
Zuwendung and reversion of entitlement in terminable ownership. The organic perspective of real effects contract and concept determined by function

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Abstract: The journal article summarises the central focus of terminable ownership theory through some essential elements and institutional sections. Among them, the main differences from ownership *sub condicione* are stressed through *dingliches Anwartschaftsrecht* situations by *Eigentumsvorbehalt* and *Vendita con riserva della proprietà*. The normative nature of the time clause in real effects contract, *dies certus*, is maintained by the character of ultra-activity efficacy and *Verbindung* test, which evaluates the degree of essentiality it may take regarding *ius-economic* operation. The institution's definition makes observable the constitutive prominence of *Zuwendung* nature, as the type of attribution by reversion *post-Diem*, and of an organic interpretation of the token according to the coherence and interpenetration of the elements which constitute and regulate the real effects agreement.

Keywords: contract law; legal systems; civil law; economic system; interpretation.

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1 Introduction

In the age of codification, civil law's modern tradition recognises the *summa divisio* between property law and the law of obligations (Gambaro, 1995). It provides that the principle of *numerus clausus* of property rights implies the effect of *Typenzwang*, the exclusivity by the legislation of real effects acts ('geschlossene Zahl der Zuordnungsrechte'), such as sales contract, exchange, donation, therefore the prohibition of untypical real efficacy *negotium* elaborated by private autonomy [Westermann, (1966), p.19; Luminoso, (2007), p.3].

This system, which originated under historical influences of different nature, has always been subjected to intense criticism [Heck, (1960), p.24]. The forms of negotiation that have currently overcome these 'dogmas' are manifold [Costanza, (1981), pp.55ff, 141ff]. The theory of ownership *sub certo die* or *Eigentum auf Zeit*, while encountering many still existing limitations, attempts to elaborate the doctrine's central core in the light of modern systems. The limitation of this study to the essential, traditional area of interest does not allow to extend the focus to a series of further issues equally relevant and dependent on it, first in the context of lien and registration [Vitucci, (2014), p.107]. As can be seen, in today's phenomenology, theoretical elements belonging to past civil systems are intertwined: a confirmation of universality that civil law also imposes regarding time.

2 *Simultaneität* and *Typenzwang*

Article 2643 of the Italian Civil Code – *atti soggetti a trascrizione* – does not provide for any catalogue of acts that can be recognised as *geschlossene Zahl*, without prejudice to the rule on the transcription's opposability to third parties and its value in terms of certitude for registered immovable and movable property's circulation. The norm is instead constructed in functional, teleological-objective terms, having as its object the functions of transfer, constitute and modify, thus describing its area of application not around the structure or types of acts but the element of *causa*, therefore, the functions mentioned above, only relevant for the purpose of transcription [Larenz, (1991), p.333]. The legal doctrine provides further critical data refers on the subject of contractual autonomy, Art. 1322(2), a crucial norm which, by retaining control of systematic consistency over untypical acts, does not limit its selective criterion, *giudizio di meritevolezza*, on obligatory acts, thus having to be considered also extended to real effects acts, concerning concrete situations that the – equally concrete – typologies of effects constitute [Gatt, (2010), p.28].

The *ratio* sustaining *Typenzwang* is based on the principle of *Simultaneität* between *consensus* that constitutes the contract and its real effect: "Die zeitliche Bedeutung dieser

Einheit liegt in der Gleichzeitigkeit von Rechtsgeschäfts und Rechtsentstehung oder Übertragung” [Blomeyer, (1938), p.1], more precisely on the “Simultaneität des Akts, des Thatbestandes (*today Tatbestand*) und der Wirkungen” [Jhering, (1865), p.143]. Along this theory by the concept of *Einheit der Handlung* is postulated the unity of the act, its inseparability and indivisibility. The *Präsenz des Thatbestandes* summarises the completeness of the type/*fattispecie astratta*: for example, the capacity of the subject, the content and object of *negotium*, ‘den Gegenstand und Inhalt des Rechtsgeschäfts’, the concurrence of the prerequisites required by the function of the act. In terms of efficacy, *Simultaneität der Wirkungen* is mainly represented as a logically consequent argument: the presence (*Existenz*) of *Thatbestand* automatically implies the effect; questioning one in presence of the other is a *logische Unmöglichkeit*: if there is the type of the effect is simultaneous and vice versa. Any chronological deconstruction between entitlement and exercise does not alter the scheme: the one who is *already* entitled to right can temporarily renounce the exercise, but his title is *already* acquired (‘erlangten Recht’) and the temporary dismissal only concerns the exercise itself. The eventuality of a chronological order of succession in the property subordinated to a *dies*, ‘eine Eigentumesbestellung *ex die*’, generates the problem of identifying what type of *obligation* coordinates the transaction between the parties, in fact, it is equally *impossible* in the context of real efficacy *negotium*.

Based on the theoretical records, it was believed that increasing the number of contracts suitable to produce real effects, other than those mentioned as an expression of the so-called *coercion of the type*, implied deconstructing the linkage of *titulus* and *modus acquirendi* and having to assume a *negotium* that is not only ‘untypical’ but also devoid of concrete *causa*, thus conceivable as abstract *negotium* only [Mengoni, (1994), p.196]. As such, a *negotium* would imply a lack of this essential element required by Art. 1325(2), and therefore of the attribution’s justification [Cariota Ferrara, (2011), p.198]. The identification between *causa* – internal to the *traditio* – and the suitability of *negotium* for the constitution of real effects have been overcome through the solo performances theory, *prestazioni isolate* [Mengoni, (1994), p.203], founded on external *causa*. In other words, has been identified a class of transactions implementing real effects justified by an external function: it legitimises the *traditio* linking it to a *negotium* that conveys a broader legal and economic function in which the act of transfer has the nature of performance.

Then, Art. 651 in the matter of legacies and devises provides that the disposition by the will of a good not owned by the testator is void unless it is ascertained by the same will, the testamentary documents or other written declaration, the awareness of the testator himself that the good belonged to the executor or a third party. In the event of such proof, if the thing belongs to a third party, the executor must acquire its ownership and transfer it to the beneficiary, however retaining the *ius variandi* to perform by paying the value of the good. This case identifies a type of transfer act (from the executor to the beneficiary) without an inner *causa* but justified on the ground of an external one, sustaining the operation envisaged in the will.

The *traditio* established under Art. 1706(2), in the matter of mandate without the power of representation, if the goods are registered movable or immovable assets, belongs to the same class. Having the agent acquired ownership by himself, on behalf of the mandator but without *contemplatio domini*, which would entail the direct transfer into the mandator’s assets, he is obliged to transfer the entitlement to the interested subject.

These are some of the *institutions* through which it is traditionally refuted the vital link, critically envisaged in this area, between untypicality and *causa* abstraction, *astrattezza causale*, by admitting how an act with real efficacy, without an inner *causa*, is functionally justified based on a link with a broader operation and relationship in which it is inserted, constituting an organically essential element.

Consequently, the demarcation between typical and untypical *negotium* of transfer cannot be based on the alternative *astrazione* or *causalità* but on the different forms through which the act responds to the need of *causa* requirements [Mengoni, (1994), p.203]; the justification imposed by Art. 1322(2) on untypical contracts, *giudizio di meritevolezza*, is not pretermitted if the act is linked to an interest *meritevole di tutela* external to it. Along with this reconstruction, the agreement's broader function can be deconstructed by stressing the coexistence of different nature of *causa*. *Causa* sustaining the transfer-performance act has a subjective nature – ex. *solvendi causa*, as in Art. 1706(2) – as the justification adopted – *expressio causae* – by the performing party; objective *causa* is instead the fundamental relationship that justifies the attribution segment. Due to its position concerning the act, it is also termed as external *causa*, which justifies the first one contextualising it throughout the entire operation.

In addition to the act's validity, coexistence and relationship are relevant for any remedial profile: subjective *causa* would be *sufficient* to justify the transfer effect; any non-existence or nullity of the principal relationship – objective *causa* – would be relevant only to preserve the effect. In case of non-existence or radical invalidity of objective *causa*, the author of the act would only have a personal action at his disposal; the case of objective *condictio indebiti (sine causa)* Art. 2033 provides that the *traditio domini* is concluded even in the non-existence of the *causa solutionis*. This thesis appeared to be criticised first based on the nature that it seems to attach to *actum traditionis*; like the contract, it has a consensual and not real nature, it is not a *traditio solutionis causa* but a consensual *negotium* having real effects in which the transfer only operates in terms of effects and performance, not of conclusion. The link between subjective *causa* – by the *actum traditionis* – and the objective *causa* – by *negotium*, the broader legal and economic operation – is a prerequisite for the former's validity. In the circumstances in which the error on invalidity (thus on the existence of a general justification, *Irrtum*) is not bilateral but unilateral and detected *ex latere solventis* only, while the *accipiens* acted by *mala fides*, the qualification that only a common empirical intent (*empirische Absicht*) can grant to *traditio* decays, that is, the performance of a pre-existing obligation functionally qualified by the objective cause [Zitelmann, (1879), p.238; Grasseti, (1936), p.110]. If, on the other hand, *mala fides accipientis* is deemed irrelevant, and the emphasis is limited to the subjective *causa* for *traditio* efficacy, the latter has also to be qualified as a unilateral act and not – as in reality – a transfer *negotium* as the performance of a *solutio*. In this case, however, the justification issue shifts to the objective level because the unilateral act can produce real effects if there is a *valid* objective *causa* that justifies it.

Therefore, if we can summarise what has been outlined so far, we can say that the *causa negotii*, of the ius-economic operation, sustains the justification of the individual acts of transfer (*causa* in a subjective sense) by representing its *empirische Absicht*.

3 Disposable nature of *Simultaneität*

Furthermore, to the deconstruction of the traditional principle concerning transfer acts' justification, another theoretical element is that the immediacy of the effects, according to *principio consensualistico* for the real efficacy, Art. 1376, *contratto con effetti reali*, does not represent a mandatory precept. The rule of *Simultaneität* between consent and effect is *disposable*, and the agreement on the transfer does not imply *traditio* in an *automatic* and *direct* form [Luminoso, (2007), p.9]. The legal doctrine leans for a disposable nature of the norm, in adherence to the principle of contractual autonomy; the chronological modulation *secundum voluntatem* of the real effect is a manifestation of autonomy; it can be expressed in the simultaneity or the deferral of the transfer effects.

For example, in addition to immediate effect, other efficacy patterns are represented by the *individuation* of generic goods, Art. 1378, by which the property's transfer is carried out, as constitutive consent alone is insufficient. The act serves to individuate, concretely choosing and separating, the thing object of agreement from the others that are part of the same *genus*, thus giving rise to the transfer effect at this moment. Individuation is mandatory since among the primary obligations of the seller, Art. 1476(2), there is that of making the buyer acquire the property "[...] if the purchase is not the immediate effect of the contract"; scholars are not univocal on its nature, viz. whether it is a mere act or whether it has nature of *negotium*, and if in this case, it is bilateral or unilateral [Luminoso, (2009), p.136].

Likewise, instalment sale with retained ownership involves separating the buyer's assumption of risk and property acquisition. Art. 1523 provides that the first is immediate while the acquisition occurs at the time of payment of the last instalment.

Equally, there is a plurality of forms that provide exceptions to the *Simultaneität*, following different transfer paths: the relationship between *contratto preliminare* and *contratto definitivo*, the actual transfer contract; the act as mentioned above of the agent towards the mandator, by Art. 1706(2); a series of typologies, detectable in practice, through which a general negotiation model is carried out: it implies the deferred transfer effect as compensation for risks, and therefore the expectancy of the acquisition of the asset is naturally in a *future* perspective, as the juridical and economic presuppositions that justify it are *in fieri* or because such is the good itself [Camardi, (1998), p.140]. Thus, it is crucial to identify these cases' structure and nature [Luminoso, (2007), p.11].

3.1 Nature of *actum traditionis*

The doubt arises from the contrast with the often-mandatory nature of such acts with the recognition of freedom that is typical of *negotium*, such that the acts should be qualified as *stricto sensu acts* for which the element of the will does not extend to the effects, these would be absorbed in the more extensive regulation's *ratio*. The prevailing legal doctrine tends towards a case-by-case reading of phenomenology, which can present different physiognomies, in any case distinguishing the functional profile – which presents the bounded element of will – from the structural profile, relating to the content of the performance, which instead can take the nature of *negotium*. Therefore, it is evident that the demarcation passes through the discriminating element of the two cases: there is undoubtedly a *negotium* act and not a *stricto sensu act* when the system recognises the extension of *subjective will*, from the performance of the act to its final effects and their content.

3.2 The structural issue

Further discussed is the structural level, viz. whether the transfer performance and the *solutio* have unilateral or contractual structure. Two elements accredit the hypothesis of a unilateral structure: the performance act is mandatory, and a contract between the parties justifies the attribution; thus, it has been already recognised by the consent; even more Art. 922 also provides an open formula, “[...] altri modi stabiliti dalla legge”, among the ways of ownership acquisition. The thesis favouring the structure’s contractual nature is based on the need for acceptance by the recipient concerning the management and maintenance costs involved by the *ingredients dominium*. Also, the need for the acquirer’s cooperation must validate the conformity between the title and the acquired ownership, as can be recognised by extending the principle by Art. 1378, for which the individuation must be “[...] made by agreement between the parties or by the manner established by them.” Another hypothetical element favouring the contractual nature is linked to written form *ad substantiam* required for *traditio*, for example, for immovable assets; this element also for the case of an act of performance requires an acceptance *ex latere accipientis* characterised by symmetry on the form.

4 Chronological elements and real efficacy *negotium*, time clause (*dies certus*), condition precedent-suspensive (*condicio suspensiva*), condition subsequent-resolutive (*condicio resolutive*)

There are many perspectives in the light of which time clause – *termine* – by the two forms of *dies certus a quo* and *dies certus ad quem*, and condition – *condizione* – by the forms *precedent* and *subsequent*, *conditio suspensiva* and *conditio resolutive*, are linked and demarcated at the same time [Zimmermann, (1996), p.716; Cataudella, (1966), p.181; Scheurl, (1871), p.*passim*; Falzea, (1941), p.76]. According to the perspective of this work, interpretation will have to be focused in the light of a *per differentiam* criterion, aimed to point out normative consequences of the distinctive character of *certitudo* between the two chronological elements, providing peculiar prominence to time clause *ultra-active efficacy* (Di Prisco, n.d.) [cited by Tolone Azzariti, (2015), p.55].

Functionally, the ultra-active time clause is placed in the context of the conceptual construction of terminable ownership (*proprietà temporanea*; *Eigentum auf Zeit*), which can take on two abstract forms. By the agreement on final time ownership, *dominium ad diem*, Titius transfers ownership’s title to Caius; the title has a duration and is terminated according to a *dies certus ad quem* that the parties have agreed to *ab initio*. Therefore, the title is *ipso iure* constituted in the patrimonial sphere of Titius or a third party. By the case of agreement on an initial-time property, *dominium a die*, Titius transfers ownership to Caius, but, according to their agreement, the transfer’s effect is not simultaneous but deferred, and Titius remains the owner until the expiry of the *dies*. The *traditio* takes place according to a future *dies certus*, when the title is *ipso iure*, automatically, transferred in the sphere of Caius. In this case, *negotium* containing the time clause by certitude marks two entitlements limited in time: the *tradens* Titius is the owner until the *dies* come into being (*dominium ad diem*), the *accipiens* Caius is the owner from its expiration onwards (*dominium a die*).

Time clause conceptually delineates a *fattispecie* that contractual autonomy disposes on the principle of *perpetuitas* of ownership right, not recognising as mandatory, such

principle. From this perspective, it has the function of determining the chronological succession of two entitlements. The first in chronological order is terminated, and the next is established. The ownership to whom a time clause of duration is attached is exercised in the *fullness of property rights* (*Wesenheit*) except for *patterns of exercise* that the parties can establish in the *negotium traditionis* and which constitute the *titulus* concerning the token. At the expiry of the established term, the transfer to the next entitled takes place *ipso iure*; the right is terminated because it receives such *essential conformation* by the existence of the time clause by agreement: the expiry does not constitute a prerequisite for an *obligatio tradendi* nor reversion is an act of the entitled owner towards the incoming one. Equally, reversion is not due to the *Elastizität* principle, as would be in the case of termination due to the expiry of an *ius in re aliena*. *Dominium temporarium* entails a full and not *deminuta* ownership qualification: the type of *ipso iure* reversion which we will deal with in this paper, given its essential value, has an *iure contractus* effect.

By ultra-activity of the *dies*, we mean a *conformative* character with chronological and normative co-essence. The first character is reflected in the extension of the binding nature of *negotium* – and of time clause in particular – beyond the phase of title acquisition, about the *accipiens* and beyond the expected expiry [Costanza, (1981), p.130]. The effect reflects the second that the time clause produces on the right and its exercise (Messineo, n.d.) (cited by Gambaro, 1995). Following the theoretical scheme *ut supra: negotium* that has transferred ownership *ad certum diem*, after the expiry, does not convert the title into a *new right* of the alienor constituted at that expiry, but instead makes effective an *ipso iure* reversion which implies the re-entry of the original right, of the *ius quo ante*, in the primitive sphere or the sphere of a third party. Thus, the reversion of the right transfer by time clause is not a subjective substitution.

Time clause is not only recognised for its qualification of the real efficacy and of the interest in acquiring the ownership according to the chronological program but also because of its objective *conformative* effect, on the right and on the patterns of exercise of owner's *facultates utendi*, which extend up to reversion. The *traditio* through the *dies ad quem* conveys the extension of the consent to the future *ipso iure* reversion upon expiry of the date; internally, the *negotium* regulation chronologically marks the sequence of interests in the acquisition of the title and at the same time *conforms* to the entitlement in its availability and enjoyment. The ultra-activity character reflects by time clause a *constitutive* character of the general scheme of *dominium temporarium*: the effect of the agreement conveyed by contractual autonomy in the regulation about the scope of use of the asset, thus within the scope of the exercise of the right that is traditionally considered to be exclusively left to legislation power and not disposable by private autonomy.

This synthetic scheme, developed here in contractual autonomy, has regulatory patterns in the Italian Civil Code that stress the *termine* Art. 1183 ff., an autonomous normative value between the areas of real and obligatory efficacy.

Arts constitute one institution. 637 and 640; the first rule provides that the time clause, if attached to a *mortis causa* general legacy disposition, *disposizione a titolo universale*, is considered as not attached; the second expressly provides that a specific legacy can be subject to both time clause and *condicio suspensiva* and that, in this case, the beneficiary of a specific legacy title (legatee/devisee) may request a guarantee from the executor.

In the case of legacy or device, *sub die ad quem*, a similar guarantee can be imposed on the beneficiary as owner *ad diem*. The specific legacy under time clause or condition

is also mentioned in a matter of opposability and disclosure, that is, for the *Trascrizione degli acquisti a causa di morte*, particularly in the transcription note, Art. 2660(2), No. 6.

Similarly, another institution is constituted by the normative on *superficies* (right of a surface), Arts. 952 and 953. According to a perpetual or terminable duration, the parties that constitute this right to the fund can program the resulting institution, *proprietà superficiaria*.

A relevant regulatory framework essential in the study of *dominium temporarium* is the combined provision of Art. 1376 mentioned above, and of Art. 1465, *contratto con effetti traslativi o costitutivi*. The rule of Art. 1465 regulates the *status* of the functional synallagma, *post consensum*, in the event of loss for which the alienor is not liable. This is the case of an already transferred ownership of a specific good or constitution or transfer of *iura in re aliena*: when a loss occurs, and *tradens* is not liable, *accipiens* is due to perform, even if the thing has not yet been delivered to him. The relief emerges because by the second paragraph, the applicability of the same rule is provided “[...] in the case that the transfer or the constitution effect is deferred until the expiration of a time clause.”

The time clause operates within the real efficacy and outlines the constitution of the right *ex latere accipientis*, for which it is believed that the case of derivative acquisition, provided by Art. 1465 justifies a different reconstruction concerning traditional perspectives. By following the norm of Art. 1376, the accomplishment of the *accipiens* interest coincides with the *transfer effect* and is *simultaneous with consent*, without other performance activities being required. But, on this ground, Art. 1465(2) and the effect’s deferral it contains oblige to clarify a dynamic which recognises, at the same time, that the interest of *accipiens* is deferred, accomplished by *traditio* at the expiry of the established time clause, while it should have been *presumptively* satisfied in a moment of consent and simultaneity of effects.

The alternative hypothesis on the nature of the time clause, mainly in real effects contracts, and suitable for determining *dominium temporarium*, establishes that by the type of Art. 1465, until the *dies certus a quo* expiry, the only existing ownership is the *tradens* one. The *accipiens* acquisition that follows the time expiration has the nature of *inter vivos* succession, and it is not an *expansion*, *Vergrößerung* due to *Elastizität* principle, of a preexisting *deminuta proprietas* constituted in a moment of *consensus*.

It, therefore, seems evident – also because of the postulates of *Simultaneität* highlighted above – the limit of the interpretation alternative to the latter which, relying on the letter of the norm ‘deferral of the real effect’, proposes that the time clause is to be referred not to the *right* but to the *transfer*, for which we should discuss the delay of the effects concerning an already definitive *traditio*.

As we have examined, the cardinal postulancy supports the co-essence and contemporaneity between act and *traditio* or *constitutio*. From the moment of consent, it does not provide for a *spatium temporis ac iuris* occupied by the effects, deferred by hypothesis *ad certum diem* so that the *traditio* can be considered a mere act of performance accorded to an *already existing title* and not what it is: genesis, transfer or constitution of property rights. The essential assertion states that *Präsenz des Thatbestandes* implies the *Simultaneität der Wirkungen*. Thus, if there is a normative type such as the one in question, the interpretation must develop an alternative path to the hypotheses that bring the time clause exclusively back to the areas of rights’ exercise and performance. First of all deconstruct the linkage of the two postulates: if the parties have subordinated the *traditio* to a *dies certus*, the *Präsenz* of the type can be defined, its

completeness in all elements and the presence of the time clause only implies the subsequent start of the effects.

5 The emergence of expectancy *ob rem* in the concept's foundation

The transfer of the risk of loss to a *nondum dominus* contracting party but whose situation is characterised by the time clause certitude must be justified according to another criterion, namely the definition of a situation of *dingliches Anwartschaftsrecht*, more precisely expectancy *ob rem sub certo die* [Fitting, (1856), p.77; von Thur, (1914), p.323; Forkel, (1962), p.86; Birks, (2000), p.238; Tolone Azzariti, (2015), p.1077]. *Certitudo*, as a character of the temporal suspension of ownership, operates on both spheres of the sequence of entitlements: on the one hand, it defines the situation of the *accipiens a die*; on the other, it limits the *dominium ad diem* of the *tradens*. For example, the agreement with deferral of the acquisition *a certo die* implies the abdication of *ius destruendi* in the hands of the alienor, *dominus ad diem*, and his liability for destruction of the good which comes into being upon the expiry of the duration of his entitlement, when the acquirer's entitlement arises and justifies his action.

Based on these elements, it is possible to focus on institutional coessentiality between time clause and ownership. Such institutional link both identifies another normative perspective through time clause, beside the ones mentioned above, and preludes to a type of ownership that can derogate to *perpetuitas* and yet not *deminuta* about its typical prerogatives: terminable ownership or *dominium temporarium sub certo die* [Di Prisco, (n.d.), p.182] [cited by Tolone Azzariti, (2015), p.55].

5.1 The complexity of token: *Anwartschaftsrecht* as structural type, *Recht am Recht*

The conception of *dingliches Anwartschaftsrecht* as a structural type, *rechtliche Strukturtypus* [Larenz, (1991), p.466], is conceptually justified [Würdinger, (1928), p.11] on the basis of the extreme structural and normative heterogeneity that connotes the area of interest. About this issue, it is stated that: “‘Anwartschaft’ ist keineswegs ein fester juristischer Begriff, es gibt Anwartschaften der verschiedensten Art, mit mehr oder weniger sicherer Erwerbssaussicht, und jede dieser ‘Anwartschaften’ folgt ihren eigenen Regeln” [Wieling, (2007), p.240; Scognamiglio, (1958), p.226]. This implies first of all a consistent methodological approach in the definition of the structural and functional nature of the subjective situation, considering that – by limiting the cases to what is relevant for this work – it can be defined by the alternative concurrence of the so-called *elementi accidentali*: expectancy by time clause or under condition, and by the typology of the expected *final situation*: expectancy *ob rem* or expectancy *propter obligationem*. Among these typologies, with respect to an ideal comparison on the stronger subjective form of entitlement in terms of *Rechtsmacht*, that is, the *diritto potestativo* as a power of modifying the situation only through the entitled will, which corresponds to the subjection of any possible counterpart, as an example may be taken the case described above, expectancy *ob rem* by time clause, *dingliches Anwartschaftsrecht sub certo die*, that normally represents a form of subjective right, *Art der subjektiven Rechte*, classified and protected for example among the *rights to acquisition*, *Erwerbsrechte* [Wieling, (2007), p.6]. Even with respect to the limited heuristic suitability of the class, it has long

been ascertained as such mainly due to the *dies* certitude in the perspective of property rights acquisition, in the case that concerns us is thus an expectancy of ownership [Raiser, (1961), p.45].

Recognising a *subjective right* situation in the complexity of the expectancy type implies the recognition, by an *abstract* form, of a *Rechtsmacht* that entails a modifying power of the situation, authorised by the system but differentiated according to the tokens, thus for which a – unitary – notion around *Willensmacht* would lack conceptual reconstruction. Tokens are, for example, acts with essentially factual content or whose effectiveness is exclusively regulated by legislation or conveyed within an activity authorised by the system. Likewise, the right to act to protect the situation or dispose of it is a right (*ius alienandi*). These characters may or may not be present together in the same situation but have to be examined in a deconstructed form, case by case, and the presence or absence of any of them is not essential for defining the concept [Larenz, (1977), p.146]. The effect of this complexity on expectancy as a juridical-structural type is analogous, and the interpretative process, beyond the *Gesamtbild*, must take place through the elements of the peculiar deconstruction of the type. Among the most prominent examples in the case in question is the *link of conformation* of time clause and right, not limited to the efficacy, and the degree of fullness in the *exercise of the situation* as a constitutive element of its definition [Larenz, (1991), p.468]. Thus, the relief for this study is essentially *ad excludendum*. The theoretical problem and the founding element of the concept take place around the prism of *ius alienandi* by an ownership *sub die* situation, representing a real expectancy of ownership type. It is the *Übertragbarkeit der Eigentumsanwartschaft* which, if recognisable and by its form of exercise, attracts typically the discipline of subjective right and excludes other types, and not vice versa [Georgiades, (1963), p.24].

5.2 *Expectancy ob rem, expectancy propter obligationem, certitude and Vorwirkungen*

Thus, according to a primary classification, expectancies *ob rem* can be demarcated from expectancies *propter obligationem*, according to whether the final state concerning which they are prodromal is a property right of or a right of obligatory nature. Equally, however, the type that interests us arises in a ‘basic’ form in constructing the concept of *dominium temporarium* according to multiple profiles derived from the opposite connotation of *incertitudo diei*. For this reason, within the class of expectancies linked to property rights, the essential function of the expectancy *ob rem* by time clause is relevant not only in the specific context in question but in the whole, broader thematic of the preliminary effects of the act (*Vorwirkungen*), on the ground of demarcation of these tokens and the homologous of expectancy *ob rem* connotated by the opposite character of *uncertainty* of the event, as for the expectancies *sub condicione* and under aleatory condition.

This perspective facilitates the expectancy’s conceptual position in the context of *Vorwirkungen* and the recognition of the *eventus, certus* or *incertus*, regarding disposable right, for example, ownership, and not exclusively concerning *effects*. So emerges the relief of the symmetry between the intermediate and the final situation, under the perspective of the broader *negotium* whose *causa* justifies an interest of the parties. This interest can also be conveyed by attachment of an internal limit of *dominium*, “weil das Zwischeneigentum selbst eine innere Schranke in sich trug”, and the creation of the final situation when the event itself occurs [Fitting, (1856), p.77]. This implies that the future

right, *post eventum*, is a subjective right that by expectancy is recognised according to the same nature in a prodromal phase and is to be treated according to the norms that regulate the right in its fullness: this process of development of the situation, and the expectancy as its phase, always depend on the existence and nature of the functional element of the contract [Serick, (1963), p.53].

The element that highlights the institution's functioning, diversifying the respective regulatory profile, is the protection that the system provides through different tokens, in the perspective form concerning the situation of the subjective right to which the expectancy preludes. This is concretised, for example, with the symmetry between the protection of the final situation and expectancy by actions of the same nature, deriving from property rights area. A paradigmatic token of expectancy *ob rem* in the Italian system can be identified in the *traditio sub condicione*, following Art. 1357. This general rule states that "Anyone who has a right subordinate on a suspensive or resolutive condition can dispose of it while pending the condition, but the effects of any disposition are subjected to the same condition." When *eventus incertus* occurs, the expectancy *ob rem* justifies the supervening – retroactive character – inefficacy of the disposition acts carried out *pendente condicione suspensiva* by alienor the constitution of the effects in favour of the acquirer [contra Pelosi, (1975), p.9].

The retroactivity element allows us to highlight a differentiation between the Italian and German systems, which is relevant in our investigation: §158 BGB does not provide for the retroactive *ipso iure* effect of the condition into being. The provision by §158(1) provides the efficacy of transactions subjected to a suspensive condition, *aufschiebenden Bedingung* when the condition is satisfied; §158(2) provides the end of the efficacy of transactions subjected to resolutive condition, *auflösenden Bedingung* when the condition is satisfied providing at the same time the restoring of the previous legal situation "[...] mit diesem Zeitpunkt tritt der frühere Rechtszustand wieder ein." Under §159, retroactivity, *Rückbeziehung*, is a character that has possibly to be derived by interpretation of disposition and which has a mandatory effect on the parties, to render: "[...] each other the performance that they would have rendered if the consequences had occurred at the *Zeitpunkt*." The qualification of ineffectiveness, *Unwirksamkeit*, is provided by §161 for the dispositions occurred *pendente condicione*, *Schwebezeit*, having as area of enforcement all the acts which, symmetrically, can be qualified as defeating or adversely affecting the suspended or resolved effect, "[...] als sie die von der Bedingung abhängige Wirkung vereiteln oder beeinträchtigen würde." §161(1) provides that, after the transaction, when the suspensive condition comes into being, the disposition acts with these characters that the holder has further carried out during the suspense period are ineffective; the §161(2) applies the same rule to acts performed by the *accipiens sub condicione resolutive*. By §161(3), necessary adaptations are required for the application of provisions in favour of subjects deriving rights from unauthorised person, "[...] von einem Nichtberechtigten herleiten."

6 *Anwartschaftsrecht. Abstraktionsprinzip and the abstract expectancy ob rem*

Summarising some theoretical elements, on the virtue of the separation principle, *Trennungsprinzip*, the German civil system conceptually demarcates the obligatory relationship between the parties, *Verpflichtungsgeschäft*, by the legal transaction which

concretely interferes with rights, disposition contract, *Verfügungsgeschäft*. The system provides that the second transaction's validity is independent of the first, *Abstraktionsprinzip*.

Following the regulation necessary to carry out the *traditio*, the system *naturaliter* facilitates recognising the expectancy by a series of tokens, although not all unanimously accepted among the class of *Anwartschaftsrecht*. Thus, can be noted the similarity to the general discipline of the *Abstraktionsprinzip* of expectancy: "As always in German law, the disposition *in rem*, which encumbers the seller's ownership with the buyer's expectancy, is independent of the existence of the acquisition contract, according to the principle of abstraction [...]. However, the expectancy does not constitute an exception to this basic principle of German civil law" [Wieling, (2007), pp.12, 241, 246; Spöner, (1965), p.73]. At the same time, however, it should be noted how these principles constitute a system naturally productive of complex cases, differently characterised by protected *Vorwirkung* [Baur and Stürner, (1992), p.180]. An abstract situation of *dingliches Anwartschaftsrecht* [Spöner, (1965), p.108] is identified, for example, in a crucial area of transactions on immovable rights, precisely by the *spatium temporis ac iuris* between the *Willenserklärungen*, the joint declarations of the parties on the transfer of ownership of a plot of land, according to *Auflassung*, §925 BGB, and the registration in the *Grundbuch of the Übertragung des Eigentums* [Raiser, (1961), p.14]. *Abschnitt 2*, within the *Sachenrechts*, deals with *general provisions on rights in land* ('... über Rechte an Grundstücken'). §873(1) in this regard establishes the *essential* value of registration in the *Grundbuch* and which is its object: the transfer of the ownership of a plot of land, 'Übertragung des Eigentums an einem Grundstück', the encumbrance, *Belastung*, of a plot of land with a right, the transfer and encumbrance of such a right. In these cases, are required the agreement between the person entitled and the other person in a moment of the rights' modification, 'über den Eintritt der Rechtsänderung', and the registration of this modification in the *Grundbuch*, except insofar as otherwise provided by law. Under §873(2), the alternative prerequisites about reciprocal obligation by the agreement, before the registration, are the notarial record of the declarations, their occurrence by the Land Registration Office or submission to it, the delivery by the entitled subject to the other party of an approval of registration compliant with the registration code, "[...] wenn der Berechtigte dem anderen Teil eine den Vorschriften der Grundbuchordnung entsprechende Eintragungsbewilligung ausgehändigt hat."

The *Auflassung* by §925(1) refers to the derivative acquisition by §873, stating that the agreement of conveyance must be declared in the presence of both parties before any competent agent; the notary is always competent to receive the *Auflassung* notwithstanding the competence of other agencies; the declaration may also be made in a settlement in-court or an insolvency plan finally confirmed.

The regulation of §925(2) is additionally relevant in our analysis due to the absolute limit that it seems to oppose to the recognition of *Eigentum auf Zeit* concerning the specific object of its regulation, as opposed to other types of immovable right, movable property (*beweglich*) and consumable goods (*verbrauchbare Sachen*), sanctioning the ineffectiveness (*unwirksamkeit*) of any *Auflassung* containing a condition (*Bedingung*) or a time clause (*Zeitbestimmung*).

6.1 *Types of expectancy ob rem sub condicione, Pactum reservati domini, Eigentumsvorbehalt*

Among the types of *traditio sub condicione* that respectively take on traditional importance in the Italian system and the German system in *dingliches Anwartschaftsrecht*, *Vendita con riserva della proprietà*, Art. 1523 ff., and *Eigentumsvorbehalt*, §449 BGB. Focusing on the latter, *Vorbehaltskauf* is the type of alienation in which both parties, the alienor (*Verkäufer*) and the acquirer (*Käufer*), agree about the retention of ownership's title (*pactum reservati domini*) by the alienor himself, due to the select type of *Verfügungsgeschäft* that it entails [Pelosi, (1975), p.189; Serick, (1963), pp.11–13; Spöner, (1965), p.81; Rautmann, (1951), p.298].

Unlike the theoretical model of a contextual, reciprocal performance between *Sache* and *Preis*, *Zug-um-Zug-Prinzip* by §320, as the effect of the reciprocal obligations arising from *Kaufvertrag*, the *Eigentumsvorbehalt* is linked to an alternative content of the agreed synallagma, for which the ownership is transferred with the suspensive condition of full payment of the price of the good [Rautmann, (1951), p.298]. More precisely, in the German system, §449(1), a *praesumptio* on qualification is operative: in case of doubt, the agreement between the parties on movable property, whereby the seller alienated by retaining ownership up to the total payment of the *Kaufpreis*, qualifies as a transfer of ownership *sub condicione suspensiva*. The request for payment of the price, *full although deferred*, is deemed to include a suspensive condition, *aufschiebende Bedingung*; the effect of this qualification is that none of the previously performed acts – agreement and delivery of the good – have the value of the transfer, since the *Übertragung* coincides with the last performance completing the payment of the total price [Wieling, (2007), p.240].

The recognition of the situation *ex latere accipientis* implies an entitlement of an expectancy *ob rem*; it is characterised not only by the linkage to the future title of ownership *sub condicione suspensiva* but also by the actuality, the possession of the good on which enjoyment *already* exists. As further constitutive data of the peculiar situation of *Anwartschaftsrecht*, the acquirer is subject to the obligations of the ordinary maintenance of the owned asset, which is subject to a reversion towards the alienor in case *condicio suspensiva* is not satisfied, to the full payment of the price, to inform the seller about the condition of the goods. Beyond the system of protection on conditional acquisition as seen *supra*, the question arises on the qualification of the content of the situation: whether or not it is a state of fact, the control over the good in possessor entitlement or a 'right to possession' having *ob rem* nature, therefore opposable to seller's subsequent acquirers and creditors, and if it qualifies as an untypical right *in rem* and how it can be classified following *numerus clausus* principle.

The system would thus protect the expectancy *ob rem* according to two normative principles. The first is grounded on the retroactive effects of the condition, §161, which, without prejudice to the differences between the two sub-systems, recognises efficacy in a form like Art. 1357: the other, considering the nature of the situation, on the alleged admissibility of its *erga omnes* protection as property rights entitlement.

To demarcate this situation of expectancy from the type defined by *Eigentum auf Zeit*, the element of the lack of *ius alienandi*, *rectius* of entitlement to the sale by the principle 'nemo plus iuris in alium transferre potest quam ipse habet' is essential, since the acquirer, as possessor, lacks an autonomous title to sell that can be exercised without the agreement of the alienor. In the application of the norm of §185, *Verfügung eines*

Nichtberechtigten, this agreement can be contextual to the original alienation with retention of ownership, taking the nature of *authorisation* for subsequent sale by §§182 and 183 (*Einwilligung*), or it can take the form of *ratification* following the alienation by §184 (*Genehmigung*). Through these acts, alternatively, the lack of entitlement is remedied, the alienation of the first acquirer to a third party is valid and effective; the condition precedent and the guarantee function are terminated since they are mandatory and useful only *inter partes* and have no *ob rem* connotation: there is no succession in expectancy. The guarantee function can be reconstituted with a *pactum de (futuro) credito cedendo* by §398, *Abtretung*, which allows the subjective modification *ipso iure*, ‘Mit dem Abschluss des Vertrags’, of the *Verkäufer* in the future contract stipulated by the acquirer or, through the ratification, with retroactive effect on the contract concluded without original authorisation (*Rückwirkung der Genehmigung*). Therefore, the parties link the adhesion act about the alienor’s transfer, both *authorising* and *ratifying*, to a credit transfer, through a *Vorausabtretungsklausel*. This *Pakt* creates an automatism by which a *cessio crediti* favouring the owner from the possessor coincides with the moment of resale by the latter. Therefore, it will be future and bearing a suspensive conditional structure for the *Einwilligung* case, or with a retroactive nature in the case of *Genehmigung*. The agreement may provide that the automaticity of the subjective modification does not coincide with any notification to third parties, so the *Käufer* is authorised to receive the performance in his name and the interest of the *Verkäufer*.

A further demarcation concerning *dingliches Anwartschaftsrecht ob rem* according to the form of exercise of the *ius alienandi*, as identifiable in the *dominium temporarium sub certo die*, is the more specific reconstruction of the situation of *Käufer* for the case of *sine titulo* alienation. It emerges in the double case of *lack of title*, in which the constitution of entitlement *ex latere tradentis* for the valid transfer of the asset has not been integrated *ab origine* or subsequently ratified, and of *inconsistency* between the alienation authorised by the *Verkäufer* and the content of the alienation carried out by the acquirer towards the third party, following the symmetry between the latter and the content authorised in the *Vorausabtretungspakt*. These cases lie in the discrepancy of the *titulus traditionis*: typically, the *Einwilligung* from *Verkäufer* is limited to the sale, so, for example, a sale to third parties guarantees another debt is inconsistent with authorised activity. The same can apply to the *content* concerning the minimum price at resale or payment timing not recognised and embodied in the sale to third parties by the acquirer. Furthermore, having to focus only on the relevant aspects for our intervention, it is necessary to point out exclusively how these hypotheses, as a matter of remedies, may be qualified case by case as *traditio a non-domino* or *falsus procurator* of movable property, thus with the system of rules adopted for these types (restitution; good faith acquisition) and established for the corresponding protections [*amplius*: Minte, (1998), p.71; Birks, (2000), p.525].

By the same perspective of *ius alienandi*, the subjective situation *ex latere tradentis* is equally relevant based on §§929 ff. [Schmidt-Recla, (2002), p.760]. The formula concerning the transfer of movable property, §929, obliges the *tradens* to deliver the thing to the *accipiens*, “[...] der Eigentümer die Sache dem Erwerber übergibt.” In the *Eigentumsvorbehalt*, however, the thing owns the *Käufer* who is entitled *erga omnes* in possession, so that the transfer of the title takes the form of the subjective modification in the credit on payment of the price and redelivery of the thing according to §931, *Abtretung des Herausgabeanspruchs*. The obligee situation regarding possession is not immediately due: it is also transferred, by the *Verkäufer* to the third party, according to

the ‘*nemo plus iuris*’ principle, thus subjected to *condicione suspensiva* of non-payment of the full price by the current possessor. To the latter situation, the rule of §986(2) is applicable. Therefore, the possessor may raise the same objections to which he is entitled and mainly the duration for the final price paid for the termination of the retention *ex latere tradentis*.

6.2 *Pactum reservati domini, Vendita con riserva della proprietà*

Vendita con riserva della proprietà, Art. 1523 ff. defines a type recognised in the Italian Civil Code of 1942. Its definition is functionally autonomous and derogates *per speciem* concerning the more similar type, viz. the contract containing a *traditio domini sub condicione suspensiva*, since, in this type, the payment of the price is the – *incertus* – event on which entitlement to ownership transfer depends. In the *fattispecie* in question, however, the acquirer’s situation provides an early delivery of the asset concerning the full payment of the price: the delivery coincides with the transfer of risks, while the last payment instalment coincides with the transfer of ownership title. It is believed that ownership and other property rights can be included in type’s application, if they are compatible with the nature of the agreement and the duration and autonomy of use. The institution also applies to registered real estate and movable assets because of the norm, Art. 1524, which governs the opposability regime through public registers. The forms of disclosure constitute, according to the system, the regime of opposability of *negotium* and any additional accessory agreements, such as *pactum de non alienando*.

The evident differentiation concerning the *genus* of the transfer *negotium sub condicione* regards the moment of transfer of ownership’s entitlement: by *traditio sub condicione suspensiva* unless otherwise determined by the parties or due to the nature of the relationship, Art. 1360, retroactivity operates, so when the *eventus* comes into being, the acquisition is retroactively placed, *ex tunc*, and by a *factio iuris*, coincides with the moment of consent. In the case in question, the entitlement is acquired *ex nunc*, when the *condicio* is satisfied, that is, the payment of the last instalment of the price.

The acquirer is entitled to an *ob rem* expectancy of ownership based on actual possession; therefore, on enjoyment and *detentio*, he must bear all the risks of loss or damages caused to third parties. The alienor, on the other hand, is the holder of the credit to instalments payment, as well as he is entitled to an expectancy *ob rem sub condicione suspensiva*, depending on the non-payment of the full price, this is the *eventus* that implies the reversion of the asset free from any constraint. As will be briefly highlighted, in addition to the differences linked to the different patterns of exercise of *ius alienandi*, the certitude of the *dies* allows further demarcation between tokens under time clause and condition. Differences may also be stressed concerning their different linkage to exercise of the faculties deriving from the two different situations, between the different *Anwartschaftsrecht* as *Recht am Eigentum* the forms of possession of the thing and the related protection *ob rem*.

The type in point constitutes two symmetrical expectancies, punctuated by the same conditional *eventus* taken as a *condicio potestativa*: the price’s payment. *Ex latere tradentis* an expectancy *propter obligationem* is defined, the alienor awaits the performance of the acquirer’s obligation, the full payment of the price, up to that point he will be the owner of the transferred asset. *Ex latere accipientis* the entitlement is to an expectancy *ob rem* equally under resolutive condition, upon payment of the price the acquisition of the title on an asset already in possession will coincide. The definition of

expectancies' boundaries is left to the *pactum reservati domini*, chiefly to the position of *tradens* concerning the situation of *accipiens*. Thus, to the nature and extent of the guarantee function's interference, to which the retention of ownership is linked, concerning the nature of acquirer's expectancy right.

The situation is protected as possessory; other forms are recognised, linked to the situation's specificity, as provided by Art. 2054(3) about liability in the circulation of vehicles [Bocchini, (2004), p.677]. On the definition of the type, the doctrines are multiple and diverse.

There is almost unanimous agreement on the recognition of the type as a form of ownership, *Eigentumsteil*. However, the legal doctrines mainly differ in the recognition and classification of the *ratio* of ownership rights provided in a deconstructed form by normative. For example, the persistence of the seller's interest in the reversion of the asset, in case that suspensive condition is not satisfied – the payment of the price – and the need for its cooperation for the possible disposition acts of the acquirer, above all concerning the *ius alienandi*.

Here are some traditional theories, synthesised mainly based on the entitlement to alienation criterion.

By identifying the *ratio* in the function of the *tradens* guarantee [Bianca, (1993), p.585], the lack of *ius alienandi uti dominus* makes it possible to qualify as *detentio* the situation of the *accipiens*; the resale without consent by the alienor would thus constitute a crime of embezzlement. However, in these cases, the guarantee function of the *pactum* is the basis for ascertaining the infringement of the right, therefore of the crime itself, and of the possible recovery function that the alienor can exercise on the sums that the acquirer has obtained from the sale without performing the obligation of payment. The same *ratio* justifies that specific acquirers' activities are identified as a reduction of the guarantee (damage of the thing) and may constitute a prerequisite for the alienor's action, which can also be criminal. However, focusing on the *accipiens* situation, the buyer's difference is one in the cases of so-called *Vendita obligatoria*, like for *Vendita di cosa altrui*, Art. 1478 seems to be evident. This norm provides that "(1) If the thing sold was not owned by the seller at the time of the contract, he is obliged to procure its acquisition to the buyer. (2) The buyer becomes the owner when the seller acquires the ownership from the owner of the thing." This situation entails the buyer to be entitled as obligee to a *future* transfer by the seller by an *automatic* subjective modification when the ownership will be transferred from t. On the contrary, the possessory *situatio* at the time of the contract by the type that concerns us identifies a *current* power of control over the thing, opposable *erga omnes*, including the owner. Thus, according to this doctrine, there would still be an *Eigentumsteil* but limited in the *facultates disponendi* while of more excellent proximity to the real ownership as to the *facultates utendi*. The *alienor's reservatum dominium* has exclusively a guarantee and restitution function, which can be recognised as *ius in re aliena*. Thus, according to the doctrine, this type would not be a *dingliches Anwartschaftsrecht*: the notion of expectancy is 'weaker'; it is instead an essentially precautionary situation, concerning a future enjoyment but composed of exclusively conservative rights that do not include rights to performance or enjoyment. The acquirer by *pactum de reservato dominio* has, on the other hand, a real right *in rem* over the thing, opposable *erga omnes*, exclusively limited by the guarantee established in the *pactum*. For instance, without admitting here the existence of *Anwartschaftsrecht*, the acquirer's situation must be qualified as ownership. Moreover, it is believed to identify

compatibility between the guarantee function by the alienor and the entitlement and exercise of this right by the acquirer.

The analysis changes when the *ratio* is made to coincide on the faculties of the parties, *facultates utendi ac disponendi*, inserted in the situation of expectancy and in the process to which it precludes: thus, the focus is on the nature of the relationship between acquirer's expectancy *ob rem*, about a property right newly created even if not yet embodied by qualification into the *corpus* of the already existing ones, and alienor's expectancy, having obligatory nature because linked to the credit of payment and at the same time *ob rem* because linked to the right of restitution of the good in case of breach of payment [Mengoni, (1994), p.186]. The acquirer *pendente condicione* is qualified as possession, thus suitable to constitute an *iusta causa usucapionis*. In addition to what established by Art. 2054, different sources of corroboration are found in the bankruptcy law, Arts. 72 and 73(2). Having to circumscribe the bankrupt's assets, as regards pending relationships, the principle expressed in Art. 72 excludes cases in which the thing sold has 'already passed into the ownership of the buyer' and under Art. 73(2), it is excluded that the seller's bankruptcy is a cause of termination of this type of contract; this normative composition implies that ownership is considered already transferred.

From another perspective, *Vendita con riserva della proprietà* differs from the acquirer's case by transfer *negotium* with real deferred effects [Comporti, (1977), p.371]. Elements of qualification and demarcation are the immediate enjoyment of the thing, the protection of the situation by *actio petitoria*, the entitlement – *substantial* – to the exercise of the *ius alienandi*, regardless of the consent of the alienor. The institution's ratio would be identified in the actuality of the proliferation of *ownership statutes*, among which this type has to be subsumed. The guarantee function would operate as a connotation element of the *Eigentumsteil* constituting, together with other elements, its ownership statute. From a conceptual point of view, this is more adequately recognisable by the inversion of the perspective concerning the *eventus incertus*, thus forming *dominium sub condicione solutionis, proprietà con riserva di pagamento*.

Stressing the transfer act and the *ratio* of recognition of an acquirer's expectancy. Then, it can be assumed that the acquirer's exercise of the *ius alienandi* implies the alienation of future ownership, therefore of a *dingliches Anwartschaftsrecht sub condicione* internal to a *negotium*; this has a typical and autonomous purpose [Cattaneo, (1965), p.976] of which the efficacy towards the third party is subjected to the alienor's failure to demand termination of the first contract. Indeed, the latter can act for the violation of the *pactum de non alienando* by the acquirer, obtaining the resolution and causing the termination of the real expectancy that the acquirer has alienated to the third party, under the rule 'resoluto iure dantis resolvitur et ius accipientis'. Thus, the individuated expectancy would be a new property right pattern, typified by the legislator, as to the acquirer's situation in the *Vendita con riserva della proprietà*. Once the situation *ex latere accipientis*, concerning alienation, has been adopted as a demarcation criterion, as an exercise of the subjective right, it is clear that the acquirer's situation in the Italian type of sale with retention of title is *minor* than those cases of alienation *sub condicione*, Art. 1357, and of alienation *ad certum diem*, as in the case of the right of surface, Art. 952 ff., or as in the case of the homologous German institution of *Vorbehaltskauf*. This demarcation can also be stressed in the case of alienation for the guarantee, *Sicherungsübereignung*, through §929 ff., by the situation identified by the *Käufer* [Rautmann, (1951), p.299]. The qualification of the expectancy, regarding the *ius novum*

subsumed in the new discipline, thus varies between *proprietà sub condicione* or *ius in re aliena* [Cattaneo, (1965), p.993].

7 Reversion *ipso iure*, the relevance of *Zuwendung* in the concept's foundation

The formulation of the *dominium temporarium* as *Eigentum auf Zeit* essentially depends on the normative and conceptual value identified on the time clause: its *ratio* and function. According to the first profile, unlike the cases of *dingliches Anwartschaftsrecht sub condicione* examined *supra*, the element defines the type of expectancy *stricto sensu*, as expectancy *sub certo die*, thanks to the demarcation that the character of *certitude* guarantees concerning the *condicio* in the cases of *Schweben des Eigentums* [Fitting, (1856), p.24]. The time clause attached to a *negotium* that transfers the *proprietas sub certo die*, linking the certitude to the prefiguration of an agreed *patterns of exercise* by the situation of *dominus temporarius*, excludes the interpenetration of the antagonistic interests between the parties.

According to the second profile, in addition to what we have already illustrated about ultra-activity, the time clause constitutes an *essential conformation* of the theoretical type (*dies certus sequitur ius*) opposable *erga omnes*: the *Zuwendung ipso iure*, as attribution *ex nunc* of the title to the new subject or reversion to the *dominus quo ante* [von Thur, (1914), p.71]. The termination clause is attached to the right and conforms to its structure and exercise, while the *negotium* program, thanks to its ultra-active efficacy, provides the termination of the situation of terminable ownership. Equally essential, however, is identifying the nature of the attribution's title upon expiry of the time clause: it is *real* and *ipso iure*, it is not obligatory. In the *dominium ad diem* the attribution operates as a reversion of the title in the sphere of the original *tradens* or the third party, whether it is still in the sphere of the first *accipiens* or whether it is instead in another subject is one, who has acquired it *medio tempore* according to its original conformation of limitation in time. By the *dominium, a die*, the real nature of the *Zuwendung* operates as an *ipso iure* attribution to the successive entitled, whether the title is still in the sphere of the *tradens* or whether the latter has alienated it to other acquirer subjects.

Moreover, the element that recognises this function, together with the others, is the *causa* of the – untypical – a contract that establishes terminable ownership.

Conceptually, the *attribution* can be classified as real when it is transferred or constituted a right; it is liberatory when it implies renouncing an *ius in re aliena*, an encumbrance, or a case of debt relief. There is also a type of obligatory *negotium*, having not the nature of disposition, and it is the obligatory attribution when the subject takes on an obligation of another. In the case of *liberatory Zuwendung*, the *abdication* of title does not imply any transfer of it to the obligor. There is no symmetry between attribution and acquisition of a title because the second is a *first species*. The attribution having a liberatory effect (*remissio mercedis* or abatement of debt, debt relief and others) does not imply the acquisition of title by other subjects. It essentially abdicates the entitlement implying any transfer. Furthermore, there is no necessary symmetry between the attribution and acquisition of the right; the latter case also stands in a *specific* position concerning the first.

Concerning this system, *per differentiam* the abdicative type of *Zuwendung*, although not subsumable to the case, concerns more closely the physiognomy of the reversion in question, at least according to two essential characters.

From a technical point of view, recognising the effect between the *abdicatio iuris* of the entitled and the related expansion of another subject's ownership. An epiphenomenon in property rights is the waivers concerning *Belastung* cases set in the function of an encumbrance and, in the area of obligations, the abdicative cases resulting in the debtor's liberation. The difference is given by the *absence of correspondence* in the linkage of situations, as in the obligatory relationship: the ultra-active character of the *dies* establishes a chronological link *ipso iure* and not synallagmatic between the two entitlements and their respective exercises, that is, between the *dingliches Anwartschaftsrecht*, as ownership *in fieri* upon expiry of the time clause, and terminable ownership currently into being.

The second character is the nature of the type concerning the source: such *Zuwendung* has effect *iure contractus* not *ope legis*, as in the cases envisaged by the *Elastizität* principle, resulting in the *Konsolidation* of the property. For example, through the *accessio* when the *dies* by the right of surface expire, the 'superficies solo cedit' rule operates. The exclusion of this type of attribution from the area of theoretical consistency with *Eigentum auf Zeit* results from theoretical consistency. However, it also highlights how much the individuation of the nature of the *Zuwendung* is an essential element of the conceptual foundation.

The constitution of an *ius in re aliena* and the final *Vergrößerung* of property are effects of attributions that merge into a single process traditionally established by law, in which the elements are mutually correlated. Among the attributions of property right (*Tochterrecht*) or partial attribution (*Partialübergang*), the most relevant is that which constitutes a property right on someone's else property (*konstitutive Übergang*). The type of *Zuwendung* for which an *ius in re aliena* is separated and constituted from *proprietas* as *Mutterrecht* has a systematic content established by the principle of *autodeterminazione dei diritti reali*: the constitution of the right takes place with the 'sole indication of its content as represented by the good that forms its object'. Therefore, *Partialübergang* has as its object a *defined section of facultates on the good* that constitute a property right, as an autonomous right by another subject, *konstitutive Erwerber*.

Symmetrically, in the case of *restitutive transfer*, *restitutive Übergang*, the attributive function towards the ownership sphere, after the termination of the *Tochterrecht*, occurs by the real linkage of this and the *Mutterrecht*. The termination of the encumbrance, of the burden (*Belastung*) on the good, because of the coming into being of the *dies*, produces the *Übergang* as an *ipso iure* effect which results in the re-expansion, *Vergrößerung*, of the ownership. *Belastung* can also decade due to the *Kondolidation* principle and confusion of entitlements, as for the cases under Art. 1014, Nos. 2 and 1072, due to the coincidence in the same person of the titles of ownership and the *ius in re aliena*, a principle applied both for credit and enjoyment [von Tuhr, (1914), p.82; Bekker, (1866), p.110].

Focusing the question about the expiration of terminable ownership and the nature of attribution identifiable in the ultra-activity of time clause, it is found that its regulatory efficacy is entirely independent of what we have examined under the other types.

It is not an effect of the property's re-expansive nature, nor does it imply a transfer effect. Instead, it is a manifestation of private autonomy regarding time clause

conformation on the right, which also involves the reversion as *unreflektierte Wirkung* of accomplishing the programmed duration. This kind of efficacy has an automatic, *ipso iure*, nature; therefore, objective and independent of the subjective element. It is grounded on the *conformation* given by the agreement to the right [Hellwig, (1903), p.40], thus because of the principle “*nemo plus iuris in alium transferre potest*” and recognises the disposability of the title, the normative value of the chronological element established in the *negotium*. The situations of *ius in re aliena* established during the terminable ownership have the same outcome: upon the occurrence of the date recognised as a ‘resolutive time clause’, *auflösende Befristung*, the entitlement and the property rights constituted upon the thing are terminated [von Thur, (1914), p.83].

Thus, the institution contains duplicity elements that an – untypical – transfer contract of terminable ownership must necessarily justify in light of the standard controls that the system reserves on contractual autonomy, Art. 1322(2). The attribution, *Zuwendung ipso iure*, is typical of the legislative model in the subject of legal property rights – as are, for example, the restitution or re-expansion forms that operate on the termination of a usufruct, surface, easement – so the identification of the possible ground of autonomic disposability about it is essential.

The attribution nature is essentially of systematic and non-autonomous origin, so its *extra ambitum* application requires a similar control. The analysis, however, allows the evidence that this institution is consistent with the current evolution of the system on untypicality in the area of property rights: the function of *negotium, causa*, is the element that encompasses the path of justification of the affair.

Therefore, the problem is to identify the *rechtlicher Zweck der Zuwendung* in the broader context of the *negotium* where this type of attribution occurs.

8 Time clause and *Zuwendung* as elements of *causa* in an organic theory of the contract, the role of *causa subiectiva*

The current doctrinal situation of property law and real effects *negotium*, briefly outlined in this essay, reaffirm the value of the linkage of *causa interna*, justifying the attribution, and *causa externa* as a support for the broader *negotium* and the ius-economic operation it conveys.

To adequately focus this theme, it is first necessary to stress the ancillary concept of *unzertrennliche Verbindung, inseparable linkage*, which can arise between the element of the time clause (or condition) and the business implied in the contract, regarding which contractual autonomy provides *causa negotii* [Scheurl, (1871), p.6]. This criterion allows us to evaluate in the context of the token not only the *dies* qualification efficacy but also the value, possibly *essential*, that the *eventus*, reflected in *condicio* or time clause has for the contractual relationship. Thus, not the expiry as *factum in se ipsum* but the *ratio* towards the *eventus* through which the parties justify the chronological clause’s insertion within the relationship.

Suppose *Typenzwang* is overcome as a principle according to which the real effects *negotium* is absorbed in the system’s abstract, transfer or constitutive pattern. It follows that the traditional dogma on property rights has today a cogency limited to the provisions of patterns of entitlement consistent with the *Wesenheit* of the situations established by the system, *numerus clausus stricto sensu* [Ferri, (1966), p.244]. The traditional issues for protecting third parties, as seen *supra*, are deemed to have been

superseded by the transcription and disclosure of legally relevant facts. Hence, the subjection of the real effects transaction to the system for which, to the *causa negotii* expressly admitted, there are untypical, transfer or constitutive *causa* of property rights, which are admissible insofar as they are subject to *giudizio di meritevolezza* on contractual autonomy, 1322(2).

Therefore, if the *self-determination pattern of property rights* is overcome, the regime of justification of the *Freiheit der inhaltlichen Gestaltung* must take place concerning its extension to this area and the type here in question [Westermann, (1967), pp.78, 177]. So it has to be presumed that the unity of the type of *dominium temporarium*, through its *causa unitaria*. Moreover, it provides the composition of all the phases of the process through which the *negotium* is developed and the *ipso iure* attribution segment.

Hence, the functional element's elaboration is strictly linked to enhancing the *empirische Absicht* in the area of real effects *negotium* [Grasseti, (1936), p.107]. Furthermore, concerning the specific content of which the type discussed constitutes an epiphenomenon and the need for *ipso iure* reversion, admitting a *causa negotii* that develops the suitability for transfer but not for the persistence *ultra diem certum* of the title in the sphere of the acquirer. Furthermore, the functional reconstruction of the type, thus, can be as follows.

The contractual autonomy by attachment of time clauses in the real effects agreement does not alter the *Wesenheit* of the ownership or the reciprocal duties and obligations between the parties; there are no possible injuries to third parties' situations or the circulation system of goods.

The *Verbindung*, what is briefly indicated as *unzertrennliche Verbindung*, implies the concrete interpretation of the contractual regulation provided by the autonomy and the assessment of whether the time clause must be considered irrelevant or not for the qualitative effect it produces on the ius-economic operation and its practical implications [Tolone Azzariti, (2003), p.261].

Even though relevant for the kind of linkage it subsumes, the dichotomy *causa esterna/causa interna* does not seem consistent with the type's issues. What is meant, in fact, as "unzertrennliche Verbindung mit einer äußeren Thatsache" is the link with the time clause (or the condition) recognised not as a simple chronological reference, at the most connotative of efficacy, but as an essential *eventus* for agreement operativity. Thus, it is not subjected to interpretation because of its position (internal or external) concerning *negotium*, conveyed in the ius-economic operation. However, insofar as it *directly* connotes or not the relationship such that it cannot otherwise be conceived the functional element of the contract and in the same terms: from this kind of scrutiny, it takes or does not its nature of relevance or irrelevance, *nebensächlich*. There is no multiplicity of *causa* because, unlike in the untypical transfer types, here it is therefore presumed that *dies certus* directly connotes the function and *Zuwendung ipso iure* is a manifestation by automaticity of the *unica causa* that the parties provide for this type of ownership's transfer, *traditio sub certo die*.

So, it is the conformation of the *causa* for *negotium*, as a recognition of the *empirische Absicht* that the parties carried out, which justifies the regulations of the different areas of the operation including the attribution, thus being able to evoke the concept and the qualification of *causa materiale* or *causa subbiectiva*.

9 Conclusions

The study on terminable ownership has the effect of uncovering ancient roots for a widespread phenomenology today and for a permanent analytic spectrum in contemporary legal doctrine [Gatt, (2010), p.73]. Concerning this general area of analysis, an essential structural relevance is confirmed in the type examined here: the programmatic nature of the agreement *within which* the section of real effects is not exclusive but *organically* linked to obligatory elements and as seen about *Zuwendung*, also to segments of objective reversion nature conceived by autonomy. This effect, in a general sense, is a normal consequence once it has been accepted that *Simultaneität* principle is disposable and that both the patterns, for the exercise of property rights and about their internal structure, are invoked with it from the contractual autonomy, without prejudice to the indefectible *Wesenheit* for each of them [Campagna, (1958), p.54].

Thus, the token interpretation should lead to the essential issue, viz. what is the concrete regulation the parties agreed to provide through ultra-activity, by attaching a time clause to a transfer *negotium* (*Wesen der Zeitbestimmung*). Consequently, it must conceptually subsume the notion of *sub certo die* ownership as *Funktionsbestimmte Rechtsbegriff*, favouring the interpretation and judgement on the *meritevolezza* of the final situations established by private autonomy.

Therefore, it is necessary to identify the linkage's qualitative profile of *dies* and *Willenserklärung*, beyond the idea that the chronological element relates *only* to efficacy and not to right also, in the extent of the ius-economic operation provided by the agreement.

The latter is naturally the merger of the complexity of concurring sources, coordinated by the concrete structure, and an *empirische Absicht* that take place in the *causa concreta* defined by the parties. In our example, it attaches nature of certitude *ipso iure*, *terminative* and *constitutive ex nunc* to time clause; it defines by *certitude* the situation of the *dingliches Anwartschaftsrecht* and its exercise; it provides the plan for the intersubjective transfers of the title and the patterns for the exercise of the rights by the intermediate entitlement, set by the agreement to safeguard the subsequent entitlement.

The system reserves control over acts of contractual autonomy, *giudizio di meritevolezza*, Art. 1322(2), mainly concerning the function of the act if it does not belong to the regulatory types: "(1) The parties can freely determine the content of the contract within limits imposed by law and corporate regulations. (2) The parties can also conclude contracts that do not belong to the types having a particular discipline, as long as they are aimed at achieving interests worthy of protection according to the legal system." The provision's effect is that the ius-economic operation that transfers ownership *sub die certo* must be consistent in systemic terms to its concrete definition and the final subjective situations, *Endzweck*, which constitute the legal and economic ground of the agreements.

Evoking the *Endzweck* around control by *giudizio di meritevolezza* implies that the intermediate situations of ownership and the structure of the contractual provisions and their effects on the concrete, final situations of the entitled subjects' interests are subjected to control. Thus, interpretation and scrutiny about terminable ownership starts due to the agreement's untypical nature and goes beyond the transfer pattern following all the elements subjected to its conformation attitude. The system of disclosure of legally relevant facts authorises the case in question because of the protection that it allows providing for the rights of third parties; *giudizio di meritevolezza*, however, carries out

the control of conformity between the system and the definition of the *conformation* that concretely the parties provided for the *negotium*. It is quite clear that terminable ownership is not authorised, *ius in se ipsum*, in the same way as ownership without a chronological element, but about this type must be defined and authorised the *Endzweck*, the final situations that it produces between the parties [Hartmann, (1875), p.43].

Once the type has been outlined with theoretical consistency, the interpreter must evaluate the transfer agreement's time clause to manifest a broader principle of patrimonial subjective right disposability. Then, in the sense of its planned termination and revocability, *Revocabilität des subjektiven Rechts* and the effects that ultra-activity *conformation* has created upon the *negotium* and on the entitled subjects' final situations. Therefore, to find in the *titulus* the nature of the *Verbindung* with the *eventus*, "unzertrennliche Verbindung mit einer äußeren Thatsache", the objective linkage of real efficacy and will of the parties, but where the *external fact* is a chronological element of *certitude*, objectively controllable beyond the *causa subiectiva* in order of the constitution of conformation effects on the *negotium*.

There is not only a time factor reflected in *dies certus* and *certitude* as a determining element but, as mentioned *supra*, a *qualitative element of the fact*. It has its autonomous operational area that can be *objectively* qualified concerning the subjects' interest it concurs to define in *elemental* form. According to this perspective, we believe that the interpretation, recognising the *dies* as *coefficient*, also recognises it into the agreement as an essential element to the organicity of the relationship "[...] mit der Hauptwillenserklärung organisch verbunden sind" [Siméon, (1889), p.1]. It completes the control over contractual autonomy and the whole organic structure of interrelated elements that *ius-economic* operation produces by creating a relationship of terminable ownership.

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