«PER FAS ET NEFAS»
SHORT HISTORICAL NOTES ON THE PACTUM DE QUOTA LITIS

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Drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur
J. H. von Kirchmann (1848)

Abstract: The recent attempts to remove from Italian law the ban of the contingency fee agreement between client and lawyer, culminated, after a few years, with the return to the previously abolished prohibition. This prompted a brief reflection on the reasons and scope of the ban in question, under the particular perspective of legal history, in order to better clarify what are the actual interests involved and what the possible solutions.

Key words: Contingency fee agreement; History; Ius commune

Summary: 1. Reforms. – 2. A look back at the past. – 3. Counter-reforms (and a conclusion sketch).

1. *Reforms.*

The so-called "Bersani law", (l. 248/2006) concerned, among several other topics, the area of the legal profession. Particularly heated discussions arose from the modification of art. 2233[3] of the Italian Civil Code, which expressly forbade the so-called *pactum de quota lite*[1]. Legal science has offered different interpretations of this provision. In addition, the dissent is manifested not only on the desirability of such an innovation – before 2006, the Anglo-Saxon experience had already affirmed the utility of the contingency fee agreements for the "Access to Justice" of the most economically disadvantaged people[2] – but especially on the true extent of it.

It could be argued that the ambiguous reform[3] has not determined a change of discipline[4] (a ban of the contingency fee would remain through a more general ban on the sale of litigious rights, established by art. 1261[1] CC[5]); in contrast, the reform is also be considered to be a decisive step in the long

[1] Art. 2233[3] c.c.: «Gli avvocati, i procuratori e i patrocinatori non possono, neppure per interposta persona, stipulare con i loro clienti alcun patto relativo ai beni che formano oggetto delle controversie affidate al loro patrocinio, sotto pena di nullità e dei danni».

[2] G. C. Hazzard-A. Dondi, *Etiche della professione legale. Un approccio comparato*, Bologna 2005, pp. 364-368.

[3] This is the new text: «Sono nulli, se non redatti in forma scritta, i patti conclusi tra gli avvocati ed i praticanti abilitati con i loro clienti che stabiliscono i compensi professionali».

[4] In this sense, see U. Perfetti, *Patti e modalità di determinazione del compenso nella novella di cui alla l. n. 248 del 2006. La morte apparente del divieto del patto di quota lite*, in "Contratto e impresa", 23/1 (2007), esp. pp. 65-70; see also G. Scarselli, *Il decreto Bersani e le tariffe forensi*, in "Il foro italiano", CXXX (2007), p. V, col. 25-26.

[5] Art. 1261[1], c.c.: «I magistrati dell'ordine giudiziario, i funzionari delle cancellerie e segreterie giudiziarie, gli ufficiali giudiziari, gli avvocati, i procuratori, i patrocinatori e i notai non possono, neppure per interposta persona, rendersi cessionari di diritti sui quali è sorta contestazione davanti l'autorità giudiziaria di cui fanno parte o nella cui giurisdizione esercitano le loro funzioni, sotto pena di nullità e dei danni». See F. Gasbarri, *Brevi considerazioni sui fondamenti del divieto di «patto di quota lite»*, in "Giustizia Civile" XLVIII (1998), p. 3209; G. Musolino, *Il compenso della prestazione professionale fra autonomia negoziale, tariffe e regole di concorrenza*, in "Rivista del notariato" (2001), I, p. 85 ff.

history of the liberalization of that pact[6], which in Italy was originally subject to penalties[7], but downgraded to mere tort since the late nineteenth century[8].

These contrasting points of view – certainly dependent on the unsatisfactory technical choices made by the legislator in 2006[9] (and not entirely reconciled after the legislative intervention in 2012[10]) – also reflected the difficulty in determining the precise boundaries of this legal figure.

It is, precisely, this uncertainty draws the attention of the law-historian, who perceives the issue in the echoes of a centuries-old doctrinal labor, originating from the time of the medieval rediscovery of the Justinian sources[11] and reaching to full maturity with the transition to the modern age. It was in occasion of this passage that the lawyers – who were already experiencing many difficulties in framing the afforementioned legal figure and frequent divergence of opinion – first attempted to offer various solutions which have remained substantially unchanged until today.

Given these circumstances, it does not seem superflous to add a 'vertical' comparison – which attempts to reconstruct, albeit synthetically and partially[12], the main developments of this legal figure in the age of the *ius*

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[6] See P. Schlesinger, *La nuova disciplina dei compensi professionali per gli avvocati*, in "Corriere giuridico", 4/2007, p. 452 f.

[7] Indeed, the contingency fee agreement, in the source that we will analyze, is included among the criminal behaviours (see *infra*, § 2).

[8] For the history of this agreement in the recent Italian tradition, see M.G. di Renzo Villata, *Il patrocinio infedele in Italia tra Otto e Novecento (la norma e l'interprete)*, in Officium advocati, cur. L. Mayali, A. Padoa-Schioppa, D. Simon (*Rechtsprechung*. Materialen und Studien. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, b. 15), Frankfurt am Main 2000, esp. pp. 279-287; see also R. Danovi, *Compenso professionale e patto di quota lite*, Milano 2009, pp. 11 ff.

[9] Detailed comments on the legislator's lack of rationality in Schlesinger, *La nuova disciplina* cit., p. 451 f.

[10] V. *infra*, nt. 64.

[11] The starting point is to be found in some passages from the Digest of Justinian (Dig. 2.14.53; Dig. 17.1.6.7; Dig. 50.13.1.12) e del *Codex* (C. 2.6.3; C. 2.6.5; C. 2.12.15).

[12] We cannot develop, here, for example, a proper analysis of the professional and patrimonial penalties arising from the illegal conclusion of the prohibited agreement.

commune [13] – to the usual 'horizontal' forms of comparison with the experiences of other contemporary legal systems[14], is not superfluous,

2. *A look back at the past.*

For reasons of clarity, the present reconstruction will be based on the outcomes of medieval and post-medieval juridical thinking. In particular, the doctrinal *pivot* around which our reconstruction revolves is represented by the relevant contribution of Prosperus Farinaccius' P*raxis et Theorica criminalis*[15], that will be the object of the following analytical considerations.

As for the choice of this author, it is known that, at the end of the seventeenth century, Cardinal Giovanni Battista De Luca, in his monumental and celebrated *Theatrum veritatis ac justitiae*, referred first of all, with regard to the contingency fee agreement, to the Roman criminalist and his *Praxis*[16].

Furthermore, if we think that Farinaccius did not represent the *Idealtypus* of the honest lawyer (as a consequence of his repeated malpractice, he had acquired a practical knowledge of the mechanism of the criminal justice *ex*

[13] See di Renzo Villata, *Il patrocinio infedele* cit., *passim*, and most especially R. Bianchi Riva, *L'avvocato non difenda cause ingiuste. Ricerche sulla deontologia forense in età medievale e moderna*, parte I, *Il medioevo*, Milano 2012, p. 90 f., 96 f., 164, 174, 186.

[14] See R. Cangiano, *Il patto di quota lite negli ordinamenti italiano e statunitense*, in "Mercato, concorrenza, regole" (2007), p. 255 ss.

[15] Biographical notes in N. Del Re, *Prospero Farinacci Giureconsulto romano (1544-1618)*, in "Archivio della Società romana di Storia patria", XCVIII (1975), pp. 135-191; A. Mazzacane, v. *Farinacci, Prospero*, in *Dizionario Biografico degli Italiani* [= DBI], vol. 45, Roma 1995, pp. 1-5; Id., *Farinacci, Prospero*, in *Dizionario Biografico dei Giuristi Italiani* [=DBGI], Bologna 2013, pp. 822-825.

[16] G. B. De Luca, *Theatrum Veritatis et Justitiae*, Lib. VX, pars II, *Relatio Romanae Curiae forensis*, Disc. LXVI, p. 163, lett. c. On this work, see A. Mazzacane, *Giambattista De Luca e la "compagnia d'uffizio"*, in *Miscellanea Domenico Maffei Dicata. Historia - Ius - Studium*, vol IV, a cura di A. Garcìa y Garcìa e P. Weimar, Goldbach 1995, pp. 665-671; on this famous italian cardinal and lawyer, see Id., *De Luca, Giovanni Battista*, in DBI, vol. 30 (1990), pp. 340-347; I. Birocchi-E. Fabbricatore, *De Luca, Giovanni Battista*, in DBGI, pp. 685-689; For the De Luca's ideas about legal ethics, see S. Di Noto Marrella, *Giudici e avvocati in "Lo stile legale" di Giovan Battista De Luca*, in *Miscellanea Domenico Maffei Dicata*, cit., pp. 622-623.

parte patientis [17]), we have a guaranteed insight which is unconditioned by moral prejudices.

Thus, the work of Farinaccius, real practical and doctrinal kaleidoscope, can provide us with some useful suggestions to answer questions and remove uncertainties that still thickly surround the discipline of this agreement.

Farinaccius begins the *quaestio 106* of his *Praxis* enunciating the *regula* from which his reflection develops: «pactum de quota litis inter advocatum et clientulum, in casu victoriae est improbatum a jure»[18], because – as he explains in accordance with the Justinian texts and the *Glossa*[19] – it is concluded «contra bonos mores» [20].

By reproducing the definition formulated by Jacobus Menochius in his *De arbitrariis iudicum quaestionibus et causis* (*casus 522*) he provides another important indicator to understanding the essence of the agreement under consideration, describing it as the covenant whereby «per modum quotae promittitur some pars rei, de qua lis est vel contentio»[21]: In other words, the agreement exists when the object of the remuneration is a part of the *res litigiosa;* therefore the compensation is subject to the victorious outcome of the dispute (Menochius stated that the reference to a share of the contended good always implies the victorious outcome of the dispute, even if the

[17] See Del Re, *Prospero Farinacci* cit., pp. 138 ff., 143 ff.; Mazzacane, *Farinacci* cit., p. 1; F. Cordero, *Criminalia. Nascita dei sistemi penali*, Roma-Bari 1986, pp. 342 ff. (quote 11).

[18] Prosperus Farinaccius, *Praxis et theoricae criminalis ... Pars tertia ...* [= *Praxis*], Lugduni 1635, *qu*. 106, *Pactum de quota litis, de iure communi reprobatum, et punibile est. Quando hoc veum sit, quando non, et generaliter de materia*, n. 1.

[19] See gl. *malo more*, Dig. 50.13.1.12, *De variis et extraordinaris cognitionibus et si iudex litem suam fecisse dicetur*, l. *Praeses*, § *Si cui* (*Digestum novum, seu Pandectarum iuris civilis tomus tertius ... commentariis Accursii... illustratus*, Lugduni 1627).

[20] *Praxis*, qu. 106, n. 15.

[21] *Praxis*, *ibid*.; cfr. Jacobus Menochius, *De arbitrariis iudicum quaestionibus et causis Libri duo..., Centuria sexta* ..., Lugduni 1605, *casus* 522, *Advocati, causidici et causarum sollicitatores de quota litis paciscentes, quibus poenis plectantur*, n. 5. Biographical notes on Menochius in C.M. Valsecchi, *Menochio, Jacopo*, in DBI, vol. 73 (2009), pp. 521-524.

agreement did not mention it[22]).

The highlighted condition appears closely linked to the ban *ratio*: through these agreements the lawyers, said Farinaccius, are induced to *delictum calumniae* since, knowing that they will get the reward only if they win, they will do everything possible, *per fas et nefas*, in order to achieve a favorable outcome[23].

This prohibition constitutes the conclusion of a long and difficult doctrinal debate: a *dissensio dominorum* – later largely resolved in the Accursius *apparatus* – on whether to ban a condition that does not exceed the *dimidia pars litis,* can, for example, be found, at the beginnings of the Glossators' School[24]; and the idea of establishing an exception to the ban in the event the client agrees to offer, as compensation for the lawyer, a *moderate* share of the contended good is also expressed by the School of Orléans[25].

Since the time of the *Commentatores*, however, since «sive (...) faciat

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[22] Menochius, *De arbitrariis*, *ibid*.: «Pactum autem de quota litis illud (...) esse dicitur (...) etiam si nulla sit facta mentio de victoria causae: quia hoc in casu sic semper intelligitur (...)».

[23] *Praxis*, qu. 106, n. 2: «Ratio regulae est, quia sic paciscendo advocati invitantur ad delictum calumniae, et scientes se nihil habituros, nisi in casu victoriae, facient quicquid poterunt per fas, et nefas, ut litem vincant».

[24] V. gl. *immensa*, C. 2.6.5, *De postulando*, l. *Si qui advocatorum* (*Codicis... repetitae praelectionis Libri... Accursii commentariis illustrati*, Lugduni 1627): «(...) dixit M.[artinus] quod liceat ei pacisci de dimidia parte litis (...), quod non placet secundum Hug.[olinum] et Azonem, et not. de hoc *infra mand. l. si contra* [sic = Dig. 17.1.6.7], melius quam hic». In the same sense, see also the late Glossator Odofredus, *In primam Codicis partem complectentem I, II, III, IV et V libros Praelectiones (quae lecturae appellantur)*..., Lugduni 1552 (rist. anast. *Opera Iuridica Rariora*, V, 1, Bologna 1968), *Lectura ad* C. 2.6.5, *De postulando*, l. *Si qui advocatorum*, n. 1-2.

[25] Jacques de Revigny [Pierre de Belleperche], *iuris utriusque professoris subtilissimi Lectura insignis et fecunda super prima parte Codicis domini Iustiniani*, ..., Parrhisiis 1519, rist. anast. *Opera Iuridica Rariora*, I, Bologna 1967, l*. Si qui advocatorum*, *De postulando* (C. 2.6.5), f. LXXVr: «(...) considerandum utrum sit conventio moderata vel non; quia sub quaecumque appellatione conveniret de salario moderato etiam sub appellatione quote partis, dico quod valeret (...)».

pactum de quota litis, sive de certa quantitate, eadem est ratio» [26], the strictest principle that the pact «per nomina quotae nunquam valet etiam in centesima quota» [27] became firmly established. Farinaccius, recalling a similar statement by Menochius[28], qualifies the prohibitive *regula* as a «sententia receptissima»[29]. Despite the concern to avoid extortion phenomena by the defenders in detriment of customers – Farinaccius warns in this regard that the *doctores*, according to the Justinian sources, also define the contingency fee as *«derobatio et furtum»* and lawyers who use it as *«crudeles et depredatores»*[30] –, in the *quaestio* it is clarified that, for *communis opinio*, the pact would be illegal even if the compensation agreed was moderate[31] or even minimal[32].

The reference to the *ratio prohibitionis* allows our jurist to extend the ban even beyond the limits mentioned so far.

The prohibition exists, for example, as confirmed by the *communis opinio doctorum*, even if the pact is not established pro rata, but regards a determined good – a *res certa* – as long as it is *in litem deducta*, and for the reasons given above: even in this case, in fact, the transfer of good to the benefit of the lawyer clearly depends on the outcome of the dispute[33].

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[26] Bartolus a Sassoferrato, *Prima in Digestum vetus*..., Lugduni 1555, l. *Sumptus*, *De Pactis* (Dig. 2.14.53), n. 2.

[27] Baldus de Ubaldis, *Commentaria in primam Digesti Veteris partem*..., Lugduni 1585, l. *Sumptus*, *De Pactis* (Dig. 2.14.53), n. 1.

[28] Menochius, *De arbitrariis*, c. 522, n. 1.

[29] Menochius, *De arbitrariis*, c. 522, n. 1.

[30] Especially compare C. 2.6.5.

[31] «(...) Ita tenent omnes Doctores»: *ivi*, n. 25. Farinaccius promptly notes Revigny's dissenting opinion as well: «Ad invaliditatem huius pacti, non solum requirit[ur], quod sit de quota litis, sec etiam quod contineat salarium immoderatum» (*ivi*, n. 26: cf. *supra*, nt. 27).

[32] *Praxis*, qu. 106, n. 27 (per le minoritarie *opiniones* in contrario, cfr. *ivi*, n. 28).

[33] *Praxis*, qu. 106, n. 29: «Si pactum non fiat de quota litis, sed de certa re in litem deducta (…) isto (…) casu urget etiam ratio prohibitiva pacti de quota litis (…) ita communiter tenent Doctores». Farinaccius remarks (*ivi*, n. 30) that an exception to the rule had already been identified by the *Glossatores* (see gl. *immensa*, C. 2.6.5, *De postulando*, l. *Si qui advocatorum*), in the case where the object of the pact was a «res hereditatis» (compare Jacobus Butrigarius,

The ban will then be extended to the agreement about something *in litem not deducta*. This conclusion – which the greatest jurists of the fourteenth century, Bartolus a Sassoferrato[34] and Baldus de Ubaldis[35] did not share (the latter would be criticized consequently by one of the last exponents of the School of *Commentatores*, Paulus de Castro[36]) – will be uncontroversially established in the modern age, with the important *caveat* that the prohibition exists if the res agreed is due only in case of victory[37].

On the other hand, the case in which a certain amount of money is owed to the lawyer, in the case of victory is more complex.

In relation to this hypothesis, and on the basis of an almost inextricable

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Super Codice … Lectura, Parrhisiis 1516, l. *Si qua* [*sic*], *De postulando* (C. 2.6.5), f. LXIr: «Item quid si de una re convenitur cum esset quaestio de hereditate: ego punto quod valeat»; biographical notes in A. Tognoni Campitelli, *Bottrigari, Iacopo*, in DBI, vol. 13 (1971), pp. 498-501) and the value did not exceed the compensation due to the lawyer (in this sense, also Revigny, loc. cit. *supra*, quote 27).

[34] Bartolus a Sassoferrato, l. *Sumptus*, *De Pactis* (Dig. 2.14.53), n. 2: «Sed ubi promitteretur quantitas simpliciter, vel res, non respectu eius quod in lite deducitur, tunc pactum valeret».

[35] Baldus de Ubaldis, *Commentaria in primum, secundum et tertium Codicis libros*, Lugduni 1585, l. *Si qui advocatorum*, *De postulando* (C. 2.6.5), n. 2: «Secundo quaero, utrum possit conveniri de certa re, non de quota. Quidam dicunt quod est permissum. Credo contrarium in re litigiosa, sed in re quod non set in lite valet pactum».

[36] Paulus de Castro, *In primam Codicis partem patavinae praelectiones*, Lugduni 1546, l. *Si qui advocatorum*, *De postulando* (C. 2.6.5), n. 2: «In texto ibi certe partis. Dic: licet quote dimidie, tertie vel quarte. Certe etiam si non sub nomine quote, ut si erat questio de hereditate et pactus est de una re hereditaria cum sit eadem ratio. Secus si de alia re que non erat in controversia secundum Baldum. Sed salva reverentia, quia eadem est ratio prohibitionis, quia inducitur advocatus ad calumniandum. Dic ergo quod ubicumque pactum confertum in eventum victorie. Puta si vincam tibi hanc questionem volo habere tantum, si non vincam nihil volo habere, sed volo te iuvasse gratis: semper pactum est reprobatum ratione predicta, quoniam ut vincat utetur omni calumnia et falsitate, quibus poterit et conabitur per fas et nefas vincere, et ista fuit causa prohibitionis».

[37] *Praxis*, qu. 106, n. 31. Previously, among others, Menochius, *De arbitrariis*, c. 522, n. 7: «Tertio dicitur pactum de quota litis etiam, quando litigans promittit certam summam vel partem alicuius rei diversae ab ea, de qua est lis, adiecto tamen pacto, si obtinebit in causa».

mass of *allegationes*[38], Farinaccius enucleates four distinct rules.

Firstly, if the lawyer agrees to receive a certain amount of money, only due in case of victory, the agreement is illegal, even if the sum is moderate (we can notice, here, an overlap with the 'ordinary' hypothesis of the contingency fee agreement[39]).

Secondly, if the amount is due in any case, provided that it is moderate, the pact is valid (therefore the *fairness* of the compensation with the work done is relevant in this case[40]).

The third hypothesis, in which the compensation established is due in any case, but greater in the case of victory, is more problematic. It concerns a very old legal construct governed by Justinian sources[41], especially popular, as it has recently been pointed out, in the *Regnum Siciliae*[42]; a construct which has survived until today: the so-called *palmarium*, which is in fact an additional remuneration, paid to the victorious lawyer.

The medieval jurists questioned at length the legality of this additional remuneration and the discordancies were as numerous as those arising about the *pactum de quota lite*[43].

In particular, while in the Magna Glossa quite a favorable attitude was

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[38] See *Praxis*, qu. 106, nn. 33-37.

[39] *Ivi*, nn. 38-39: «Prima sit conclusio, quod si promittatur advocato, seu procuratori certa pecuniarum quantitas in casu victoriae tantum, et prout dicunt Doctores, si vincas tantum, si non vincas, nihil, talis promissio sit in pactum deducta, dicitur illicita et reprobata (…) semper esse illicitum et reprobatum pactum, in quo advocatus conveniat, se velle habere tantum in casu victoriae; et si in caussa non vincatur, nihil (…). Et procedit haec conclusio, etiam quod sit promissa certa quantitas moderata; si enim, ut praefertur, fuerit promissa in casu victoriae, tantum adhuc nihil valet».

[40] *Ivi*, nn. 41-42: «Secunda sit conclusio, quod si promittatur advocato, vel procuratori certa pecuniarum quantitas uniformiter solvenda, tam in casu victoriae, quam in casu non victoriae, et sic sive vincat, sive perdat tantum, talis promissio sic in pactum deducta valet, et tenet (...). Verum haec secunda conclusio procedit, quando promissa quantitas est moderata habito respectu ad salarium sibi debitum, secus si est excessiva».

[41] See *infra* (quote 46)

[42] See di Renzo Villata, *Il patrocinio infedele* cit., p. 255.

[43] A detailed analysis of these distinctions in *Praxis*, qu. 106 nn. 43-45, 48-53.

expressed towards the *palmarium* (the scope of which, however, remained rather limited[44]), the institute would be the occasion of heated disputes among the most authoritative *Commentatores*[45].

Farinaccius, for his part, highlights a further distinction, already made by some medieval jurists, based on the fact that the stipulation of the *palmarium* – always depending on the favorable outcome of the dispute[46] – occurred *before* or *after* the end of the dispute. *Post litem finitam*, the agreement on the *palmarium* is perfectly admissible[47] (this solution is also contained in the Justinian sources[48], and Farinaccius adds that even a hypothetical *pactum de quota lite* at this stage would be reasonable[49]).

On the contrary, an agreement achieved *lite pendente*, according to some,

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[44] See gl. *immensa*, C. 2.6.5, *De postulando*, l. *Si qui advocatorum*: «Praeterea nomine palmarij, id est, victoriae, licet ei aliquid pacisci: ut ff. de var. cogni., l. 1, § etsi nomine [= Dig. 50.13.1.12]». The Roman law cited in the *Glossa* required, for the validity of the *palmarium*, the sum agreed to be moderate and, above all, the agreement to be concluded at the end of the dispute: «Si vero post causam actam cauta est honoraria summa, peti poterit usque ad probabilem quantitatem, etsi nomine palmarii cautum sit: sic tamen, ut computetur id quod datum est cum eo quod debetur neutrumque compositum licitam quantitatem excedat».

[45] Iacobus Butrigarius considered the *palmarium* valid if the agreement did not relate to a share of the value of the dispute (Iacobus Butrigarius, *Super Codice … Lectura*, l. *Si qua* [*sic*], *De postulando* (C. 2.6.5), f. LXIr: «Item quaero an in casum palmarij potest pacisci non de quota. Respondeo sic, quia non reperitur prohibitum»), but Bartolus vigorously contested the opinion of his former master, and denied the legitimacy of the agreement: «Quaerit do. Iac. nunquid sit licitum pacisci de quota litis, nomine palmarij, seu victoriae. Do. Iac. determinat quod sit licitum, cum non reperiatur in iure prohibitum (...). posses dicere contrarium, quia ea ratione qua reprobatur pactum de quota, vel de certa re (...), habet locum etiam in quaestione proposita, imo multo magis debet reprobari» (Bartolus a Sassoferrato, *Commentaria in primam codicis partem...*, Lugduni 1555, l. *Si qui*, *De postulando* (C. 2.6.5), in fin.).

[46] *Praxis*, qu. 106, n. 48.

[47] *Ivi*, n. 50.

[48] V. *supra*, nt. 46.

[49] «Pact[um] de quota litis fact[um], post litem finitam, (...) non videtur improbatum, quia cessat ratio prohibitionis huiusmodi pacti»: *Praxis*, qu. 106, n. 59.

although lawful, would not be honest[50]; according to others, eg. the jurist Raphael Fulgosius, it would even be comparable to a contingency fee agreement and therefore prohibited[51].

Farinacci, however, disregards this temporal distinction, expressing his agreement with the *communis opinio*[52], and the general lawfulness of *palmarium*, even though under the condition that the agreed amount is not excessive[53] (not exceeding, in particular, as established in the same Justinian text, 100 *aureii*[54]); he nevertheless points out that this limit is not traditionally set for criminal cases, especially those relating to capital crimes, in relation to which «potest salarium ascendere quantum partes volunt» [55].

In the fourth hypothesis, finally, lawyer and client agree on a (moderate) amount of money in the case of a favorable outcome of the dispute, but nothing in case of an unfavorable one. In this case the agreement is valid, and the lawyer is always able to claim his *salarium* (according to the aforementioned lesson offered by Menochio[56], the presumption established about the contingency fee agreement is not applied[57]).

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[50] See, for example, Iacobinus a Sancto Georgio, *Lectura aurea nusquam antea impressa... Codicis*, Lugduni 1521, l. *Litem*, *De procuratoribus* (C. 2.12.15), n. 6. On this jurist, disciple of Giason del Maino, see G. Panciroli, *De claris legum interpretibus libri quatuor*, ed. Lipsiae 1721, p. 476.

[51] Raphael Fulgosius, *In primam Pandectarum partem Commentaria*, Lugduni 1554, *l. Sumptus*, *De pactis* (Dig. 2.14.53), n. 3. Biographical notes on this jurist in C. Bukowska Gorgoni, *Fulgosio, Raffaele,* in DBI, vol. 50 (1998), pp. 699-702.

[52] *Praxis*, qu. 106, nn. 48, 51.

[53] *Ivi*, nn. 45, 52.

[54] *Ivi*, n. 53. This limitation comes from an express statement of the Justinian source as well (see Dig. 50.13.1.12, in fin.: «Licita autem quantitas intellegitur pro singulis causis usque ad centum aureos»).

[55] *Praxis*, *loc. ult. cit*.

[56] V. *supra*, nt. 24.

[57] *Praxis*, qu. 106, n. 46.

3. *Counter-reforms (and a conclusion sketch).*

The texts synthesized so far provide very precise information about the structure of the *pactum de quota lite*. The doctrine of the mature *ius commune* tends to consider the relevance of the contingency agreement to be much more extensive than the *nomen iuris* might suggest. Thus, any agreement which subordinates the remuneration to the victorious outcome of the dispute – and that tends, therefore, to implement a conflict of interests between individuals (lawyer and client) whose position within a judiciary dispute should, at least theoretically, remain distinct – is included in the scheme of that figure and *a jure improbatum*.

In the recent past, the same result was reached, under the provision of the original text of art. 2233[3] CC, by Italian courts, which extended the ban of contingency fee agreements beyond its literal boundaries: a few years before the 2006 reform, the Supreme Court – guided by the need to «tutelare l'interesse del cliente e la dignità e la moralità della professione forense, che risulterebbe pregiudicata tutte le volte in cui, nella convenzione concernente il compenso, sia, comunque, ravvisabile la partecipazione del professionista agli interessi economici finali ed esterni alla prestazione, giudiziale o stragiudiziale, richiestagli» – determined that the ban contained in the standard had to be recognized «non soltanto nella ipotesi in cui il compenso del legale consista in parte dei beni o crediti litigiosi, secondo l'espressa previsione della norma (che costituisce, in relazione alla *ratio* della tutela, soltanto la tipizzazione dell'ipotesi di massimo coinvolgimento del legale e che, pertanto, non esaurisce il divieto), ma anche qualora tale compenso sia stato, comunque, convenzionalmente correlato al risultato pratico dell'attività svolta» [58].

Therefore, the 2006 reform not only removed the prohibitive rule on Contingency Arrangements, but (despite the above-mentioned *conservative* interpretations of the doctrine) produced a Copernican revolution in the regulation of the professional relationship between lawyer and client,

[58] Cass. 19.11.1997, n. 11485, in «Giust. Civ.», 48 (1998), p. 3207 ff., annotated by Gasbarri (v. *supra*, nt. 6).

removing, in the name of free competition and of greater access to justice, limits that represented a real centuries-old *taboo*.

This is what has been established in a more recent judgment of the Supreme Court, which has expressly stated that «Il patto di quota litis (...) è oggi consentito», because the law 248/2006 «nell'abrogare e sostituire il comma 3 dell'art. 2233 c.c., ha attuato il principio comunitario della libera concorrenza e della più ampia circolazione delle persone e dei servizi, nella prospettiva di assicurare agli utenti un'effettiva facoltà di scelta dei professionisti, nell'esercizio dei propri diritti e di comparazione delle prestazioni offerte sul mercato» [59].

However the *taboos* have a long-lasting life. A few weeks after the aforementioned judgment, the legislator abruptly retraced his steps: in the new Law on the Legal Profession (l. 247/2012), the provision reaffirming the freedom of determination of fees and allowing their determination «a percentuale sul valore dell'affare o su quanto si prevede possa giovarsene, non soltanto a livello strettamente patrimoniale, il destinatario della prestazione»(art. 13^3), has (contradictorily) reintroduced the ban of the contingency fee agreement (art. 13^4) [60] that seemed finally outdated; reiterated in the new Code of Conduct for Lawyers[61], it has provided material for new theoretical and judicial efforts of coordination[62] and it has, so to

[59] Cass. Civ., Sez. Unite, 10/08/2012, n. 14374 (see the website www.italgiure.giustizia.it/sncass/).

[60] «Sono vietati i patti con i quali l'avvocato percepisca come compenso in tutto o in parte una quota del bene oggetto della prestazione o della ragione litigiosa».

[61] Code of Conduct for Lawyers (amended by Resolution CNF 31/1/2014, in Gazzetta Ufficiale 16/10/2014, n. 241), art. 25^2.

[62] The main difficulty consists in distinguishing between the agreement which provides for a fee established *in proportion* to the expected results (lawful) and the one which relates to *a share* of the good in dispute (prohibited).

On this point, see G. Conte, *La tormentata disciplina del "patto di quota lite" e le equivoche novità introdotte con la riforma forense*, in "Contratto e impresa", 29/4-5 (2013), pp. 1109-1121 (in part. p. 1117 s.). Recently, also the Supreme Court, reproducing verbatim a decision of the *Consiglio Nazionale Forense* (Sent. 18/03/2014, n. 26 – see the website

speak, turned the clock of history back to the doctrine of the sixteenth and seventeenth centuries[63].

Clearly, we do not intend to express an opinion on legislative choices: it is not easy to establish whether, in this delicate matter, the reasons of competition, of the market and of the access to justice should prevail or whether, on the contrary, the concerns related to the defender's loss of impartiality or, even worse, to the possibility of his illegal ploys at the expense of the client, should be deemed more relevant[64].

Our intention is, however, to highlight the conclusion of the reflections carried out so far, the inability to escape the Manichean oscillation between the polarities of unconditional liberalization and absolute prohibition.

If this finding contradicts the well-known motto that we have placed in the epigraph and allows, sometimes, the unexpected recovery of entire law libraries, it inevitably prevents a solution of the problems perhaps more difficult and complex, yet more balanced and modern.

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cnf.ipsoa.it), fixed that «la percentuale può essere rapportata al valore dei beni o degli interessi litigiosi, ma non al risultato, in tal senso deve interpretarsi l'inciso "si prevede possa giovarsene" che evoca un rapporto con ciò che si prevede e non con ciò che costituisce il consuntivo della prestazione professionale. Questa interpretazione (...) ha dalla sua, oltre che la conformità al dato letterale, anche la coerenza con la ratio del divieto, dal momento che accentua il distacco dell'avvocato dagli esiti della lite, diminuendo la portata dell'eventuale commistione di interessi quale si avrebbe se il compenso fosse collegato, in tutto o in parte, all'esito della lite, con il rischio così della trasformazione del rapporto professionale da rapporto di scambio a rapporto associativo» (Cass. Civ., Sez.Unite, 25/11/2014, n. 25012 (see the website www.italgiure.giustizia.it/sncass/).

[63] Even if, after the reform of 2006, U. Carnevali noted: «Sulla storia, sulle ragioni del divieto [del patto di quota lite], sugli argomenti addotti pro o contro di esso, non mette conto di soffermarsi, dal momento che esso appartiene ormai alla storia» (*Compenso professionale e autonomia privata. Il patto di quota lite: probemi civilistici*, in *Compenso professionale e patto di quota lite*, a cura di R. Danovi, Milano 2009, p. 1 f.)

[64] It is very difficult to determine whether, in the current socio-economic context, it is always the client to embody the role of the weaker party, but this is not the appropriate place to resolve this issue.