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The Concepts of the Scottish (and Italian) Unilateral Promise and the English Unilateral Contracts –

Comparative Law Reflections on "Call Options" and "Put Options" in the light of the Jurisdictions of England, Scotland and Italy

PIERDOMENICO DE GIOIA-CARABELLESE

Abstract

On the backdrop of the "put options" and "call options" – two common contracts in the practice of the capital markets – lies this comparative law analysis concerning the approach taken by three jurisdictions to the concept of the unilateral promise.

The outcome of the discussion is a criticism toward the English jurisdiction where this concept is missing, the same being replaced, in a non-convincing way, by the similar concept of the "unilateral contract". In addition to this, the requisite of the consideration, peculiarly requested in that jurisdiction, could even result in putting at risk, in some circumstances, the same validity and enforceability of these typologies of transactions.

As to the Scottish jurisdiction, stranded between its ancient Roman roots and its "British ties", the work seeks to demonstrate that, although the "unilateral promise" is accepted in this jurisdiction (these making both "put options" and "call options" theoretically safe under this jurisdiction), there is still a non-perspicuous categorization of the concept and, particularly, a possible "blunder" in the way this jurisprudence seems to put together, in a sort of conceptual "melting pot", both the promise to the public (*in incertam personam*) and that aimed at the conclusion of the contract. However, this possible erroneous view – quite transparent in the light of the civilian jurisdiction adopted as comparator (the Italian one) – could find a potential "way-out", should the Scots legal system eventually adopt a code in the matter of the contracts more in line with its traditions and peculiarities.

1. The Economic Rationale of Options in the "M&A" Field[*]

In the *"M&A"* business practice,[1] an option[2] is a right to purchase or to sell property at a future time. An M&A Option is contracted either as part of a contract or

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[1] M&A market (acronym of Mergers and Acquisitions) comprises transactions whereby the acquisition of the majority stake of a target company is fulfilled. For explanatory purposes, reference must be made to take-overs or sale and purchase agreements.

[2] Henceforth the *"M&A Option"*.

as a unilateral promise; in either case, in order for the property to be purchased or sold, the M&A Option must be exercised.

The right to sell or purchase, encompassed in an M&A Option, normally but not necessarily requires the payment of a premium.[3] Thus, a potential buyer of shares is required to pay a certain amount of money which gives her a period of time to decide if he wishes to conclude the transaction and then pay a further amount for the shares themselves.[4] If the beneficiary decides to exercise the M&A Option, then he pays the *"Strike Price"*. In contrast, if the time to exercise expires then the M&A Option terminates. Remarkably, the Premium is not refundable as the *"beneficiary"* buys the M&A Option independently of whether or not he will exercise it.

M&A Options are also known as *"Call Options"* or *"Put Options"* according to whether the right which the beneficiary is entitled to is a right to purchase shares or, conversely, to sell them.

Traditionally scholars have commented little in respect of M&A Options,[5] although the peculiarity of their structure and, their non perspicuous categorisation (particularly under the English common law) ought to encourage a different conclusion.

On this backdrop, these notes will analyse M&A Options in a threefold perspective, with respect to common law (particularly the law of England and Wales), to the civilian systems (namely, the Italian one) and to a mixed legal system, such as the Scottish one.

The discussion will be carried out bearing in mind the characterisation, which pursuant to each legal system duly considered, may be inferred with respect to the M&A Options; in addition to this, suggestions will be made for those legal systems, like the English one, in which, due to certain peculiarities[6], the enforceability of these agreements appears to be somewhat doubtful.

Moreover, this work aims to demonstrate that legal systems, such as both the Scottish and the Italian one, in which consideration is not required, are more market-friendly with respect to M&A Options in comparison with others such as the English system, in which conversely the feature at stake may be a "sword of Damocles" pending on the validity and enforceability of simple contracts.

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[3] Henceforth the *"Premium"*.

[4] The so called *"Strike Price"*, usually amounting to a significant multiple of what has been paid for the *"Premium"*.

[5] In the literature (usually the economic rather than the legal one), the study of such peculiar contracts is usually carried out "tangentially" or simply hinted at; eg DJ Cooke & J Dow, *Private Equity: Law and Practice* (2nd edn, Thomson/Sweet & Maxwell 2004); E Ferran, *Principles of Corporate Finance Law* (Oxford University Press 2008) particularly at 203, 230. In Italy, among the first legal analyses, mention can be made to P de Gioia-Carabellese, 'Revocatoria Fallimentare e Sorte delle Securities Option' [*Claw-back Rules and Consequences on Securities Options*] (1998) 3 *Il Mondo Bancario* 71, 75.

[6] In particular, consideration as requisite for a contract to be valid and binding.

2. Legal Characterisation of M&A Options

From a mere legal perspective, M&A Options are agreements whereby a party (promisee) contracts with another (promisor) the right to acquire or to sell, at a certain future time, a specific amount of shares. In addition, M&A Options may even be structured in the form of unilateral promises; in the latter case, the promisee does not formally contract terms and conditions, rather he is merely the recipient of a unilateral declaration by the other party.

More often than not, the M&A Option is accompanied by a Premium, which is the consideration that the beneficiary of the promise gives the other party for his right to be duly entitled to exercise the M&A Option itself. In actual fact, such a Premium is not a necessary element and there are several cases in which it is completely omitted.

The absence of the Premium in the context of the M&A Option is one of the crucial points in this legal analysis, as it gives flesh to the peculiarities of the English system with respect to the two others under consideration. The English legal system, in fact, does traditionally recognise consideration as one of the main features for a contract to be valid. As a result, an attempt will be made, from a practical perspective, with a view to understanding whether even under English law, the validity of an M&A Option not duly endowed with a Premium and therefore gratuitous may nonetheless be affirmed.

3. Option and Promise in the Traditional English Law Perspective

3.1. The Unilateral Contract

At least theoretically, English law recognises, albeit controversially, the unilateral contract. These may be defined as agreements whereby

> *"One party promises to pay the other a sum of money if the other will do (or forbear from doing) something without making any promise to that effect."*[7]

Under case-law the categorization of unilateral contracts is recent, as English common law traditionally lacks the concept of unilateral promises. Under case law there are two cases to be recalled: *Harvela Investments Ltd v. Royal Trust Co of Canada*;[8] *Blackpool and Fylde Aero Club v. Blackpool Borough Council*.[9]

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[7] GH Treitel, *The Law of Contract* (11th edn, Thomson/Sweet & Maxwell 2003) at 8,41. This maxim is echoed by E Peel, *Treitel The Law of Contract* (12th edn, Thomson/Sweet & Maxwell 2007) at 40) where it is affirmed that a unilateral contract *"arises without the offeree's having made any counter-promise to perform the required act or forbearance; it is contrasted with a bilateral contract, in which each party undertakes an obligation and in which acceptance, as a general rule, takes the form of a communication by the offeree of his counter-promise."*

[8] [1986] AC 207.

[9] [1990] 1 WLR 1195.

In the first case, The Royal Trust invited tenders for the sale of a controlling block of shares in a company, the offeror being adamant that only the highest offer received would have bound itself. The plaintiff submitted an offer of C$2,175,000, whereas the second defendant (Sir Leonard) lodged a bid of C$2,100,000 *"or C$101,000 in excess of any other offer"*, *"whichever is the higher"*. The Royal Trust accepted Sir Leonard's referential bid; in the ensuing case, upon Harvela's initiative, the Court held that the implied intention of the conditions of tender was to exclude referential bids and to invite only fixed price bids. As a result the plaintiff's requests were upheld. Remarkably, the thrust of the Court decision at stake is not the *decisum* itself, rather the qualification which, as per Lord Diplock's averments, is provided for in respect of the unilateral offer to sell the shares at the highest price. In essence, the invitation is viewed as a *"unilateral"* or *"if"* contract which is made *"at the time when the invitation was received by the promisee to whom it was addressed by the vendors."*[10] To elaborate, the characterisation as *"unilateral contracts"* lies on the fact that

> *"Under neither of them* [*i.e.* if contracts, not as per original text] *did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or to refrain from doing anything."*

The unilateral contract entailed under the *"Harvela"* case is nothing but the Trust's undertaking to be bound to enter into a *"synallagmatic"* (exchange) contract with the highest bidder.[11] Not without emphasis, it is affirmed[12] that, under such a promise, the offeror assumes an obligation to enter into a contract to sell shares to the bidder who offers more; in such a way

> *"The unilateral contract concluded with the successful bidder would be transformed into a binding bilateral contract, while the unilateral contract with the unsuccessful bidder would be terminated by the submission of the higher bid."*

Albeit with certain similarities, the Blackpool case[13] partially differs from the Harvela case in so far as, in the latter, the conditions for the contract to be made were placed only on one party,[14] whereas in the former the benefit merely results in being a bid submitted on time. In addition, in the Blackpool case a formal acceptance of the *"subsidiary contract"* was in any case required on the side of the

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[10] Because the case being examined dealt with two invitations, accordingly two unilateral contracts resulted: that existing between the vendors and Harvela, as previous promisee; the second one, between the vendors and Sir Leonard, as second promisee.

[11] As emphasised in Chapter 4 below, under Scottish law the same result is reached, albeit via the different but more perspicuous, concept of the unilateral promise.

[12] See E McKendrick, *Contract Law. Text, Cases, and Materials* (3rd edn, OUP 2008) at 78.

[13] A thorough narration of the dispute may be read in JAK Huntley, J Blackie, C Cathcart, *Contract: Cases and Materials* (2nd edn, Green & Son Ltd 2003) at 82.

[14] Namely the party submitting the highest bid.

offeror, as, conversely, under Harvela *"the unilateral contract was held to exist by mere declaration of one of the parties."*[15]

Although according to the Court decisions at issue is the concept of the *"unilateral contract"* which makes its debut on the English law *"stage"*, and it still remains doubtful, not to mention mysterious, if and how a consideration for such a promise is given for the promisor's undertaking.

Moreover, not only is the concept of the *"unilateral contract"* a recent acquisition of English common law, but it also no longer appears monolithic to commentators. In fact, a different theory seems to be advocated by those scholars who see in the *"Harvela"* case a mere offer of a unilateral contract, the *"prize"* being in such a case the contract itself for the sale of shares. On such footings, pursuant to such an interpretation

> *"Until the bid was made, no one was under obligation. The Trust could have withdrawn its offer and the two offerees were under no obligation to bid. [..]"* [emphasis added].

3.2. The Consideration

Under English common law, a further *bête noire* – probably the most dangerous one – is represented by the fact that such a system traditionally treats consideration as a requisite both for the validity of contracts and for their enforceability as early as *Curie v. Misa*.[16] Therefore consideration turns out to be a salient feature in construing the matter at issue, irrespective of the legal characterisation (either a unilateral promise or an actual contract) of the M&A Option.

It will suffice for the purposes of this analysis to be reminded that the consideration, in the case of M&A Options, is the price for which the promise of the other contracting party has been bought;[17] thus only a promise given for value is enforceable.[18] As a consequence of such a principle, for so long entrenched under common law,[19] only a person who has provided consideration can sue[20] and, secondly, consideration must be endowed with certain, specific characteristics; namely:

(a) The same must not be illegal, based on *Allen v. Rescous*;[21]

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[15] See M Hogg, *Obligations* (2nd edn, Azivandum 2006) at 60.

[16] [1875] LR 10 Ex.

[17] In other words, the *"Premium"*.

[18] See again *Curie v. Misa* (n 16).

[19] Eg I Brown and A Chandler, *Law of Contract* (5th edn, OUP 2005) at 29, 51; J Poole, *Casebook on Contract Law* (8th edn, OUP 2006) at 120, 178; GH Treitel, 'Consideration' in HG Beale (ed), *Chitty on Contracts, General Principles,* vol 1 (30th edn, Sweet & Maxwell 2008) at 253, 377; E McKendrick, *Contract Law. Text, Cases, and Materials* (n 12) at 150, 151.

[20] See *Tweddle v. Atkinson* [1861] 121 ER 762.

[21] [1676] Freem KB 433; 2 Levinz 174.

(b) Based on *Chappell*[22], it must be of some value (normally of an economic character) but this need not be necessarily adequate;
(c) Lastly, consideration is required for simple contracts, but is not necessary for contracts by deed.[23]

Admittedly, under the same English law of contract, the doctrine of consideration seems to be a stronghold *"under siege"*. Apart from considering that such a concept is unknown both under the Civilian Systems and under the emerging principles of European law, even some common law scholars are inclined to consider such doctrine somewhat artificial.[24] Despite this, the majority of English commentators are still adamant that the validity of the concept remains beyond any doubt, although the explanations provided to such an end seem to impinge on mere tautologies.[25] These optimistic (or too simplistic?) stances are echoed by those[26] who emphasise that a reworking of the theory would not be necessary either, for the reason that, on the one hand,

> *"There are few cases where even in modern times courts have decided that contractual claims must fail for want of consideration,"*

and, on the other hand,

> *"On careful examination it will usually be found that such claims could have been decided on other grounds, e.g. the absence of an intention to create legal relations or the fact that the transaction was induced by duress."*

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[22] *Chappell & Co Ltd v. Nestle Co Ltd* [1959] 2 All ER 701 but, more recently, *Midland Bank Trust Co. Ltd v. Green* (no 1) [1981] AC 513. Among commentators, see, among the others, P Richards, *Law of Contract* (7th edn, Pearson Longman 2006) 60; E McKendrick, *Palgrave Macmillan Law Masters. Contract Law* (7th edn, Palgrave Macmillan 2007) at 89 and more recently E McKendrick, *Palgrave Macmillan Law Masters. Contract Law* (8th edn, Palgrave Macmillan 2009) at 68, 72.

[23] L Koffman & E Macdonald, *The Law of Contract* (6th edn, OUP 2006) at 56.

[24] In such sceptical terms PS Atiyah, 'Consideration: A Restatement' in PS Atiyah (ed), *Essays on Contract* (Clarendon Press 1986) at 179, 243.

The most significant of Atiyah's statements is worth being recalled:

"The truth is that the courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced.[…] It seems highly probable that when the courts first used the word "consideration" *they meant no more than there was good* "reason" *for the enforcement of the promise. If the consideration was* "good", *this meant that the court found sufficient reason for enforcing the promise.*"

[25] E McKendrick, *Contract Law. Text, Cases, and Materials* (n 12) at 278, who is of the opinion that:

"[…], [I]t is unlikely that the courts will […] abandon the doctrine."

[26] Among the others, Lord Stein, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 437.

As hinted at above, the "last rites" of the consideration appear to have already been read at supranational level, namely according to Art. 2.101 of the Principles of European Contract law;[27] similarly the Principles of International Commercial Contracts adopt the same approach, as per Art. 3.2.[28]

3.3. English Law and M&A Options

Given the legal scenario described above and by turning the focus to the posits under this article, an M&A Option, under English law, would be valid only to the extent to which the beneficiary gave value for it and therefore, if at the same time as the formation of the M&A Option a Premium were awarded to the promisor. By contrast, any dearth of Premium could lead one to conclude that the M&A Option was actually gratuitous; as a result, the promise would fail to incorporate an actual legal intention to create a binding obligation and, in the time elapsing between the conclusion of the M&A Option and the exercise of the right, the promisor could even withdraw the promise.[29]

Such stances, on the other hand, could be inferred both in the case the M&A Option were structured as a promise and should the same be envisaged as an actual bilateral agreement. In both circumstances, in actual fact, the consideration would be the necessary feature and, in the absence of this, the M&A Option would not purport to create a stable tie between the contracting parties.

As a rule of thumb, M&A Options may not be characterised as unilateral contracts, at least as long as they are configured as contracts entered into between two parties, whose object is to confer a right to do something (either to purchase or to sell). On the other hand, room for a possible characterisation of the M&A Option as a unilateral contract could stem from the Option itself being envisaged by one party as a grant unilaterally conceded to the beneficiary. Remarkably, should the latter be the case, the unilateral structure of the Option would raise two intriguing questions; namely, whether that promise is nonetheless made, and therefore the same is enforceable, even without a formal acceptance; secondly, whether such acceptance must be notified.

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[27] Art. 2.101 ("Conditions for the Conclusion of a Contract")

"A contract is concluded if:

(a)the parties intend to be legally bound; and

(b) they reach a sufficient agreement

without any further requirement."

"A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witness."

[28] The tenor of Art. 3.2 is eloquent in this respect:

"A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement"

See, in this respect, O Radley-Gardner and H Beale, *European Private Law* (Hart Publishing 2003) at part 3.

[29] In other words, the Premium is the keystone for the Option legal architecture to "work" under English law.

As for the first issue, it is recognised nowadays that the performance of the task required does indeed amount to acceptance. The principle, in fact, is set out in the *Harvela* case; in essence, as per Lord Diplock's averments, the invitation issued ought to be treated as a *"unilateral"* or *"if"* contract. More precisely:

> *"Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors."*

As far as the second issue is concerned, it is trite law that, in dealing with unilateral contract, there is no actual need to notify the acceptance. Such a principle has been entrenched under case law since *Carlill v. Carbolic Smoke Ball*[30] and is echoed in *Balfour v. Balfour*[31].

4. Scots Law and M&A Options: the Unilateral Promise

4.1. Definition

Scots law, in contrast to English law, expressly recognises unilateral promises as a tangible and palpable sign of its tribute to the Roman law roots. The unilateral promise is commonly defined as

> *"An undertaking, binding on one party alone, to do or refrain from doing specific acts."*[32]

In essence, the contract is bilateral, whereas the promise is unilateral, as only one party is bound by the obligation.[33]

In addition to this, the promise is fundamentally treated as an agreement, in cases where it was concluded between two parties and, therefore, it was embodied in a contractual framework. Under case law such a reasoning is advocated as per L P Hope's averments in *Lord Advocate v. City of Glasgow District Council*[34]*:*

> *"If the obligation is based on a promise, that expression of willingness may be by one party only. If it is based on offer and acceptance the expression of willingness must be by both. [..] On either alternative the party who has expressed his*

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[30] [1893] 1 QB 256.

[31] [1919] 2 KB 57.

[32] At level of mere manuals, the definition is provided by M Hogg (n 15) at 44.

[33] In a more recent comment (G Gordon, 'The Law of Contract' in G Black (ed), *Business Law in Scotland* (Thomson/W Green 2008) at 113), the phenomenon is synthesised as follows:

"A promise places an obligation on one person alone. By contrast, contracts place obligations on both parties to the contract. In theory this is true even of gratuitous contracts." [emphasis not per original text].

[34] (1990) SLT 721 at 725.

> *willingness to be bound by the obligation can be said to have bound himself to it by his agreement."*

Moreover, the concept is echoed by scholars[35] who, not without acumen, point out that in spite of a contract making reference to promises stemming from a party, such a contract shall not be re-characterised as a promise. That is to say, the bilateral structure of the promise, as a contract, tends to prevail on the tenor of promise being somehow inferable from the declaration of one of the parties.

Differently from the unilateral promises, the concept of option seems be an unclear category under Scots law. Quite tautologically, it is affirmed that it *"is not a term of art"*[36] and that the option may be seen either as a firm offer or as a unilateral promise. Under authorities, it is affirmed that the option, if encompassed by a contractual structure, shall be characterised as a firm offer;[37] in *Hamilton*,[38] where the controversy related to a memorandum of agreement entered into between two parties,[39] Lord Trayner's eloquent averments were the following:

> *"Although represented, and in some respects accurately represented, as an agreement between the parties, comes, in effect, to nothing that this – an offer on the part of the pursuer to sell the house to the defender, binding on the pursuer for a certain time, within which the defender had the option to accept or decline the offer. But the exercise of the option, which was just the acceptance of the offer, to be effectual and binding on either party required to be in writing, or proved by the oath of the party who was said to have accepted."*

More recently, in approaching again the concept of the options and particularly in dealing with their effects, the judicial stances under *Carmarthen Developments Ltd v. Pennington*[40] failed again clarifying in Scotland the ontological category at stake; in the Lord Hodge's averments, the main consequences of the signing of an option are clarified once again and *ad abundantiam*: (i) until the beneficiary of the option has not exercised his right, no obligation arises on his part; (ii) once the right has been exercised, *"he becomes bound to complete the contract by purchasing the*

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[35] WW McBryde, *The Law of Contract in Scotland* (2nd edn, W Green 2001) at 19, as well as Idem, *The Law of Contract in Scotland* (3rd edn, Thomson/W Green 2007) at 17,18.

[36] M Hogg, *Obligations* (n 15) at 63. In reality, as explained below, in civilian systems the option usual enjoys the status of autonomous concept.

[37] These stances may find confirmation in the Italian civil code, namely in the tenor of Art. 1331 (see below Chapter 5).

[38] *Hamilton v. Lochrane* (1899) 1 F 478.

[39] In a nutshell, Hamilton undertook to build a house with Mrs Lochrane having the option to purchase the tenure for a certain period of time.

[40] 2008 CSOH 139.

subjects".[41] However, it is also recognised that in Scots law there is not a lucid position in this matter.[42]

Somehow connected with these judicial stances, is the usual doctrinal interpretation of the phenomenon of the ordinary option as

> *"A promise by the grantor to enter a contract on certain terms if the promise so desires within a given period of time. For that period of time the grantor may not withdraw."*[43]

In the light of this, the conclusive stage of the transaction shall be the formation of the actual contract of sale, triggered by the notice of the intention to exercise the option.[44]

4.2. If and When a Promise is Relevant under Law

Not every statement shall be characterised as a promise; it is not a coincidence that court decisions are not particularly inclined to acknowledge its existence (and, therefore, to recognise its mandatory effects). Paradigmatic of such a trend are significant rulings; namely: *Bathgate v. Rosie*[45] and *Stone v. MacDonald*.[46] Any legal offer must amount to an expression of willingness to be bound on specific terms. What courts must take into account in the case of dispute, pursuant to an objective test, is what a reasonable man would have deduced from both the terms and the conduct entailed to the disputed relationship.[47]

In any case, should the statement be a promise, court decisions are adamant in inferring the binding nature of the promise, a withdrawal being totally excluded.[48]

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[41] *Carmarthen Developments Ltd v. Pennington* (ibid), at para. 15.

[42] At para 15 Lord Hodge in the case *Carmarthen* (ibid) acknowledges:

"There may be disagreement as to the correct legal characterisation of an option in Scots law, namely whether it is a unilateral promise by the grantor, a conditional contract of sale or sui generis."

[43] HL MacQueen, 'Offers, Promises and Options' (1985) SLT (News) 187.

[44] Therefore also the Option, as defined *supra* as transactions entered into in the "M&A" market.

[45] 1976 SLT (Sh.Ct.) 16. As recalled doctrinally (see WW McBryde, *The Law of Contract in Scotland* (2nd edn) (n 35) at 16)), a mother promised to pay for the repair of a shop window damaged by her son.

[46] (1979) SLT 288. In the case at stake, a conditional option to purchase heritage was treated as a promise as distinct from an offer.

[47] N Busby and others, *Scots Law* (2nd edn, Lexis Nexis UK 2003) at 80.

[48] *Littlejohn v. Hadwen* (1882) 20 SLR 5; *Paterson (A&G) Ltd v. Highland Railway Co.* 1927 SC 32 (HL).

In the latter, Viscount Dunedin expressly adheres to this concept, by underlining that:

"If I offer my property to a certain person at a certain price, and go on to say: "This offer is to be open up to a certain date," I cannot withdraw that offer before that date, if the person to whom I have made the offer chooses to accept it….."

Under doctrine, the theory is propounded by Gloag and Henderson*, The Law of Scotland* (12th edn, W Green/Sweet & Maxwell 2007) at 129. See also S Woolman and J Lake, *Contract* (3rd edn, W Green

4.3. The Consideration and Further Issues

Not only does Scots law differ from English law in expressly recognising unilateral promises, but it is also remarkably peculiar, given the fact it does not contemplate the consideration as a necessary feature for any contractual agreement to be valid, as early as *Kintore v. Sinclair*.[49] In this respect, the same Commentators[50] are adamant that:

> *"A promise requires the act of one party only- a contract requires at least two parties."*

Also doctrinally and with a language not devoid of imagination, it is affirmed[51] that:

> *"Scots law never needed to indulge in the dark arts of consideration."*

In effect, if the contract is bilateral, then it will be indifferently either gratuitous or onerous. More specifically, a bilateral gratuitous contract will be

> *"An agreement where, although there are two parties bound to the obligation, only one comes under any onerous duty."*

Similarly, unilateral promises as a rule of thumb may not be affected by the requisite of the consideration, as this is not a condition for a promise to be valid.[52]

Doctrinally, a further debate, particularly intense and animated, albeit fundamentally devoid of practical implications, is whether unilateral promises are ever gratuitous. In fact, originally Institutional Writers unanimously tended to consider the promise itself as *"naturally"* gratuitous, given that:

2001) para 4.2, where emphasis is placed on the fact that, whereas an offer is revocable until accepted, a promise is binding and irrevocable from the moment it is made.

[49] 1623 Mor. 9425.

[50] WW McBryde, *The Law of Contract in Scotland* (2nd edn) (n 35) at 15.

[51] JAK Huntley and AD Dedouli, 'Third Party Rights, Promises and the Classification of Obligations' (2004) Juridical Review 321.

[52] In other words, every voluntary obligation is actionable, to the extent that it is supported by appropriate evidence. The concept is summed up by the Stair's aphorism (*Institutions*, I.10.7) according to which:

"Every paction produceth action, et omne verbum de ore fideli cadit in debitum." (see JAK Huntley and AD Dedouli, ibid).

> *"[A]t the moment the obligation is created, the promise comes under no obligation to the promisor, even although it may be envisaged by the parties that the promise is made with expectation of receiving something in return."*[53]

Similarly and more recently, Authors[54] emphasise that:

> *"The whole discussion of gratuitous obligations has been bedevilled by the consideration of trivial examples such as the promise of a reward for walking to York"*[55]

And, even more significantly, that:

> *"Promises are always gratuitous obligations. My unilateral statement cannot bind anyone else to do anything."*

However, in contrast to this doctrinal strand,[56] a school of thought is inclined to concede that a unilateral onerous promise can nonetheless exist in the Scottish jurisdiction, in addition to the gratuitous promise.[57]

Whether or not the promise is valid even in onerous form, Scots law seems to hermeneutically broaden a lot (or too much?) the concept of the unilateral promises; not coincidentally and in stark contrast to continental jurisdictions,[58] the range of what may be deemed a "promise" is a particularly wide one, as it comprises in a slightly confusing way both typically "contractual" concepts (options, a promise to keep an

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[53] Erskine, *Institutions* 111.11.1. Such a view is echoed by the Stair's classification according to which an enforceable promise, being always unilateral, is also always gratuitous (Stair, *Institutions* I,10.12).

[54] See HL MacQueen, 'Constitution and Proof of Gratuitous Obligations' (1986) SLT (News) 1, at 3. See also, more recently, M Hogg, *Obligations* (n 15). For a wide and extensive description of the legal debate on the subject, see JAK Huntley and AD Dedouli, 'Third Party Rights' (n 51) at 318.

[55] In the peculiarity of the example, the case *Rogers v. Snow* (1573) Dalison at 94 clearly transpires.

[56] Incidentally, in Italy, unilateral promises shall be either gratuitous or onerous, according to their actual qualification. For instance, a *promessa al pubblico* (promise to the public; see Art. 1989 of the Italian Civil Code), which would be a unilateral promise according to the Scottish legal concepts, shall be by definition gratuitous. Likewise, in this jurisdiction, a firm offer under Art. 1329, Italian Code, which in Scotland would be also a unilateral promise, would be either gratuitous or onerous. See *amplius* 6.1 and 6.2 below, particularly n 75 as to the definition of a *promessa al pubblico.*

[57] J Thomson, 'Promises and the Requirements of Writing' 1997 SLT (News) 284. Opposite to this view is that expressed by HL MacQueen, 'Constitution and Proof of Gratuitous Obligations' (n 54). The discrepancy emerging on the topic at stake between the two Authors is wittily acknowledged by them in a joint work (HL MacQueen and J Thomson, *Contract Law in Scotland* (2nd edn, Tottel Publishing 2007) at 66, 67, particularly n 2 therein. For an overview on the matter in Italian, see L Vagni, *La Promessa in Scozia. Per un Percorso di Diritto Contrattuale Europeo* (Giuffré 2008) at 226, particularly n 37 therein.

[58] See Chapter 5 below, concerning the Italian jurisprudence.

offer open, the grant of an option) and typically non-contractual structures (the promise to pay a reward).[59]

Beyond the doctrinal dispute as to the feasibility of an onerous unilateral promise, Scots statute seems to establish a requisite of formal validity of the promise.[60] In this respect reference must be made to the *Requirement of Writing (Scotland) Act 1995*, namely Sections 1(1) and 1(2). More specifically, a unilateral promise, whose definition is not provided within the context of the Act,[61] needs to be in written form if it is gratuitous and the promisor releases it for reasons extraneous to his professional activity; conversely, through the combined reading of Sect. 2 and 3 of the above referred Act, *"simple"* contracts, whether or not onerous, are not subject to any writing encumbrance.

4.4. Scots Law and M&A Options

The fact that under Scots law the grant of an option is viewed as a valid unilateral promise means that the M&A Option in that jurisdiction does not necessarily require the utilisation of a contractual structure for the purposes of its enforceability. Likewise, the consideration as a concept not adopted by the Scots legal system, may lead one to affirm that the payment of the Premium will not be a necessary element for the M&A Option to be valid in this jurisdiction. In other words, Scots law is a system where the M&A Option, both in the usual onerous form and in the less frequent gratuitous one, would certainly be deemed as binding and enforceable.

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[59] WW McBryde, *The Law of Contract in Scotland* (3rd edn) (n 35) at 20, 21. In spite of there being very few court decisions dealing with unilateral promises, it is usually inferred among scholars that unilateral promises are those falling within multifarious further typologies: (i) promise to pay an agent a commission; (ii) promise to hold an offer for a stated period; (iii) letter of credit by a banker; (iv) undertaking to accept the highest offer; (vi) undertaking to accept the lowest tender; (v) undertaking to pay for work done in reliance of a letter of intent; (vi) promise to take all future requirements from a particular supplier.

As far as the promise subject to a condition is concerned (or promise to a recompense), Scottish authorities have been for a long time inclined to apply to them the contractual pattern rather than the unilateral one, probably mislead by the stances of the English authorities in *Carlill v. Carbolic Smoke Ball Co* (n 30). This redundancy is indirectly underlined by L Vagni, (n 57) at 257. See also below Chapter 6.

[60] It is worth mentioning that, originally, under Scots common law promises could be constituted even verbally. In case of dispute, however, Courts usually required a special type of proof (proof *"by writ or oath"*), for the promise to be enforceable.

[61] Quite controversially, the legislative framework at stake makes reference to the "gratuitous unilateral obligation" rather than to the "promise"; however, the reading of the adjective unilateral as referring to the structure of the obligation, rather than the nature (onerous or gratuitous) of the promise, enables one to nonetheless conclude that the wording cannot help but referring to the "promise". See L Vagni, *La Promessa in Scozia* (n 57) at 226.

5. Promises and Options under Italian Law

5.1. Statutory Provisions

Italian law, as a typical Civilian System, does recognise the option as an autonomous genre, with its own distinctive contractual nature. In fact it is prescribed under Art. 1331[62] (eloquently headed "Option") of the Italian Civil Code[63] that:

> *"When the parties agree that one of the same shall remain bound to his declaration and the other is entitled to accept the same or not, the declaration of the former amounts to an irrevocable proposal at all events pursuant to Art. 1329."*

In turn, Art. 1329, Italian Code, states that, if the promisor binds herself to hold firm the contractual proposal for a certain time, the revocation is without effect.[64] Remarkably, in case of death or supervened incapability of the promisor, such a proposal – either if made under Art. 1329 or if formulated pursuant to Art. 1331, Italian Code – will be nonetheless efficacious, unless such an efficacy is excluded because of either the nature of the business or the practice.

Not secondarily, Art. 1336, Italian Code, categorises the further concept of offer to the public (or public offer); this must be viewed as an ordinary offer (therefore endowed with contractual nature), although, differently from the latter, it is addressed to the public in general (*in incertam personam*).

Incidentally, the offer to the public distances itself from the *promessa al pubblico*[65] (literally, promise to the public), for the reason that the former is merely a proposal to conclude a contract which must be accepted by the offeree, whereas the *promessa al pubblico* is fundamentally a promise of remuneration (or offer of reward) and is binding as soon as it is communicated by the promissor (*rectius*: disseminated).[66]

It may be inferred from the above that the Italian legislative framework treats an option, with regard to its practical effects, fundamentally as an irrevocable proposal or, to put it in a Scottish law nomenclature, as a firm offer. As a result, M&A Options will be binding on the promising party, either in unilateral form or as a bilateral struc-

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[62] Eloquently, such article is headed "Option".

[63] Henceforth also the "Italian Code".

[64] Cass civ, no 1917/1949. Among scholars, such a stance has been advocated as early as in M Betti, 'Commentary to Court Decision' (1949) Temi 567; A Torrente, 'Commentary to Court Decision' (1949) (I) Foro Italiano 1050. As to more recent doctrinal stances, see F Gazzoni, *Manuale di Diritto Privato* (13th edn, Edizioni Scientifiche Italiane 2007) at 848.

[65] See below further explanations under Chapter 6.2.

[66] G Branca, 'Delle Promesse Unilaterali' in A Scialoja and G Branca (eds), *Commentario al Codice Civile Scialoja-Branca*, sub art 1989, para IV (Zanichelli 1974) at 453; CM Bianca, *Il Contratto,* vol 2 (Giuffré 2000) at 250. The promise to the public is usually viewed as a "unilateral act" (*negozio unilaterale*). Opposed to this and despite the clear tenor of the Italian Code, a minority strand of scholars tend to advocate the view according to which the promise to the public is a contract (see G Sbisà, *La Promessa al Pubblico* (Giuffré 1974) at 72).

ture, and the right of the promisee will not be affected by any unpredicted and/or unwanted withdrawal on the part of the promisor. Notwithstanding this, from a purely conceptual perspective, albeit without practical repercussions, both under authorities[67] and among commentators[68], it is emphasised that an option under Art. 1329, Italian Code, might slightly differ from a firm offer because it is a bilateral *negotium* (or obligation).

Finally, it is unnecessary here to go into the Principles of European Contract Law[69] beyond noting that they adopt an approach analogous to the Italian Code, given the fact that under such a supranational and conventional framework, a unilateral promise does constitute a distinct type of obligation.[70]

5.2. The "Consideration"

From the Italian perspective (particularly according to Art. 1325, Italian Code), consideration is not a general requisite for a contract to be valid,[71] nor is it required for irrevocable promises. Such a legal stance impacts significantly on the analysis of the M&A Options, the same fundamentally meaning that their validity is beyond discussion, independently of whether they are endowed with a Premium in favour of the promisor.

For the sake of completeness, it is worth noting that those which under Scots law are defined as *"unilateral promises"*[72] cannot be mistaken for the *"promesse unilaterali"*[73] under the correspondent Italian legislative scenario, in spite of the apparently same terminology adopted. Remarkably, Italian Law, in addition to the contractual promises examined *supra* under 5.1, refers to unilateral promises as legal and binding non-contractual sources of obligations, albeit exclusively in nominated circumstances expressly contemplated under the same Italian Code. In other words, as a general principle, Italian law enables the parties to create contracts also not fall-

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[67] Cass civ, no 515/1955; Cass civ, no 1739/1967; Cass civ, no 3986/1974; Cass civ, no 3341/1977; Cass civ, no 3170/1978; Cass civ, no 579/1982; Cass civ, no 17737/2002.

[68] *Ex plurimis*, see CM Bianca, *Il Contratto,* vol 2 (n 66) at 261,265. Opposed to this is the opinion of those who deem the option as fully ascribable to the irrevocable proposal (or firm offer) in resemblance to Art. 1329, Italian Code; see G Gabrielli, *Il Rapporto Giuridico Preparatorio* (Giuffré 1974) at 10.

[69] More specifically, C von Bar and others, *Principles, Definitions and Model Rules of European Private Law* (Selier 2008) at 105.

[70] According to Art. 1:103 of the *"Principles"* ("Binding effect"):

"A valid unilateral promise or undertaking is binding on the person giving it if it is intended to be legally binding without acceptance."

[71] *Ex plurimis*, R Sacco, 'Il Contratto. 2'*,* in F Vassalli (ed), *Trattato di Diritto Civile Italiano.* Vol VI (UTET 1975) at 6 ff.

[72] See Chapter 5 above.

[73] *Promesse unilaterali* is the literal translation of *"unilateral promises"*.

ing within a specific legal category;[74] conversely, unilateral promises (*promesse al pubblico*), in order to be legally binding, must necessarily fall within one of the three nominated typologies mentioned under the Italian Code; namely, (i) the promise of payment and the recognition of debit;[75] (ii) the promise to the public;[76] (iii) the negotiable instruments.[77] The *rationale* behind this lies on the fact, from the perspective of the Italian legislator, parties are entitled to undertake obligations on unilateral basis exclusively through a contract of donation (whose rules are set forth under Artt. 769 ff, Italian Code) or through the mechanism of the contract with obligations exclusively on the part of the offeror (Art. 1333, Italian Code).[78] In this scenario, the consent is expected to work as a "stronghold", because, on the one hand, it should defend the autonomy of the promisee, despite the favourable consequences of the promise (*i.e.* the "birth" of a new right); on the other hand, such consent aims to protect the promisor too, because, thanks to it, the undertaking of the obligation, as required under Italian law for every obligation or *negotium*,[79] will result in being "justified" in terms of cause.

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[74] In detail, Articles 1321(1) and 1321(2) of the Italian Code:

"The parties are entitled to freely determine the content of the contract within the limits set forth by the law."

"The parties are entitled also to conclude contracts which do not belong to kinds having a dedicated discipline to the extent to which the same are aimed to achieve interests worthy of protection pursuant to the public policy."

[75] Art. 1988 of the Italian Code:

"The promise of payment or the recognition of a debt holds harmless him in favour of whom the same is addressed, from the onus to prove it."

[76] Art. 1989 of the Italian Code:

"He who, in addressing to the public, promises a performance in favour of who is in a specific condition or carries out a definite action, is bound on the promise, as soon as the same has been published."

"If the promise is not endowed with an expiry, or the expiration is not inferable form the nature of form the scope of the promise itself, the promisor's obligation terminates if, within one year as from the promise, he has not been informed of the fulfilment of the condition or the carry-out of the action contemplated under the promise."

The gratuity of the *promessa al pubblico* is emphasised by Italian scholars. *Ex plurimis*: CM Bianca, *Il Contratto,* vol 2 *(*n 66) at 250:

"L'offerta al pubblico non dev'essere confusa con la promessa al pubblico, la quale è un negozio unilaterale, e precisamente l'assunzione di un'obbligazione gratuita nei confronti di chiunque del pubblico sia in una data situazione o compia una determinata azione."

[77] In other words, bills of exchange and cheques.

[78] Therefore, without acceptance.

Namely, Art. 1333, Italian Code, states as follows:

"The offer aimed at concluding a contract from which obligations exclusively on the part of the offeror arise, is irrevocable as soon as the offer is known to the offeree.

The offeree may reject the offer within the time requested by the nature of the business or because of the practice. In lack of such a rejection the contract is deemed as concluded."

[79] Art. 1325 n. 2, Italian Code. See in this respect F Gazzoni (n 64) 693; G Branca, *Promesse Unilaterali*, vol 2, in F Galgano (ed), *Commentario del Codice Civile Scialoja-Branca, Art. 1960–1991* (Società Editrice del Foro Italiano – Zanichelli 1974) at 407; under authorities, see Pescara Tribunal, 17 May 1990.

It is intuitive, therefore, in light of the description provided, that *"unilateral promises"* which Scots law utilises to encompass a "melting pot" of obligations endowed with either contractual or non-contractual nature, correspond just partly to the unilateral non-contractual promises under Artt. 1987 ff, Italian Code, to which the Italian legislative system refers. As a rule of thumb, the discrepancy is paradigmatic of the different way in which an identical concept (the unilateral promises under Roman law) has been implemented in two different jurisdictions.

6. Conclusions

This work has brought to light significant differences in how three jurisdictions (English, Scots and Italian) regard the subject of unilateral promises (and unilateral contracts in England) and how, consequently, the M&A Options may be characterised and treated in terms of validity and enforceability in each of them.

Nearly paradoxically, English law – at international level the jurisdiction usually chosen by parties to govern these typologies of contract -, in acquiescing into the legal concept of consideration, seems not to offer an adequate protection to the contracting parties to an M&A Option. Likewise, although such a jurisdiction has recognised, indeed very recently, the concept of the *"unilateral contract"* via case law, it is not yet so adamant in respect of the binding character of such a concept.

Scots law, quite surprisingly, reveals a certain degree of flexibility, as it does not pay tribute to the theory of consideration, and moreover, in the wake of its remarkable Roman roots, does recognise unilateral promises. As a result, the promise does not require specific consideration, nor can it be withdrawn by the offeror, therefore in a legal scenario it certainly caters for certainty and stability within the ambit of the contractual relationships (particularly for those at stake, the M&A Options).

In the "Continent", Italian law would treat M&A Options pursuant to legal principles theoretically not so dissimilar from those existing in Scotland, an obvious difference being that under Italian law, as a Roman legal system which benefited (or suffered?) from the Napoleonic codification process, rules relating to the unilateral promise, as well as those concerning the contractual proposal, the option, the firm offer and the promise to the public, are duly enshrined under its legal written framework governing the matter of both the contracts and the quasi-contracts.

However, and probably also as a result of such a codification, the concept of unilateral promises (indeed dispersed in Scotland into a too vast conceptual perimeter and probably impinging also in a conceptual "blunder" where, on the one hand, it completely omits the concept of both the non-contractual, albeit binding, "promise to the public"[80], on the other hand it forgets to give autonomy to the concept of "option") tends to have, in a more lucid way, at least three solid correspondent ram-

[80] Promise of a recompense.

ifications in Italy: (i) option/firm offer; (ii) offer to the public; (iii) promise to the public and *lato sensu* the unilateral promises.[81]

Despite the basic proximity of the principles of the law of contract existing within the two jurisdictions (Italy and Scotland), the Scots jurisprudence seems to have been influenced in a negative way by the principles of common law, blossomed in the adjacent English jurisdiction; this is due to both concepts that are clearly contradictory (the epitome might be the "unilateral contract") and authorities that might create asymmetries and inconsistencies with the Roman general theory of both the promise and the option (the thought in this case instinctively goes towards *Carlill*[82]).

Finally, in non-legal terms and in looking at the specific transactions of the M&A Options, a doubt assaults the interpreter: if Scots law, despite certain arguable stances embodied in its *corpus*,[83] might represent a safe harbour for the "Ulysses" who have to navigate through the perilous waters of M&A transactions (as opposed to the mischievous Sirens who still populate the routes of the "English waters"), why do international banks (even the Scottish ones) tend to subject the M&A Options to English jurisdiction? The non-English language in which the provisions of law are conceived and written down, could be a justification for the Italian jurisdiction; however, this answer cannot work in dealing with a legal system, such as the Scottish, based on a perfectly "Shakespearean" language!

Also in the light of these observations, *de iure condendo* the empirical evidence provided in this article might suggest Scotland adopt soon a code of the contract, in a position, on the one hand, to categorise more rationally its concepts (such as the "unfettered" unilateral promise) of Roman tradition and, on the other hand, to be able to offer more convincingly its jurisprudence as a "governing law" at international level.

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[81] As already mentioned, the promise to the public, the promise of payment (and recognition of debit) and the negotiable instruments.

[82] *Carlill v. Carbolic Smoke Ball* (n 30).

[83] These stances are even more evident in comparing its discipline to the Italian one. See, in this respect and in a persuasive way, L Vagni, *La Promessa in Scozia* (n 57) at 268. The Author rigorously notes that the Scottish "model" does not allow a clear differentiation between promise and contract. The autonomy of the promise in comparison to the contract is affected by an analysis of the former from a "contractual" perspective. It is not a case Scottish jurists deal with the subject of the promise, simply affirming that "promise" and "offer" differ from each other because the former, unlike the latter, does not require the acceptance for the purposes of the "birth" of the obligation.