

BOOK REVIEW

ISSUES IN COMPUTER-ASSISTED CONTRACTING

IL CONTRATTO CONCLUSO MEDIANTE COMPUTER [THE CONTRACT FORMED VIA COMPUTER]

By Francesco Parisi

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INTRODUCTION

To ensure that an agreement will be considered legally binding, it should be evidenced in writing. In spite of this general evidentiary rule, many agreements are either not written or are written without covering all of the important aspects of the transaction.¹ Historically, the courts have responded by enforcing oral contracts only where the behavior of the parties sufficiently points to the existence of an agreement.² However, the statute of frauds prevents the enforcement of certain types of unwritten agreements even where the parties' behavior does point to the existence of a contract.

As new commercial practices developed over the years and the contracting parties no longer routinely met face to face, additional legal difficulties developed.³ While agreements increasingly were made in writing, they often remained incomplete, even as the legal complexity of the agreements became more pronounced. Today, a California party can reach an agreement with a New York party via mail, telegraph, or telex

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1. In particular, the consequences of a breach or the burden of risk are passed over in order not to upset the agreement the parties have reached.

2. Partial performance, acceptance of tendered performance, etc.

3. F. PARISI, *IL CONTRATTO CONCLUSO MEDIANTE COMPUTER [THE CONTRACT FORMED VIA COMPUTER]*, 51-52 (1987).

involving a transaction to take place in a third state. The correspondence exchanged in anticipation of such multi-state deals frequently does not address the plethora of legal problems which can occur in the course of performance.⁴

Even where parties use standard forms which cover all or most aspects of an agreement, legal problems arise where the standard forms do not reflect the parties' intent. When standard forms do not address material issues or contain incompatible clauses, the courts must decide whether an agreement exists at all and, if so, which terms apply.

Both common law and civil law systems have attempted to adapt the existing legal framework to reflect emerging commercial practices brought on by technological innovations. Where the new commercial practices cannot be fit into existing legal categories and rules, both legal systems require legislative intervention to fashion a new legal framework which the courts can then apply. However, the American judiciary, drawing on a large body of judge-made precedent, has traditionally been innovative in fashioning "interstitial legislation" absent legislative action.

One of the most difficult questions posed by a civil law system is how to fit new technology-induced commercial practices into a rigid legal structure composed of comprehensive codes. Major societal changes may require the code to be rewritten, a long and complex endeavor which usually spans decades. A more limited method of adaptation is to supplement the code with specialized provisions governing the new practices. The problem with supplementation is that the civil and commercial codes of many European countries are already so riddled with special provisions for particular industries or particular types of litigation that they are no longer workable.

A third approach is to interpret the existing legal scheme in such a way as to encompass the new practices. In a civil law system, the courts are less free to fill the gaps in the statutory scheme enacted by the legislature. While the courts often establish standard interpretations of statutes, decisions usually do not refer to prior cases. Instead, the courts rely on scholarly writing and academic comment about prior cases, particularly where the law is in a state of flux.

The value of Mr. Francesco Parisi's book, *Il Contratto Concluso Mediante Computer*⁵ [The Contract Formed Via Computer], for the American practitioner is twofold. The book reflects and has helped shape current thinking in Italian legal circles on the computer's legal effect on

4. In the above example, the parties might not negotiate a choice of law clause, or a clause specifying where the contract was made.

5. F. PARISI, *supra* note 3.

contract formation.⁶ The book will be of particular importance for those trying to gauge the Italian Supreme Court's thinking on the subject. A committee of the Supreme Court debated various approaches to the subject put forward by scholars and found Mr. Parisi's approach particularly persuasive.⁷ It is therefore possible that the Italian Supreme Court would use the approach recommended by the book when and if it is called upon to decide a case involving the use of computers in the formation of a contract.⁸ No cases on the subject have yet been litigated in the Supreme Court of Italy.

Also, and perhaps more importantly, the rigor of Mr. Parisi's analysis can help the American scholar or practitioner define and focus his or her own thinking on the topic. Though Mr. Parisi's analysis is set in a very different legal system, the requirements of the Italian law regarding the formation of a binding contract are substantively similar to those developed under American common law.⁹ Italian lawmakers, like their American counterparts, have struggled with the issues of what constitutes a contract and how it can be verified in court, and have developed similar substantive solutions.

Mr. Parisi's book addresses the issues raised by the uses of computers and computer networks in the formation of contracts. The author analyzes how existing legal rules can or cannot be applied to various types of computerized contract formation processes. What is the effect of an automated purchasing system on the legal requirement that the parties involved must have the intent to contract? How do evidentiary rules apply to electronic documents? The two main issues with which the author is primarily concerned are contractual intent and the legal sufficiency of proof as to the content and source of an offer or acceptance made through a computer.

6. Fourth International Congress on Data Processing and Legal Regulations, Sess. III, n. 11, Corte Suprema di Cassazione, Rome, May 16-21, 1988. At the Fourth International Congress on Data Processing and Legal Regulations held in Rome in May, 1988, Mr. Parisi was extensively cited in the findings of the Committee of the Italian Supreme Court which sponsored the Congress.

7. *Id.*

8. In civil law systems, in the solutions of cases not contemplated in the codes and in the statutes, courts will often look to treatises and sometimes cite them as secondary authority; *see supra* p. 2.

9. Requirements of offer and acceptance, evidentiary requirements, requirements of intent and ability to contract, etc.

SYNOPSIS

The author is interested in two crucial stages of the contract formation process. The first is the formation of a contractual intent by an actor and the legal consequences that flow from the intent being implemented by a computer. When a user programs a computer to transmit an offer, the actual offer might be issued by the machine months later, and worse, under completely changed circumstances, possibly even after the death of the person in whose interest the computer was operating. The second stage is the formation of the contract itself, when two actors wish to contract and the computer pairs the actors' terms, thereby creating a binding contract.

The book is divided into four parts. This review will focus on Parts I and II. Parts III and IV specifically deal with problems of how to fit the contract made by computer within the existing Italian statutes covering general evidentiary requirements and agency rules as well as rules on contracting, and thus may be of less interest to the American reader.¹⁰

In Part I, Mr. Parisi identifies four possible uses of the computer in the contract formation process.¹¹ The first, and most limited use, is that of the computer as data bank. Here, the computer does not externalize or transmit to others its user's intent.¹² Legally, the computer does not effect the contract formation process, since its effects are restricted to the user.

Second, the computer can be used as a means of transmitting its user's intent (offer, acceptance, counter-offer).¹³ The evidentiary issues raised by such a use are similar to those raised by other electronic transmission devices, and can be addressed by the legal rules developed in response to the latter's widespread commercial use. However, some characteristics of the electronic document require the courts to evaluate its probative nature in light of existing evidentiary rules. The author develops this aspect in part IV of his book, where he compares the probative value of electronic documents to that of evidence used in cases involving automated banking and telexes.¹⁴

The third possible use of the computer is to input "the data and algorithms which will regulate its [the computer's] commercial activity and to let it . . . make decisions."¹⁵ In such situations, the computer is not

10. The legal principles regarding these two issues are covered in Parts I and II and are discussed *infra*.

11. F. PARISI, *supra* note 3, at 2-3.

12. *Id.* at 2. The author speaks of *volonta negoziale* [commercial intent].

13. *Id.* at 3-4.

14. *Id.* at 53-55; see also *id.* at 10-16.

15. *Id.* at 4.

only a tool used to carry out the user's specific intent to enter into a contract, but also transmits that intent to other parties and may even "make" the specific decision to contract as a result of its program.¹⁶

Finally, the computer can be used as a marketplace¹⁷ which actively pairs buyers and sellers. Here the computer is no longer working for a single user. Since the computer has to be neutral as between the contracting parties, only a disinterested third party may program the computer.¹⁸

Before analyzing the legal implications of the last two uses in depth, the author turns to the evidentiary problems which attach to the use of the computer as a means of communication with others.¹⁹ Electronic documents need to acquire sufficient probative value in court so that their use outside of the courtroom does not create legal uncertainty for the commercial actors who use them.²⁰ Hence, the identity of the user entering the market via his or her computer must be reasonably certain. In practice, this has meant restricting access to computer terminals within a company to those who know the necessary password and/or possess a magnetic key to access the computer network.²¹

Once an electronic document has been transmitted to others, a record of it needs to be kept on a "non-cancelable" storage system.²² However, the author notes that the most widely used storage systems are in fact designed to be erasable and reusable, thereby creating evidentiary problems.²³ Hence, he suggests the use of electronic seals, which would protect an electronic document from modification or erasure. The user would attach such a seal to any document to which she wished to give legal or probative value.²⁴

16. *Id.* at 5.

17. The author uses the expression *nuove piazze* [new marketplaces] to characterize the rise of electronic marketplaces. *Id.* at 33.

18. *Id.* at 7.

19. *Id.* at 10-16.

20. Electronic document means the electronically transmitted terms of a contract (quantity, price, etc.).

21. F. PARISI, *supra* note 3, at 11.

22. The author lists optical storage (such as compact discs), mechanical storage (on perforated cards) and photosensitive storage (microfilm) as three prime examples of non-cancelable storage systems. *Id.* at 15. However, even with such storage systems, originals and copies remain indistinguishable. *Id.* at 66.

23. *Id.* at 15. The evidentiary issues raised by the use of these different types of data storage are discussed in Part IV of the book. *Id.* at 64-68. A particularly difficult problem for the law is the use of magnetic storage which, in theory, allows modifications of the data (i.e. of the terms of the contract) where such modifications leave no visible signs that the original document has been tampered with. *Id.* at 73.

24. *Id.* at 15. The problem is discussed more thoroughly in Part IV of the book. *Id.* at 64-68.

In Part II of the book, the author looks at two uses of the computer in which the computer can directly influence or determine the formation of a contract. The first example is that of a department store's automated monitor-purchase system.²⁵ In this case, the computer keeps track of the goods in stock²⁶ and orders new goods whenever the available quantities fall below pre-defined levels. The computer then automatically offers to purchase certain quantities at the prices originally programmed by the user.

With such a purchasing program, the user does not decide each purchase separately, but merely programs the levels at which the computer's purchase functions kick in.²⁷ The critical question is whether there is sufficient intent by the user for her to be bound by an acceptance of the computer's purchase offer. In common law parlance, the question is whether there can be a meeting of the minds where one of the parties possesses only a generic intent to contract²⁸ and might not even be aware that she entered into the specific contract in question.

The author suggests that the necessary intent to contract exists at the time the computer is programmed to automatically issue purchase orders. The intent to contract is at that time subject to objective variables. By setting those variables at certain values, the user thereby determines the essential terms of a possible contract. She sets out the terms under which she is willing to deal. Since there are no undetermined essential terms, there exists an intent to contract whenever these conditions are met.²⁹

25. *Id.* at 17-23.

26. The computer could keep track of sold goods through the use of a bar code on products which are scanned by the cash registers. The machine could monitor both sales and shelf life of the products. The author notes that a manual check of the stocks is nevertheless necessary to insure that the computer is performing properly and that the computer's numbers reflect losses of stock due to accidents, theft, etc. Such losses would not be reflected by a computer which relies on bar codes to keep track of sold goods. *Id.* at 18-19.

27. The author points out that the users of such programs do not necessarily let the program effectuate their buying and selling without supervision. Where each computer purchase decision is cleared by the user, the computer's use raises no legal issues besides the evidentiary questions mentioned *supra* notes 19-24 and accompanying text, since the user had the specific intent to contract in each individual instance in which she entered the market. How she reached that intent is of no relevance to the fact that she is bound by the terms. However, where the supervision encompasses solely a regular review of the program rather than approval of each of its "decisions," the question of intent and the legal effect of the computer's behavior remain. F. PARISI, *supra* note 3, at 19-22, 33.

28. *Id.* at 21. The author notes that the user is not necessarily the programmer, thus removing the former even further from the intent to contract required under most legal systems for a contract to be binding.

29. *Id.*

The second example is that of a computer used as a marketplace, such as a stockmarket, via which players trade. The legal issues involved in such a use include the question of whether an entry constitutes an offer or an acceptance as well as questions of proof.³⁰ The head-on collision between legal categories and rules and technological innovation can, according to Mr. Parisi, only be solved by legislative intervention.³¹ The traditional legal constructs of offer and acceptance cannot be applied to the fast-paced matching of offers in the computerized marketplace.

The offers transmitted by the computer are offers to the public.³² These offers are sufficiently definite as to price and quantity to become binding upon acceptance. To avoid the issue of crossed offers,³³ the author suggests that an offer entered later in time which matches a previous offer be considered an acceptance.³⁴

There remains one hurdle. An acceptance creates a binding contract only when the acceptance is known or should be known to the offeror.³⁵ While a computer *qua* marketplace can keep precise track of the entry time of offers and align the offers to the public into offers and acceptances based on time of entry, it cannot track the moment at which the acceptance effectively becomes known to the offeror.³⁶ Knowledge of an acceptance is difficult to verify. The law might create a presumption that anyone entering the market keeps track of which of her offers have been accepted and which have been converted to acceptances of another's offer.³⁷ But this kind of presumption would be difficult to create in a civil law system, without a specific legislative intervention.

However, with the computerized marketplace, situations occur which cannot adequately be addressed by legal constructs and presumptions. In the computerized stockmarket, offer and acceptance can be nearly simultaneous without the parties being face to face, making the presumption that the offeror knows of the acceptance a somewhat unrealistic exercise in legal reasoning.

30. *Id.* at 27.

31. *Id.* at 30-31.

32. *Id.* at 27.

33. *Id.* at 29; *see also id.* at 35-36.

34. *Id.* at 29-30.

35. *Id.* at 29. The author speaks of the moment at which the acceptance is considered to have entered the "legal sphere of the offeror." *Id.* at 30. Under Article 1326 of the Italian Civil Code, the legal effects attached to a binding contract can only come into play once the contract has been formed through the offeror's knowledge of an acceptance. *Id.* at 30-31.

36. *Id.* at 29.

37. *Id.*; *see also supra* note 35.

Finally, the use of a computer as a marketplace or stockmarket raises the same type of evidentiary issues described above with the only difference that in the case of computer as a marketplace, the system is usually run by a third party, different from the offeror and the offeree, and presumably neutral to the parties' interests, and calls for similar solutions, namely the use of non-erasable storage for the electronic document and/or the use of seals to prevent the alterations of such documents.³⁸ The user will additionally have to restrict access to terminals plugged into the computerized market because, under basic agency rules, she might be held responsible for any offers or acceptances emanating from her computers.

CONCLUSION

Much of Mr. Parisi's analysis and discussion is highly relevant for any lawyer thinking about the use of computers in contract formation. The legal principles with which the author grapples are the same basic contract principles which American lawyers encounter in practice. As the author attempts to reconcile the electronic contract making process and the legal issues of offer, acceptance, formation of a binding contract, and legal proof, the American reader will find innovative as well as traditional insights into familiar issues.