ς τὴν γῆ[ν
[. .]τρημένην καὶ ὠμαλισμένην καὶ κεχωματισμένην καὶ καθαρὰν ἀπὸ
θροίου καλάμου ἀγράστεως τ[ῆς
[ἄλλ]ης δεί[σ]ης πλὴν τῆς προειρημένης χέρσου. ἐὰν δὲ Π⟨τ⟩ολεμαῖος
αἱρῆται χερσοκοπῆσαι ὅλην τὴν γῆ[ν ἐν
[τῶι δεκ]τ[έ]ρ[ωι [ἕ]τει δότω Ὥρίων αὐτῶι τὰ προκείμενα χαλκοῦ τάλαντα
δύο ἐν τῶι Παχὼν μηνὶ τοῦ πεντε[καιδεκάτου

ἑκάστης ἀρτάβης χαλκοῦ δραχμὰς τρισχιλίας ἢ τὴν ἐσομένην πλείστην
τιμὴν ἐν τῆι αὐτῆι κώμηι, καὶ τῶν δὲ κ[αρπ]ῶν κ[αὶ τῶν
γ[ε]ν[ημάτων κατ' ἔτος κυριευέτω Ὥρίων ἕως ἂν τὰ ἑαυτοῦ ἐκφόρια ἐκ
πλήρους κομίσηται καὶ τἄλλα πάντα τὰ κατὰ τὴ[ν μ]ίσθωσιν σ[υν-
τελεσθῆι. ἐὰν δέ τι πραχθῆι Πτολεμ[α]ῖος ὑπὲρ τοῦ κατ[σχ]ημένου
Μάρωνος ἢ Ὥρίωνος εἰς τὸ βασιλικὸν ἢ ἄλλην τ[ι]νὰ εἰσφορ[ὰ]ν
. . [. . .]. ας [σ]ύμβολα ὁμόλογα ὑπολογείτωι ἐπὶ τῶι ἐκ τῶν ἐκφορίων, ἐὰν
δὲ μὴ ἐκποιῆι ὥστε κομίσασθαι προσαποδότωι αὐτῶι Ὥρίων,
ἐὰν δ]ὲ μὴ ἀποδῶ καθὰ γέγραπται ἐξέστωι Πτολεμαίωι ἐάν τε βούληται
πρᾶξαι αὐτόν, ἐάν τε αἱρῆται ἐπιγεωργεῖν τὸν κλῆρον τῶ[ν
[αὐτῶ]ν ἐκφορίων εἰς τὸν μετὰ ταῦτα τῆς μισθώσεως χρόνον ἕως ἂν τὰ
ἑαυτοῦ ἐκ πλήρους κομίσηται μετὰ τῶν καθηκόντων . . . . [. .
[ἡ συ]γγραφὴ κυρία. μάρτυρες Τιμόστρατος Σαραπίωνος Μακεδὼν τῶν
κατοίκων ἱππέων Τήρης Πτολεμαίου Ἕρμων . . . . ῃ . τ̣ου . . . . . ⟨χ[. . .
[Πά]τρων Πτολεμαίου Ἡράκλειος Σαραπίωνος οἱ πέντε Μακεδόνες τῆς
ἐπιγονῆς. συ[γ]γραφοφύλαξ Τιμόστρατος.
2nd hand [Πτ]ολεμαῖος δὲ καὶ Πετεσοῦχος Ἀπολλωνίου τοῦ καὶ Ἀρυώτου Πέρσης
τῆς ἐπι(γ)ον[ῆ]ς ὁμολογῶ
[με]μισθ[ῶ]σθαι τὸν ὑπάρχοντα τῶι Μάρωνι κλῆρον εἰς ἔτη πέντε ἀπ[ὸ τοῦ]
πεντεκαι-
[δεκάτου τοῦ] καὶ τωδεκάτου ἔτους ἐκφορίου τοῦ παντὸς καθ' ἔτος ἕκαστ[ο]ν
π[υρ]ῶν
[ἀρταβῶ]ν ἑκατὸν εἴκοσι καὶ ἔχω εἰς τὴν τοῦ κλήρου χερσοκοπίαν παραχρ[ῆμα
[τὰ] δύ[ο] τά[λ]αντα καὶ τὰς τρισχιλίας δραχμὰς τοῦ χαλκοῦ, καὶ προσλα-
βόντος μου ἄλλα [. . . .
τάλαντα δύο παραδώσω τὸν κλῆρον κεχερσοκοπημένον καὶ ὡμαλισμένην
καθ[αρὸν
ἀπὸ θρύου καλάμου ἀγρώστεως τῆς ἄλλης δίσης πλὴν τῆς [γει]τνιώσ[ης
Θοώνιος καὶ
Παυσίριος γῆ χέρσου, καὶ τἄλ(λ)α συγχωρῶ καθότι προγέγραπτα[ι], καὶ
τέθ[ειμαι τὴν συγ-
γραφὴν [κ]υρίαν πα[ρ]ὰ [Τιμο]στράτωι.
3rd hand Τιμόστρατος ἔχω κυρίαν.
1st hand ἔτους ιε τοῦ καὶ ιβ Φαῶφι κδ τέ(ταχται) εἰς ἀναγρ(αφήν).

On the *verso*

65 Ὡριώνος [π]ρὸς Πτ̣ο̣λ̣ε̣μ̣α̣ί̣ο̣ν . . . . . .
κλ[ήρο]υ εἰς (ἔτη) ε ἀπὸ τοῦ ιε [(ἔτους)

And below

[Ὡρ]ί̣ω̣ν̣[ος]	Τιμοστράτου	Ἕρμωνος	Χ . . . . ᾱτος
[Π]τ̣[ο]λ̣ε̣μ̣α̣ί̣[ο]υ	Τήρους	Πάτρωνος	Ἡρακλέους

3. θο of θοωνι corr. 5. θρ of θρνον corr. 13. υ of μεστασιτμιος corr. 18. l. ἀποδίσου . . . ἀποπλόγων. 26. l. θρίου. 32. δε of μηδε corr. α of ποιεζοντας corr. from ε. 36. και το θλαβος over an erasure. 37. ου of επι[τι]μου corr. 46. l. τῶν τε καρπῶν. 56. l. δωδεκάτου. 59. l. ἁμαλισμένον.

ll. 8 sqq. 'In the reign of Cleopatra the goddess Euergetis and Ptolemy surnamed Alexander, gods Philometores, the 15th which is also the 12th year, the priest of Alexander and the rest being as written at Alexandria, the 24th of the month Xandicus which is the 24th of Phaophi, at Kerkeosiris in the division of Polemon of the Arsinoite nome. Ptolemaeus also called Petesuchus, son of Apollonius also called Haruotes, Persian of the Epigone, agrees with Horion son of Apollonius, Macedonian, sword-bearer in attendance upon the strategus, that he has leased from him the catoecic holding in three lots belonging to Maron son of Dionysius near the village, and leased by him to Horion, of which land the adjacent areas are: of the first lot on the south, separated by a canal, the land of the great god Mestasutmis and the Crown land of Horus son of Pekods, Thoönis and Pausiris, on the north the holding of Ptolemaeus son of Apollonius, on the west and east canals; of the second lot on the south, north and west a field, on the east the holding of Apollodorus; and of the remaining lot on the south the holding of the aforesaid Apollodorus, on the north and east the holding of Asclepiades, on the west a field. This lease is for five years from the 15th which is also the 12th year at a yearly rent for the whole area of 120 artabae of wheat with no allowance for seed, warranted against all risks and subject to no deductions for loss, on condition that Ptolemaeus shall break up at his own expense all the dry ground in the holding except that which adjoins the land of Thoönis and Pausiris, Horion paying him for the breaking up 4 talents 3000 drachmae of copper, which are not to be returned; from which sum Ptolemaeus has forthwith received 2 talents 3000 drachmae, the remaining two talents to be received within two years from the aforesaid 15th which is also the 12th year, one talent being paid in each year in the month of Pachon. Ptolemaeus shall every year beginning with the second year of the lease sow half the holding with such light crops as he may select excluding oil-producing plants; and he shall in each year pay all the expenses and dues at the threshing-floor to the amount of three artabae of wheat at his own charges. And when the term of the lease has expired Ptolemaeus shall deliver up the land . . . , levelled and banked in and free from rushes, coarse grass, and other weeds, except the aforesaid dry ground. If Ptolemaeus chooses to break up all the dry land in the second year, Horion shall pay him the aforesaid two talents of copper in the month of Pachon of the 15th which is also the 12th year. Horion shall guarantee to Ptolemaeus and his agents the lease and the enjoyment of the produce of the land upon the terms arranged for the time appointed and for any extension that may be necessary, and he is not permitted to lease the land to others or expel Ptolemaeus before the proper period or hinder him

or his agents from tilling the ground or watering the crop each year. And he shall also pay Ptolemaeus within the appointed time the remaining two talents of copper for the breaking up of the dry land, as is aforesaid. If he fails to guarantee them as aforesaid or violates any other of the aforesaid provisions, Horion shall forfeit to Ptolemaeus a fine of 30 talents of copper, and for failure to pay the money for the breaking up of the dry ground one and a half times that sum and the loss incurred, while the validity of the lease shall not be affected; and Ptolemaeus himself and his agents if they expel intruders upon the land shall be liable to no fine or penalty of any kind. If the lease is guaranteed Ptolemaeus shall till the land and sow light crops on half of it every year, and he may not alienate the lease. The appointed rent shall be paid every year by Ptolemaeus to Horion or his agents in the month of Pauni, payment being made in wheat that is new, pure, and unadulterated in any way, measured by the six-choenix dromos measure of the temple of Suchus in the aforesaid village by just measurement, and it shall be delivered to Horion at the village at whatever place he may fix in the said village at Ptolemaeus' own expense. And when the period of the lease has expired Ptolemaeus shall deliver up the land in a clean condition as aforesaid. But if he fails to pay the rent as aforesaid or violates any other of the aforesaid conditions, Ptolemaeus shall forthwith forfeit to Horion for renouncing the lease a fine of 30 talents of copper and the loss incurred, and for not sowing light crops yearly a fine of 10 artabae of wheat besides the rent, and for not delivering up the land in a clean condition a fine of 10 talents of copper, and for (not paying the rent?) 3000 drachmae of copper for each artaba or the highest price at which it may be sold at the said village; and Horion shall in each year own the harvest and produce until he recovers his rent in full and all the other provisions of the lease are fulfilled. If Ptolemaeus is called upon to pay anything to the State on behalf of Maron whose property has been impounded or of Horion, or to make any other contribution, he shall deduct in the allowances from the rent the equivalents of the sums in the tax-receipts, and if that is not sufficient to make good the debt Horion shall pay him the additional amount. If Horion fails to pay him as aforesaid, Ptolemaeus has the right either, if he chooses, to exact the deficiency from him, or, if he prefers, to continue cultivating the holding at the same rent beyond the term of the lease until he recovers his debt in full with the (interest?) This contract is valid. The witnesses are Timostratus son of Sarapion, Macedonian of the catoecic cavalry, Teres son of Ptolemaeus, Hermon son of . . . , Patron son of Ptolemaeus, Heracleus son of Sarapion, all five Macedonians of the Epigone. The keeper of the contract is Timostratus. I, Ptolemaeus also called Petesuchus, son of Apollonius also called Haruotes, Persian of the Epigone, agree that I have leased the holding which belongs to Maron for five years from the 15th which is also the 12th year at a total rent for each year of 120 artabae of wheat; and I have forthwith received the 2 talents and 3000 drachmae of copper for breaking up the dry ground in the holding; and on receiving in addition 2 talents more I will deliver up the holding with the dry ground broken up and levelled and free from rushes, coarse grass, and other weeds, except that adjoining the land of Thoönis and Pausiris, and I accept the other stipulations as aforesaid; and I have placed this contract, being valid, with Timostratus. I, Timostratus, have received the contract, being valid. Registered in the 15th which is also the 12th year, Phaophi 24.'

6–7. The last line and a half does not seem to correspond to any provision in the body of the document from l. 29 onwards, and without a definite clue decipherment of this scrawl is hopeless.

8. The title Σωτῆρος is omitted here as becomes usual in the papyri of Ptolemy Alexander's reign after the disappearance of Cleopatra; cf. **104.** 5, **106.** 3. It is,


OCEANO ATLANTICO
GALLI
ITALIA
MAR NERO
MACEDONIA
Pydna
EPIRUS
Cynoscephalae
ASIA
Magnesia
Massilia
Roma
Capua
CORSICA
SARDEGNA
HISPANIA
Saguntum
Cartagena
Gades
SICILIA
CRETA
Utica
Carthago
Zama
MAR MEDITERRANEO
NUMIDIA
MAURETANIA
CIRENAICA
LEGENDA
Repubblica romana dal 201 a.C.
Aggiunte
ESPANSIONE DI ROMA
attorno al 2° secolo a.C.
N
SCALA IN MILIA
0 100 200 300 400 500 600


HIBERNIA
BRITANNIA
Oceanus Germanicus
Oceanus Ibericus
Mare Suebicum
Popoli baltici
Slavi
OCEANUS ATLANTICUS
Mare Britannicum
Mare Cantabricum
GERMANIA
Venedae
Sarmatia
BELGICA
Lugdunensis
GALLIA
RAETIA
NORICUM
PANNONIA
DACIA
Alani
AQUITANIA
Lusitania
HISPANIA
Baetica
Mare Ligusticum
ITALIA
DALMATIA
MOESIA
PONTUS EUXINUS
Caucasus M.
Iberia
ARMENIA
MAEDIA
THRACIA
MACEDONIA
GALATIA
CAPPADOCIA
REGNUM PARTHORUM
MESOPOTAMIA
ASSYRIA
SYRIA
PALMYRENE
ARABIA
Mare Hadriaticum
Mare Tyrrhenicum
Mare Balearicum
Mare Iberum
MARE INTERNUM NOSTRUM
Mare Siculum
Mare Libycum
Sicilia
CRETA
ACHAIA
Cyprus
MAURETANIA
NUMIDIA
Gaetuli
AFRICA
PROCONSOLARIS
CYRENAICA
AEGYPTUS
Garamantes
NABATAEI
Arabia
Sinus Arabicus
Ottaviano Augusto: 31 a.C. - 14 d.C.
Territori appartenenti a Roma prima del 31 a.C.
Annessioni e conquista di Ottaviano:
dal 31 al 19 a.C.
dal 19 al 9 a.C.
dal 9 a.C. al 6 d.C.
Regni clienti di Roma con Ottaviano:
Fortezze legionarie: nel 6 d.C.

What was another element (beside the fact that they were typical with regard to the content – objective function) which all these new types of '*ius gentium* contracts' were having in common?

D. 46.3.80 (*POMPONIUS libro IV ad Quintum Mucium*)

Prout quidque contractum est, ita et solvi debet: ut, cum re contraxerimus, re solvi debet: veluti cum mutuum dedimus, ut retro pecuniae tantundem solvi debeat. Et cum verbis aliquid contraximus, vel re vel verbis obligatio solvi debet, verbis, veluti cum acceptum promissori fit, re, veluti cum solvit quod promisit. Aeque ***cum emptio vel venditio vel locatio contracta est, quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest***

In the same way in which something was 'contracted' it has to be untied. Hence, when we contracted by giving an object, it should be discharged by giving the object, as, for instance, when we lend something and the same amount is to be given in return; and where we have contracted anything orally, the obligation should be discharged by giving an object, or orally. Orally when, for instance, the promisor is given a release or by giving the object, when, for instance, what was promised is given. Likewise, **where a purchase, sale, or lease, is contracted, since it is <in these cases> contracted by the mere consent (合意), the contract can be dissolved by a contrary mere dissent.**

We can see how these examples of obligations which can be contracted on the basis of the consent are the **types which we saw started developing along with the *ius gentium* and the protection recognized by the *praetor* through the theoretical help from the jurists**

In the actions – *formulae*, **to give legal protection to these types of contractual relationships the *certa verba* were related to the "function" of the transaction** (i.e. sale, purchase, lease, partnership etc.)

Again Quintus Mucius Scaevola

started pointing out that there was a common element among all of them: they were **stipulated on the basis of the consent**

A new era was about to disclose:

the agreement as a `source` of obligation

But as we are seeing it was not just the agreement by itself to be a source of obligations, (this is basically an approach we will find promoted by the School of Nature Law from the 16 - 17 century)

For these contracts we are talking about if as remarked by Quintus Mucius the consent, **the agreement, was the common element, this was not enough by itself to generate an obligation**

In the cases he was listing as well as in the other similar cases, in order to be allowed by the praetor to claim for an enforcement or compensation etc, **the consent had to be expressed within the context of a transaction having a certain – specific - objective function and in that case the transaction could have received protection on the basis of the *oportere ex fide bona***

NOTE:

The ***oportere ex fide bona*** is recalling also in the formula the principle that Quintus Mucius was stressing *manare latissime*

The **objective functions** which were recognized to be relevant to give raise to an action were a **really limited number**: sale, lease, mandate (?), partnership (*societas*)

TO SUMMARIZE:

The socio-economic needs first push towards abandoning the old form and «rituals» related models

With the *legis actio per condictionem* they already started breaking the ground towards giving more relevance to the function (in that case, broadly speaking, the *datio* - giving) and slightly less to the rituals

This direction has been travelled further and with regard to **some specific 'types', the *praetor* recognized protection to a transaction that was stipulated** not by following a certain form or ritual, but **by the mere consent as long as the 'objective function' was matching with one of those prescribed**

At pace with the «new» socio-economic needs this was already a **big improvement** compared to the old forms that were not in condition to meet many of the needs rising with the new model of society

Gaius, Istitutiones III, 136: "*Ideo autem istis modis consensus dicimus obligationes contrahi, quod neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos, qui negotium gerunt, consensisse.* ***Unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per internuntium, cum alioquin verborum obligatio inter absentes fieri non possit***".

In these contracts consent is said to create the obligation, because no form of words or of writing is required, but the mere consent of the parties is sufficient. **Therefore, these transactions can be contracted also by absent parties <(which are not physically present together in the same place)>; as, by letter or messenger; while the verbal obligations, instead, cannot be contracted between absent parties.**

Despite all, **with these new types of contracts it was still necessary that the elements of transaction** (given the inflexibility of the *certa verba* of the *formulae*) **were strictly matching with the requirements prescribed by the *praetor* with regard to the type**

But, as later clarified by Ulpianus (II – III century) – see D. 19.5.4 – the jurists were also aware of the fact that «***Natura enim rerum conditum est, ut plura sint negotia quam vocabula***»

It derives in fact from the nature of things, that there are more kinds of business transactions than terms to designate them.

D. 50.16.19

Ulpianus libro 11 ad edictum

***Labeo** libro primo praetoris urbani **definit**, quod quaedam "agantur", quaedam "gerantur", quaedam "contrahantur": et actum quidem generale verbum esse, sive verbis sive re quid agatur, ut in stipulatione vel numeratione: **contractum autem ultro citroque obligationem, quod Graeci συνάλλαγμα vocant**, veluti emptionem venditionem, locationem conductionem, societatem: gestum rem significare sine verbis factam*

Labeo, in the First Book On the Urban Praetor, **defines** the terms "to act", "to do something legally relevant", and "to contract", as follows. He says that the word act has a general application, and refers to anything which is done orally or by the giving of an object; for example, in stipulation or enumeration. **Contract instead is a reciprocal obligation, what the Greeks call *synallagma*, as, for instance, purchase, sale, hiring, leasing, partnership**. The term "to do something legally relevant" signifies to do something relevant without words.

One of the most studied and discussed fragments

The Justinian's jurists put it in the Book 50, Title 16 which is "**De verborum significatione**" – "The meaning of the terms"

Ulpianus is therefore saying that Labeo was considering the **contract as reciprocal obligations**, what the Greeks were calling ***συνάλλαγμα***, and then follows a list of those which for Labeo could have been considered as **«models»** of contracts like the sale, the lease and the partnership

At Labeo's time the 'intellectual elite' Romans were almost bi-lingual with Greek language – in fact the largest part of philosophy, science, literature was coming from Greece

Labeo knew Greek and, to make an example, **since the Roman term "*contractus*" as a noun seems was not employed**, he probably used one of the terms that Greeks were using (mainly in the praxis – for what we can see) to designate contractual activities, the *συνάλλαγμα,* in order to provide an idea of what he was trying to say

Later on, along with the consolidation of the notion of *contractus* and of the Latin term itself, in the Greek speaking part of the Empire it was adopted (probably also in connection with the influence of Labeo's employment first and Aristo's after) *συνάλλαγμα* as a Greek legal technical term to **translate the 'imported' Latin technical term *contractus***

Mutual consent (agreement) of the parties

By reading what from Quintus Mucius is reported in D. 46.3.80 and what from Labeo in D. 50.16.19 we can see how **the types of contracts listed in both** were having a **common element** which can be considered as one of the elements to be put at the basis of the category: **the consent**

With regard to the versatility *consensus* in Labeo's view:

D. 2.14.2 pr. (Paulus, *libro 3 Ad edictum*): *Labeo ait convenire posse vel re: vel per epistulam vel per nuntium inter absentes quoque posse. Sed etiam tacite consensu convenire intellegitur*

Labeo says that is **possible to agree** also by giving an object, or, **between absent parties**, also by a letter, or by a messenger. It is also <commonly> maintained that it is possible to agree by a tacit consent.

Therefore Labeo seems to have been inspired by Quintus Mucius with regard to the consensus and then added another step to the construction of a logical system: the identification of another common element…

Ultro-citroque obligatio (*causa*)

As clearly stated in the text of the fragment **"*contractum*" is the *ultro-citroque* obligation** (of course such a structure is possible to be found also in the 'models' listed either by Quintus Mucius and by Labeo)

The **agreement between the parties itself is not enough**, but it is **also necessary that the agreement is related to reciprocal obligations**

By saying that the *contractum* is the reciprocal obligations and by the examples Labeo brought, the jurist was already pointing out that **the minimum requirement that an agreement needed to have** in order to be considered as a **contract** was that it would have give rise to **reciprocal obligations**

Like in many of the cases – until and during Labeo's time – which Greeks were calling *συνάλλαγμα*

In the *ius gentium* contracts mentioned as models, the agreement should have been related to a certain typical objective function of the contract, which was however also representing cases of transactions with reciprocal obligations i.e. sale/purchase; hire/lease; partnership etc.

Labeo, instead, started referring not to the typical function, but just to the structure: reciprocal obligations – this was the causa!

The minimum requirement that an agreement needed to meet in order to be considered as a contract

Ulpianus centuries later (after having recalled Aristo's theory that as we will see his quite close to the Labeo's and perhaps inspired by the latter) will come up with the really famous statement contained in D. 2.14.7.4:

"***Sed cum nulla subest causa***, *propter* **conventionem** *hic constat* ***non posse constitui obligationem***: ***igitur nuda pactio obligationem non parit,*** *sed parit exceptionem*"

But, **where there is not a *causa*,** it is not under discussion the fact **that no obligation can be created by this agreement**; in fact, **a mere agreement does not create an obligation**, but it does create an exception.

And in Labeo's approach **this *causa* was not only related to a typical function but it managed to make it broader and more adaptable to the new needs arising**

The contract started becoming a ***contractus*** (noun) and not just a *contractum* (past participle)

The **versatile good faith based *formulae* helped to provide a procedural instrument** to protect the contract and, through the good faith principle they recall, provided also **parameters to evaluate the contents of the contract in the light of "justice"**

D. 17.8.1 (*Ulpianus libro 31 ad edictum*)

"[…] ***uniuscuiusque enim contractus initium spectandum et causam***"

[…] in fact, it is necessary, **in every contract, to have regard to the initial <agreement> and to the *causa***

Beside the mentioning of the "initium" which is commonly by scholars interpreted as "initial agreement" (合意), and the mention of the *causa*

What we have to devote out attention to is the fact that it looks like here it is **ascribed to Labeo also the use of "*contractus*" as a noun** and not 'only' the use of *contractum* (past participle of the verb *contrahere* or as an adjective)

Another place where we see ascribed to Labeo the employment of the noun "*contractus*" is D. 18.1.80.3 (*Labeo libro quinto posteriorum a Iavoleno epitomatorum*) were we read

"*Nemo potest videri eam rem vendidisse, de cuius dominio id agitur, ne ad emptorem transeat,* ***sed hoc aut locatio est aut aliud genus contractus***"

No one considers that it has been sold the thing of which the property is agreed to be transferred to the buyer, but **it is rather a lease or another kind of contract**

Or also in D. 19.5.19 pr. (*Ulpianus libro 31 Ad edictum*) where we read

"*Rogasti me, ut tibi nummos mutuos darem: ego cum non haberem, dedi tibi rem vendendam, ut pretio utereris. Si non vendidisti aut vendidisti quidem, pecuniam autem non accepisti mutuam, tutius est ita agere, ut labeo ait,* ***praescriptis verbis****, quasi negotio quodam inter nos gesto* ***proprii contractus***"

You asked me to loan you money, and as I did not have it, I gave you a certain thing to be sold that you might keep the price you may receive as a loan. If you did not sell said property, or you did sell it and did not take the price received as a loan, it is safer to proceed, as Labeo says, by **an action with a description of the relationship** <occurred between us (the parties)>, as if the transaction we entered into was a **typical contract** <different from the other types>.

CONCLUSIONS

At the **earlier stage**, the procedure and the substantive law were **mainly based on rituals**, the agreement in itself was not a source of contractual obligations not even in case it was having as an object a transaction with a typical function – *causa*

Basically, in order to set up a transaction it was necessary to follow the prescribed rituals and employ the required words

These juridical schemes were matching with a **small community**, with an **economy based on a little scale agriculture** etc.

With the expansion of Rome, the old schemes were not suitable anymore

The economy became more sophisticated: **more sophisticated transactions** (started shifting from agriculture to commerce); more sophisticated objects of the transactions (for instance the *res mancipi* were including only a small number of kinds of animals)

More versatility was needed with regard to the possible contents of the transactions and to other cultures which may have been involved

Necessity to start substituting the type of 'social control' which in a small city was playing a strong role along with the law with some more law-based instruments

A **formal agreement was beginning not to be enough anymore** to ensure that what agreed would have been also performed

Too much formality in a more sophisticated environment could provide 'boomerang effects' – the example of the vines etc.

The ‘structure’ of the ***ius gentium*** **contracts was based on the *consensus* + the ‘typical *causa*’ (objective function);**

the versatile procedural instrument of the *bona fidei actiones* and the evaluation parameters arising from the good faith principle allowed to start shifting from formalities

In other terms:

the *praetor* was giving protection to a transaction that was not stipulated by following a certain form or ritual, **but by the mere consent as long as the ‘objective function’ was matching with one of those of the types which were regulated**

This was **still not enough** since the *certa verba* of the *formulae* (in particular those in the *demonstratio*) and the self-limitation of the *praetor* through his *edictum* were **not versatile enough to face the challenges related to the need of new types of contracts or to the new features also within the different types** which were required to keep the pace of the expansion and sophistication of the society and commerce

Let's not forget that Ulpianus (II-III century) was still remarking that (D. 19.5.4) «***Natura enim rerum conditum est, ut plura sint negotia quam vocabula***»

It derives in fact from the nature of things, that there are more kinds of business transactions than terms to designate them.

Labeo managed to find a solution versatile enough to be employed in these circumstances

From **D. 50.16.19** we can see how for him contracts were related to the consent, they were, basically **agreements**

Nonetheless, **just a mere agreement was not possible to be considered as a contract**, but it was also necessary that, in order to receive protection by the law, the **agreement was productive of reciprocal obligations**

The ***agere praescriptis verbis formulae*** **based on the good faith** made it possible to provide the judge with the *vir bonus*, the *honest agi* etc. as parameters to refer to when handling a potentially unlimited number of cases with different features

The good faith principle (which as we saw "*manare latissime*" and reaches all the relationships in which the "*societas vitae*" shows itself) was a versatile enough instrument to make sure that these relationships would match with the **justice**

What happened after Labeo?

Even if different kind of remedies were tried to be found in order to let a more 'typicality based approach'…

- Sabinians 学派 were trying to do so by 'forcing' the structures of the 'types', by reforming the procedures, by increasing the role of the *actiones in factum*, by using the analogy etc.) -

… at the end we saw that Ulpianus (II-III century) was still remarking that (D. 19.5.4) «***Natura enim rerum conditum est, ut plura sint negotia quam vocabula***»

It derives in fact from the nature of things, that there are more kinds of business transactions than terms to designate them.


117 AD
Caledonia
Hiberni
Eburacum
Deva
Britannia
Camulodunum
Londinium
Novionagus
Colonia Agrippina
Frisii
Chauci
Langobardi
Cherusci
Chamavi
Suebi
Tencteri
Chatti
Burgundiones
Lugii
Hermunduri
Buri
Mogontiacum
Augusta Treverorum
Argentoratum
Marcomanni
Quadi
Cotini
Costoboci
Gaul
Vesontio
Augusta Raurica
Raetia
Noricum
Pannonia
Jazyges
Carpi
Bastarnae
Dacia
Roxolani
Aquitania
Lugdunum
Dalmatia
Moesia
Italia
Rome
Neapolis
Tarraconensis
Hispania
Lusitania
Baetica
Tingis
Carthage
Sicilia
Mauretania
Numidia
Africa
Mauri
Gaetuli
Musulamii
Garamantes
Macedonia
Thessalonica
Epirus
Achaia
Athens
Creta
Thrace
Byzantium
Bithynia
Pontus
Cappadocia
Galatia
Asia
Ephesus
Cilicia
Pamphylia
Lycia
Antioch
Cyprus
Cyrene
Lepcis Magna
Tripolitania
Cyrenaica
Paraetonium
Alexandria
Maeotae
Aorsi
Siraci
Alani
Bosporan Kingdom
Sarigae
Abasgi
Apsilae
Colchis
Laxi
Iberia
Albania
Armenia
Gordyene
Adiabene
Osrhoene
Assyria
Parthian Empire
Mesopotamia
Tripolis
Emesa
Palmyra
Ctesiphon
Seleucia
Babylon
Babylonia
Susa
Charax
Sidon
Tyrus
Bostra
Judaea
Jerusalem
Petra
Aila
Leuce Come
Hegra
Hegra Come
Myus Hormus
Memphis
Oxyrhynchus
Ammonium
Ægyptus
Ptolemais
Thebae
Syene
Berenice
Hierasycaminus
Nasamones

D. 2.14.7 (*Ulpianus libro 4 ad edictum*)

pr. *Iuris gentium conventiones quaedam actiones pariunt, quaedam exceptiones.*

1. ***Quae pariunt actiones, in suo nomine non stant, sed transeunt in proprium nomen contractus****: ut emptio venditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus*.

D. 2.14.7 (*Ulpianus, On the Edict,* Book 4)

Pr. Some agreements based on the *Ius gentium* give rise to actions, and others give rise to exceptions.

1. **Those which give rise to actions are not known by their own names <and therefore are not simply known as "agreements">, but acquire the special name of a type of contract**; as purchase, sale, hire, partnership, loan, deposit, and other similar contracts.

2. ***Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem***. *Ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias*: ***hoc συνάλλαγμα esse et hinc nasci civilem obligationem***. *Et ideo puto recte Iulianum a Mauriciano reprehensum in hoc: dedi tibi Stichum, ut Pamphilum manumittas: manumisisti: evictus est Stichus. Iulianus scribit in factum actionem a praetore dandam:* ***ille ait civilem incerti actionem, id est praescriptis verbis sufficere****: esse enim contractum, quod Aristo συνάλλαγμα dicit, unde haec nascitur actio*.

2. **Even when the agreement does not <match the specific requirements of a type and therefore does not> acquire the name of a type of contract, as Aristo <I – II century> very properly stated to Celsus <I century>, an obligation exists**. As, for instance, I gave you something with the understanding that you would give me something else; or I gave you something with the understanding that you would perform some act: **this is a *synallagma* and therefrom arises a civil obligation.** Therefore, I am of the opinion that Julianus <II century> was very appropriately criticized by Mauricianus <II century> in the following case: "I gave you Stichus with the understanding that you should manumit Pamphilus; you manumitted him, but Stichus was evicted by another party". Julianus holds that an action *in factum* should be granted by the Praetor; **but the former says that it will be enough a civil action of those for an object which is uncertain, that is to say, one of those which start with the description of the relationship**: there is in fact a contract, that Aristo designates as *synallagma*, from which this action is derived.

4. ***Sed cum nulla subest causa,*** *propter* **conventionem** *hic constat* ***non posse constitui obligationem: igitur nuda pactio obligationem non parit,*** *sed parit exceptionem*”

4. But, **where there is not a *causa*,** it is not under discussion the fact **that no obligation can be created by this agreement**; in fact, **a mere agreement does not create an obligation**, but it does create an exception.

D. 19.5.5 pr. (*Paulus libro 5 quaestionum*)

Naturalis meus filius servit tibi et tuus filius mihi: convenit inter nos, ut et tu meum manumitteres et ego tuum: ego manumisi, tu non manumisisti: qua actione mihi teneris, quaesitum est. In hac quaestione totius ob rem dati tractatus inspici potest. **Qui in his competit speciebus: aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias: in quibus quaeritur,** quae obligatio nascatur.

D. 19.5.5 pr. (*Paulus, Questions,* Book 5)

My biological son is your servant, and your son is mine. It is agreed between us that you shall manumit mine, and that I shall manumit yours. I did so, but you did not. The question arose as to what action you will be liable to me. In this case every kind of transaction relative to the giving of something in order to achieve a result <as a counter-performance> comes into consideration, which can happen in the following ways: **I either give to you so that you may give to me, or I give to you so that you may perform some act <for my benefit>, or I perform some act <for your benefit> so that you may give to me, or I perform some act <for your benefit> so that you may perform another <for my benefit>.** In these cases, it may be asked what obligation arises.

A really well made solution on this topic is balancing the Labeo (Proculean 学派) style approach with the Sabinian 学派 style:

本法分则或者其他法律**没有明文规定的合同**，

A. 适用本法**总则**的规定，

B. 并可以参照本法**分则**或者其他法律**最相类似**规定

First you try to the answer the most general question:

Is this a contract? And then *generatim* you continue towards the more specific aspects…

This helps for instance when dealing with:

- the 无名合同,
- with the ‘pre-contractual documents’ which in many cases are instead already contracts
- with the issues related to the transnational contracts given the absence of a supra-national legislator which is stating in a ‘positive way’ the parameters

Labeo and Aristo's models have been **'rediscovered' in Bologna** afterwards

A. Path in civil law:

the **humanists still used** them but with the influence of the **natural school of law** (by following a tendency which started developing in the **canon law**) they have started being neglected and the **importance have been shifted to the consensus**

Napoleon told his commissioner **not to call the donation a contract**

Rechtsgeschäft **(法律行为) theorization by Pandectists** based on the **will dogma** definitely decreased the role of 'causa' – see for instance the **BGB** etc.

Those which expressly use it attached it back to the 'function' of the transaction but in this way it **does not work properly in clarifying what is a contract** and what is something else: that is why we are having **confusion in understanding at the end what is a contract**!

B. **Path in common law**:

From the **Summa Azonis** they started **drafting the first handbooks of English law – Fleta and Bracton** are still based on the Azo's writings (again a **Glossatore from bologna**) hence the **Labeo / Artisto model**

From this the doctrine of the ***quid pro quo*** – **consideration** raised

Mainly from the **XVIII-XIX** century starting from the **influence of the teories developed in France along with the codification (Pothier - Portalis)** and then the **laissez faire** triumph the **consideration**:

moral consideration

peppercorn consideration etc.

Ancient contract law in China:

Contract mainly within the *li* (礼), however 红契约 (red *qiyue*) and 白契约 (white *qiyue*)

Several **'Forms'**: 契约 (qiyue) 傅别 (fubie) 质剂 (zhiji) 书契 (shuqi) 合同 (hetong) etc.

Based on written evidences the were mainly **used in 'exchange' contracts** or contracts featuring obligations on all the involved parties

- ***Qi* (契) recalling the idea of 'carving'** and therefore referring to the **form**

(Shuowen: 契、大約也。从大从刧)

***Yue* (约) rather the link** between fastened or tied things

(Shuowen: 約、纏束也。从糸勺聲)

Yue (约) is directly recalling the *li* (礼):

Book of Rites 礼记 (Liji), in the part dealing with the *dian* rite we read: **“约信曰誓” (*yue* and *xin* are called *shi* / oath)**

Still from the Shuowen Jiezi it is possible to see how the **meanings of 信 (xin) and 诚 (cheng)** used to designate the technical notion of the objective **good faith** (诚实信用 – chengshi xinyong / 诚信, chengxin) **were quite connected**:

“信，誠也。从人从言”

The *xin* was also one of the confucian virtues - 仁 (ren) 义 (yi) 礼 (li) 智 (zhi) 信 (xin) recalling a semantic area that in Rome was connected to the ***fides***

Yang Lixin and other jurists are reconnecting it to the *fides* and the good faith principle

Still in the Book of Rites, il 礼记 (*Liji*), in the part on the Rite of *dian*, we read:

“礼尚往来” (*li shang wang lai*)

‘Explained’ as

“往而不来，非礼也；

来而不往，亦非礼也”

Yang Xiangkui remarked that it was **originally connected to commercial activities**

In **Conficius Analects 论语 (*Lun Yu*) we find the 恕 (*shu*)**

Defined with the well-known maxim providing **'Do not do to others what you do not want them to do to you'**

己所不欲，勿施于人

New models arrived with the Qing modernization such as the idea of a contract as 'legal act' or 'transaction' (?) ***Rechtsgeschäft*** (法律行为, *falü xingwei*) built on the will declaration ***Willenserklärung*** (意思表示, *yisi biaoshi*)

The «**causa**» merely considered as a 'legal foundation' ***rechtlichen Grund*** (法律上的原因, *falü shang de yuanyin*) of the obligation, or as ***Zweck*** **aim/function** (目的, *mudi*) of the contract

The 契约 was used to translate the ***Vertrag*, "contract"**, and **合同 for the *Gesamtakt*** the 'collective act'

…

But then the 'economic contract' appeared

The Interim Measures for **Contracts between Government Agencies and State-owned Enterprise Cooperatives** (机关、国营企业合作社签订合同契约暂行办法) dating back to September 27th **1950**

It was issued in order to deal with **business activities between government agencies**, state-owned enterprises and cooperatives **that could not be settled immediately** (art 2: 凡机关、国营企业、合作社之间有主要业务行为不能即时清结者，如借贷、代理收付、货物买卖、定制货物、以货易货、委托收售、委托加工、委托贷放款项或实物、委托运输、修缮建筑、租让经营、合资经营等，必须签定合同，并须将原合同抄送当地人民银行一份，以当地的人民银行为结算中心，履行合同之每笔收付，必须使用人民银行支票)

… and therefore **where a legally protected duty is needed**

With the **Opening and Reform Policies** the contracts were regulated on the basis of the **"Tripod System"** (三足鼎立, **sanzu dingli**)

- Economic Contract Law 1981

- Foreign Economic Contract Law 1985

- Technology Contracts Law 1987

+

the 1986 Law on General Principles of Civil Law

1999 – Contract Law

Used as a **fundation for the rules provided in the 2020 Civil Code**

Where, **as result of the *bonum et aequum*:**

第六百六十三条　受赠人有下列情形之一的，**赠与人可以撤销赠与**：

（一）**严重侵害赠与人**或者赠与人近亲属的**合法权益**；

（二）**对赠与人有扶养义务而不履行**；

（三）不履行赠与合同约定的义务。

赠与人的撤销权，自知道或者应当知道撤销事由之日起一年内行使。

Art. 663:Where the donee has any of the following circumstances, the donor may revoke the gift:

(1) Seriously harming the lawful rights and interests of the donor or any of his or her close relatives;

(2) (2) Failing to perform support obligations owed to the donor;

(3) (3) Failing to perform the obligations under the gift contract.

The donor shall exercise its revocation right within one year after he or she knows, or should have known, the cause of revocation.

第六百六十六条　赠与人的经济状况显著恶化，严重影响其生产经营或者家庭生活的，可以不再履行赠与义务。

Art. 666: If the donor's economic situation is deteriorated significantly, seriously impacting on his business operation or family life, he or she may no longer perform the gift obligations.

(第六百四十六条　法律对其他有偿合同有规定的，依照其规定；没有规定的，参照适用买卖合同的有关规定。

Art. 646: If there are provisions in the law for other onerous contracts, such provisions shall apply; in the absence of such provisions, the provisions on sales contract shall apply mutatis mutandis.)

第六百六十二条　赠与的财产有瑕疵的，赠与人不承担责任。附义务的赠与，赠与的财产有瑕疵的，赠与人在附义务的限度内承担与出卖人相同的责任。[…]

Art. 662: **The donor is not liable for any defect in the gifted property. Where the gift is conditional, and the gifted property is defective, the donor has the same warranty obligations as a seller to the extent of the prescribed obligations. […]**

TEAM WORK