

FREE INTERNATIONAL UNIVERSITY OF SOCIAL STUDIES

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DOCTORIAL THESIS

OF

PH. D.

IN

NATIONAL AND INTERNATIONAL ARBITRATION

COURSE OF STUDY XXI

***THE DETERMINATION OF THIRD
PARTY***

THE RIMEDIES OF JUSTICE

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ABSTRACT

In everyday procedures, it is common that subjects of law practice a range of private powers recognized by our legal order and appoint a third party to determine certain elements of an act or an incomplete agreement which by them had already been closed, or to resolve a dividing controversy with a decision to produce the same effects of a previously completed contract.

In fact, numerous dispositions of law exist that regulate cases in which the “external source,” according to the wishes of the third party, permits an integration in the part of the transaction that the parties do not want or cannot complete or precisely determine, because they are not in agreement about the data to be inserted. Instead, other rules regulate a procedure different from that of a typical state jurisdiction, which takes place before the third party. He has the power to decide the solution of a lawsuit regarding rights or conflicting legal interests, or

regarding parts of a lawsuit which can be matters of right, but also of fact alone.

The practice of a third party decision is justified because it entrusts the decision to a subject thought to be impartial and disinterested, or an expert in the matter at hand, and therefore more capable to complete the lacking element of the act or contract, or to settle the controversy.

Moreover, the intervention of a third party to complete a missing element of an act or legal transaction consents to avoiding the risk of prolonging or impeding in practice the achievement of the same desired legal outcome. Additionally, appropriate dispositions of law with applicable provisions exist which permit one to surpass the further risk that the third party is not to decide, and which substitute the judge of state with the third party, or insert an element in the place of that being lacking, already determined by law or definable based on precise and predetermined criteria.

The goal of the present work is to deepen the general issue of the third party decision (when they do not intervene to decide a controversy), beginning from their alleged opposition to the articles 1346 and 1418 of the civil code that oblige the parties to conclude contracts with elements of the determined object, or at least that can be determined, and that establish the

nullity of an agreement lacking an object with these requirements.

One must confront the subject of compatibility of intervention of the third party with the unilateral transactions between living persons with property content, or among those with personal content (absolutely personal).

This work also discusses whether the contract or act to be completed, that already is concluded by the parties with an irrevocable declaration of will, immediately produces some or all of the effects, or if it must wait for the successive decision of the third party; a response is offered for every individual elaborated issue, underlining the present differences and emphasizing that it is perfectly concluded and effective, but that the complete effects can produce themselves only when the third party decides. Therefore, the effects and the substance of a transaction are completely defined only by the deferment due to a natural or human fact, or of a scientific declaration or a declaration of will by another.

The subject of general institutes, typical and atypical that represent models of reference, is first elaborated; then begins the expected arbitrage as seen in article 1349 of the civil code. It appears that other contents of special laws are often recalled in the course of

analysis which are specific applications of the same with some modifications.

The arbitral assessment or contractual fact is cited, but only to underline the difference with the arbitration; the legal document is confronted with caution as it appears widely used in commercial and judicial relations but without an expressed discipline.

The actions that the parties can take are described for each of the institutes to cancel the binding effects of a decision made by a vitiated third party.

The work then studies the infrequent arbitration disciplined by the new article 808-ter of the civil code of procedure, which is the standard model of the third party decision issued to resolve a conflict with the effects of a contract after the parties involved have participated in legal proceedings.

Subsequently, the individual rules which foresee different forms of third party decisions are analyzed during a legal procedure, as well as those decisions issued without passing through this process.

First, the existing rules in the field of law that apply to successions for cause of death and in the area of donations are analyzed, followed by four other rules which are used to

regulate the decisions of the third party in the area of societal laws.

Further ahead, it deals with institutes contained in the rights of titles of credit, in the rights of navigation by sea, in the laws of cultural assets, in those that regulate the activity of organized sports as well as relevant bets, and in cases of prize competitions and promises to the public.

In conclusion, some hypotheses about the determination of the third party, with or without procedure, are briefly cited. These were registered in practice and submitted to the decision of judges of state with the goal of establishing to what type of institute it belongs in order to apply the relevant discipline.

This research is not centered solely on the matter of institutes, about which extensive and valuable monographs already exist, but above all on the judicial nature of the figures dealt with to understand what type of discipline is applicable to annul the effects of a vitiated decision.

The final objective of this work is to supply the reader with a capable contribution to sufficiently and completely unify the multiple hypotheses of determination proceedings which

do not exist in our legal order, and are much more numerous than can be imagined.

Furthermore, the objective is to offer help to those practicing law in the chambers of justice who

must face various controversies regarding the effectiveness of the decision of the third party who

is denounced as vitiated.

