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Libertas contractus.
Paolo Comitoli SJ on Freedom of Contract*

INTRODUCTION

Early modern scholasticism had a great influence on private law and especially on contract law. One of the main areas of this influence was what we call today “freedom of contract” understood as an approach founded on the general theory of contract. This phrase may refer to two core issues of early modern contract law. The first one was the question of the actionability of naked agreements or in other words – the question of justification of the binding force of all agreements with a proper cause. The other one was a broad topic of *voluntas* and the vices of will of the parties, which affected the consent and the contract itself. Both of these topics contributed to the growth of concepts which finally led to the establishment of general theory of contract in 19th century. Probably it was the latter issue that would have been more likely chosen by the early modern theologians as the real question of freedom of contract, however, they did not use this heading for their argument.

Yet, this phrase appeared as the title of a chapter in a book on contracts of Paolo Comitoli (1545–1626).¹ He was an Italian Jesuit, a moral theologian and an academ-

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¹ Decock indicated Leonardus Lessius (1554–1623) as (possibly) the most relevant author who also used this phrase. See W. Decock, *Jesuit freedom of contract*, “Tijdschrift voor Rechtsgeschiedenis” 2009, vol. 77, p. 425, note 9. See also P. Alexandrowicz, *Kanonistyczne uzasadnienie swobody*

ic teacher, who also did not refrain from an engagement in political issues of his time.² He was the author of several works, his *opus magnum* was a big collection of responses – *Responsa moralia* (Lugduni 1609, Cremonae 1611, Rothomagi 1709),³ but here we will focus on his *Doctrina de contractu* (Lugduni 1615, Rothomagi 1709 – published as an appendix to *Responsa*),⁴ which will serve as the main source for examination of his contractual doctrine. Within this treatise Comitoli discussed *libertas contractus*. The aim of this study will be answering the questions of what he meant by this phrase and what his views on contractual freedom in the context of his general contract doctrine and early modern private law were.

To sketch the external landscape of Comitoli's writings we should add a couple of general statements. Firstly, it is worth noting that at the threshold of modernity moral theology contributed a lot to the jurisprudence in general⁵ and to contract

umów w zachodniej tradycji prawnej [Canonistic Justification of Freedom of Contract in the Western Legal Tradition], Poznań 2020, p. 128, note 102.

² For an overview of Comitoli's bio and works see P. Alexandrowicz, *Paolo Comitoli SJ on Contracts*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung" 2021, vol. 107, pp. 255–263. For biographical data on Comitoli see: I. Marracci, *Paulus Comitulus* [in:] idem, *Bibliothecae Marianaе alphabetico ordine digestae et in duas partes divisae*, Romae 1648, p. 208; L. Iacobillus, *Bibliotheca Umbriae sive de scriptoribus Provinciae Umbriae Alphabetico Ordine Digesta*, Fulginiae 1658, p. 218; *Paulus Comitulus* [in:] P. de Ribadeneira, P. Allegambe, N. Southwell (eds.), *Bibliotheca scriptorum Societatis Iesu Opus inchoatum*, Romae 1676, p. 647; A. Oldoino, *Paulus Comitulus* [in:] idem, *Athenaeum augustum in quo Perusinatorum scripta publice exponuntur*, Perusiae 1678, pp. 269–271; G.B. Vermiglioli, *Comitoli Paolo* [in:] idem, *Biografia degli scrittori perugini e notizie delle opere loro*, vol. 1, Perugia 1829, p. 335; A. De Backer, *Comitulus, Paul* [in:] A. De Baker et al. (eds.), *Bibliothèque des écrivains de la Compagnie de Jésus: ou Notices bibliographiques*, vol. 1, Paris 1869, col. 1344–1345; J. Müllendorf, *Comitulus, Paul* [in:] J. Hergenröther, F. Kaulen (eds.), *Wetzer und Welte's Kirchenlexikon oder Encyclopädie der katholischen Theologie und ihrer Hilfswissenschaften*, vol. 3, Freiburg im Breisgau 1884, col. 690–691; C. Sommervogel, *Comitoli, Paul* [in:] C. Sommervogel (ed.), *La Bibliothèque de la Compagnie de Jésus: Bibliographie*, vol. 2, Bruxelles – Paris 1891, col. 1342–1343; P. Bernard, *Comitoli Paul* [in:] E. Mangenot et al. (eds.), *Dictionnaire de théologie catholique: contenant l'exposé des doctrines de la théologie catholique, leurs preuves et leur histoire*, vol. 3, Paris 1908, col. 308; A. De Bil, *Comitoli Paolo* [in:] A. De Meyer, É. Van Cuwenbergh et al. (eds.), *Dictionnaire d'histoire et de géographie ecclésiastiques*, vol. 13, Paris 1956, col. 366; J.P. Donnelly, *Comitoli, Paolo* [in:] C.E. O'Neill, J.M. Domínguez et al. (eds.), *Diccionario histórico de la Compañía de Jesús*, vol. 1, Roma – Madrid 2001, pp. 874–875; L.B. O'Neil, *Comitoli, Paolo* [in:] B. Marthaler (ed.), *New Catholic Encyclopedia*, vol. 4, Detroit – Washington² 2003, p. 4; D.J. Osler, *The Jurisprudence of the Baroque* (Bibliographica iuridica 4; Studien zur europäischen Rechtsgeschichte 235), Frankfurt am Main 2009, p. 470; I. Birocchi, *Comitoli, Paolo* [in:] I. Birocchi, E. Cortese et al. (eds.), *Dizionario biografico dei giuristi italiani (XII–XX secolo)*, Bologna 2012, p. 565.

³ The first edition was examined in this paper [later referred to as: *Doctrina*].

⁴ The first edition was examined in this paper [later referred to as: *Responsa*].

⁵ See e.g. P. Grossi (ed.), *La Seconda Scolastica nella formazione del diritto privato moderno. Atti dell'incontro di studio (Firenze, 16–19 ottobre 1972)*, Milano 1972, passim; P. Prodi, *Una storia*

law in particular.⁶ The direct influence of moral theology was possible due to the fusion of civil law, canon law, commercial law and customary laws into one body of laws which was called *ius commune* in the late Middle Ages. For many authors of the early modern period it was natural to take into consideration also the rules governing human conscience because *forum internum* – where they were of high importance – was treated as a separate and autonomous court.⁷ What happened in private law at the turn of the 16th and 17th centuries may be called *moral transformation of ius commune*.⁸ Among many moral theologians involved in theological and legal disputes of this time Jesuits played the pivotal role. In fact, it is not without accuracy to say that the most significant contribution of the scholars from Societas Jesu to private law was the freedom of contract, i.e. the comprehensive attitude toward the vices of will.⁹ The late scholastics served also as advocates of freedom of contract as it was discovered by medieval canonists who claimed that every agreement was binding and should be kept.¹⁰ The school of *ius naturae* capitalized on these two facets of their contractual doctrines and in this respect perpetuated their achievements.

della giustizia, Bologna 2000, pp. 325–389; W. Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)*, Leiden – Boston 2013, passim; W. Decock, C. Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit 1500–1750*, Berlin 2016, pp. 23–30, 77–87.

⁶ See e.g. K.-P. Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*, München 1985, pp. 139–149; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford 1991, pp. 69–111; I. Biocchi, *Causa e categoria generale del contratto. Un problema dogmatico nella cultura privatistica dell'età moderna*, vol. 1: *Il Cinquecento*, Torino 1997, pp. 203–269; D. Poldnikov, *Origins of General Concept of Contract in Western European Legal Science (12th through 16th Centuries)*, “Journal on European History of Law” 2016, vol. 7, no. 2, pp. 57–58.

⁷ See e.g. W. Decock, *Jesuit freedom...*, pp. 431–435.

⁸ The phrase is taken from the title of Decock's book.

⁹ W. Decock, *Jesuit freedom...*, pp. 441–458.

¹⁰ On medieval canon law jurisprudence and discovery of freedom of contract see from the vast literature e.g. F. Spies, *De l'observation des simple conventions en droit canonique*, Paris 1928; J. Roussier, *Le fondement de l'obligation contractuelle dans le droit classique de l'Église*, Paris 1933; M. Roberti, *L'influenza cristiana nello svolgimento storico dei patti nudi* [in:] M. Roberti et al. (eds.), *Cristianesimo e diritto romano*, Milano 1935, pp. 85–116; P. Fedele, *Considerazioni sull'efficacia dei patti nudi nel diritto canonico*, “Annali dell'Università di Macerata” 1937, vol. 11, pp. 115–200; P. Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico*, Milano 1964; P. Landau, *Pacta sunt servanda. Zu den kanonistischen Grundlagen des Privatautonomie* [in:] M. Ascheri et al. (eds.), *Ins Wasser geworfen und Ozeane durchquert. Festschrift für Knut Wolfgang Nörr*, Köln – Weimar – Wien 2003, pp. 457–474; F. Scigliano, *Spunti per una riconsiderazione del principio canonistico ex nudo pacto oritur actio*, “Studi Urbinati. A – Scienze giuridiche, politiche ed economiche” 2007, vol. 58, fasc. 1, pp. 123–55.

1. *LIBERTAS CONTRACTUS* ACCORDING TO PAOLO COMITOLI

1.1. Broad context: Freedom of contract in Comitoli's contractual doctrine

In case of the works of Paolo Comitoli it is rather obvious what we may consider freedom of contract due to the fact that he himself used precisely this term to discuss some important questions of the general doctrine of contract. The formula *libertas contractus* appeared as the heading of the fourth chapter from the second book of his *Doctrina* and the following nine chapters were also dedicated to explain its meaning. Therefore, it seems necessary to give a short insight into his general concept of contract.

The main aim of *Doctrina* was to present contract with the use of a new scientific method, as claimed the full title of this treatise: *Doctrina de contractu universe ad scientiae methodum revocato in tres partes distributa*. The method Comitoli used was based on the application of Aristotelian principles to the lecture on contract. Therefore, it was crucial for Comitoli to provide a proper definition of contract founded on the comprehension of the causes and aims of contract and to explain the characteristics of contract. The important feature of Comitoli's scientific approach was also the tendency to take into consideration broad theological and philosophical contexts of the discussed problems as well as to organize his reflection with frequent listing and plethora of enumerations and divisions. Providing definitions of significant legal concepts was an essential part of works focused at the methodical approach.

The definition of contract as it was proposed by Comitoli grew from his desire to grasp all causes of contract into one definition. According to him, contract was the legal consent of at least two wills, the inviting and the invited, which arose from the cause of ownership and donation, to perform or not to perform any action, signalled externally and established for the wellbeing of the state and of the mankind.¹¹ The aim of contract (final cause) was expressed as the general wellbeing of all mankind. The efficient cause were the wills of the parties, the formal cause was the consent between the parties expressed by an external sign to act or not to act, the material cause was the subject of contract which Comitoli saw as a kind of transfer of broadly understood property. He combined these four causes to estab-

¹¹ P. Comitoli, *Doctrina*, pars 1, cap. 4, n. 10, p. 11: *Contractus est minimum duarum voluntatum, provocantis et provocatae, quae dominio rationis ac rei praeditae sint, legitima consensio ad rem aliquam agendam, vel non agendam, externo aliquo signo declarata, atque ad civitatum humanique generis bonum instituta.*

lish his definition of contract.¹² The most important element of this formula was the focus on the consent of contracting parties, more precisely – consent of wills. At this point we can already see how important the circumstances of expressing the consent were for Comitoli. The definition of contract implied the significance of questions about the factors that may influence the will of a party to contract. However, the problem of *libertas contractus* was addressed by Comitoli only in the middle part of his treatise.

1.2. Narrow context: The attributes of contract

The detailed second part of *Doctrina* was dedicated to the presentation of the twelve attributes of contract. It was the most elaborated part of Comitoli's treatise and it was his most original concept. By these twelve attributes he understood the specific characteristics of every contract and he discussed the fundamental issues of contract law around them. These included: *necessitas, utilitas, libertas, contraria pactio, bona fides, soliditas, iustitia, honestas, benignitas expressam vel tacitam habens donationem, obligatio, actio, dominii translatio*. The order of these attributes was not accidental. It resulted from the definition of contract and the causes of contract as they were presented by Comitoli. He explained the connection between the attributes, which also contributed to the chosen order of their presentation.¹³

Some of them were rather obvious (like *iustitia, obligatio, actio*), but some of them might have been a kind of surprise for a reader. For example, *soliditas* of contract meant that the contract needed a real subject and not a fictitious one, *benignitas* was Comitoli's idea that in every contract there was a hidden gratuitous benefit or donation, *honestas* was a name given to the requirement for contract to meet the standards of *boni mores*. The depth and breadth of the analysis of each attribute varied – it took the Jesuit between half a chapter up to ten chapters to grasp their nature. He usually began with the account of the former doctrine and on the basis of its evaluation he built his own definitions to which he added the lists of specific questions important for the discussed attribute.

¹² This definition was expressly rebutted by Pedro de Oñate. See P. de Oñate, *De contractibus tomii tres*, vol. 1: *De contractibus in genere*, Romae 1646, tract. 1, disp. 1, sectio 3, num. 14, p. 5. See also in this context I. Birocchi, *Causa e categoria...*, p. 277, note 19; W. Decock, *Theologians and Contract Law...*, pp. 173–174, note 614, and p. 511.

It is worth mentioning that *causa* was a broad issue discussed in contractual doctrine at least since the late Middle Ages and thanks to the canonists it became an important point in the development of contract law. It seems, however, that Comitoli represented a more general approach to *causa* as he discussed in the Aristotelian manner the four causes of contract without clear link to the question of actionability of all agreements.

¹³ For more details see P. Alexandrowicz, *Paolo Comitoli...*, pp. 272–297.

1.3. *Libertas contractus* as the attribute of contract

The freedom of contract was listed as the fourth attribute of contract. Comitoli saw this attribute as a one connected to the efficient cause of contract.¹⁴ Therefore, the wills of the parties stood in the centre of the freedom of contract as the contract resulted from the consent of two dialoguing wills. Comitoli dedicated ten chapters (numbered 4–13 from the second book of *Doctrina*) to discuss various types of contractual freedom and the questions important for its understanding¹⁵. It was the biggest number of chapters for one attribute, which already indicates the importance of this topic for the Italian Jesuit. These chapters were titled as follows:

4. De libertate contractus.
5. Definitio consilii a Damasceno allata explicatur.
6. De secunda libertate contractus, quae est voluntarii, ignorantiam et errorem, quamvis dolo careant, excludentis.
7. De dolo et fraude, et num contractum efficiant nullum.
8. Duodecim discrimina inter culpam iuridicam et dolum enucleantur.
9. De culpa iuridica, quae in contractus incurrit.
10. De libertate vim metumque excludente.
11. An reverentiae et observantiae metus contractus inanes et cassos efficiat.
12. Blanditia et adulatio efficiantne contractum nullum, cum eius sunt causae.
13. Num importunae preces contractus irrites faciant.

Within these chapters Comitoli presented his attitude towards freedom of contract and therefore their content will be the main issue of the further study. However, it is worth noting that he placed similar elucidations at the beginning of the book on contracts in his *Responsa moralia*.¹⁶ It was not only a typical moral casebook but it also contained a lot of theoretical explanations. These initial chapters will also be taken into consideration below.

Probably, the most striking in Comitoli's account of freedom of contract is the title of the first chapter devoted to the third attribute of contract. As a separate heading it sounds very modern, like a title from a modern handbook on contracts rather than a chapter from an early modern moral theologian. Comitoli claimed that there are three types of necessary freedom of contract: the first was freedom of will (*libertas rationi, consilii, atque electionis*), the second may be called the requirement of voluntariness (*libertas spontanei, seu voluntarii, quae abiicit inscientiam,*

¹⁴ P. Comitoli, *Doctrina*, pars 2, cap. 1, num. 3, p. 55; pars 3, cap. 3, num. 2, p. 195. See also on *causa conficiens*: ibidem, pars 1, cap. 4, num. 6, pp. 9–10.

¹⁵ Ibidem, pars 2, cap. 4–13, pp. 59–93.

¹⁶ P. Comitoli, *Responsa*, lib. 3, q. 1–3, pp. 353–360.

errorem, dolum, fraudem, vim, atque terrorem) and the third was what we may call freedom of ownership (*libertas domini aut perfecti, aut imperfecti*).¹⁷ The core of his argument was the second type of contractual freedom, as the vices of will were a common issue in early modern contract law. However, it seems adequate to explain all types of freedom of contract separately to show the complexity of Comitoli's idea hidden behind the wording *libertas contractus*. We may add that the next attribute, *contraria pactio*, was somehow connected to the freedom of contract but not in the way that would enrich the reflection on Comitoli's concept of this freedom.¹⁸

2. THE FIRST: FREEDOM OF WILL (*LIBERTAS VOLUNTATIS*)

The first type of freedom of contract required more philosophical than legal explanation. To justify the separation of this particular kind of freedom Comitoli used the authority of many renowned authors and there is very little of his own input in this part except for the arrangement of *auctoritates*. The Perugian Jesuit collected various names of this freedom and briefly explained each of them.¹⁹ *Libertas naturae* meant that it was the most intrinsic freedom of human nature, rooted in human reason as it was capable of cognition and action. It was also *libertas a coactione et a necessitate* as both of these excluded the freedom of human reason. It was properly called *libertas rationis* because it was necessary that a man was a free judge over his or her own acts. Human reason was by itself the first cause of freedom in a human and only because it enabled a human the proper cognition was it possible that a human was able to choose and act. It was also simply called *libertas voluntatis*, i.e. the freedom of will, as it aimed at specific objectives. Therefore, it was also *libertas electionis*, as the choices of a human were the steps to reach an objective. To make choices was possible because a human was able to freely evaluate the moral value of them, which is why the proper name of this freedom was also *libertas arbitrii*.

Comitoli explained each of these names with references to common sources, especially Aristotle, Augustine, Gregory of Nyssa, John of Damascus, Anselm of Canterbury, Peter Lombard, Bernard of Clairvaux and Thomas Aquinas. We may state that by references to these philosophers Comitoli gave the reader in short the essence of the Christian teachings on free will.

What he found particularly important was the definition given by John of Damascus, namely the definition of deliberation (which however is not the fully satisfactory equivalent of Latin *consilium*). Comitoli quoted from John's *De fide*

¹⁷ P. Comitoli, *Doctrina*, pars 2, cap. 4, num. 1, p. 59.

¹⁸ *Ibidem*, pars 2, cap. 14, pp. 93–96.

¹⁹ *Ibidem*, pars 2, cap. 4, num. 1–7, pp. 59–61.

*orthodoxa: Consilium est appetitus inquisitivus de rebus agendis, quae in nobis sunt.*²⁰ He explained this definition and its significance for the first freedom of contract. There were four elements required for *consilium*: to investigate the means for reaching an objective, to make orders for will, to consult about the actions to perform, to deliberate on the things which are in one's power. With the use of Aristotle and Simplicius he went into a detailed analysis of terminology which was the most suitable for discussion on deliberation, intention and desire (e.g. on the question whether the efficient cause is in desire or cognition). At the end he noted that many people acted without a proper deliberation and were coaxed by other less relevant factors.

Comitoli listed also five differences between the first and the second freedom of contract.²¹ Free will was not excluded by the vices of will as was voluntariness. The former was an attribute of human actions, whereas the latter was a requirement for civil actions. Free will was used in any action, while voluntariness was important only in making agreements. The use of freedom of will did not result in the obligation for the others, as it was the case with voluntariness which led to the rise of a bond of law. Finally, to perform an action with the use of free will one did not need anyone else engaged, but the action of making agreement required voluntariness from both parties.

It seems to be a good summary of how Comitoli understood the first type of freedom of contract. It was not a strictly legal concept, but rather an application of Christian views on free will to the legal doctrine. It was a preliminary requirement which should be examined in case of any human action and therefore it was proper to stress that also in contracts every man should act with the use of free will. However, apart from some general indication that men should act directed by a fine deliberation and not driven by other incentives, the complex philosophical background of free will was of little importance for contract law. The reader of Comitoli's treatise may feel that it was slightly artificial to add the passage on free will in the general theory of contract, but it was consistent for the Jesuit as he often made erudite additions to his main lecture.

3. THE SECOND: VOLUNTARINESS (*LIBERTAS VOLUNTARII*)

The second type of freedom of contract may be called voluntariness and it should be seen as a right issue in general contract law. As we may deduce from the introductory remarks, the discussion of this freedom was in fact the question of the

²⁰ *Ibidem*, pars 2, cap. 5, num. 1, p. 61.

²¹ *Ibidem*, pars 2, cap. 4, num. 7, pp. 61–62.

influence of vices of will on the validity of contract.²² Apart from the initial remark on the name of this freedom (*libertas spontanei, libertas voluntarii*) Comitoli did not discuss its nature in general. Hence, it is necessary to picture voluntariness by the description of the vices of will. Firstly, Comitoli noted six vices of will while introducing the second type of contractual freedom to the reader (*inscientia, error, dolus, fraus, vis, terror*²³). Secondly, he listed again six of these but replaced *terror* with *metus*.²⁴ Taking into consideration the titles of the chapters dedicated to the second type of contractual freedom, one may list even more circumstances which may be seen as potentially influential on the parties' consent. Therefore, below we will see how Comitoli discussed this issue by following his order of argument. The focus will be on Comitoli's evaluation of the influence of the vices on the validity of contract and on the most recent sources which served the Jesuit in his *Doctrina*.

3.1. Ignorantia and error

The Italian Jesuit began the chapter in the way he used to start when a new issue arrived, i.e. with definitions. Right at the beginning he said that among theologians there were notable differences in the usage of the words *ignorantia* and *error*, whereas among jurists they were used interchangeably without detriment.²⁵ Still, he found it necessary to provide the reader with many definitions and philosophical explanations on error, ignorance and the relation between these two. His own suggestion was to understand ignorance as lack of cognition in mind (*ignorantia est in intellectu creato cognitionis privatio*).²⁶ Comitoli reached here for the writings of Augustine, Guillaume d' Auvergne, Henry of Ghent, Aquinas.²⁷

Then he moved forward to discuss the legal influence of *ignorantia* and *error* on contract. He said that when someone agreed to contract deceived by ignorance or error, the contract would have been void, unless he had not entered it otherwise. The reason behind this statement was that it was the requirement of free consent of the parties.²⁸ To this he added the notice on the difference between private obligations

²² Extensively on the vices of will in early modern moral theology see e.g. J. Gordley, *The Philosophical Origins...*, pp. 82–93; W. Decock, *Theologians and Contract Law...*, pp. 215–327.

²³ P. Comitoli, *Doctrina*, pars 2, cap. 4, num. 1, p. 59.

²⁴ *Ibidem*, pars 2, cap. 4, num. 7, p. 61; pars 3, cap. 3, num. 2, p. 195.

²⁵ *Ibidem*, pars 2, cap. 6, num. 1, p. 64: *Ignorantiam atque errorem non vocabulo tantum, sed re etiam a Theologis distingui haud me latet. Verum ipsi in hac disceptatione more Iurisconsultorum utrumque verbum confuse atque permist usurpabimus.*

²⁶ *Ibidem*, pars 2, cap. 6, num. 2, p. 64.

²⁷ *Ibidem*, pars 2, cap. 6, num. 1–5, pp. 64–65.

²⁸ *Ibidem*, pars 2, cap. 6, num. 6, pp. 65–66: *Verumenim ipsi, ut in hoc capite a primo professi sumus, ignorantiae nomine errorem quoque notabimus: illudque vere nos in contrahendi ratione asseverare posse arbitramur, cum quis sua ignorantia suoque errore deceptus, quem errorem et ignorantiam pusilla diligentia studioque adhibito profligare potuisset, contractum cum altero inii,*

and those imposed by law, as well as on the significance of good faith in the context of ignorance. He gave some examples to show that good faith was necessary to claim that contract was void, as it was in the case when someone bought a thing from an apparently sane man without knowing he was insane so the sale was void.²⁹ After his general reference to theologians, Comitoli interestingly noted that inequality did not always lead to the nullity of contract but the lack of consent was always the cause of nullity of contract because in the parties' consent there was placed a form of contract.³⁰ The last two paragraphs of this chapter Comitoli dedicated to the rejection of an opinion of moral theologians (he mentioned especially Juan de Medina), according to which when one party was deceived by their own ignorance, the contract was valid in conscience. For Comitoli even in the case of voluntary ignorance, the contract should be void when such an ignorance led to the consent as the consent pertained to voluntary obligations and they required voluntariness.³¹ On the example of *ignorantia* and *error* we can see how consistent Comitoli was in defence of his preliminary premises on the condition of wills to freely agree upon consent for contract. Voluntariness was a requirement which at some points had influence of Comitoli's solutions of specific cases.

3.2. *Dolus* and *fraus*

The next chapter dealt with *dolus* and *fraus* and their impact on the validity of contract. No other questions in the general contract doctrine of this period were more popular than these regarding *dolus* and *fraus*. Their significance, however, had a long history as it was proved by Comitoli, when he tried to grasp the nature of these two phenomena. He used his usual method, i.e. the collection and comparison of plethora of definitions and specific divisions. At the beginning of his reflection

quem sciens et non deceptus nullo modo iniisset, contractum nullum existere, ideo quod consensus defuit liber [...].

²⁹ Ibidem, pars 2, cap. 6, num. 7, p. 66: *Huius verissimae asseverationis exempla ad persuadendum apposita subiiciamus. Rem ab homine insano, quem sanae mentis fore credebas, ipse emis: postea tibi renunciatur hominem illum amentem esse, tua bona fide incolumi contractus est nullus.*

³⁰ Ibidem, pars 2, cap. 6, num. 7, p. 66: *quippe qui magis quam aequalias est contractui necessarius neque enim iustitiae violatio contractum semper dissolvit: at dissensus, sive non esse assensum, contractum semper everit, cum in consensu forma sit posita contractus.*

³¹ Ibidem, pars 2, cap. 6, num. 8, pp. 66–67: *Multo vero minus probare possum, quod Medina [...] affirmate scripsit: quando dolus a venditore non est appositus, sed a seipso deceptus est emptor; ut quiq lapidem emit vitreum, quem putabat esse pretiosum, aut ad certum morbum curandum valere, si ad emendum ignorantia, ut is loquitur, vincibili adductus est, iure conscientiae non irritum esse contractum [...]. Ipsi enim dicimus quamvis eiusmodi ignorantia voluntarium, aut deliberationis, aut electionis, aut actionis, ut humana est, non tollat, tollit tamen ut parens est obligationis ex contractu. Ac licet non tollat voluntarium culpa in iis rebus, quae ignorari non debent: at tollit in iis de quibus inter se homines contrahunt voluntarium obligationis atque consensus.*

on the validity of deceitfully made contracts he pointed out that he had discussed this question in his *Responsa* but it still required a more comprehensive answer.³² Comitoli said that it was necessary to distinguish between two types of contract, *contractus spiritualis* and *contractus temporalis*. The former (e.g. vows or marriage) was valid as long as it was good for the party who had been deceived and the consent was agreed freely because it led to the greater good. It was generally accepted that when a deceit was the cause for a mundane contract (which was also called civil contract), the agreement was void as it was against the will of the deceived party.

However, in their detailed analysis of this issue the learned authors differed a lot, so Comitoli decided to formulate a couple of general rules in this respect.³³ The first one was the statement accepted by *communis opinio* that when *dolus* of one party led the other one to agree on a purchase which he or she would not have entered without *dolus*, the contract had been void. The main reason behind this rule was that it was the case similar to *error* – voluntariness and free consent were cancelled by *dolus*.³⁴ From the second one we can learn that when the parties acted in good faith and it was the agent who caused *dolus*, the contract was valid, although the party who was made worse off had the right to sue both the agent and the other party. This was a case of disagreement between the learned authors, as some of them claimed that on *forum internum* such a contract was void, but Comitoli did not belong to this group.³⁵ According to the third rule, in the case of *dolus* there was no point in dividing contracts into *bonae fidei* and *stricti iuris* because – as famously stated by Baldus – according to canon law all contracts were *bonae fidei*. (Here we can mention that this controversy and its' solution by Baldus was the

³² Ibidem, pars 2, cap. 8, num. 12, pp. 71–72.

³³ Ibidem, pars 2, cap. 8, num. 13, p. 72: *Distingui solet a Doctoribus contractus genus: aut enim spiritualis est contractus, ut religionis votum, ut coniugum: aut civilis, seu temporalis. si spiritualis est, et bono ei, qui fallitur; contractus est ratus; quoniam in eo non proprius versatur dolus. Itaque si dolo te ad sanum aliquod virorum domicilium pellexi, in quo sollemnia obedientiae, paupertatis, et castitatis vota nuncupasti, susceptae disciplinae ac vitae te paenitere non potest; quoniam quod tibi salutare et optimum est, delegisti: et consensus liber intercessit, sine quo nec contractus spiritualis ratus esse posset. In rebus caducis contrahendis si quis decipiatur, quoniam qui fallitur, amittit quod nollet, ac damnum sustinet, nec Dei, nec hominum lex statuit ratum esse quod pernicioso dolo actum est, quando dolus adhibitus fuit huiusmodi, ut causam contractui attulerit.*

³⁴ Ibidem, pars 2, cap. 8, num. 14, p. 72: *Primum perceptum: Si dolus ab alterutro contrahentium structus fecit, ut alter, verbi causa, emeret, quod sine dolo numquam emisset, ex maxime communi sententia magistrorum est nulla emptio, atque venditio, etiamsi nonnulli secus fuerint opinati [...]. Huc accedit, quod error tollit consensum, ut in cap. 9 demonstratum est: at dolus inquinatur non quovis errore, sed eo a quo humana voluntas abhorret maxime. Itaque tollit voluntarium et consensum liberum.*

³⁵ Ibidem, pars 2, cap. 8, num. 16, pp. 72–73: *Secundum perceptum: Si doli auctor et causa fallax contrahendi fuit proxeneta, in contrahentibus bona fide conservata, valet contractus: sed actio datur doli adversus proxenetam, qui si non sit solvendo, is cui bono fuit contractus, alteri, cui nocuit, praestabit id omne, in quo factus est locupletior [...].*

sole content of Comitoli's reflection on *dolus* in *Responsa*³⁶). Comitoli added that *dolus* in *stricti iuris* contract had the same effect on consent as *dolus* in *bonae fidei* contract had on the cause of contract. In both types of contract there was needed voluntariness which was excluded by *dolus*.³⁷ The fourth rule said that in the case of *dolus incidens* the deceived party was entitled to either nullify the contract or to claim the other party to bring the balance between benefits e.g. by a correction of the price. In the latter solution the free will of the party would be sufficiently restored.³⁸ Fifthly, the penultimate rule was concerned with *dolus incidens* in contract *stricti iuris*, and Comitoli referred here to his argument from the other part of the book on the division of contracts. The last rule stated that when *dolus* was rooted in the lack of knowledge of the parties, one could not speak about any sin in their actions. In such a case there were also slight changes in the rules regarding the equation of benefits according to the level of parties' deliberation.³⁹

In his presentation of each rule Comitoli added some more specific arguments. It is a good opportunity to see which early modern authors influenced his concepts on this specific topic. Here he referred most frequently to the arguments given by Konrad Summenhart (ca. 1458–1502),⁴⁰ Juan de Medina (Medina, 1490–1547),

³⁶ P. Comitoli, *Responsa*, lib. 3, q. 1, pp. 353–356.

³⁷ P. Comitoli, *Doctrina*, pars 2, cap. 8, num. 17, p. 73: *Tertium perceptum: Etiam si Doctores tradant hoc discrimen esse inter contractus bonae fidei, et stricti iuris, quod illi propter dolum initi fiant irriti, hi autem rati; id quod ex legibus quoque non obscure colligitur, nihilosecius mihi semper sententia Baldi placuit, qui [...] profitetur iure canonum contractus omnes bonae fidei esse [...]. Si enim dolus in contractus irruens stricti iuris consensum tollit non secus, quam cum tamquam causa perimit contractus bonae fidei; cur non stricti iuris iuxta irriti censendi erunt, atque bonae fidei; cum in utroque genere desideretur similiter voluntarium.*

³⁸ *Ibidem*, pars 2, cap. 8, num. 18, p. 73: *Quartum perceptum: Quando dolus incidit in contractum; ut quia exempli causa emptor rem sibi venditam optabat, iusto pretio persoluto: sed venditor illi imposuit, multo maiore pretio poscendo, quod sane ad iustitiam et aequalitatem rediget, nisi volet rescindere contractum. nam in potestate esse eius, qui pretio circumvenit, aut rescindere contractum, aut ad aequalitatem eum revocare, sentiunt fere, qui in huius loci explicatione versantur. Ergo duplicem habet perceptum hoc animadversionem. Altera est, contractum in eum incidente dolo valere, quia vere amborum contrahentium consensum liberum habuit in rei venalis substantia, licet per errorem alter pretii quantitati minime consenserit, ut merito dolus emendatione egeat [...].*

³⁹ *Ibidem*, pars 2, cap. 8, num. 21, p. 74: *Sextum perceptum: Si dolus evenit re ipsa in contractu ob inscitiam contrahentium, quia, verbi causa, rei pretium, vel rerum aequalitatem ignorabant, nullum admittitur peccatum: neque hic error doli nomine appellandus foret. Hoc igitur tertio modo si accidat dolus, emptor venditori non cogetur rem emptam restituere, quamvis minoris emerit, nisi repetatur, si a principio hoc deliberatum habuit, non pluris emere; sin a principio hoc illi cerum erat plus emere, cognitio iusto rei pretio, vel illud impendet, vel certe rem ipsam reddet [...].*

⁴⁰ In the brackets there are given the name of author as was used by Comitoli and his dates of life. The first author mentioned above, referred to as *Corradus*, might have been also completely different scholar, i.e. Giovanni Battista Corradi (ca. 1530–1606), a Dominican preacher born in Perugia (like Comitoli), who wrote *Responsa ad cuiuscunque pene generis, casuum conscientiae*. The clear references to Summenhart works and ideas prove that he was the one behind the reference *Corradus*.

Diego de Covarrubias y Leyva (Covarrubias, 1512–1577). To these he added also references to Angelo Carleto de Clavasio (Angelus, 1411–1495), Giovanni Cagnazzo (Tabiensis, ?–1521), Silvestro Mazzolini da Prierio (Prierias, 1456/1457–1527) and Gabriel Vásquez (Gabriel, 1549/1551–1604). Angelus, Tabiensis and Prierias were authors of *summae* to the cases of conscience, i.e. these sources were not strictly legal works. Most of the above-mentioned writers were moral theologians rather than jurists. It is particularly worth mentioning that Comitoli had a special inclination toward the arguments of Summenhart, 15th century German theologian and canonist. The fine example of his influence on Comitoli was that the latter paid great attention to the definition of contract given by Summenhart.⁴¹ However, in this short part of *Doctrina* Comitoli did not refer directly Summenhart's *opus magnum*, i.e. *Septipertitum opus de contractibus pro foro conscientiae atque theologico*, but he referred to *Compendium, seu epitome questionum de contractibus* which was an addition to this main work of Summenhart.⁴²

In case of *dolus* and *fraus* in contract law Comitoli hardly proposed any new solutions. He gathered the discussed issues under one heading and presented an elegant enumeration of specific rules but the content of these rules was taken by him from the earlier authors, mostly moral theologians. By no means is this an assault on the Jesuit – it is rather a statement that on this narrow example we can see that Comitoli remained a moral theologian of his age and even while discussing the general contract doctrine he stuck to casuistry to explain its facets. Of course, in other parts of his *Doctrina*, Comitoli referred to many other authorities. In total he used the works of over a hundred different authors, reaching from the Sacred Scripture up to his early modern fellow theologians. From the last group of authors he most willingly referred to the above-mentioned writers, to whom we may obviously add many more theologians, like Bartolomeo Fumo (Armillas), who seemed to be also particularly important for Comitoli.

Before discussing the next couple of vices of will, Comitoli placed two chapters on the subject of *culpa iuridica*. In the first one he listed the differences between *dolus malus* and *culpa iuridica*. Among them we can find a clear statement that *dolus* at the beginning of an agreement resulted in the nullification of contract because it was against *boni mores* and both divine and human laws.⁴³ Then he focused

On Giovanni Battista Corradi see e.g. R. Coulon, *Corrado Jean-Baptiste* [in:] E. Mangenot et al. (eds.), *Dictionnaire de théologie catholique...*, col. 1906–1907.

⁴¹ P. Comitoli, *Doctrina*, pars 1, cap. 1, pp. 2–4. Cf. K. Summenhart, *Septipertitum opus de contractibus pro foro conscientiae atque theologico*, Hagenau 1515, tract. 1, q. 16, conclusio 4, s.f. On Summenhart's definition see e.g. I. Birocchi, *Causa e categoria...*, pp. 214–219.

⁴² P. Comitoli, *Doctrina*, pars 2, cap. 8, num. 14, p. 72.

⁴³ *Ibidem*, pars 2, cap. 8, num. 4, p. 75: *Pactum inter contrahentes initum, ut qui dolose in contractu, vel ex contractu egerit, non teneatur nomine doli, est nullum: quia est contra bonos mores, contra ius omne divinum et humanum.*

on *culpa*, its definitions and divisions, and many questions referring to *culpa* in contracts. He described e.g. the significance of *culpa* in contracts in general and he discussed many types of contracts paying special attention to the types and forms of possible *culpa* appearing in them.⁴⁴ It seems that for Comitoli *culpa* was a subject tightly related to voluntariness of contract, though, there are no direct implications of this statement for the nullity of contract.

3.3. *Vis* and *metus*

The next two typical vices of will were *vis* and *metus* (or *terror*). In *Doctrina* Comitoli only briefly addressed these two due to the fact that he had written two chapters on them in *Responsa*. In the first one the Jesuit explicitly indicated the list of authors on whom he relied in discussing the influence of *metus* on contract. Apart from the sources of Roman and canon law there were medieval canonists and theologians together with many moral theologians of his age. Comitoli's aim was to present a short summary of the questions concerned with duress.⁴⁵ Firstly, he gathered the sources which briefly justified the importance of *metus* for the validity of contract (X 4.1.14, 1.40.2; D. 4,2,1). Contract was made on the basis of consent so *metus* had to be excluded from it and in general *ius* could not arise from any *iniuria*.⁴⁶ Next he introduced the division of duress according to the degree of coercion. *Coactio sufficiens* was not the case of *metus* because *metus* needed to be caused externally, and in this type coercion was absolute and intrinsic and it was against will. The other type, *coactio inducens*, might happen in the case of *metus* because it could make the will choose under the influence of duress but it did not exclude free will.⁴⁷ He followed with the division of the level of *metus* depending on whether its subject was *vir constans* or *vir inconstans* and the examples of *metus* which feared the constant man.⁴⁸ Answering the next question about the characteristics of such a duress Comitoli mentioned that it was a probable issue for his

⁴⁴ Ibidem, pars 2, cap. 9, num. 8–16, pp. 79–81.

⁴⁵ P. Comitoli, *Responsa*, lib. 3, q. 2, num. 1, p. 356.

⁴⁶ Ibidem, lib. 3, q. 2, num. 2, p. 356: *Sine consensu autem non perficitur contractus [...]. Adde, quod non nascitur ius ex iniuria: cum igitur metum inferre alteri, et terrore ac minis illum cogere ad quidpiam agendum, iniuria sit, non videtur ex ea ius aliquod verum in contractu existere posse.*

⁴⁷ Ibidem, lib. 3, q. 2, num. 3, p. 356: *Secundum quaesitum. Cum metus efficiat coactionem in voluntatis actu, qui est velle, sive electio; duplex autem cogitari possit coactio, una sufficiens, sive absoluta; altera inducens sive condicionata [...]. Utram coactionem gignere potest metus, ac vis extrinsecus allata? Respondeo, non primam [...] sed secundam, id est, conditionatam seu inducentem [...]; quid enim magis voluntarium, quam velle, propter quod reliqua omnia censentur, et sunt voluntaria: inductiva tamen, et conditionata coactione cogi potest voluntas ac consensus: propterea quod voluntas propter timorem quarundam rerum, et propter quaedam alia, nonnulla eligit, quibus sublatis eadem nollet.*

⁴⁸ Ibidem, lib. 3, q. 2, num. 4–5, pp. 356–357.

consideration of freedom of contract and he stated that duress of a constant man had to be sudden, heavy and unjust.⁴⁹ Next he described the attributes of a judge appropriate to determine the weight of duress.⁵⁰ Finally, he provided the reader with the list of actions which required a free consent and might be claimed void due to the fact that there was *metus* capable to fear a constant man (among them Comitoli counted e.g. *satisfactio*, *confessio*, marriage, *iurisdictio*, absolving from excommunication, witnesses of will, vow).⁵¹ The last question concerned the nullity *ipso iure* of contracts entered with disruption of the same heavy type of *metus*. According to civil law, such contracts were not void but they were voidable via the decision of a judge, whereas according to law of conscience, they were null. The former was founded on common opinion and the latter was agreed among theologians with some exceptions which were addressed by Comitoli. In the court of conscience it may be said that there was no difference between light duress and heavy duress as they both were sufficient to declare the contract void. However, he also referred to the opinion of Adrian of Utrecht who stressed that *metus* should be illegal and against *boni mores*.⁵²

The second chapter from *Responsa* was dedicated to *metus levis* and its evaluation on *forum internum*. Here Comitoli dived into a very subtle discourse on the influence of *metus levis* on contract on *forum internum* and he fiercely rebutted three arguments against his (and many others') opinion that *metus levis* did not lead to the nullity of contract. The first argument requires our special attention. Comitoli first demonstrated the opinion which he wanted to fight against. It claimed i.a. that *metus levis* did not affect the validity of marriage. Here Comitoli made probably

⁴⁹ Ibidem, lib. 3, q. 2, num. 6, p. 357: *Quintum quaesitum. Sed quaenam esset apposita definitio metus cadentis in constantem virum? Haec nobis probabilis visa est aliquando in nostra disputatione de libertate contractus. Metus cadens in constantem virum est instantis, gravis, iniustique mali ab homine sibi inferendi vehemens opinio.* The use of word *probabilis* by Comitoli in this case is rather without deeper meaning but it is worth noting that he was remembered as the adversary of probabilism, which made him dissident among his fellow Jesuits. See e.g. T. Deman, *Probabilisme* [in:] É. Amman et al. (eds.), *Dictionnaire de théologie catholique: contenant l'exposé des doctrines de la théologie catholique, leurs preuves et leur histoire*, vol. 13.1, Paris 1936, col. 497–498; R. Schüßler, *Moral im Zweifel*, vol. 2: *Die Herausforderung des Probabilismus*, Paderborn 2006, pp. 62–65.

⁵⁰ P. Comitoli, *Responsa*, lib. 3, q. 2, num. 7, pp. 357–358.

⁵¹ Ibidem, lib. 3, q. 2, num. 7, p. 358.

⁵² Ibidem, lib. 3, q. 2, num. 8, p. 358: *Octavum quaesitum. Contractus initi metu cadente in constantem virum, sunt ne ipso iure nulli? Respondeo, iure civili non videri nullos, sed rescindendos officio et auctoritate iudicis: est communis sententia: sed iure conscientiae existimo esse nullos [...]. Quaerat aliquis, num in foro DEI et conscientiae vis par sit metus levis ac Vehementis: ita, ut propter utrumque fiat contractus irritus seu irritandus [...]. Prudenter autem admonet Adrianus [...] metum esse debere iniuriosum, et contra bonos mores, non quem magistratus iuste incutit, quicumque tandem is sit metus, sive cadat in animum constantem, et fortem, sive in imbecillum. Quid enim magis pugnat cum ratione, iustitiae et aequitate, quam ex iniuria alterius gigni ius illi quid piam necesario praestandi?*

the most interesting observation on the nature of contractual freedom. He argued that when there was a contract entered due to unjust duress it was not possible that this injustice gave any right to the party who caused duress. Conversely, this party was forced to satisfy the other one and the only possible satisfaction was in this case *restitutio in integrum* because contract involved commutative justice. The main reason was that the contractual freedom of the abused party had been violated. Comitoli said that it was not possible to restore the initial state of affairs as long as the abused party had not recovered their full freedom. He stressed that this attribute of contract was a highly important and very intrinsic feature of contract. Therefore, any violation of this attribute resulted in the nullity of contract. To this explicit argument he added that in such a case it was *iniuria* that was nullified and it may happen by law or by the decision of a judge even if the violated parties did not want to terminate contract themselves. It was the law of nature and law of nations which stood behind this rationale.⁵³

The second argument was founded on the general notion of the nature of human society which was directed toward justice and not injustice and the third was built around Covarruvias' statement that any duress was sufficient to claim the act void before God.⁵⁴

In these chapters Comitoli followed many writers from the 15th and 16th centuries. Moral theologians Prierias, Angelus, Gabriel, to whom he added e.g. Domingo de Soto (Soto, 1495–1560), were equally important for him. Adrian of Utrecht (Adrianus, 1459–1523), Martín de Azpilcueta (Navarrus, 1492–1586) and Covarruvias were particularly relevant for him and he often relied on the teachings of the last two. However, in this part of Comitoli's output the impression that he mainly reiterated the arguments of the others is much lesser as he developed his own concepts. It is important to see that in the areas which were of his particular interest he willingly deepened his analysis.

⁵³ Ibidem, lib. 3, q. 3, num. 2, p. 359: *Nam si me cogis metu iniusto, quicumque sit ille, tecum contrahere, igitur mihi iniuriam facis: ergo haec iniuria nullum tibi ius parit: imo necessitatem adfert et legem, ut mihi pro iniuria satisfacias. Satisfacere mihi non potes ex iustitiae commutativae praescripto, nisi me in integrum restituas: et id, in quo me laesisti, reddas: lasisti autem in contrahendi libertate: ergo pro infecto habere debes, quod inter nos factum est: alioquin in pristinum ego statum non redirem libertatis meae. Praeterea, sublata proprietate contractus, quae illi quovis iure est necessaria, tollitur contractus: sed in nostro volumine de contractu docuimus in maxime necessariis, et intrinsicis affectionibus contractus esse libertatem, qua excluditur fraus, vis, metus, ignorantia: ergo quocumque modo et metu violetur haec libertas, interit contractus. Ad haec ius non ius, sed iniuriam rescindit; cum ergo contractus initi metu viri constantis rescindantur a iure, et a iudice [...], fatendum est ob iniuriam rescindi: et quia iure naturae, et gentium sunt nulli: et illius auctoritas ideo interponitur, primum, ut id, quod antea ignorabatur esse nullum, eius decreto irritum esse intelligatur: deinde, ut, qui in contrahendo iniuriosus fuit, si sua sponte nolit contractum dirimere, et libertatem restituere ei, qui vi est iniuriam et metum passus, coactu et imperio id iudicis faciat.*

⁵⁴ Ibidem, lib. 3, q. 3, num. 3–4, p. 360.

Keeping in mind what was Comitoli's argument, we can now just mention that in *Doctrina* apart from the summary of his reflection from *Responsa* he added the description of a couple of cases inspired by the writings of other authors.⁵⁵ However, it does not seem that their presentation is necessary to clarify Comitoli's view on *metus*. In the next chapter he explained two specific causes of *metus*, i.e. *reverentia* and *observantia*.⁵⁶ This detailed elaboration did not carry relevant general observations on freedom of contract, especially if we add that it was based on many works of other theologians.

3.4. The other vices of will

Two more chapters elaborated on the description of the second freedom of contract. In these chapters Comitoli added several less known vices of will. He introduced them in the previous chapter where he stated that it seemed right to conclude the reflection on the freedom of contract by discussing two other types of vices which disrupted parties' consent.⁵⁷ Due to their lesser significance we can limit to mentioning them briefly. The first type of vices was defined as adulations and flatteries. Comitoli, as always, quoted extensively many sources, especially the classics of Roman literature. The short conclusion of his analysis is that such practices did not result in the nullity of contract, unless they led to error or deceit.⁵⁸ Some curious ideas were discussed in the last chapter, where Comitoli considered the influence of importunate claims on contractual freedom. At the end he once again stressed that this attribute of contract was the most excellent of all attributes.⁵⁹

3.5. Voluntariness: summary

We can now shortly sum up Comitoli's attitude towards the second type of freedom of contract. Comitoli paid special attention to three vices of will, *ignorantia*, *dolus* and *metus*, however, he presented them as duplex sets of vices (together with *error*, *fraus* and *vis*, respectively). To these vices he added another two which were of less importance. Three general observations may be made in respect of voluntariness. Firstly, this type of contractual freedom served Comitoli to express

⁵⁵ P. Comitoli, *Doctrina*, pars 2, cap. 10, num. 3–4, pp. 84–85.

⁵⁶ *Ibidem*, pars 2, cap. 11, pp. 85–88.

⁵⁷ *Ibidem*, pars 2, cap. 11, num. 9, p. 88: *Cogitanti mihi institutionem de libertate contractus non longius ducere, inter differendum duo alia genera oblata sunt, quibus liber contrahentium consensus saepenumero perturbati solitus est. Alterum est blanditiarum, adulationum, assentionum: alterum importunarum precum. Omnis igitur de libertate contractus disputatio ad exitum adducta erit, cum locus de blanditiis et assentionibus, deinde de precibus importunis, breviter ac lucide fuerit pertractatus, id quod duobus consequentibus capitibus exequemur.*

⁵⁸ *Ibidem*, pars 2, cap. 12, num. 6, pp. 90–91.

⁵⁹ *Ibidem*, pars 2, cap. 13, num. 6, pp. 92–93.

the central role of consent for contract as a result of dialoguing wills. It was a consequence of his definition of contract and he stressed it many times throughout his discourse. Secondly, the Jesuit repeated a couple of times it was by no means possible that *ius* would arise from *iniuria*. Therefore, it was necessary to deny effectiveness from all contracts entered with any lack of voluntariness. Thirdly, as contracts were voluntary obligations the requirements to ensure they were entered voluntarily were absolute. There was no place left for any infringement of parties' voluntariness. Otherwise, the contracts were declared void. Voluntariness of contract played a crucial role in Comitoli's general contract doctrine.

4. THE THIRD: FREEDOM OF OWNERSHIP (*LIBERTAS DOMINII*)

The reader encouraged by Comitoli's clear division of contractual freedom into three types must feel a kind of disappointment while noticing that after several chapters on the vices of will there is nothing more said about the third type of contractual freedom. Except for its mentioning at the beginning of the description of the third attribute of contract, Comitoli said nothing more about *libertas dominii* at this point. As it comes without any particular explanation it gives the impression of a doctrinal shortcoming. However, there is at least one possible approach to catch the idea which lied behind the phrase *libertas dominii*.

It seems just to look for the meaning of this phrase in the concluding chapters of the second part of *Doctrina*, where Comitoli described the last attribute of contract, namely *translatio dominii*.⁶⁰ In terms of the number of pages dedicated to its description it was even longer than the one provided for *libertas contractus*. Additionally, the chapters dedicated to this topic were given even a separate heading. Typically, Comitoli offered the reader a bunch of definitions of the discussed term and the study on the difference between *dominium* and *ius dominii*.⁶¹ On this basis he proposed his own definition, according to which *dominium* was *potestas rei efficiendae, conservandae, habendae, possidendae, utendae, et quoquo modo transferendae*.⁶² In general it is worth noting that creation of such a close relation between contract law and property law is another aspect of Comitoli's thought which strikingly resembles the modern jurisprudence. It is similar e.g. to the discussions from common law on the nature of contract and contractual obligation and the

⁶⁰ For general remarks on the ownership in the late scholasticism see e.g. P. Grossi, *La proprietà nel sistema privatistico della seconda scolastica* [in:] P. Grossi (ed.), *La Seconda Scolastica nella formazione del diritto privato moderno. Atti dell'incontro di studio (Firenze, 16–19 ottobre 1972)*, Milano 1972, pp. 117–222.

⁶¹ P. Comitoli, *Doctrina*, pars 2, cap. 29, num. 1–8, pp. 150–152.

⁶² *Ibidem*, pars 2, cap. 29, num. 8, p. 152.

difference between contract law and property law. According to some theories, we can even try to grasp the characteristics of contract law by the application of the language taken from property law.⁶³

As there was no specific reference to the third type of freedom of contract in the chapters dedicated to the third attribute, it seems justified to connect the phrase *libertas dominii* with the part of *Doctrina* describing the last attribute, *translatio dominii*. However, there are no clear indications whether it was something Comitoli himself expected from the reader. The last chapters of the second part of *Doctrina* also lack a clear reference to *libertas dominii*. In the very last chapter on *translatio dominii* Comitoli explained why it should be seen as an attribute of contract.⁶⁴ He claimed that it was justified to see the subject of contract as a transfer of ownership in various ways. It did not necessarily mean that in every contract there happened a real change of owner, but with some more detailed divisions of ownership and the right to a thing he managed to defend his point. The transfer of property resulted from the action of human wills, which only together were able to create consent, i.e. the basis for contract. For Comitoli it was clear that this consent embraced also the intention of one party to transfer the ownership of a thing to the other one.⁶⁵ On the margin of his argument – while he discussed the contract as a function of commutative justice – he mentioned the division of contracts according to these transferring *dominium* or *usus*. Contract seen as an exchange required the transfer of ownership and this transfer was obvious in contracts which were rooted in *liberalitas* to which he counted *emptio venditio*, *permutatio*, *locatio conductio*, *societas*.⁶⁶ *Liberalitas* is not the same as *libertas*, but this is probably the phrase which is the closest to *libertas dominii*.

Taking this type of contractual freedom more broadly in the context of Comitoli's doctrine we may say that it was a case similar to *libertas voluntatis*. It was artificially extracted by the Jesuit to make his concept of *libertas contractus* more complex. He did not elaborate on this type of *libertas* but he probably saw its importance as an initial requirement to introduce *translatio dominii* as an attribute. Transfer of the ownership was the core of the formal cause from his contract definition as it was element of the externally expressed sign of contract. However, to enable the transfer via consent of parties' wills it was necessary to grant them a freedom in their ability to dispose of ownership. In this respect *libertas dominii* was a general view on humans' right to use things given to them freely. For Comitoli – who discussed in his argument on *dominium* also such general issues as natural divisions of things – it might have been important to stress even this facet of contractual freedom.

⁶³ See e.g. S.A. Smith, *Contract Theory*, Oxford 2007, pp. 97–103.

⁶⁴ P. Comitoli, *Doctrina*, pars 2, cap. 37, pp. 187–189.

⁶⁵ *Ibidem*, pars 2, cap. 37, num. 1, p. 187.

⁶⁶ *Ibidem*, pars 2, cap. 37, num. 2, pp. 187–188.

CONCLUSIONS

In his works Paolo Comitoli emphasised the significance of *libertas contractus* as an attribute of contract several times. Having examined his concept of freedom of contract we may say that it was indeed placed in the centre of his doctrine. It was the attribute which was strictly connected to the efficient cause of contract, i.e. to the wills of parties. For Comitoli it was clear that consent of wills, properly made and expressed, was the basis of contract. Therefore he defined a lot of requirements which parties' wills had to meet to secure the social function of contract. The freedom of contract was developed by Comitoli to grasp some of these requirements. This freedom was threefold: free will as a prerequisite, voluntariness due to the voluntary character of private obligation and freedom of ownership as an initial condition enabling to transfer the object of contract. The first and the last type of freedom were somewhat artificially extracted by the Jesuit to add the depth to his concept of *libertas contractus*.

It was a concept developed by a moral theologian and he focused on some issues of little importance for law itself. Therefore, in many points Comitoli relied on the works of others and he combined various approaches present in the jurisprudence with a little additions of himself. In some points he was especially dependant on local authors, which allows us to call his doctrine a parochial one. It was founded on the literature of its time, but there were only occasionally important novelties to the old doctrine and the influence of Comitoli on the later scholarship was scant. By no means did he intend to produce a brand new doctrine of contract. Yet, his specific erudite attitude to sources and methodological tendency to order the argument led at the same time to the creation of some interesting legal ideas.

However, it was voluntariness that was the core of contractual freedom for Comitoli. He built a coherent concept linking the function of contract as a tool of commutative justice with voluntariness as the set of requirements guaranteeing the freedom of parties to contract. He demanded from parties' consent absolute voluntariness, not disturbed by any vices. By recognizing the wills of parties as sole creators of consensual form of contract Comitoli was a forerunner of the school of natural law. It is hardly possible that he inspired Grotius or Pufendorf, but his doctrinal output may be seen as an intriguing outline of the future model of contract due to his praise of parties' wills which create voluntary consent as the main cause of contract.⁶⁷

⁶⁷ This idea was articulated in A. Giuliani, *Tre giuristi perugini cinquecenteschi: Giovan Paolo Lancellotti, Paolo Comitoli, Benincasio Benincasa* [in:] G. Barberini (ed.), *Giuristi dell'Università di Perugia: contributi per il VII centenario dell'ateneo*, Roma 2010, p. 250.

LIBERTAS CONTRACTUS.
PAOLO COMITOLI SJ ON FREEDOM OF CONTRACT

Abstract

The paper presents the results of research devoted to the concept of freedom of contract in the writings of an early modern Italian Jesuit, Paolo Comitoli. He claimed that freedom of contract was one of the attributes of contract and it was essential for the consent of parties entering into a contract. He distinguished between three types of this freedom. Freedom of will was a prerequisite in case of any and all human actions including contracts. Voluntariness was a requirement for the parties' wills creating consent to be the result of a voluntary decision, not disturbed by any vices. Freedom of ownership enabled the parties to conduct a transfer of the object of contract in its broadly understood sense. Comitoli's concept of contractual freedom was an expression of his belief that voluntary consent of the wills of the parties as the foundation of contractual consent was the basis and the main cause of a contract.

Keywords: freedom of contract, contract theory, vices of will, moral theology