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Essays

Towards a Unitary and Consistent System of Informational Defects in Consent and Pre-Contractual Liability Under Italian Law

Andrea Maria Garofalo*

Abstract

Over the last few decades, various attempts have been made to hermeneutically update the regulation of defects in consent (mistake, fraud, duress, incapacity), and above all of those defects in consent which we might call 'informational' (mistake and fraud). After having broadened the scope of mistake and fraud, Italian scholarship, followed by case law, has proposed the application of pre-contractual liability in cases in which a person causes the conclusion of a valid, but disadvantageous contract, failing to correct an error or to provide relevant information, or providing wrong information.

However, the modern way of understanding informational defects of consent – not as contractual pathologies deriving from the lack of a constituent element of the contract such as the will, but as remedies in favour of one party – suggests a hermeneutical revision (or, at least, legislative reform), leading to the construction of a unitary and consistent system of pre-contractual liability and defects of consent based on a pre-contractual distribution of risks in accordance with good faith.

Analytically, this requires that the scope of application of defects in consent provided for by the Civil Code (typical mistake and fraud) be restricted rather than broadened, creating space between them for the introduction of a series of 'atypical' informational defects in consent: recognised atypical mistake, induced atypical mistake, and mutual mistake.

I. Introduction

Since the entry into force of the new Italian Civil Code in 1942, the regulation of defects in consent (mistake, fraud, duress, incapacity), and above all of those defects in consent which we might call 'informational' (mistake and fraud), has represented one of the most controversial topics in the Italian legal system, although the Civil Code was very modern by the standards of its days.

Scholars and judges, in fact, have endeavoured to broaden the scope of defects in consent in order to respond to a demand for justice perceived differently over

* Research Fellow of Private Law, University Ca' Foscari of Venice. This paper has been presented, in a shorter version, at the Max Planck Institute for Comparative and International Private Law of Hamburg, during an Aktuelle Stunde that took place on June 6th, 2019. I would like to thank Professor Zimmermann for the kind invitation and all the participants for their remarks and suggestions. Usual disclaimers apply. This paper was completed on 20 October 2019.

the decades.[1] In recent years this hermeneutical modernization has been linked to pre-contractual liability, which has taken on a supplementary role wherever it was not possible to broaden the scope of defects in consent by interpretation (a path that had already been fruitfully followed in Germany).[2]

These changes, however, are not completely satisfactory, mainly because the resulting system appears in some respects intrinsically incongruous, and to some extent to lack correspondence to the demands of justice.[3] For this reason, it is necessary to verify whether, by construing in a different and innovative way the relationship between defects in consent and pre-contractual liability, it would be possible to give intrinsic (internal) and extrinsic (with respect to questions of justice) congruity to the system of defects in consent.

The discussion will be articulated as follows: first, we shall talk about the development of pre-contractual liability and its supplementing function with regard to defects in consent in Germany, where *culpa in contrahendo* was 'discovered'. Then we shall look into these same issues from the point of view of the Italian system, also describing its current state. Finally, we shall ask ourselves if it is possible to propose a new construction of defects in consent, considering whether their regulation, as well as that of pre-contractual liability, derives from a distribution of pre-contractual risks according to good faith.

This last question will be answered not only synthetically, but also analytically, verifying whether an interpretative revision of the defects in consent that goes in the indicated direction can be sufficiently faithful to the texts of the statutory provisions and to the political and technical choices of the current legal system.

In this way, it will be ascertained whether, through a hermeneutic revision, it is possible to modernise the Italian system of defects in consent, and whether or not, at the same time, an updated regulation will be close to the regime provided for by European soft law instruments and in particular by the Principles of European Contract Law (PECL). If this hermeneutic revision does not appear convincing, the national legislature, which is about to reform the Civil Code, will have to intervene in the modernisation of defects in consent.

The subject matter of the present paper will be limited in two different respects. Our attention will turn to 'informational' defects in consent, ie those that are related to uncorrected mistakes, to disclosure duties, or to misrepresentation, and not to other defects in consent, such as duress or incapacity (nor to the other even more severe deficiencies of will, which can lead to nullity of the contract

[1] See, among others, G. Visintini, *La reticenza nella formazione dei contratti* (Padova: CEDAM, 1972), 98-112.

[2] See, for example, M. Mantovani, *'Vizi incompleti' del contratto e rimedio risarcitorio* (Torino: Giappichelli, 1995), 187-292.

[3] See A.M. Musy, 'Informazioni e responsabilità precontrattuale' *Rivista critica del diritto privato*, 611, 618 (1998) and, more recently and from a European perspective, F.P. Patti, ' "Fraud" and "Misleading Commercial Practices": Modernising the Law of Defects in Consent' *European Review of Contract Law*, 307, 310 (2016).

under Italian law). The reason for this constrained focus is that these are the central defects in consent and those whose provisions are most affected by the time elapsed since the entry into force of the Civil Code. Moreover, it is these defects in consent that pose the greatest problems from the point of view of remedies.

Furthermore, we shall essentially deal with contracts between equal parties, and not with consumer contracts or so-called 'contracts of the third kind', ie contracts concluded between businesses that do not have comparable negotiating power.

Of course, however, the considerations that will be undertaken may also be applied, where compatible, outside the present area of interest.

II. *Culpa in Contrahendo* and Defects in Consent: From Rudolf von Jhering's 'Discovery' to Possible Future Italian Evolutions

As mentioned, our analysis must consider informational defects in consent and pre-contractual liability, especially in its (variable) relationship with the former.

It is not possible to examine this issue without briefly sketching out developments in the German legal system from the middle of the 19th century to the present day (para II.1). Later, we shall deal with the Italian legal system: first, in the state in which it was when the Civil Code came into force (para II.2); then, in its evolution from the middle of the 20th century until today (para II.3). Finally, we shall pinpoint whether the current state of the Italian system makes possible, and indeed necessary, a hermeneutical revision that modernises the system of informational defects in consent, as well as in (and by virtue of) their relationship to pre-contractual liability (para II.4).

1. The 'Discovery' of *Culpa in Contrahendo* by Rudolf von Jhering, Its Developments and Evolutions in Germany and Its Relationship with Defects in Consent

Let us first analyse developments in pre-contractual liability in Germany, both in itself and in its relationship to the informational defects in consent, from its 'discovery' to the present day.

a) Rudolf von Jhering and the *Culpa in Contrahendo*

As is well known, pre-contractual liability is an 'invention'[4] of Rudolf von Jhering.[5] He elaborated this theory in order to mitigate some outcomes of the *Willenstheorie*,[6] which seemed to him unjustified from the point of view of justice.[7]

[4] H. Dölle, 'Juristische Entdeckungen', in Ständige Deputation des Deutschen Juristentages ed, *Verhandlungen des 42. Deutschen Juristentages 1957* (Tübingen: Mohr Siebeck, 1958), II, B, 7.

[5] R. von Jhering, '*Culpa in contrahendo* oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen' 4 *Jherings Jahrbücher*, 1, 23-56 (1861).

[6] F.C. von Savigny, *System des heutigen Römischen Rechts* (Berlin: Veit, 1840), III, 5-7.

In the famous telegraph case,[8] the declaration of one party was wrongly transmitted by the telegraph office and, due to this fact, the party was able to revoke the declaration, although the other party relied on it without any fault or negligence. In this case, according to Jhering, the revoking party had to pay compensation to the other party. The amount of compensation should correspond to the *negatives Interesse* of the counterparty: that is, everything he or she had lost by relying on a declaration that later would have been revoked (this 'reliance interest' consists mainly of wasted expenses and lost opportunities).

Jhering found a trace of *culpa in contrahendo* in the Roman sources: for example, in cases where a party had sold a *res sacra*, and so had concluded a null contract, without disclosing this relevant information to the counterparty (that in turn was unaware).

Consequently, Jhering argued that a pre-contractual liability based on fault, and therefore an action arising from the contract despite its voidness or failed conclusion, had to be recognised in cases in which a party negligently created the impression of the existence of a valid contract, and precisely when: (i) there was a declaration, but it did not correspond to the will of the party (as in the telegraph case, in which fault had to be found in the use of an unreliable means of communication); (ii) the object was not 'suitable' (eg because of its loss or its inalienability) or the subject lacked capacity; (iii) the proposal had been revoked or the offeror had died.

b) The German Civil Code and the Problem of Pre-Contractual Liability

Jhering's theory gave rise to a great debate,[9] which resulted in some very important provisions of the BGB.

With regard to the first group of cases (i), we must mention in particular §§ 119 and 122 BGB, which stated – and still now state – that the mistaken party may revoke (*anfechten*) his or her declaration of will when the mistake is as to the declaration (as to its content or as to the declaration itself) and it can be assumed that he or she would not have made the same declaration if he or she had known the facts of the case and had made a reasonable assessment of them.

[7] H.P. Haferkamp, 'Pandektistik und Gerichtspraxis' *Quaderni fiorentini per la Storia del Pensiero Giuridico Moderno*, I, 177, 204-205 (2011).

[8] See, among others, see M. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (Wien-Köln-Weimar: Böhlau, 2000), 540-541.

[9] Analytically reconstructed by F. Procchi, Licet emptio non teneat. *Alle origini delle moderne teoriche sulla cd.* culpa in contrahendo (Padova: CEDAM, 2012), 189-361. See also D. Medicus, 'Zur Entdeckungsgeschichte der *culpa in contrahendo*', in H.P. Benöhr et al eds, Iuris professio. *Festgabe für Max Kaser zum 80. Geburtstag* (Wien-Köln-Graz: Böhlau, 1986), 169, 169-178, and J.D. Harke, '§ 311 II, III BGB. Rechtsgeschäftsähnliche Schuldverhältnisse', in M. Schmoeckel et al eds, *Historisch-kritischer Kommentar zum BGB* (Tübingen: Mohr Siebeck, 2007), II, 1536, 1541-1545.

Errors concerning such characteristics of the person or object which are considered essential in trade are included in this category of mistake. In cases of revocation (*Anfechtung*), the mistaken party must pay compensation to his or her counterparty for the loss suffered by it as a result of its legitimate reliance on the validity of the declaration, but not in excess of the interest which the other party had in the validity of the declaration.

The German Civil Code did not rigidly embrace the *Willenstheorie*:[10] in fact, it has sweetened it by accepting to some extent also the opposite *Erklärungstheorie*.[11] As is evident from §§ 119 and 122, in cases of mistake the contract is not null and void, but valid; nevertheless, the drafters argued that it was necessary to protect the mistaken party, entitling him or her to revoke his or her declaration, and to safeguard the interests of the counterparty through compensation, regardless of the excusability of the error, whenever he or she could not and should not have noticed the error.

This compensation had – and has – little or nothing to do with fault. The party who revokes must pay compensation, even if he or she was not in any way negligent (as in cases of excusable mistake): from this perspective, § 122 BGB appears to be closer to the concept of warranty than to that of *culpa*.[12] In the same sense, we could read § 179, which stated – and states – that a person who has entered into a contract as an agent, without the power of agency and without being aware of this, is obliged to compensate the counterparty for the loss which he or she suffers as a result of legitimately relying on the power of agency, but not in excess of the interest which the counterparty had in the contract.

Two other provisions, repealed by the recent *Schuldrechtsmodernisierung*, were closer to the concept of *culpa*, ie §§ 307 and 309 BGB, which refer to the second group of cases mentioned above (ii). According to these provisions, if a contract is void (eg due to the impossibility of its object), and one party knows or ought to know of this voidness, he or she must disclose this information to the other party or must pay him or her compensation, where he or she relied upon the validity of the contract. It is not difficult to note that these two provisions required the compensating party to be at fault.

As far as the third group of cases is concerned (iii), §§ 145 and 153 BGB stated – and state – that the offeror is always bound to the offer, even if he or she dies, unless (in the case of revocation) he or she has excluded being bound by it or (in the case of death) a different intention can be presumed. In other words, the offer is not revocable and does not expire if the offeror dies, unless it has been

[10] W. Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (Berlin-Heidelberg-New York: Springer, 3rd ed, 1979), II, 55-56.

[11] O. Bähr, 'Ueber Irrungen im Contrahiren' 14 *Jherings Jahrbücher*, 393, 401 (1875).

[12] R. Ehrlich, *Die Entwicklung der Lehre von der Haftung für Verschulden beim Vertragsschluß im spätgemeinen und im bürgerlichen Recht* (Berlin-Neukölln: Biegner, 1933), 12-13.

explicitly or implicitly qualified as such.[13] Protection of the counterparty's rights was – and is – therefore guaranteed by a property rule.[14]

c) The XX Century's Theories About *Culpa in Contrahendo* and Its Relationship with Defects in Consent

In the decades after the promulgation of the German Civil Code, German scholars and judges construed a complete theory of fault-based pre-contractual liability, first building upon §§ 122, 307 and 309 BGB,[15] and then asserting the existence of a customary rule in the legal system.[16]

These evolutions and developments were due in part to an in-depth study of the doctrine of *culpa in contrahendo* and in part to new demands for justice that, over time, emerged and gained strength. New cases arose that in the past had never – or had only infrequently – occurred; gaps in protection, caused by the entry into force of the BGB, appeared, and had to be filled in; a trend towards greater solidarity, aimed at making parties more responsible during negotiations, developed. For the sake of simplicity, we can distinguish three fronts of development, with regard to which all three of these factors played a role.

First of all, the German Civil Code did not provide for a special remedy for cases of breaking off negotiations not covered by the irrevocability of the contractual offer. Moreover, tort law could not be utilised, because § 823 BGB severely limited its scope of application. Under German law, non-contractual liability was – and still is – typical, ie was – and is – based on a statutory catalogue of protected interests (although in the last few decades, scholars and judges have greatly broadened its scope by way of interpretation).[17] The need for a remedy could be satisfied only by recognising pre-contractual liability of significant scope, subject to the rules of contractual liability. Furthermore, in the meanwhile even Italian and French authors were moving in a similar direction, transposing and integrating Jhering's theory into their legal systems.[18]

The second realm is the most relevant for us. In cases where a disadvantageous contract has been concluded on the basis of misinformation or lack of information, the party could have availed itself of relief for defects in

[13] This topic has recently been discussed in A.M. Benedetti and F.P. Patti, 'La revoca della proposta: atto finale? La regola migliore, tra storia e comparazione' *Rivista di diritto civile*, 1293, 1308-1314 (2017).

[14] For the distinction between property and liability rules see the well-known study by G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 *Harward Law Review*, 1089 (1972).

[15] See, for example, H. Hildebrandt, *Erklärungshaftung, ein Beitrag zu, System des bürgerlichen Rechtes* (Berlin-Leipzig: De Gruyter, 1931), 118-135.

[16] See, among others, K. Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin-Heidelberg: Springer, 6th ed, 1991), 433.

[17] See, today, H. Kötz and G. Wagner, *Deliktsrecht* (München: Franz Vahlen, 12th ed, 2013), 45-49.

[18] See n 36 below.

consent: namely, revocation for mistake and, especially, for fraud (*Arglistige Täuschung*, § 123 BGB). However, this would have failed to account for a large number of potential situations, since not every *Motivirrtum* could – and can – result in a mistake and lead to this remedy[19] and fraud only covered – and covers – those cases in which the counterparty acts intentionally (and not cases in which he or she acts negligently).[20] Moreover, in such situations, the party could not demand compensation under the law of tort, because tort law did not – and does not – allow for compensation in cases of pure patrimonial losses (for example, caused by a breach of the duty of information). Once again, it was necessary to find a way to overcome the narrow limits of non-contractual liability.

Third, the regulation of non-contractual liability allowed – and allows – the employer of a person who has caused a loss to avoid liability by simply proving that he or she had taken reasonable care in choosing him or her as an employee or in supervising him or her (§ 831 BGB).[21] This provision gave rise to problems for cases in which a client who had entered a shop suffered injuries due to the conduct of an employee (as in the famous *Linoleumfall)*.[22] Once again, this need to protect clients entailed that they were provided with a contractual right of action whose regulation did not contain any provision similar to § 831 BGB and thus did not allow the employer to avoid liability by means of the aforementioned defence. This right of action could not be based on the yet-to-be-concluded contract, but rather had to be based on the pre-contractual relationship.

In response to these urgencies, German scholars and judges argued that a special relationship arose between parties during negotiations. Following the thinking of Stoll, according to which, in the normal obligatory relationship, there are both obligations to perform and obligations to protect,[23] scholars and judges maintained that, before the conclusion of a contract, a special obligatory relationship, consisting merely of obligations to protect the counterparty, arose.[24]

[19] R. Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* (Tübingen: Mohr Siebeck, 4th ed, 2016), 325-326. § 119 II BGB gives relevance to a mistake as to motive, but requires particular conditions be met: see W. Hefermehl, '§ 119', in *Soergel Kommentar* (Stuttgart: Kohlhammer, 13th ed, 1999), 64, 78-79, and, more in detail, n 156 below.

[20] H.C. Grigoleit, *Vorvertragliche Informationshaftung. Vorsatzdogma, Rechtsfolgen, Schranken* (München: Beck, 1997), 16-19.

[21] See D. Medicus, 'Culpa in contrahendo' *Rivista critica del diritto privato*, 573, 575 (1984).

[22] Reichsgericht 7 December 1911, 78 *Entscheidungen des Reichsgerichts in Zivilsachen*, 239-241. There are also other *Warenhausfälle*: among them, the *Gemüseblattfall* and *Bananenschalenfall* are worth mentioning.

[23] About the obligatory relationship as *Organismus*, see above all H. Stoll, 'Haftung für das Verhalten während der Vertragsverhandlungen' *Leipziger Zeitschrift für Deutsches Recht*, 532, 544 (1923), and in the modern German literature K. Larenz, *Lehrbuch des Schuldrechts* (München: Beck, 14th ed, 1987), I, 26-72. About the obligations to protect (*Schutzpflichten*) see H. Stoll, 'Abschied von der Lehre von der positiven Vertragsverletzung' *Archiv für die civilistische Praxis*, 257, 258 (1932) and now G. Bachmann, '§ 241 BGB. Pflichten aus dem Schuldverhältnis', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 2 and 114-120.

[24] A *Schutzverhältnis*: see, from partially different points of view, Hein Stoll, ibid 543-544, and L. Enneccerus and H. Lehmann, *Recht der Schuldverhältnisse* (Marburg: Elwert, 11th ed,

This peculiar relationship, called in the most complete theory *Schuldverhältnis ohne primäre Leistungspflichten* (obligatory relationship without primary performance obligation),[25] results from the trust that one party gives rise to in the other and from the reliance the other party grants (effective reliance).[26] The protection obligations consist mainly in duties of disclosure and duties of care, whose violation gives rise to compensation according to the principles of contractual liability.[27]

d) *Culpa in Contrahendo* and Defects in Consent After the *Schuldrechtsmodernisierung*

The doctrine of *Schuldverhältnis ohne primäre Leistungspflichten*, which had already become dominant among German scholars and judges in the second half of the 20th century, has been mostly transposed into the German Civil Code by means of the recent reform of the law of obligations.[28]

The new § 311 BGB, in fact, expressly states that an obligatory relationship, with duties to take account of the rights and legal interests of the counterparty, comes into existence as a result of the beginning of contractual negotiations.

As far as defects in consent and disadvantageous contracts are concerned, pre-contractual liability now enables a party to claim compensation whenever a disadvantageous contract has been concluded because of a breach of the duty of information, regardless of whether the party is protected or not by the regulation of defects in consent.[29] Compensation may be monetary or may, under particular circumstances, involve restitution in kind, ie cancellation of the contract.[30]

1930), 169. In case law see Reichsgericht 1 March 1928, 120 Entscheidungen des Reichsgerichts in Zivilsachen, 249-251.

[25] K. Larenz, see n 23 above, 106.

[26] See firstly K. Ballerstedt, 'Zur Haftung für *culpa in contrahendo* bei Geschäftsabschluss durch Stellvertreter' *Archiv für die civilistische Praxis* 501, 507-508 (1950-1951) (the relationship arises due to the 'Gewährung in Anspruch genommenen Vertrauens'), and then, more completely, C.W. Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (München: Beck, 1971), 503-517.

[27] K. Larenz, 'Bemerkungen zur Haftung für *culpa in contrahendo*', in W. Flume et al eds, *Festschrift für Kurt Ballerstedt zum 70. Geburtstag* (Berlin: Dunker & Humblot, 1975), 397, 400-414.

[28] About the new regulation of *culpa in contrahendo* see H. Heinrichs, 'Bemerkungen zur *culpa in contrahendo* nach der Reform - Die Tatbestände des § 311 Abs. 2 BGB', in A. Heldrich et al eds, *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag* (München: Beck, 2007), I, 421, 428-442.

[29] V. Emmerich '§ 311 BGB. Rechtsgeschäftliche und rechtsgeschäftsähnliche Schuldverhältnisse', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 211-215.

[30] In particular, it is required that the contract objectively causes losses, having a negative market value. If one of the parties can prove that, without the pre-contractual misconduct, the parties would have concluded the contract with different content, it is also possible to demand an adaptation (*Anpassung*) of the contract (different from the *Vertragsanpassung* provided for by § 313 BGB). Among others, see R. Schwarze, *Das Recht der Leistungsstörungen* (Berlin: De Gruyter, 2008), 403-404.

2. The First Italian Phase (or: The Fear of a General Clause)

The 1942 Italian Civil Code, overcoming the silence of the 1865 Civil Code, has expressly regulated pre-contractual liability, including its relationship to defects in consent. However, the Code's provisions were initially construed in a very restrictive way.

a) Mistake and Pre-Contractual Liability in the Statutory Provisions of the 1942 Italian Civil Code

The Italian Civil Code,[31] which entered into force in 1942, was more inclined towards the protection of reliance than the BGB.[32] This emerged – and emerges – particularly from the regulation of mistake, according to which a mistake is relevant when it is 'essential' (Art 1429 Civil Code) and when it is 'recognisable' by the other party (Art 1431 Civil Code). Errors are essential when they concern the nature or the object of the contract, the identity of the object or a quality thereof that is considered determinative of consent, the identity of the counterparty, or its qualities – if they are determinative of consent – or when there is a mistake of law and it was the only or principal reason for the contract. Errors are recognisable when, with regard to the content, circumstances, and qualities of the contracting parties, a person of normal diligence would have detected it. A mistake that is not recognisable by a party does not allow that party to avoid the declaration of will (even if paying compensation for breach of the reliance interest, as in the German legal system); on the contrary, in this case the contract is unassailable.[33] Briefly, the protection of the interests of the counterparty of a mistaken party was – and is – ensured by a property rule, and not only by a liability rule.

Nevertheless, the Italian Civil Code stated – and states – with a very broad provision that, during negotiations and the formation of contracts, the parties shall act according to good faith (Art 1337 Civil Code). It might seem, therefore, that the Italian positive regulation reflected and transposed the developments of the German legal system on pre-contractual liability and in some way anticipated the modern § 311 BGB, accepting the idea of a pre-contractual relationship based on reliance. However, this conjecture would be wrong. This is because, in that cultural milieu, it was obvious that Art 1337 was intended to have quite a different effect than might be expected, as is demonstrated by the analysis of the academic works and of the judicial decisions that appeared immediately after

[31] Translation into English of the Italian Civil Code provisions is here inspired by that of S. Beltramo, *The Italian Civil Code and Complementary Legislation* (New York: Thomson Reuters, 2012), which is based on the work of M. Beltramo, G.E. Longo and J.H. Merryman.

[32] See V. Pietrobon, *Errore, volontà e affidamento nel negozio giuridico* (Padova: CEDAM, 1990), 9-11; R. Sacco, 'Affidamento' *Enciclopedia del diritto* (Milano: Giuffrè, 1958), I, 666.

[33] See V. Pietrobon, 'Affidamento' *Enciclopedia giuridica* (Roma: Treccani, 1989), I, 4-5.

the entry into force of the Civil Code.[34]

b) The First Restrictive Applications of Pre-Contractual Liability

First of all, it should be noted that, under Italian law, there was no problem – and still there is no problem – to apply tort law in the case of loss caused by employees and, therefore, there was no need to broaden the scope of pre-contractual liability. This is because the Italian tort law stated – and continues to state – that an employer is vicariously liable for the actions of its employees, and that it cannot avoid this liability by means of a defence similar to the one provided for in § 831 BGB (absence of *culpa in eligendo* or *in vigilando*).[35]

As far as breaking off negotiations is concerned, the most rigorous position, developed under the Italian Civil Code of 1865, argued that a liability could only arise once the contract proposal had been sent and if its revocation had reached the other party after it had started to perform the service. This form of liability was also expressly provided for in Art 36, para 3, of the 1882 Commercial Code and, then, in Art 1328 of the new Italian Civil Code. Under the 1865 Italian Civil Code, for several scholars it was not necessary, from a functional point of view (ie from the point of view of justice), to envisage a form of pre-contractual liability for other cases. On the contrary, some authors assumed that even at an earlier stage pre-contractual liability for breaking off negotiations could arise.[36] Even though this idea became over time more and more influential in the literature and popular in case law, after the promulgation of the new Civil Code there were still some authors who continued to maintain restrictive opinions.[37]

Let us now consider the problems posed by defects in consent and disadvantageous contracts, which for us represent the most important issue.

[34] Nevertheless, the Italian regulation must, in any case, be considered very advanced given the period of time of its approval. Even though Art 1337 was not originally intended to introduce a pre-contractual liability construction similar to that developed in Germany, its vagueness gave ample space to the doctrinal and judicial construction and foresaw future changes. See R. Di Raimo, 'Dichiarazione, ricezione e consenso', in F. Macario and M.N. Miletti eds, *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto* (Milano: Giuffrè, 2006), 179.

[35] M. Maggiolo, *Il risarcimento della pura perdita patrimoniale* (Milano: Giuffrè, 2003), 104-105.

[36] See C. Faggella, 'Dei periodi contrattuali e della loro vera ed esatta costruzione scientifica', in *Studi giuridici in onore di Carlo Fadda pel XXV anno del suo insegnamento* (Napoli: Luigi Pierro, 1906), II, 269. For a similar evolution in France, see R. Saleilles, 'De la responsabilité précontractuelle. A propos d'une étude nouvelle sur la matière' *Revue trimestrielle de droit civil*, 697 (1907). About this topic see U. Babusiaux, 'Introduction before Art 2:301', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 348, 351-352. For the dominant view, see among others L. Coviello, 'Della cosiddetta *culpa in contrahendo*' *Filangieri*, 728 (1900), and after Faggella's work G. Segrè, 'Sulla responsabilità precontrattuale e sui punti riservati' *Rivista del diritto commerciale*, II, 633 (1925).

[37] See for example M. Jannuzzi, 'Buona fede e recesso dalle trattative contrattuali' *Foro italiano*, I, 667-670 (1948).

The new Italian Civil Code stated – and states – that a party who knows or ought to know the existence of a ground of invalidity of the contract, and does not disclose it to the other party, must compensate that party for the loss suffered by the latter for having relied, without fault, on the validity of the contract (Art 1338).

This provision was read by scholars and judges to mean that, when a party knows or ought to know that the contract is void but does not disclose it to the other party, the former party must compensate the latter party, provided that this party was unaware of the contract's voidness and was under no duty to make itself aware of it.[38] In this regard, the provision traces back to Jhering's sell of *res sacrae* and to §§ 307 and 309 BGB a.F (old version). Similarly, Art 1398 stated – and states – that a person who enters into contracts as an agent without having the powers to do so, or does so in excess of the powers conferred on them is liable for the loss that a third person suffers as a result of having relied, without fault, on the validity of the contract.[39] This provision was largely based on § 179 BGB, except for the fact that it required the fault of the agent for liability to be made out.[40]

However, Art 1338 was also construed to mean that a party who knows or ought to know that the contract is voidable, but does not disclose it to the other party, must compensate the party that was unaware of the voidability and that was under no duty to make itself aware of the contract's voidability.[41] This interpretation, apparently modelled on Jhering's theory and on § 122 BGB, in fact ran counter to it: the party that claimed compensation was not that which had fallen into an unrecognisable error, but that which claimed avoidance because of mistake, fraud, duress or incapacity, when certain other requirements that made the other party's conduct unfair had been met.[42]

To understand this interpretation, it must be borne in mind that the regulation of mistake requires that, in addition to being essential (ie in respect of certain elements), it must be recognisable by the other party; otherwise, the contract cannot be avoided on the ground of mistake. For this reason, Art 1338 could not be understood in the sense of § 122 BGB: under Italian law there is no need to provide for a rule of liability similar to the German one, since the party that is not mistaken is already protected by a proprietary rule (as the contract cannot be annulled if the error is not recognisable).[43] Furthermore, it must be

[38] See, for example, F. Messineo, *Dottrina generale del contratto (artt. 1321-1469 cod. civ.)* (Milano: Giuffrè, 1948), 452, and Corte di Cassazione 18 May 1954 no 1731, *Giustizia civile*, 1269 (1954).

[39] See E. Betti, *Teoria generale del negozio giuridico* (Torino: UTET, 1st ed, 1943), 382-383.

[40] See L. Mengoni, 'Sulla natura della responsabilità precontrattuale', in Id, *Scritti* (Milano: Giuffrè, 2011), II, 280.

[41] For quotations see n 38 above.

[42] Nevertheless, in twentieth-century literature there was a widespread misunderstanding that Art 1338 was the transposition in Italy of the theories of Jhering. See M.L. Loi and F. Tessitore, *Buona fede e responsabilità precontrattuale* (Milano: Giuffrè, 1975), 51.

[43] See C. Turco, 'L'interesse negativo nella *culpa in contrahendo*' *Rivista di diritto civile*, I,

taken into account that, under Italian law, defects in consent (mistake, fraud, duress or incapacity) result in avoidability, which is considered to be a form of invalidity (although the contract produces effects – *Rechtsfolgen* – until it is avoided). This allowed scholars and judges to interpret Art 1338 extensively, even if in some cases such construction was a bit forced: it is obvious, for example, that a person who is threatened does not want to be informed of the invalidity, but rather wants there to be no threat.

These hermeneutical choices, which led to the exclusive application of Arts 1328, 1338 and 1398 to cases of breaking off negotiations and of pre-contractual information to the contract to be concluded, had a justification.[44] Scholars and, above all, judges of the time looked with suspicion at the general clause of Art 1337: therefore, as far as possible, they tried to limit its scope, preferring to apply specific provisions, even at times reaching interpretations that were not present on the face of the texts,[45] or ignoring the need for protection that formed its very basis.[46] On the other hand, the formalistic and literal argument had an easy time prevailing over the functional one, because the need for protection was felt less strongly than now and in this narrower scope of protection could often match to the text of the aforementioned specific provisions.

Therefore, following the previously-discussed opinions, Art 1337, far from creating a relationship consisting of obligations to protect (as § 311 in the modern German legal system), was intended as an empty rule, which merely referred to other more specific rules provided for by other provisions:[47] Art 1328 for the revocation of the offer, and Arts 1338 and 1398 for those cases of conclusion of a null contract, of an ineffective contract due to the lack of representative powers, or of a voidable contract due to a defect in consent. Thus, ultimately, under Italian law, pre-contractual liability could be governed by a series of specific provisions.[48]

165, 189-190 (2007); P. Sirena, 'Responsabilità precontrattuale e obblighi informativi', in L. Frediani e V. Santoro eds, *L'attuazione della direttiva Mifid* (Milano: Giuffrè, 2009), 101, 102.

[44] About the 'fear for general clauses' see J.W. Hedemann, *Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat* (Tübingen: J.C.B. Mohr, 1933), 66-73; for the Italian case law see L. Bigliazzi Geri, 'Note in margine alla rilevanza dell'art. 1337 c.c.', in *Scritti in memoria di Domenico Barillaro* (Milano: Giuffrè, 1982), 136-137.

[45] Extending the scope of application of Art 1338, therefore, was intended to attract all the regulation of pre-contractual liability in the event of failure to disclose relevant information to Art 1338, so as to completely diminish the scope of Art 1337.

[46] As in the case of breaking off negotiations, whose liability was evidently required by the interests at stake, but was denied by a minority of authors even after the promulgation of the new Civil Code. As we shall see below, although under the new Civil Code the assertion of this liability immediately became the prevalent opinion and then the unanimously accepted opinion, case law tended nevertheless to apply it strictly.

[47] In this direction: Corte di Cassazione 9 October 1956 no 3414, *Vita notarile*, 423 (1957); Corte di Cassazione 16 February 1963 no 357, *Foro italiano*, I, 1769 (1963).

[48] According to the *Relazione al codice civile*, para 612, the duty of good faith during negotiations 'sbocca in una responsabilità *in contrahendo* quando una parte conosca e non riveli all'altra l'esistenza di una causa di invalidità del contratto' (results in liability *in contrahendo* when one party knows and does not disclose to the other the existence of a cause of invalidity of

As far as the dogmatic reconstruction is concerned, it was not considered that pre-contractual liability, fragmented in particular provisions, constituted a form of contractual liability, ie the breach of a pre-contractual relationship based on trust, which led to contractual liability. Scholars and judges looked at these rules in isolation and, if necessary, assigned them to the realm of non-contractual liability.[49]

3. The Second Italian Phase (or: The Need for a General Clause)

It goes without saying that, as time goes by, legal systems change. After the entry into force of the Italian Civil Code, some scholars proposed innovative constructions of the regulation of pre-contractual liability, which became dominant over time, including in case law.

a) Breaking off Negotiations

With regard to breaking off negotiations, we have already pointed out that, under the old Civil Code, a new approach developed and became more and more popular: more precisely, it had been argued that breaking off negotiations could give rise to pre-contractual liability in cases other than those in which revocation of the proposal had been received by a party who had in good faith begun to perform the contract. In addition, under the new Civil Code there were further reasons to accept this construction.[50]

Literally, Art 1328 provided – and provides – that an offeror who revokes his or her offer must 'indemnify' (and not compensate) the other party. The term 'indemnification' was – and is – normally used in the Italian Civil Code to refer to liability for a lawful, non-infringing act. Consequently, Art 1328 of the Italian Civil Code did not appear to refer to the problem of pre-contractual liability for breaking off negotiations (or at least did not seem to exhaust its potential scope of application).[51]

From a justice point of view, it was becoming increasingly urgent to provide for a form of liability in cases in which negotiations had been broken off contrary to good faith (for example, if the other party had legitimate grounds to believe that a contract would be concluded and there was no serious and legitimate reason to break off the negotiations) and for cases of negotiations into which a party had

the contract); no other concretizations of this duty were mentioned.

[49] This was the prevalent opinion: see, for example, L. Barassi, *La teoria generale delle obbligazioni. La struttura* (Milano: Giuffrè, 2nd ed, 1948), I, 117. Some authors asserted that the wording of Arts 1337 and 1338 led to pre-contractual liability of a contractual nature, which derived from the breach of specific obligations created by law: see G. Stolfi, 'In tema di responsabilità precontrattuale' *Foro italiano*, I, 1108-1110 (1954).

[50] Besides, of course, the existence of a provision such as Art 1337, which at least required the building of the regulation of pre-contractual liability in a less and less formalistic sense.

[51] See, among others, G. Patti and S. Patti, 'Responsabilità precontrattuale e contratti *standard*', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 1993), 85.

entered or continued without any real intention of reaching agreement (and, for example, only to waste the other party's time or to obtain confidential information).[52]

Under the new Civil Code, the idea of pre-contractual liability for breaking off negotiations became immediately dominant in literature and case law, which directly applied Art 1337 to these cases, ie the general clause of pre-contractual good faith.[53] Nowadays, this construction is unanimously accepted,[54] even though there is no consensus on the exact scope of this liability. According to the dominant conception, both (i) the breaking-off of negotiations without legitimate grounds in circumstances in which the other party can rely, and effectively does rely, on the conclusion of the contract, and (ii) the entrance into negotiations without the intention to conclude a contract, constitute misconduct, and thus oblige the party that has acted unfairly to compensate the other party.[55]

As a result, scholars and judges have acknowledged that Art 1337 has its own regulatory scope. Nevertheless, for a long time, case law stated that Art 1337 dealt only with breaking off negotiations (moreover, strictly interpreted).[56] However, some scholars asserted that it gave also rise to other duties, such as the duty to care for the other party's goods (where delivered and to be returned), and to duties of confidentiality.[57] As far as duties of information are concerned, Art

[52] These needs arose already in the first half of the last century: see G. Meruzzi, 'La responsabilità per rottura di trattative', in G. Visintini ed, *Trattato della responsabilità contrattuale* (Padova: CEDAM, 2009), I, 781.

[53] See Corte di Cassazione 7 May 1952 no 1279, *Foro italiano*, I, 1638 (1952), and F. Messineo, n 38 above, 174-175.

[54] See, for example, Corte di Cassazione 14 February 2000 no 1632, *Danno e responsabilità*, 982 (2000); C.M. Bianca, *Il contratto* (Milano: Giuffrè, 2nd ed, 2000), 167-170; V. Roppo, *Il contratto* (Milano: Giuffrè, 2nd ed, 2011), 173-174.

[55] About this difference see G. Meruzzi, *La trattativa maliziosa* (Padova: CEDAM, 2000), passim.

[56] In case law, where this thesis remained dominant for a long time, see Corte di Cassazione 11 December 1954 no 4426, *Giurisprudenza completa della Cassazione, Sezioni civili*, VI, 489 (1954); Corte di Cassazione 18 October 1980 no 5610, *Rivista del diritto commerciale*, II, 167 (1982), and also the review of L. Nanni, 'La buona fede contrattuale nella giurisprudenza' *Contratto e impresa,* 501, 501-502 (1986). In the literature see, among others, G. Stolfi, 'Il principio di buona fede' *Rivista del diritto commerciale*, I, 162, 164-165, 168 and 172 (1964). In the same way, Art 2:301 PECL, regulating the matter of 'Negotiations Contrary to Good Faith', refers only to breaking off negotiations: see U. Babusiaux, 'Art 2:301: Negotiations Contrary to Good Faith', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 359, 364-370 (and, in addition to this provision, in the Section 'Liability for negotiations' there is only Art 2:302, which is dedicated to 'Breach of confidentiality'). In the PECL system the reason lies above all in the fact that, already within the system of defects of consent, pre-contractual liability finds full expression: the defects themselves are provided for in a manner that is, at the same time, wide, based on a pre-contractual balancing of risks and linked to compensatory remedies (see Arts 4:106 and 4:117). This choice of legal policy, moreover, is not considered merely to be more modern, but also more in line with common law legal systems, which had some difficulties in accepting a provision stating a good-faith duty during negotiations (as § 311 II BGB and Art 1337 Civil Code).

[57] This idea was clearly pointed out above all by F. Benatti, *La responsabilità precontrattuale* (Milano: Giuffrè, 1963), and soon became widespread in the literature: see, among others, F.

1337 has continued to be intended by the majority of scholarship, and obviously by case law, to be a mere link to Art 1338 (or to other more specific provisions).[58]

b) Informational Defects in Consent, Duty of Disclosure and Misrepresentation

Nonetheless, further interpretative changes were also afoot with regard to the relationship between informational defects in consent and pre-contractual liability, even if these came to be realised only more recently, and are still today accompanied by very strong criticism and resistance.

Facing the increasing need to ensure wider protection of the interests of a party that had concluded a disadvantageous contract due to the non-disclosure of essential information or to misrepresentation, scholars and judges at first did not recur to pre-contractual liability, but preferred to broaden the scope of informational defects in consent: mistake and, above all, fraud.

As anticipated, Arts 1429 and 1431, whose texts have not been changed since the entry into force of the Civil Code, stated that a mistake was relevant only if it was essential and recognisable.

In order to enlarge the scope of application of mistake, Italian scholars and judges have understood the catalogue of essential errors only as providing examples,[59] and have considered that recognisability could be replaced by concrete and effective recognition,[60] and moreover that there was no need for this requirement to be met in cases of mutual mistake.[61] Even following the broadening of the scope of mistake, however, many areas remained uncovered, including, above all, those of mistake as to a simple motive (on a subjective reason, which did not enter into the contract). These errors could not be included, even in a properly and appropriately expanded catalogue of essential mistakes.

With reference to fraud, Art 1439, whose text is still in force without modification, stated that fraud is relevant if it causes a mistake, even as to motives. This, however, requires that the other party put in place real 'artifices' to deceive

Carresi, 'In tema di responsabilità precontrattuale' *Temi*, 440 (1965).

[58] This was the traditional opinion until the end of the last century, even though some important scholars did not accept it (see n 69 below). See G. D'Amico, 'La responsabilità precontrattuale', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 2, 1108.

[59] See, among others, M. Allara, *La teoria generale del contratto* (Torino: Giappichelli, 2nd ed, 1955), 144; Corte di Cassazione 17 January 1953 no 124, *Giurisprudenza italiana*, I, 1, 918. Other scholars argue that the catalogue cannot be expanded by interpretation; nonetheless, their purpose is to avoid the consequence, accepted by no one, of the relevance of error as to motive. See, for example, F. Carresi, *Il contratto* (Milano: Giuffrè, 1987), I, 443.

[60] See F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 9th ed, 1966), 165; more cautiously V. Pietrobon, *Errore* n 32 above, 116 and 237-240; in the opposite direction a minority view, for which see P. Barcellona, 'In tema di errore riconosciuto e di errore bilaterale' *Rivista di diritto civile*, I, 57, 76-78 (1961).

[61] See F. Messineo, n 38 above, 90; distinguishing between 'mutual mistake' and 'bilateral mistake' V. Pietrobon, see *Errore* n 32 above; asserting an opposite opinion P. Barcellona, n 60 above, 78-79.

the defrauded party.[62]

Over time, Italian scholars[63] and judges[64] have considerably extended the scope of the application of fraud. Artifices have been understood, despite the use of a plural form, in a singular sense, so that even a simple intentional lie – a misrepresentation intended to deceive – has been considered sufficient (*dolo commissivo*).[65] Moreover, an intentional non-disclosure of information which should have been disclosed in accordance with good faith has been considered sufficient (*dolo omissivo*).[66] Finally, some scholars have gone even further, proposing to recognise 'negligent fraud', ie misrepresentation or non-disclosure due to negligence, even in the absence of intentional deceit (*dolo colposo*).[67] This last outcome, however, does not appear to be entirely persuasive, as it strongly departs from the recent tradition of fraud and from the expressed tenor of Art 1439. In addition, this enlargement did not succeed in embracing within the scope of fraud those spontaneous errors (ie not caused by an omission or a false information by the other party) that are not essential but are concretely recognised.

To sum up, there has been a tendency in the Italian legal system to broaden the scope of mistake and, primarily, fraud, including by means of an increasing freedom of interpretation of certain legal provisions. This development, however, has left many open problems of coordination of these different defects in consent and, in any case, has left uncovered a vast gap between mistake and fraud.

Moreover, the need for protection in this no-man's-land between mistake and fraud has been felt more and more deeply due to changes in society and in the legal system.[68] In order to respond to this need, the most recent Italian

[62] The wording of this provision was probably influenced by the work of A. Trabucchi, *Il dolo nella teoria dei vizi del volere* (Padova: CEDAM, 1937), 523 and 530.

[63] Most of them, but there is no lack of exceptions. See, for today's prevailing position, P. Trimarchi, *Istituzioni di diritto privato* (Giuffrè: Milano, 22nd ed, 2018), 186-187; for the opposite opinion M. De Poli, 'I mezzi dell'attività ingannatoria e la reticenza da Alberto Trabucchi alla stagione della "trasparenza contrattuale" ' *Rivista di diritto civile*, I, 647, 694 (2011).

[64] To be honest, the texts of the judicial decisions are often ambiguous and sometimes seem to follow a different *ratio decidendi*: see F. Galgano, *Trattato di diritto civile* (Padova: CEDAM, 2nd ed, 2010), II, 364, and, recently, Corte di Cassazione 8 May 2018 no 11009, *Immobili & proprietà*, 393 (2018). Nevertheless, a certain trend towards an extension of the scope of fraud can be identified, which follows the proposals of the majority of scholars, as highlighted by A. Gentili, 'Dolo - I) Diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1989), XII, 1, 2.

[65] See, among others, M. Lobuono, 'Art. 1439', in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 171, 173-174; Corte di Cassazione 28 October 1993 no 10718, *Foro italiano*, I, 423 (1994).

[66] See, among others, G. Grisi, *L'obbligo precontrattuale di informazione* (Napoli: Jovene, 1990), 283; Corte di Cassazione 7 August 2002 no 11896, *Rivista di diritto civile*, II, 911 (2004).

[67] See, also for quotations, P. Lambrini, 'Dolo colposo: una figura della scienza giuridica romana', in Id, *Dolo generale e regole di correttezza* (Padova: CEDAM, 2010), 117, 117-121. For the opposite (and traditional) opinion see C.A. Funaioli, 'Dolo' *Enciclopedia del diritto* (Milano: Giuffrè), XIII, 1964, 738, 746, and A. Trabucchi, 'Dolo (diritto civile)' *Novissimo Digesto Italiano* (Torino: UTET, 1960), VI, 149, 151.

[68] And, of course, this need has been felt even more deeply by those who did not accept the broadening of the scope of informational defects in consent.

literature has referred to pre-contractual liability.[69] Therefore, it has been proposed that a pre-contractual compensatory remedy be granted wherever the party who has fallen into a mistake or who has been defrauded cannot find protection on the basis of defects in consent. In particular, it has been noted that the regulation of fraud also provides for, in addition to 'decisive fraud' (*dolus causam dans*), which leads to avoidability, 'incidental fraud' (*dolus incidens*), which leads only to compensation (and this occurs when the party would have concluded the contract in the absence of fraud, even if under different conditions). Moving from incidental fraud (Art 1440), some scholars have further argued that, in the other cases in which there is no defect in consent, the mistaken or defrauded party should be able to claim compensation under Art 1337 of the Italian Civil Code, insofar as there is an error on the part of one party and misconduct on the part of the other: or, in other words, if there is an 'incomplete defect in consent' (which does not represent a full defect in consent).

According to its academic proponents, this theory is essentially based on the distinction between validity rules and liability rules, which under Italian law are supposed to follow two totally different tracks.[70] Consequently, even where a contract is valid, its conclusion can be a source of liability for damages. Some scholars, however, considers the doctrine of incomplete defects in consent to be unpersuasive, asserting that the very distinction between rules of validity and rules of liability implies that there cannot be liability (and, *a fortiori*, a violation of good faith) where there is no invalidity, adding that, in order to be relevant, every atypical (not expressly regulated by statute law) duty of disclosure must fall within the scope of the application of Art 1338.[71]

Nonetheless, despite this criticism, the majority of scholars[72] and the most relevant judicial decisions[73] today accept, as has been said, the doctrine of incomplete defects in consent. Consequently, where there is no defect in consent, it

[69] M. Mantovani, n 2 above, 187-292. The assertion of pre-contractual liability even in cases of conclusion of a valid contract can be found also in some important works about pre-contractual liability and defects in consent of the Sixties and Seventies. Nevertheless, in these works, such a thesis was only hinted at and, for this reason, did not affect the dominant opinion, which denied the presence of pre-contractual liability in the event of the conclusion of a valid contract. See in particular F. Benatti, n 57 above, 13 and 67; L. Mengoni, n 40 above, 273; V. Pietrobon, n 32 above, 105, and already Id, *L'errore nella dottrina del negozio giuridico* (Padova: CEDAM, 1963), 118.

[70] On this topic see, among others, V. Pietrobon, n 32 above, 105-106, and already Id, *Il dovere generale di buona fede* (Padova: CEDAM, 1969), 73. More recently, see G. Perlingieri, *Regole e comportamenti nella formazione del contratto. Una rilettura dell'art. 1337 codice civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 50-82, and Id, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 9-31.

[71] See G. D'Amico, *'Regole di validità' e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 101-159.

[72] See G. Afferni, *Il* quantum *del danno nella responsabilità precontrattuale* (Torino: Giappichelli, 2008), 182.

[73] Corte di Cassazione 29 September 2005 no 19024, *Foro italiano*, I, 1105 (2006).

is argued that there may be pre-contractual liability so long as there is misconduct. This solution applies not only to cases of mistake and fraud, but also to cases of duress and incapacity.

In any case, it is almost unanimously held that the rules of liability can give rise to invalidity only if the legislature provides for it; for this reason, it is asserted: (i) that the violation of pre-contractual good faith cannot give rise to nullity of a contract for violation of an imperative rule under Art 1418, para 1, of the Civil Code (also because, if this were the case, the entire system of avoidability for defects of consent would be overwhelmed by the provision of an extremely wide ground of voidness);[74] (ii) that new defects of consent cannot be forged by analogy where a disadvantageous contract is concluded because of pre-contractual misrepresentation or non-disclosure of relevant information;[75] (iii) that compensation for damages for breach of an obligation to provide information cannot lead to a restitution in kind under Art 2058 of the Italian Civil Code and, through it, to the total or partial cancellation of the contract (otherwise it would be possible to elude the system of defects in consent).[76]

Many works of scholarship and many jurisprudential decisions continue, however, to apply Art 1338 in cases in which pre-contractual liability is associated with a defect in consent, and to apply Art 1337 in other cases.[77] Some scholars, on the other hand, consider it preferable to always directly apply Art 1337 of the Civil Code,[78] or to apply it directly, at least in cases of fraud and violence (which can be included in the provision of Art 1338 of the Civil Code only by liberally interpreting its text).[79] The question has no practical importance, but has an

[74] See Corte di Cassazione 19 December 2007 nos 26724 and 26725, *Foro italiano*, I, 784 (2008), and G. Vettori, 'Regole di validità e di responsabilità di fronte alle Sezioni Unite. La buona fede come rimedio risarcitorio' *Obbligazioni e Contratti*, 104, 107 (2008).

[75] See L. Cariota-Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1949), 336, and now V. Roppo, n 54 above, 713.

[76] In other words, restitution in kind would substantially correspond to a new defect in consent while, on the contrary, the legal interpreter cannot create new defects in consent: see G. Iorio, *Struttura e funzioni delle clausole di garanzia nella vendita di partecipazioni sociali* (Giuffrè: Milano, 2006), 89-90 (this solution is opposite to the German one, as has been already mentioned). An opposite opinion is famously argued by Rodolfo Sacco – see now R. Sacco and G. De Nova, *Il contratto* (Torino: UTET, 2016), 611, and about this well-known opinion also G. Vettori, 'Buona fede e diritto europeo dei contratti' *Europa e diritto privato*, 2002, 915, 922-925 (2002) – who moreover asserts this restitution in kind without applying its natural limits, provided for by Art 2058, para 2, Italian Civil Code (according to which the restitution in kind must be not too expensive for the debtor), nor seems to consider this cancellation unenforceable against the third parties involved (as it should be for a mere judicial cancellation, differently from a true avoidance of the contract). In fact, Sacco goes further than mere restitution in kind and ends up speaking, on this basis, of a form of atypical avoidance.

[77] See for example R. Scognamiglio, 'Dei contratti in generale', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1970), 221; L. Rovelli, 'La responsabilità precontrattuale', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 2000), XIII, 2, 312, 315 and 332-337

[78] R. Sacco and G. De Nova, n 76 above, 1572.

[79] See, for example, C. Castronovo, 'Vaga *culpa in contrahendo*: invalidità e responsabilità

important systematic relevance, as we shall see later.

c) Dogmatic Construction of Pre-Contractual Liability: From Non-Contractual Liability to the Idea of 'Obligation Without Performance'

As is evident, all the developments thus far described have led to the bestowing of a high degree of importance upon Art 1337. At the same time, these changes have led to a new perspective: the specific rules of Arts 1338 and 1398 have been seen as simple implementations, already provided for in legislation, of a unitary and general principle, ie that of good faith in negotiations.[80] This outcome, in turn, has itself contributed to the aforementioned development.

Parallel to these transformations, the dogmatic construction of pre-contractual liability has also changed. The Italian legal system did not necessarily require that this liability have a contractual nature: non-contractual liability under Italian law is, in fact, atypical, and has been over the decades interpreted in an increasingly broad way, both by the scholarship and case law.[81] However, several authors have considered that it would be preferable to adopt a construction similar to the German one to describe pre-contractual relationships, as this would be more faithful to the reality of things.[82]

As a result, more and more scholars have asserted that an obligatory relationship including duties to protect the counterparty arises between the parties to negotiations. This relationship, later called 'obligation without performance',[83] stems from the particular reliance of each party on the other, which has as its object the compliance with the requirements of good faith.[84] This relationship embraces different duties to protect, which can be classified as duties of disclosure and confidentiality, and to take care of goods. Breach of these obligations gives rise to contractual liability.

e la ricerca della *chance* perduta' *Europa e diritto privato*, 2010, 1, 8 (he proposes the direct application of Art 1337 in cases of duress and of recognisable, but inexcusable, mistake); G. Patti and S. Patti, n 51 above, 203 (according to which liability in cases of fraud or duress is based on Art 1337).

[80] As we have seen, for some authors this means also that Art 1337 can found an atypical duty of disclosure broader than the one provided for in Art 1338; for other scholars this conclusion is unconvincing.

[81] The debate on this subject is enormous. Here it is sufficient to mention, in literature, E. Navarretta, 'L'evoluzione storica dell'ingiustizia del danno e i suoi lineamenti essenziali', in N. Lipari et al eds, *Diritto civile* (Milano: Giuffrè, 2009), IV, 3, 137-161, and, in case law, Corte di Cassazione 22 July 1999 no 500, *Foro italiano*, I, 2487 (1999).

[82] L. Mengoni, n 40 above, 267-282.

[83] See C. Castronovo, 'L'obbligazione senza prestazione ai confini tra contratto e torto', in G. Alpa and F. Benvenuti eds, *Le ragioni del diritto. Scritti in onore di L. Mengoni* (Milano: Giuffrè, 1995), I, 147, 160-165.

[84] For the idea that the object of reliance is the respect of good faith see also Salv. Romano, 'Buona fede (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1959), V, 677, 684, and V. Cuffaro, 'Responsabilità precontrattuale' *Enciclopedia del diritto* (Milano: Giuffrè, 1988), XXXIX, 1265, 1269-1270.

Today, the majority of scholars (perhaps not the most numerous, but certainly the most attentive and influential) consider that pre-contractual liability derives from the violation of those duties to protect that arise in the context of the pre-contractual protection relationship.[85] Case law has long disregarded this thesis, at the same time, paradoxically, making use of other doctrines that had been developed as corollaries (for example, that concerning the contractual nature of liability of a doctor dependent on a nursing home for breach of the obligation without performance that arises from social contact with a patient).[86] Recently, however, in an important decision, the Court of Cassation changed its opinion, accepting the aforementioned thesis.[87] Shortly thereafter, the legislature promulgated a law in order to imperatively attribute a non-contractual nature to the liability of the doctor in the aforementioned situation.[88]

4. Is a Third Phase Coming? Future Evolutions, Towards a Consistent System of Informational Defects in Consent and Pre-Contractual Liability

The evolution described above has led to a present situation which, insofar as the regulation of informational defects in consent and their relationship with pre-contractual liability are concerned, is not entirely persuasive. We shall now focus on why this is not convincing, and how (or even if) it is possible to improve the situation in a hermeneutic way (ie without legislative reform).

a) Inconsistency Aspects of the Current Italian System of Informational Defects in Consent and Pre-Contractual Liability

There are many reasons why the current state of the system of informational defects in consent and pre-contractual liability, which we can draw from literature and case law, seem incongruous.

With regard to mistake, apart from the usual anti-literal interpretations of the provisions in cases of mutual mistake (for which the requirement of recognition is held as not necessary) and recognised mistake (relevant even if not recognisable), many authors tend to believe that mistake may overlap with contractual warranties[89] and that, in any case, there may be an error even if the other party breaches its duty of disclosure.[90] These outcomes are not convincing, as there is no

[85] See C. Castronovo, *Responsabilità civile* (Milano: Giuffrè, 4th ed, 2018), 539.

[86] See Corte di Cassazione 11 January 2008 no 577, *Foro italiano*, I, 455 (2008).

[87] See Corte di Cassazione 12 July 2016 no 14188, *Giurisprudenza italiana*, 2565 (2016); already in this direction Corte di Cassazione 20 December 2011 no 27648, *Giurisprudenza italiana*, 2547 (2012), and Corte di Cassazione 21 November 2011 no 24438, *Giurisprudenza italiana*, 2662 (2012).

[88] See Art 7, para 3, legge 8 March 2007 no 24.

[89] See R. Sacco and G. De Nova, n 76 above, 528. A different opinion can be found in C.M. Bianca, n 54 above, 653-654.

[90] See, for example, C. Colombo, 'Il dolo nei contratti: idoneità del mezzo fraudolento e

place for mistake when contractual warranties are provided for[91] and, above all, because mistake should not apply when the counterparty violates its obligations to provide information (the mistake ruled by the Civil Code is not an 'induced' mistake, ie a mistake caused by the other party breaching its duties of disclosure or providing incorrect information, but a spontaneous one, as Art 1431 implicitly states, providing that the error 'can' – and not 'must' – be recognised by the counterparty).[92] Moreover, it is not clear to what extent the catalogue of essential errors, even though considered open, can be extended in a hermeneutic way.[93]

With regard to fraud, the concept of 'negligent fraud', as already argued, is not persuasive, although it does seem necessary in order to respond to questions of justice.[94] Furthermore, nor is the differentiation between decisive and incidental fraud clear, being sometimes linked to objective indices, and sometimes to subjective indices or the mere will of the deceived person.[95]

Despite this lack of clarity, the theory of incomplete defects in consent as a whole is based on the existence of incidental fraud, as we have seen. Moreover, the practical outcomes of this doctrine are sometimes difficult to tolerate, particularly when they lead only to compensation (and not to the cancellation of the contract) in cases which seem to be no different from those of 'full' defects of consent.[96] And this is especially because not every incomplete defect in consent is an incidental one.[97] It would be even less persuasive, however, to reject this theory and leave without legal protection a number of cases falling into the no-man's-land between mistake and fraud.

rilevanza dell'errore del *deceptus*' *Rivista del diritto commerciale*, I, 347, 386 (1993).

[91] As in the German legal system it is correctly pinpointed: among others, see R. Singer, '§ 119', in *Staudinger Kommentar* (Berlin: Sellier-de Gruyter, 2016), 514, 592-593.

[92] When the parties are in the same position with regard to the piece of information, the mistake 'can' be recognised in some situations (when it is readily apparent). When two parties are in different positions, the mistake 'must' be recognised in some situations, because a duty of disclosure exists even before the mistake. The contrast is identical to that between spontaneous and caused error: see A. Gianola, *L'integrità del consenso dai diritti nazionali al diritto europeo. Immaginando I vizi del XXI secolo* (Milano: Giuffrè, 2008), 642.

[93] See, also for quotations, C. Rossello, 'L'errore nel contratto', in P. Schlesinger and F.D. Busnelli eds, *Il codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2019), 83-85.

[94] See E. del Prato, 'Le annullabilità', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), V, 1, 271.

[95] See, for different points of views, C.A. Funaioli, n 67 above, 747; F. Lucarelli, *Lesione di interesse e annullamento del contratto* (Milano: Giuffrè, 1964), 99; A. Checchini, *Rapporti non vincolanti e regola di correttezza* (Padova: CEDAM, 1977), 317, fn 173; G. D'Amico, n 71 above, 122-123.

[96] In Germany, as we have seen, it is possible to fully or partially cancel the contract in cases of failure of disclosure or misrepresentation through a restitution in kind (*Naturalrestitution*). This outcome is more persuasive than the Italian one, even though the restitution in kind requires the existence of damages, and not only the conclusion of a valid contract as a result of the misconduct.

[97] From the traditional perspective, it is worth mentioning the decisive negligent fraud that that does not coincide with an essential mistake: this error, if we do not grant avoidance in cases of '*dolo colposo*' (negligent fraud), does not result in a defect in consent.

Furthermore, it is not clear whether the right of a party to avoid the contract is also a burden, in the sense that it is not possible to waive the right to avoid the contract and at the same time to demand full compensation.[98] Similarly, it is not clear what should be the quantum of damages resulting from pre-contractual unfairness in cases where the contract cannot be avoided or is not actually avoided.[99] These doubts make it even more difficult to coordinate the defects of consent and the remedies for breach of pre-contractual duties.

b) Arguments For and Against a Hermeneutical Revision

In fact, all these doubts derive from a larger question. The current system was formed by successive stratifications, by accumulation, until it reached the current situation. As we have seen, all the importance of pre-contractual information was first enclosed in Art 1338. Then, the scope of application of informational defects of consent was broadened. Only recently a pre-contractual liability for breach of duties of disclosure was recognised even where a contract cannot be avoided, attributing to it a sort of 'stop-gap' function.

All these stratified choices had, at the time they were made, their own logic, and were supported by arguments, sometimes textual, sometimes systematic, sometimes practical. The same idea of proceeding by stratification, moreover, is completely legitimate, since the interpreter always has to deal with a 'formed system' that has a resistance force and cannot easily be subverted, except in the presence of sufficiently strong arguments.[100] These arguments induced scholarship and case law to adopt corrective measures, but not to radically change the pre-

[98] As far as fraud is concerned, a negative answer is given by F. Benatti, see n 57 above, 68 (the author proposes to recognise a claim for compensation even if the party does not intend to avoid the contract) and under the previous Civil Code by A. Trabucchi, n 62 above, 331. A different opinion can be found in S. Pagliantini, 'Il danno (da reato) ed il concetto di differenza patrimoniale nel caso Cir-Fininvest: una prima lettura di Cass. 21255/2013' *Contratti*, 113 and 119 (2014); according to this scholar the party that confirms the contract cannot demand compensation. As is apparent, there is no agreement in the literature (even though most of the scholars deny any form of prejudiciality, at least for fraud). Moreover, there are no studies that analyse this topic in-depth, and even the ones that deal with it often take into consideration different situations (for example, claims for compensation without claims for avoidance, or claims for compensation after expiration of avoidability, or claims for compensation after confirmation of contract).

[99] Normally, the quantum of the compensation is assessed on the difference between the value of the concluded contract and the value of the contract that would have been concluded in the absence of the error: see, for example, A. Ravazzoni, *La formazione del contratto* (Milano: Giuffrè, 1966), II, 65. However, it is not clear whether 'the contract that would have been concluded' is the contract that the mistaken or defrauded party relied upon or the contract that the party would have effectively concluded in the absence of a mistake. Following the first solution, it not clear what happens when the other party objects that it would not have concluded the contract under these different conditions; following the second one, the protection of the mistaken or defrauded party may be very restricted.

[100] In this light we could recall some passages from the works of Tullio Ascarelli, in which the author builds a historicist theory of law: see, for example, T. Ascarelli, 'Antigone e Porzia' *Rivista internazionale di filosofia del diritto*, 756, 766 (1955).

contractual information system. The last and most conspicuous corrective is precisely that of the 'stop-gap' function of pre-contractual liability.

This outcome does not exclude, however, that, today, in the face of a certain state of the system and of the society in which it subsists, there are other even stronger arguments, which require this stratification to be overcome, restoring on new bases the construction of defects in consent.

The revision that can be imagined, to be more precise, would lead to abandoning the current constructions of mistake and fraud, re-interpreting informational defects in consent in an innovative way and with full attention to the interests of the parties. At the same time, however, this revision could recover the text of the provisions relating to mistake and fraud, coming back to an interpretation closer to the first sense of these provisions and creating through analogy new atypical defects in consent (ie atypical mistakes) with regard to the no-man's-land between mistake and fraud, which would be much wider than it is now, on the basis of the current state of the system.

In order to assess this hermeneutical proposal, we need to see what arguments support it, as well as how it can work.

Accepting this proposal involves: (i) creating an axiological gap[101] between mistake and fraud, rather than simply adopting an extensive interpretation of informational defects in consent; (ii) largely overcoming the current interpretation and application of the system.

Against this, therefore, there are obviously arguments linked to the text (to a textual interpretation of the Civil Code) and to the current interpretation and application of the system: (i) creating an axiological gap is not possible, if there is no urgent need; (ii) overcoming what is widely accepted is not possible, if there is no urgent need.

These arguments traditionally emerge in the face of any analogical or innovative construction. For this reason, we have to verify if the functional argument is stronger or weaker than the other arguments. In doing so, we have to remember that the current Italian legal system is nowadays less formalistic than in the past, and that because of this it easily, from a general point of view, welcomes legal analogies and innovations.[102]

More precisely, we must consider whether all the successive stratifications have led to a system that, because of the demand for justice, claim a totally new

[101] Regarding the axiological gaps, see R. Guastini, 'Defettibilità, lacune assiologiche, e interpretazione' *Revus*, 57 (2010). More generally, on legal gaps in civil law systems, see C. Irti, 'A Short Introduction to 'The Problem of Legal Gaps' 29 *Tulane European & Civil Law Forum*, 1 (2014).

[102] In fact, the modern conception of private autonomy does not sit very comfortably with arguments that sound too formalistic and that lead to results which are functionally unjustified. On the *Materialisierung* of private autonomy see C.W. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung" ' 200 *Archiv für die civilistische Praxis*, 273 (2000), and A. di Majo, 'Giustizia e 'materializzazione' nel diritto delle obbligazioni e dei contratti tra (regole di) fattispecie e (regole di) procedura' *Europa e diritto privato*, 797 (2013).

conformation, based entirely on a rational and reasonable assessment of the interests of the parties, even at the cost of creating an axiological gap, and overcoming what is widely accepted. It has to be proved that this construction, which is directly based on interests, would be simpler, more coherent with the legal system and its political and technical choices, and more reasonable with regard to the interests of the parties. At the same time, it must be verified whether the statutory texts that remain in force would be interpreted in a faithful or even more faithful way to the text (thanks to its open nature)[103] and whether the new construction could still be systematically and functionally close (or close enough) to the recent tradition (avoiding all unnecessary or excessive overruns).

We shall discuss now the first point, while the other point will be dealt with below, as we try to analytically build a new system of informational defects in consent and pre-contractual liability.

c) Functional Arguments: A New Way of Looking at Informational Defects in Consent

If we want to prove that a totally new construction, directly based on interests, would be simpler, more coherent, and more reasonable, we must take into account the fact that the current strength of the functional argument does not depend so much on the need to broaden the scope of mistake or fraud, but above all on a radically different way of understanding these defects in consent, and thus on a Copernican revolution in the way we identify the interests at stake.[104]

The Italian legal system traditionally regulated informational defects in consent, and above all mistake,[105] merely from the point of view of the mistaken person, looking at these defects in consent as contractual pathologies. The regime of informational defects in consent entailed a distribution of pre-contractual risks, but they presented themselves and were primarily understood in a different way, as contractual pathologies deriving from a defect in the intent of the party.[106]

This view, typical of continental systems and closely linked to the role of the will as a constituent element of the contract,[107] led to the conclusion that

[103] About the 'open texture' of the legal provisions, see, of course, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed, 1994), 127-128.

[104] About paradigm shifts and revolutions, in the Kuhnian sense, in law, see S. Worthington, A. Robertson and G. Virgo, *Revolution and Evolution in Private Law* (Oxford-Portland, Oregon: Hart, 2018).

[105] The following considerations refer mostly to mistake. However, the normal classification of both mistake and fraud as defects in consent and the greater importance of mistake usually have led scholars and judges to conceptualize fraud in the same way as mistake.

[106] This is evident above all for mistake: see, for example, L. Cariota-Ferrara, n 75 above, 477-581. The need for a change of perspective was already underlined by P. Barcellona, 'Errore (dir. priv.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1966), XV, 246, 250-253.

[107] See, with regard to mistake, F.C. von Savigny, n 6 above, 263-276. See also M.J. Schermaier, 'L'errore nella storia del diritto' *Roma e America. Diritto romano comune*, 185, 241-242 (2007).

informational defects in consent should be understood as pathologies of the will and thus of the contract.[108] This idea placed defects in consent on a different level from a form of pre-contractual liability directly based on good faith, because the regulation of defects dealt more with the question of the contract's validity than with the question of good faith.

Proof of this, moreover, is the traditional interpretation of Art 1338,[109] according to which not only could pre-contractual liability be imagined exclusively in the case of defects in consent, but also and above all could pre-contractual liability be derived only from the existence of an undeclared (or unprevented) invalidity. It was considered, in fact, that in the event of a defect in consent, the protected party could also claim damages if the other party was or should have been aware of the invalidity and had not informed the other party of it (or, in cases of duress and incapacity, had not prevented the invalidity), and not that the very misconduct of the other party gave rise to a remedy in a specific form (cancellation of the contract) and a compensatory remedy (liability for damages). The core of the regulation was, in short, validity and invalidity; and this appeared clear above all for cases of mistake (even more so than for cases of fraud). Further proof is the fact that, when pre-contractual liability has also been recognised in cases of disadvantageous but valid contracts, the direct application of the principles of good faith provided for by Art 1337 has given rise to the abovementioned inconsistencies with (and in) the system of defects in consent.

In light of modern sensibilities, it would seem simpler and more correct to construe defects in consent differently.[110]

The reasons that led to the formation of this sensibility are many. The role of the will in the conception of contract has been diminished, partly because of a deeper study and clarification of this topic, and partly because of changes in society (ie of its cultural horizon). Today, the contract is seen as an act of voluntary self-regulation of interests, at the basis of which there is a normal intent, which in practice can also be missing or deformed.[111] Where there is no intent or there is

[108] This outcome was, however, true not only for those scholars which adhered to the 'will' theories, but even for those authors who followed the opposite 'declaration' or 'expression' theories: in fact, they too were shaped by the dominant idea of mistake as contractual pathology resulting from lack of will (intended or as always relevant, unless the law did not recognise this relevance, or as relevant only where the law recognised this relevance). See, with regard to mistake, A. Verga, *Errore e responsabilità nei contratti* (Padova: CEDAM, 1941), 223-285. Nonetheless, the importance that the 1942 Italian Civil Code placed upon reliance has contributed to the development of new perspectives, as we shall see in the text.

[109] See n 77 above.

[110] This development is only the last step in a process that, with respect to mistake, has spanned more than two thousand years: see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 600-602. On the history of mistake see M.J. Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB* (Wien: Böhlau Verlag, 2000).

[111] See K. Larenz, *Die Methode der Auslegung des Rechtsgeschäfts. Zugleich ein Beitrag zur Theorie der Willenserklärung* (Leipzig: A. Deichertsche Verlagsbuchhandlung, 1930), 34-

a deformed intent, there will be a consequent defect in consent, but the contract will still exist (the two concepts, existence and validity, ie voidness and avoidability, are distinct under Italian law).

The regulation of defects in consent, which has always implied a distribution of pre-contractual risks, has accentuated the focus on the balance of the parties' interests.[112] After all, already with the entry into force of the new Italian Civil Code in 1942, the legislature abandoned the requirement of excusability of mistake provided for by the previous Civil Code, replacing it with that of recognisability, which in turn placed more importance upon the interests of both parties.[113] Moreover, in the same vein, scholars and judges have argued that an unrecognisable error is to be regarded as a mistake, if recognised.[114]

Over time, therefore, the pre-contractual distribution of risk has come to be the core of the system. Consequently, at the bottom of the system of defects of consent there is no longer (only or above all) the idea of contractual pathology, but that of remedy:[115] defects of consent do not represent vices of the contract due to a pathology of a constituent element, the regulation of which also takes into account the reciprocal position of the parties in the negotiations, but rather remedies available to a party directly based on a distribution of pre-contractual risk, and which can involve a pathology of the contract.

Therefore, if, at the centre of the system, there is a distribution of risks, and defects of consent are manifestations of this distribution, it is unreasonable to interpret these autonomously with respect to a form of pre-contractual liability directly based on good faith. On the contrary, it is necessary to build a unitary system of pre-contractual liability and defects of consent based on a pre-contractual distribution of risks that cancels precisely those critical points mentioned in the opening of the section. This will allow for the simplification of the system, making it more coherent and avoiding gaps in protection. In fact, the full connection between pre-contractual liability and defects of consent from the perspective of the same distribution of risks, on the one hand, makes the inconsistencies between remedies intolerable and unjustified. On the other hand, it allows these inconsistencies to be overcome, better delimiting and defining the

53 and E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2002), 54-74.

[112] In particular, by giving more importance, as far as mistake is concerned, to the 'other party's behaviour', than to 'the subject matter of the mistake'. See S. Lohsse, 'Art 4:103: Fundamental Mistake as to Facts or Law', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 657, 660-662. See also, for an interpretative revision of the German *Eigenschaftsirrtum*, Armbrüster, '§ 119. Anfechtbarkeit wegen Irrtums', in *Münchener Kommentar* (München: Beck, 8th ed, 2018), paras 116-118.

[113] A. Cataudella, *I contratti. Parte generale* (Torino: Giappichelli, 4th ed, 2014), 93.

[114] On the relevance of 'concrete reliance' of the non-mistaken party, see n 94 above.

[115] The idea of remedy is necessarily relational, different from the idea of pathology deriving from the discrepancy between the will of the party and the contract. About legal remedies see, among others, Y. Adar and P. Sirena, 'La prospettiva dei rimedi nel diritto privato europeo' *Rivista di diritto civile*, I, 359 (2012).

various remedies.

d) Construing a New Unitary and Consistent System

The need to build a unitary system represents a very strong practical argument. However, this argument must, as we attempt to do next, be put into practice.

aa) A Copernican Revolution in the Relationship Between Informational Defects in Consent and Pre-Contractual Liability: An Example

Once this re-orientation is completed, the whole traditional construction falls apart. The textual and traditional arguments that support it clearly diminish their persuasive strength and become simple obstacles to a revision of the system. This is the case, for example, for the traditional interpretation of Art 1338.[116]

Considering that, in our (new) system, defects in consent must be primarily seen as remedies, and only through this prism as pathologies, it is absurd to assert that, in cases of defects in consent, a party can ask for compensation under Art 1338.

Indeed, as far as duress and incapacity are concerned, even the traditional interpretation of this provision was not very convincing and needed a textual correction: as we have seen, in these cases it cannot be considered that the protected party had trusted in the validity of the contract and that the other party had been under an obligation to inform it of the invalidity. However, this construction could be accepted for mistake and fraud, so that it was also adopted in cases of violence and incapacity.

Today, even with respect to mistake and fraud, it is necessary to re-interpret the provision: it cannot be considered that the mistaken or defrauded party relies on the validity of the contract and that the other party must warn it of the invalidity. Invalidity is not the cause of a breach of reliance, but rather a remedy. The other party must, rather than informing the party of the invalidity, correct the error and avoid deception.[117]

The re-interpretation of Art 1338 of the Italian Civil Code does not imply that the protected party cannot be asked for compensation, but only that it must claim it under Art 1337. From a practical point of view, it does not change much. From the systematic point of view, however, the result is remarkable, because it attests a new way of understanding defects in consent (primarily understood as remedies and not as pathologies), and confirms the necessity of reorganizing the entire system of pre-contractual liability and informational defects in consent,

[116] It is no coincidence that a different interpretation of Art 1338 is proposed by Rodolfo Sacco, who sees in defects in consent, rather than contractual pathologies, remedies. See, respectively, R. Sacco and G. De Nova, n 76 above, 611 and 1572.

[117] In other words, it is not the very existence of the defect that could give rise to a compensatory claim, but it is the misconduct in itself.

directly balancing the interests of the parties, in accordance with the general clause of good faith (Art 1337 Civil Code).

bb) Informational Defects in Consent and Pre-Contractual Liability as Epiphenomena of the Same Pre-Contractual Risks Distribution

As we have seen, informational defects in consent were in the past understood as totally heterogeneous from a form of *culpa in contrahendo* directly based on good faith. This idea led at first to the assertion that pre-contractual liability was only available in the presence of mistake and fraud (Art 1338), and then to the assertion of compensation claims for pre-contractual liability, even in the absence of mistake and fraud (Art 1337).

Nowadays informational defects in consent and *culpa in contrahendo* must be understood as two epiphenomena of the same pre-contractual risks distribution. Nonetheless, this new assumption opens a choice similar to the past one (even if in a totally new light): as it was asserted (first) that pre-contractual liability existed in the case of defects in consent and (then) that it could cover a larger area, nowadays (i) it is possible to argue that, through the system of informational defects in consent, the Civil Code has regulated the distribution of pre-contractual risks, so that liability for compensation can be asserted only taking into account the construction of the informational defects in consent offered by the legislator; (ii) in the abstract, it is also possible to assert that the system of informational defects in consent provided for by the Civil Code is only illustrative and regulates only partially the distribution of pre-contractual risks, primarily assigned, together with pre-contractual liability, to the general clause of good faith and, therefore, to the interpreter.

With regard to the current Italian legal system, the first option is unacceptable, precisely because the regime of defects in consent appears to be deficient and in need of revision.[118] All that remains, therefore, is to follow the second path.[119] This leads precisely to a less extensive interpretation of typical informational defects in consent, opening up the possibility of an 'atypical mistake' (or, better, of many 'atypical mistakes') in the middle zone between mistake and fraud.[120]

[118] This is the case, on the other hand, with the PECL, whose regime of defects of consent makes it possible to create a unitary system of pre-contractual distribution of risks, primarily regulated by law through the regime of the defects of consent. See below, in the last paragraph.

[119] From this, it follows that, even if the law had always accepted the idea of defects of consent as remedies, it would be necessary today to update the traditional system through recourse to the general clause of good faith to review the whole unitary system of defects of consent and of the pre-contractual liability. Simply, this process would have long since led to the outcomes that now will be proposed, without the need to go through the idea of incomplete defects in consent, which give rise only to liability for damages.

[120] As far as duress and incapacity are concerned (ie defects with which we do not deal), no analogy is needed, because duress and incapacity are not regulated in such a limited way that an axiological gap need be opened. Nonetheless, an extensive interpretation is necessary; to be more precise, the interpreter must construe these defects in consent according to the idea

cc) Analogy, Special and Exceptional Provisions, Legal Certainty and Protection of *Bona Fide* Purchasers

We must take on, and respond to, a possible criticism. It could be argued that the Italian system does not allow analogy for defects in consent and in general for exceptional rules (Art 14 preliminary provisions to the Civil Code).[121]

This argument is unconvincing: the exceptional nature of a rule should not be confused with its special nature, which indicates the existence of a subsystem within which analogy is certainly allowed, and the difference between the special rule and the exceptional rule itself depends on a functional reasoning, similar to that which has just been completed.[122] Nor can the principle of legal certainty nor that of the protection of third parties be invoked in the opposite direction: legal certainty is weakened as much by a system of vices of consent, interpreted extensively, as by one that allows an analogical interpretation of their statutory provisions; the protection of third parties is not undermined if avoidability is extended, simply because under Italian law avoidability has effects vis-à-vis third parties only if they are not *bona fide* purchasers or if the purchase is free of charge, ie in cases in which their reasons are of less merit than the reasons of the protected party.[123]

dd) The Need for an Analytical Construction of the System of Informational Defects in Consent

We have now to pinpoint whether and how a new construction directly based on a good-faith oriented balance of parties' interests can also take account to some extent of those legal categories and concepts already developed by scholars and judges that are not outdated, as well as of the texts of the provisions that come to light. If this were not the case, that is to say, if this new construction forced the interpreter to arrive at excessive hermeneutical twists, it would not be acceptable, and progress in the system could only be made through legislative reform.

We shall see, however, that the interpretative revision proposed not only avoids hermeneutical stretches, but also fully respects the other legal categories which were already in use and are now not outdated, while, moreover, allowing the provisions of the Civil Code on mistake and fraud to be read in a plain and simple way.

of the 'mobile system', and therefore considering that the requirements established by the statutory law regard only some typified situations and may be lacking in others that are equally relevant.

[121] See M. De Poli, *Asimmetrie informative e rapporti contrattuali* (Padova: CEDAM, 2002), 106.

[122] See L. Gianformaggio, 'Analogia' *Digesto delle discipline privatistiche - Sezione civile* (Torino: UTET, 1987), I, 320, 328-329, and F. Gallo, 'Norme penali e norme eccezionali nell'art. 14 delle "disposizioni sulla legge in generale" ' *Rivista di diritto civile*, I, 1 (2001). See also P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1984), 202-203.

[123] See R. Sacco and G. De Nova, n 76 above, 612.

III. A System of Informational Defects in Consent Based on Pre-contractual Good Faith

In the following paragraphs, we shall consider how it is possible to create an orderly and coherent system of pre-contractual good faith and defects in consent: that is, a system of defects in consent directly based on the balancing of pre-contractual risks.

This will require (para III.1) a functional evaluation of the reciprocal position of the parties during the negotiations (para III.1.a); an analysis of how the pre-contractual protection offered by the law works in general (para III.1.b); and a more specific examination of the types of informational defects in consent (para III.2.a) and their remedies (para III.2.b).

1. The Pre-Contractual Relationship Based on Reliance

It is not necessary to reprise here the long-standing debate on the nature of pre-contractual liability.[124] On the contrary, it is important to say a few words about the object of pre-contractual protection. These remarks can be modulated according to the preferred theory on the nature of pre-contractual liability (contractual, non-contractual, or of a third genus).

Here we shall limit ourselves to what is strictly necessary to establish a suitable framework for the study of defects in consent.[125]

a. The Role of Pre-Contractual Reliance

As soon as two parties come into contact for the purpose of forming a future contract, the conduct of each gives rise to reliance on the part of the other party. However, this 'reliance' is not to be understood, as the Italian literature usually understands it, as reliance on the fair conduct of the other party.[126] Reliance, on the contrary, is on the fact that the other party has a certain propensity (gradually changing) to make a future contract (whose content is gradually defined during the negotiations).[127]

The fact that this reliance can and does arise with a certain content, directly derives, on the one hand, from the fact that, objectively, the situation can give rise to it according to good faith and, on the other hand, from the fact that the concrete situation coincides with the abstract one that enables it. As soon as

[124] See A. Albanese, 'La lunga marcia della responsabilità precontrattuale: dalla *culpa in contrahendo* alla violazione di obblighi di protezione' *Europa e diritto privato*, 1129 (2017).

[125] More widely in A.M. Garofalo, 'Il ruolo dell'affidamento nella responsabilità precontrattuale' *Teoria e storia del diritto privato*, 1 (2018), also with regard to the nature of pre-contractual liability.

[126] See, lastly, C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015), 127 and 129, and C. Amato, *Affidamento e responsabilità* (Milano: Giuffrè, 2012), 125.

[127] This idea is closer to the German thesis of Kurt Ballersted and Claus-Wilhelm Canaris: see n 26 above.

there is such a situation and a party activates this reliance or intentionally gives the impression of doing so, a pre-contractual relationship is created in its favour.[128] As soon as the other party becomes aware of an objective activation of reliance, a pre-contractual relationship is also created in its favour.[129]

This does not exclude the fact that reliance, although it is regulated by the legal system in its objective reasonableness and in its specific and ever-changing content, must also be subjectively activated by the party. Therefore, reliance is protected within the limits of what is objectively reasonable and what is subjectively supposed. In that instance, the relevant reliance is the one that offers the narrower protection for the party, between reliance on what is objectively reasonable and reliance on what is subjectively supposed.

The core of this relationship (of these two relationships: one for each party) is the tension towards a certain future contract, the content of which is specified during the negotiations. This tension is protected not by a right of performance, but in the negative.[130]

The legal system foremost protects the party from erroneous reliance when this is due to misconduct on the part of the other party, allowing it to claim damages related to this reliance (reliance – or negative – interest).[131] It must be assumed, however, that this compensation cannot exceed the limits of the satisfaction of its positive interest, since the party could not be protected more and better than if it had concluded the contract (where it would have been able, in the event that failure of performance is imputable to the other party, to claim the expectation – or positive – interest).[132]

Moreover, the legal system protects a party from erroneous reliance deriving from the misconduct of the other party or even from an exceptional situation in some way imputable to the other party, allowing the party to break off at no cost the negotiations or to cancel the contract already concluded without cost.

Alongside this nucleus of reliance, which we can call 'pretensive',[133] the pre-

[128] Except for the case of *falsa demonstratio*, ie when the parties explicitly or implicitly agree to give another meaning to their words or conducts.

[129] Again, except for the case of *falsa demonstratio*.

[130] V. Emmerich, see n 29 above, para 201.

[131] Regarding the *negatives Interesse*, see H. Dedek, *Negative Haftung aus Vertrag* (Tübingen: Mohr Siebeck, 2007).

[132] About these expressions (positive, negative, expectation, reliance interest) see R. Zimmermann, 'Art 9:502. General Measure of Damages' in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 1455, 1458, and, in the common law literature, the well-known study of L.L. Fuller and W.R. Perdue, 'The reliance interest in contract damages' 46 *Yale Law Journal*, 52 and 373 (1937).

[133] It is worth explaining the meaning of 'pretensive', which derives from the Italian term '*pretensivo*'. According to Italian law, in any obligatory relationship, two parts can be distinguished: (i) the debtor must perform the obligation (ii) without damaging the creditor. While the second part refers to protection of the pre-existing interests of the creditor, the first part refers to the obligatory conduct that the debtor is obliged to maintain (to give or to do or not do something), so that the creditor can force him or her to maintain this conduct by demanding performance

contractual relationship also consists of a 'protective' part, which ensures that each party is always protected from damage caused by the other party acting against good faith and related to the negotiations.[134]

Let us see better how pre-contractual legal protection works.

b. Pre-Contractual Protection in General (Breaking Off Negotiations, Defects in Consent, Other Damages)

An analysis of the legal protection offered by pre-contractual liability requires a separate examination of the pretensive and protective cores of the pre-contractual relationship.

aa. Pretensive Core of Pre-Contractual Relationship

The pre-contractual relationship can be infringed both in its pretensive and in its protective core.

Pretensive-core infringement concerns the problems of breaking off negotiations and defects in consent that we consider here (mistake and fraud).

The object of reliance of each party is, as has already been said, the fact that the other party has a certain degree of propensity to make a contract having a certain object that gradually becomes more specific. The discrepancy between this reliance and the reality of things is legally protected.

It can happen, first of all, that a party believes – because the other party induces it to believe or because it spontaneously believes something wrong, in a way recognised or recognisable by the other party – that the other party has stronger intentions to conclude the contract than it actually does. This discrepancy is relevant if the gap between what is supposed and what is real is sufficiently wide. In such a case, the protected reliance does not overlap with the reality and has an autonomous content.

As soon as the discrepancy emerges, the party may abandon the negotiations at no cost and, if there has been misconduct by the other party, charge it for the incurred costs.

To be precise, there is misconduct where the other party has given rise to the erroneous reliance or has acknowledged it and this conduct was imputable

through a claim that in Italy is called '*pretesa*' (literally 'pretension'). In the pre-contractual relationship, two components can be distinguished: besides the protective one, which is deputed to protect the pre-existing interests of the party, there is a 'pretensive' part, that is characterized by the aspiration of the party to satisfy further interests through conduct of the other party (ie through its consent to the conclusion of the contract). Unlike the obligatory relationship, in this case the party cannot demand performance (cannot demand the conclusion of the contract): its expectation is not protected by a demand for performance, but only through a demand for compensation, which moreover is limited to its reliance interest, in the event of misconduct on the part of the other party.

[134] In this sense Claus-Wilhelm Canaris spoke of '*Anvertrauenshaftung*': see C.W. Canaris, n 26 above, 539-540.

to it. Imputability here lies in the fact that there were no exceptional circumstances justifying this conduct: for example, a third party who by means of duress had forced the other party to give rise to this erroneous reliance.[135] If the other party breaks off negotiations without a reason that, with regard to the stage of the negotiations, can be considered legitimate, the reliance will be retroactively considered erroneous from the moment when the party could no longer withdraw on the basis of that reason (or without any reason).[136] If the negotiations are entirely false as the other party entered into them without any intention of concluding a contract, the reliance will be considered wholly erroneous from the very beginning of negotiations.[137]

In such cases, the compensation will concern the wasted expenses and lost opportunities, the latter within the limits of the positive interest.[138] Positive interest is to be understood in its continous mutability, starting from the moment in which the discrepancy between reliance and reality occurred; therefore, the maximum limit must be assessed with reference to the opportunities lost at each moment. However, it is not possible to duplicate lost opportunities if they are incompatible with each other.

As far as mistake and fraud are concerned, however, it must be borne in mind that reliance relates to a contract which is gradually changing. Problems will arise here where a party considers the negotiations to concern a contract different than the one about which the parties are negotiating or that which is in fact concluded.

The relevant discrepancy here, in the case of conclusion of a contract, is the one between the content (largely intended) of the contract that is in fact concluded and the one which the party intended to conclude. This relevance is based on the rules (referred to below) of mistake and fraud, inspired by a balance of pre-contractual risks between the parties.

The remedies that may be granted in these circumstances can be restitutory or compensatory, ie can lead to the avoidance of the contract and, where appropriate, to compensation. With regard to their nature, avoidance will cancel the contract; compensation will be assessed on the loss resulting from the unnecessary

[135] In other words, it is necessary to distinguish fault (or intentionality) as an element of the state of affairs of the duty and the element which renders its breach imputable to the party and gives rise to compensation. More precisely, as far as imputability is concerned, this liability tends to be a strict liability.

[136] See also Art 2:301(2) PECL.

[137] See also Art 2:301(3) PECL.

[138] This limitation is normally not accepted by the Italian scholars: see for example V. Pietrobon, n 32 above, 118, and F. Benatti, n 57 above, 151; for a different opinion, see C. Scognamiglio, 'La conclusione e la rappresentanza', in N. Lipari et al eds, *Diritto civile* (Milano: Giuffrè, 2009), III, 2, 195, 239. On the contrary, however, German scholars usually accept this limitation: see Ha. Stoll, 'Tatbestände und Funktionen der Haftung für *culpa in contrahendo*', in H.C. Ficker et al eds, *Festschrift für Ernst von Caemmerer zum 70. Geburtstag* (Tübingen: Mohr-Siebeck, 1978), 435-436.

negotiation within the limits – for the lost opportunities – of the positive interest. The question of possible compensation without avoidance involves the problem of prejudiciality, which shall be discussed later. After the conclusion of the contract, the discovery of a defect in consent may lead to damages that also take into account the loss resulting from having relied on being bound by a different contract. Before the conclusion of the contract, the detection of the error may lead to breaking off negotiations. This breaking-off may be imputable to the party who did not inform the other party of the error from the moment that it was compulsory according to good faith.

A different type of error is that concerning the validity of the contract that is concluded (as opposed to its content); it is this error that is referred to in Art 1338 of the Italian Civil Code.

This error is relevant whenever an invalid contract is concluded (for the sake of simplicity, we consider only the case of nullity)[139] and the other party had noticed or could have noticed that the party was not aware of this invalidity (nullity).[140]

The remedy in this case is a compensatory one. The other party will be liable for the discrepancy between the (valid) contract that the party supposed had been concluded and the (invalid) contract that was concluded if: (i) both parties could have been aware of the nullity, but in fact only one party was so aware and did not communicate it to the other party,[141] excluding exceptional cases in which the other party seemed to be aware of the nullity; or (ii) only one party ought to have been aware of the nullity or did actually notice it, being closer to the source of information or simply becoming close to a source of information that was distant to both parties, and did not inform the other party, excluding exceptional cases in which the other party seemed to be aware of the nullity.

Here too, compensation consists in what was lost during the negotiations, within the maximum limit of the positive interest (in its continuous mutability) for the lost opportunities. Before the conclusion of the contract, the same items of losses are compensated and, even in the absence of liability and compensation, each of the parties may abandon the negotiation (unless the other party, only negligently unaware of the ground of invalidity, offers to continue it

[139] In very particular cases, avoidability or inexistence of the contract may also lead to compensation according to Art 1338 (for example, when a threatened party does not promptly inform the other party about its intent to avoid the contract, even though the threats have ceased). See, for example, G. Patti and S. Patti, n 51 above, 204.

[140] Also in such cases fault (or intentionality) are elements of the state of affairs of the duty of information. Nevertheless, breach of the information duty must be imputable to the party: for example, there is no imputability if a party informs the other party of the nullity, but this information is not received for reasons of force majeure (L. Mengoni, see n 40 above, 271). As before, also in such cases this liability tends to be, as far as imputability is concerned, a strict liability.

[141] According to one traditional opinion, if a party is at fault, it cannot demand compensation, even in cases of intentionality on the part of the other party: see, for example, R. Scognamiglio, n 77 above, 223. This opinion is not persuasive, because intentionality is always considered to be more serious than negligence.

by overcoming the cause of invalidity). After the conclusion of the null contract, compensation will also account for subsequent losses, due to the fact that the party trusted that it had concluded a valid contract.

bb. Protective Core of Pre-Contractual Relationship

The other side of the pre-contractual relationship is the protective one, which protects the pre-existing interests of the party who takes part in the negotiations (while the pretensive part protects, in the negative, the expectation of satisfying further interests through the conclusion of a certain contract).

The other defects in consent (duress and incapacity) are related to this protective part. In these cases, the protected party did not rely on a different contract, but simply did not want to, nor have to, conclude any contract (or any contract like the one concluded). Breaches of duties of confidentiality[142] and to take care of goods also belong to this protective part.

In such cases, the remedies offered by the law will be compensatory and, sometimes, restitutory (allowing for the avoidance of the contract). In cases of duress, it is also possible that the cancellation of the contract does not give rise to a right to compensation. This is for instance in cases where the threats are exercised by a third party, without the other party being aware of it.

2. Informational Defects in Consent: Types and Remedies for Mistake and Fraud

The demonstration of the proposed thesis now requires an analytical indication as to what the typical and atypical informational defects of consent are in a system revised by interpretation, as well as what the related remedies are.[143]

The following construction will be inspired by a political choice that balances solidarity and freedom; it will be aimed at the creation of concepts and rules that reflect the statutory texts, that respond to the interests at stake, while also ensuring certainty.

a) Types of Informational Defects in Consent

The new construction requires an explication of typical and atypical informational defects in consent.

For every defect in consent the corresponding legal provisions will be cited, specifying what new interpretation is proposed. We shall see that, even if all the informational defects in consent are based on a distribution of pre-contractual risks, the typical mistake does not coincide with misconduct, while fraud coincides with the most serious misconduct. Between these two typical defects there is a

[142] See Art 2:302 PECL.

[143] More widely in A.M. Garofalo, *Informazione precontrattuale e vizi del volere. Contributo allo studio dei vizi atipici*, currently being completed.

large grey area, in which the atypical informational defects in consent are located. Some of these are suitable grounds for the avoidability of the contract, while others justify only a pecuniary remedy, namely damages.

aa) Classical (Typical) Mistake

Following the proposed thesis, the types of mistake expressly regulated by the Civil Code (typical mistake) must be suitably reduced in breadth. It is appropriate to first discuss the two subtypes of typical error (1 and 2), and then their regulation (which is based on the requirements of recognisability and essentiality: 3 and 4).

1) The first subtype of typical mistake corresponds to *mistake as to the declaration or its content* (Arts 1429, 1430 and 1433). Italian scholars usually distinguish between '*errore motivo*' (error that leads to the conclusion of the contract; Arts 1429 and 1430) and '*errore ostativo*' (error that affects the enunciation or the transmission of the declaration; Art 1433),[144] while German scholars distinguish between mistake as to the declaration or as to its content (§ 119 I BGB) on one hand, and mistake in its transmission on the other (§ 120 BGB).[145] This German classification appears to be more fruitful, both because it is more precise than the often-uncertain Italian distinction, and because it is easily adaptable to the text of the Italian Civil Code. For these reasons, we shall use the German classification.[146]

Mistake as to the declaration (or in its transmission) occurs when a party unintentionally says something it does not mean (for example, due to a slip of the tongue).

Mistake as to the content of the declaration occurs when a party says what it means, but does not understand the meaning of its words. For example, when it answers 'yes' to a proposal, without having understood it well, or when it orders a piece of furniture calling it 'drawer unit' instead of 'wardrobe' because it does not know the correct meaning.

In both cases, this is a spontaneous error, ie not caused intentionally by the other party, nor negligently through the breach of its obligation to provide information (which may occur when the other party is required to explain the content of the contracts terms) or through undue, but false and misleading, information (which can induce reliance).

2) Typical mistake can then be a *mistake as to the motives* (again, Arts 1429 and 1430).

By 'motive' we mean everything that pushes a party to contract, including

[144] See V. Pietrobon, n 32 above, 321-328.

[145] See R. Singer, n 91 above, 536-546.

[146] See, recently, Ph. Ziegler, *Der subjektive Parteiwille. Ein Vergleich des deutschen und englischen Vertragsrechts* (Tübingen: Mohr Siebeck, 2018), 213-216. However, Art 4:104 PECL is more similar to Art 1433 Civil Code, than to § 120 BGB.

both qualities of the good or service[147] and subjective circumstances.[148]

Mistake as to the motives, however, opens up many problems, not only because not every motive here is relevant (as we shall see), but also, and above all, because it can easily be confused with other errors and other remedies.[149] For this reason, it is necessary to distinguish several concepts, which we shall also need to do in the following paragraphs.[150]

The first is that of '*contract planned by the parties*' (not coincident, as we shall see, with that concluded). It covers all the motives that have legal relevance and enter the pre-contractual sphere (according to all that we shall say in the following pages). Briefly, these motives normally push an ideal contractor to conclude a certain specific contract under concrete circumstances (normal motives) or become in practice relevant (abnormal motives). In both cases, the conformity to the truth of these motives appears in those circumstances to an ideal contractor modelled on the parties or on the party further from the source of information.

The second concept we encounter is the one of '*contract consented-to by the parties*' (ie concluded). This notion does not always overlap with the concept of contract planned by the parties. In fact, contracts consented-to by the parties legally coincide with reality, even when there is a discrepancy between reality and supposition. However, exceptionally, the consented-to contract coincides with the supposition (and therefore with the planned contract). More precisely, this happens if: (i) the parties are both wrong about a motive which, because of its normality or the way in which the contract is concluded, is consented to, without misconduct of any party;[151] or (ii) there is a warranty, which requires verification of whether the legal regulation of the contract provide for it (with an express statutory provision or not), or whether the parties have consented to this term (expressly or not).[152]

[147] Qualities are, in fact, motives in a broad sense (see n 169 below).

[148] For example, when a person buys a house because he needs to move to another city. See L. Cariota-Ferrara, n 75 above, 557.

[149] As mentioned, Italian scholars and judges often assert that avoidability and warranties are not mutually exclusive (see, for example, V. Pietrobon, n 32 above, 412-413; other opinion in C.M. Bianca, n 54 above, 653-654). In the German legal system, the opposite opinion is dominant: see R. Singer, n 91 above, 592.

[150] When we talk about 'planned' or 'consented-to' contracts, we do not strictly refer to the very content of the contract. In fact, motives can enter the 'planned' or 'consented-to' contract without having any relevance during the performance of the contract. Rather, under Italian law, a motive is effectively embraced by the contract (in a strict sense), thus having relevance also during its performance, where it enters its purpose (ie its cause).

[151] Cases of mutual mistake: see below, para III.2.a.ee.

[152] Whatever the dogmatic conceptualization of warranty, there is no doubt that, if it is applicable, the consented-to contract extends to a certain quality of the good or the service. This is also true in the case of traditional sales (Art 1470 Civil Code), where the seller undertakes to deliver not a conforming good, but rather to deliver the sold good in the state in which it is (Art 1477 Civil Code), and therefore the quality cannot be the object of an obligation, but only of a warranty, as highlighted by L. Mengoni, 'Profili di una revisione della teoria sulla garanzia per i vizi nella vendita' *Rivista del diritto commerciale*, I, 4 and 15 (1953). At most, following a certain

The third concept is that of '*object of reliance*'. The reliance of each party is shaped on the contract planned by the parties, except in two cases: (i) where one party spontaneously makes a mistake concerning the planned contract,[153] and the mistake is recognisable or recognised (but does not shape or modify the contract planned by the parties), in which case its reliance is based on its own mistake;[154] or (ii) where one party knows or ought to know that the reality is different from that conveyed by the contract planned by the parties, and is obliged in good faith to warn the other party, in which case its reliance is based on the reality.[155]

Once we have made these distinctions, we can go back to typical mistake as to the motives.

In general, informational defects in consent (mistake or fraud) always imply that reliance and the concluded contract do not overlap. The discrepancy, however, may result from a gap between the planned contract and the consented-to contract, which occurs in the case of an error caused intentionally or negligently, or from a gap between reliance and the planned contract. The typical error as to the motives is to be understood as a spontaneous error, ie as a gap between what the mistaken party believes and what is evident: therefore, this is a gap between reliance and the planned contract.[156]

There are not many typical errors as to the motives that are relevant as such:[157] this happens, for example, if a party sells a work of art for a very low price, thus showing that it has not realized that the work of art is authentic, even

thesis, it must be considered that in this case the lack of the obligatory effect allows the pre-contractual discrepancy to survive for the party not covered by the warranty: that is, for compensation of the further loss due to the (negligent or intentional) lack of information about the presence of defects on the part of the seller (Art 1494, para 1). On this point see C. Castronovo, *Problema e sistema nel danno da prodotti* (Milano: Giuffrè, 1979), 468.

[153] This will be a spontaneous mistake, in the sense that a person of equal diligence would normally not have made the same mistake.

[154] For cases of typical mistake see n 156 below.

[155] In fact, it does not deserve any protection.

[156] In this sense, typical mistake as to motive is again a mistake as to the content of the declaration. Nonetheless, the mistake does not result in a linguistic error, but in an error as to the qualities of the good, which represent motives in a broad sense. Under this light we can easily understand why German literature is divided about the *Eigenschaftsirrtum* (§ 119 II), ie mistake as to qualities (material or immaterial), which is always relevant if qualities are customarily regarded as essential. Some scholars, in fact, assert that this kind of mistake is in any case an error as to the declaration (so that § 119 II, stating that this mistake must be regarded as a mistake about the content of the declaration, would be wrong, simply because this mistake is a mistake as to the content of the declaration); other scholars, on the other hand, argue that this kind of mistake concerns motives and, for this reason, is a *Motivirrtum* that is exceptionally relevant. Both of these views seem to be right, from different perspectives. See, respectively, H. Brauer, *Der Eigenschaftsirrtum* (Hamburg: Friederichsen, de Gruyter & Company, 1941), 33-34, and W. Flume, n 10 above, 462-463; more recently, R. Singer, *Selbstbestimmung und Verkehrsschutz im Recht der Willenserklärungen* (München: Beck, 1995), 213-219, and W. Hefermehl, n 19 above, 73-74.

[157] Because, by narrowing the scope of typical mistake, we assign the whole matter of disclosure duties to a different mistake (induced mistake).

though this clearly emerges, and the other party does not recognise this error, even though it is readily apparent, and believes that the low price results from other reasons.

3) Both typical mistakes must also be *essential*.

Under Arts 1429 and 1430, a mistake is essential if it relates to: the nature or the object of the contract; the identity or a quality of the object itself which determines the consent;[158] the identity or a quality of the other party to the contract if it determines the consent; any error in law if it was the sole or main reason for the contract; error in the quantity which determines the consent.

As can be seen, the abovementioned catalogue always requires the error to be the determining factor of consent. For some types of mistake this is expressly stated; for others it is implicit in their nature. However, in general, what does it mean that an error is 'determinative' or 'decisive'?

The defect is decisive when it 'determines consent',[159] ie it is such that without it 'the other party would not have contracted', and would not have been satisfied with concluding the contract 'under different conditions'.[160]

In order to understand these formulations, it is necessary, first of all, to understand the correct point of view. The question is not whether the party who concluded a certain contract would have concluded the same contract on any different terms,[161] but whether there is an appreciable difference or not between the contract concluded and the contract supposed, in light of the protected party's interest that has projected itself and has made itself an objective part of the contract relied upon.[162]

[158] Here 'consent' is used in the sense of 'consent to the agreement on the part of each party (both the offeror and the offeree)'.

[159] Something similar is provided for in the PECL, where it is stated that the mistake must be 'fundamental': see Art 4:103(1)(b), according to which the contract is avoidable if and only if 'the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms'. However, unlike the Italian regulation, the same requirement does not apply for fraud and does not exclude the possibility of partial avoidance. Moreover, scholars seem to intend 'fundamentality' to mean 'causation' or 'causality' (*Kausalität*, *Erheblichkeit*), which in the German system distinguishes errors which have no causal relevance and errors which have it (in this system the 'causal' nature of an error is understood in a stricter way than in the Italian legal system, but in a narrower way than, in Italy, the 'incidental' nature of an error): see S. Lohsse, n 112 above, 670-671 and, for the German system, R. Singer, n 91 above, 585.

[160] The decisive character of mistake must be intended in the same sense of the decisive character of fraud (Art 1439), both for textual arguments (the Civil Code uses similar expressions) and for systematic arguments (it would be not only difficult, but also incongruent, intending in two different ways the same 'decisiveness'). Therefore, there is only one category of 'incidental error'.

[161] Titius bought goods for one hundred, believing he was paying one; Titius bought goods X for one hundred, believing he was buying goods Y for one hundred and, in any case, he would have bought goods X for one.

[162] In fact, by making use only of subjective assessments, the realm of incidental error would be too wide: on the other hand, the interests of the party that is not mistaken must also be taken into account. Moreover, in that way it would be quite impossible to find a suitable criterion to quantify the damage suffered.

It is necessary to verify whether the concluded contract more or less satisfies the interest of the protected party, ie whether the difference with respect to the supposed contract resulting from an error as to the terms or as to an external fact is such that the interest is substantially satisfied in any case, even if not perfectly. Obviously, a wide difference does not exclude that the party could have concluded that contract anyway; however, it would have been a different contract, with its own negotiation and its own agreement on price.[163]

To go into further detail here, the interest is still satisfied if the terms in fact differ only on secondary profiles. A discrepancy can normally be wide, according to an evaluation based on an objective-concrete criterion.[164] Nonetheless, a discrepancy that is not so wide can become such if a person has its own reasons and has made this assessment known in a serious, appreciable and recognisable or recognised way.[165] Similarly, a discrepancy that is normally wide can cease to be such if it is objectively deprived of its importance in the economy of a certain contract.[166]

At this point, however, now that the requirements for the mistake to be decisive have been laid out, the question arises as to whether the list of essential errors in Arts 1429 and 1430 is illustrative or exhaustive. In other words, is the essential error a particular decisive error, or is it any error so long as it is a decisive one?

A strict interpretation of the legal provisions would tend toward the former interpretation. However, a different interpretation seems to be more persuasive: the catalogue in Arts 1429 and 1430 refers to those errors which are usually decisive, but nothing excludes that in practice other errors may be so, and may therefore be essential. Again, here the functional argument leads to the overturning of the literal interpretation and imposes an interpretation of the 'system' as 'mobile' or 'flexible':[167] the understanding of 'essential' in the sense of 'decisive' is imposed by an evaluation of the parties' interests, and the mere textual argument cannot lead to a different solution, so that the (more) literal interpretation must be

[163] In this way, the evaluation becomes more objective, without losing its concrete character.

[164] See Art 1429, para 1, no 2, Civil Code.

[165] Following an approach less informed by the principle of solidarity, only recognition would have relevance. As far as recognised (and not recognisable) and induced mistakes are concerned, only recognition has relevance in order to differentiate decisive and incidental mistakes.

[166] These results are confirmed by the historical origin of the (modern) incidental fraud; see R.J. Pothier, *Traité des obligations* (Paris-Orléans: Rouzeau-Montaut, 1761), 42. The incidental fraud – as has traditionally been the case for legal doctrines and statutory provisions in French law: see P.G. Monateri, *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti* (Milano: Giuffrè, 1984), 421-434 – was built by generalizing concrete cases, often in very broad terms, which required a reduction in hermeneutics. This is also the case for incidental fraud: and for this reason Art 1440, which derives from the French law and which in its formulation risks covering too wide a range, must be hermeneutically limited. The same applies, therefore, to all incidental errors. These considerations also help us to clarify the amount of compensation in cases of fraud (see para III.2.b.dd).

[167] W. Wilburg, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Graz: Kienreich, 1950).

revised in light of the parties' interests. As we shall see when talking about remedies, this essentiality allows here and elsewhere for the avoidance of the contract, that is to say, the cancellation of it entirely.

To the proposed construction, it cannot be replied that usually the other party does not recognise the mistake when this does not fall on one of the elements mentioned in Arts 1429 and 1430 of the Civil Code (so that, following the proposed construction, the mistaken party would be too protected). This outcome is not achieved, because the relevant error always must be recognisable (see in this para, no 4 below).

In any case, even in opening the catalogue provided for in Arts 1429 and 1430, not every essential mistake can be considered relevant.

As far as typical mistake as to the motives is concerned, in fact, the motive has legal relevance where it corresponds both to a material or an immaterial quality of a person, good, or service, intended in the broadest sense, and this quality is objectively relevant in the concrete circumstances or has been declared as subjectively relevant by the errant party in a serious, appreciable and recognised or recognisable way[168] (whereas in cases of recognised or induced mistakes, which we will discuss later, any motive may be relevant, as long as it is relevant according to a concrete-objective evaluation, or the errant party has declared its subjective relevance in a serious, appreciable and recognised way).[169] To sum up, the motive must result in a material or immaterial quality of the person, good, or service.[170]

[168] On the contrary, German scholars and judges, who deal with a wide provision such as § 119 II BGB, tend to further limit its scope, arguing that not every error as to qualities is relevant: for example, errors which do not result in errors as to actual and permanent qualities according to a *konkret-objektiver Maßstab* are not relevant (see, among others, R. Singer, n 91 above, 568-569; R. Bork, n 19 above, 335-337). On the other hand, in the Italian legal system, even subjective relevance is sufficient, under the conditions mentioned in the text. The reason is that the Italian typical mistake must be seen as a spontaneous error which is readily apparent (the reality must be well known by every ideal contractor and the party makes a mistake about this reality in a recognisable way) and which refers to a (normally or even abnormally) relevant quality, while the German *Eigenschaftsirrtum* is an error which is relevant if it has a causal influence and which may also not be apparent, because the other party knew the reality, but could not recognise the error, or did not know the reality and did not have to know it (unless the error is as to circumstances important for both parties, since in that case § 313 II is applicable).

[169] We can call motives in a strict sense all those subjective projections of the qualities of the good or service which are not 'qualities' in the broadest sense. On these 'motives in a strict sense', it is normal that the level of attention of the counterparty is lower: for this reason it is correct that the mistaken party assumes the risk of an error, if not recognised or caused.

[170] Some scholars argued that errors in law (Art 1429, para 1, no 4) must be considered to be errors as to mere motives (in a stricte sense): see, on this debate, U. Mattei, 'Errore nel diritto civile' *Digesto delle discipline privatistiche - Sezione civile* (Torino: UTET, 1991), VII, 510, 517. However, errors in law must be considered to be errors as to legal qualities (as argued ibid, 517). As far as errors in quantity are concerned, they can result in: (i) a matter of interpretation (the parties say 100 instead of 10); (ii) an error as to a quality (the content of a warehouse is sold, but the buyer thinks that it is larger than it is in reality); or (iii) an error in the quantity (a party determines its consent on a price that is erroneous). See V. Pietrobon, n 32 above, 416-439, and V. Roppo, n 54 above, 749-750.

Moreover, the error must refer to an assumption which is in the reality false. It would not be sufficient that the assumption may fall apart or may be fulfilled in the future (this requirement does not apply in cases of recognised or induced mistakes).[171]

Finally, there is no duty or burden to correct the mistake whenever there is a 'right to remain silent', ie where the mistake concerns not an element of objective reality, but a subjective assessment (a personal opinion),[172] or involves the incurring of expenses on research and relates to elements that appear to be uncertain to both parties,[173] or concerns a piece of information to be kept confidential.[174] Subjective evaluation can also affect the economic balance of the contract, on which there is therefore no need to correct any mistake unless it results rather in a mistake as to the quality of the person, good, or service.[175]

In conclusion, typical mistake as to declaration or as to the content of the declaration is always relevant as long as it is a determining factor of consent. Conversely, typical mistake as to motive concerns all the above-mentioned determining reasons for consent. Normally, errors as to the nature of the contract or as to the object of the contract are errors of the first subtype. Errors as to the qualities of the object or of the other person are errors of the second subtype, unless indication of the qualities is included in the declaration and serves to identify the object or the person. In the latter case the error is a mistake as to the identity of the object or the person.[176]

4) Typical mistakes must also be *recognisable* by the other party, whose reliance must correspond to the planned contract (otherwise, there would be a mutual mistake).

Since typical mistake corresponds to a spontaneous error, the real factual or legal situation must be clear to any ideal party that is normally diligent. The

[171] See, in Italy, U. Mattei, n 170 above, 514, and, for the German *Eigenschaftsirrtum* (§ 119 II BGB), R. Singer, n 91 above, 573. We could say that future events represent motives in a strict sense; and in this sense motives are not relevant (except in cases of misconduct). Nonetheless, at least in the Italian legal system (where the error must be recognisable), it seems possible – even if not normal – that the probability of a future event, evaluated with a certain degree of accuracy and on the basis of certain actual facts, objectively represents an actual assumption.

[172] See n 188 below.

[173] See n 189 below. Something similar happens in the cases of conscious ignorance, where there is no mistake at all (see S. Lohsse, n 112 above, 671).

[174] See n 190 below.

[175] In the PECL, the concept of mistake is wide (every 'mistake of fact or law existing when the contract was concluded', also deriving from an inaccuracy in the expression or transmission of a statement), but is limited by Art 4:103(2), according to which 'a party may not avoid the contract if: (a) in the circumstances its mistake was inexcusable, or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it'. Nonetheless, it is not easy to understand what Art 4:103(2)(a) refers to: perhaps the recognisability of the mistake, but this is already reflected in Art 4:103(1)(a)(ii); perhaps the exclusion of protection in cases of fault on the part of the mistaken party, which, however, recalls old opinions, not suited to modern (Italian) society. In this regard, see S. Lohsse, n 112 above, 671-673.

[176] See W. Flume, n 10 above, 458-460.

mistake of the protected party, in turn, must be readily apparent to the other party, who is not obliged to discover the error, but normally notices it. In fact, Art 1431 of the Italian Civil Code states that, 'in relation to the content, the circumstances of the contract or the quality of the contracting parties, a person of normal diligence *could* have detected', and not '*should* have detected' the mistake. The other party, in other words, inevitably discovers the error, paying normal attention.[177]

This applies both to the mistake as to the declaration or as to the content of the declaration, and to the mistake as to motive.

The requirement of recognisability limits the scope of typical mistake, avoiding the negative consequences of the broadening of essentiality. Indeed, in fact, recognisability will be more frequent for mistakes relating to central elements of the contract, and vice versa.

bb) Recognised Mistake

The recognised mistake may be, alternatively, 1) a typical mistake that is also concretely recognised; 2) a typical mistake that lacks concrete recognisability and that nevertheless is recognised; 3) a mistake similar to the typical one, recognisable or even merely recognised, but not essential.[178]

1) A *typical mistake that is concretely recognised* does not pose particular problems.

Recognition of the mistake means that the distribution of pre-contractual risk assumes particular forms. While a typical mistake that was only recognisable entitles one party to cancel the contract despite the other party's reliance on its validity, a typical mistake that was recognised corresponds to true misconduct on the part of the other party that did not correct the mistake.[179]

[177] This outcome implies the fact that typical mistake refers to a discrepancy between reliance and planned contract, so that the error is recognisable by a person who knows the (evident) truth. However, this restrictive construction is different from the traditional Italian one, in which mistakes recognisable but not correct and mistakes caused by a lack of information overlap. A construction similar to the traditional Italian one is, to be sincere, followed not only in Germany, but also in the PECL: see 4:103(1)(a)(ii). This latter provision, however, states that the contract may be avoided when 'the other party *knew* or *ought to have known* of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error', which is rather different from providing that 'the other party *could* have detected the mistake'. In any case, this PECL provision implicitly means that it is contrary to good faith to leave the mistaken party in error when the mistake was spontaneous and recognisable, but not recognised (otherwise in this case the contract could not be avoided). This result is clearly not persuasive for the Italian sensibility.

[178] As said, the recognised mistake can concern also a 'motive in a strict sense' and also (the probability of) a future event, with the usual exception of the grounds for exclusion (subjective appreciations, agreed uncertainty, confidentiality). Of course, there must be a knowledge of the real factual or legal situation on the part of the party that is not mistaken: it is not sufficient, for example, to have a mere doubt as to the probability of the future event, if it results in a subjective assessment.

[179] Since recognised mistake must be… recognised, it must be added that the abnormal

From this, two corollaries derive: (i) first of all, the mistaken party also has at its disposal a remedy for damages, as we shall see below; (ii) secondly, the mistake is not relevant when the erroneous assumption of the other party has already entered the content of the contract by way of construction. This occurs in those cases where the party that is not mistaken explicitly or implicitly allows it to happen, adhering – so to speak – to the mistake of the other party.[180]

2) A typical mistake that is not recognisable, but actually recognised, does not fall within typical mistake, because Art 1431 of the Italian Civil Code cannot be applied to it.[181] Likewise, a typical mistake that is not essential, but is determining and recognised, does not fall within the scope of typical mistake.[182]

These are cases of an atypical mistake, which we could call '*recognised decisive mistake*'. In any case, the relevance of this error does not pose particular problems: it derives from the fact that this mistake corresponds in all respects to pre-contractual misconduct.

3) A typical mistake, besides being recognisable, must be decisive. If there were a similar, and therefore spontaneous, mistake, recognisable and recognised, or even simply recognised, but not decisive, this could be relevant as an atypical mistake. We could call this category '*recognised incidental mistake*'.

If such a mistake were only recognisable, it would have no legal relevance. Conversely, if it were recognised, it would have legal relevance, coinciding with misconduct, and giving rise only to compensation, as we shall see below.

Such a mistake, even though not decisive, must nevertheless have causal relevance (normal in the circumstances, or declared by the mistaken party in a serious, appreciable and recognised way).[183] In order to verify such causal relevance, it is not correct to ask whether the party, or an ideal party, would have concluded the contract under those conditions even after the error had been discovered; it is necessary to ask whether the concluded contract and the assumed contract do not entirely correspond, so that, even if the former substantially satisfies the interest of the party, it differs from the latter in certain elements concerning price or other contractual terms, or does not correspond to the motives of the party, and this discrepancy is relevant either normally or subjectively (ie

motive must also be declared causally relevant in a way that is not only serious and appreciable, but also recognised (and not only recognisable or recognised).

[180] See P. Barcellona, *Profili della teoria dell'errore nel negozio giuridico* (Milano: Giuffrè, 1962), 55-86. In Germany, scholars refer to this priority as '*Auslegung vor Anfechtung*': see R. Bork, n 19 above, 322. Nonetheless, in Germany the realm of interpretation is much wider than in Italy, because every recognised mistake as to the declaration or its content, and indeed, according to some scholars, every recognisable mistake, changes the content of the contract (where the party that is not mistaken could understand what the other party meant).

[181] In this sense we follow the well-known thesis of Pietro Barcellona (n 60 above). However, we have to grant avoidance in these cases also, differently from that asserted by the author.

[182] In particular, when the mistake is as to motive in a strict sense, as already pointed out.

[183] In addition, and with regard to any kind of error, if the non-mistaken party or the defrauding party can prove that it was not materially relevant causally, the error has no relevance.

declared by the mistaken party in a serious, appreciable and recognised way).

cc) Induced Mistake (by an Informed Party or by an Uninformed Party)

An 'induced' mistake – ie a mistake which is 'caused' by the other party, in the forms that we shall see – is an atypical mistake, because it does not find any express regulation in the Civil Code. We shall call the correspondent category simply '*induced mistake*'.

This kind of mistake occurs when the error is not spontaneous, but negligently caused by one party, which leads the other party to legitimately rely on an erroneous factual or legal situation. The induced mistake may be decisive or incidental; in any case, it must be causally relevant, either normally under the circumstances, or by virtue of subjective idiosyncrasies of the party, declared in a serious and appreciable way, and recognised by the other party.[184] The relevance of this mistake implies that the other party actually relies (more or less knowingly) on the erroneous factual or legal situation.

The induced mistake may be an error as to contractual terms or, as happens commonly, as to motive. No use may be made here of the recognition requirement provided for by Art 1431 of the Civil Code, which concerns a very different situation (that of spontaneous error).

Induced mistake as to the contractual terms or as to the motives brings us to consider the topic of *duty of disclosure* and that of *misrepresentation*, the two of which must be discussed separately.[185]

[184] If declared merely in a recognisable way, we could ask ourselves whether there is a typical mistake, even though the real factual or legal situation is not readily apparent to both of the parties, as normally happens with regard to this kind of mistake. The negative answer is more persuasive, because otherwise the position of the party that is not mistaken would be too burdensome. In any case, 'recognised' here means 'that it has been recognised or that the other party, by virtue of its conduct, gives the clear appearance of having recognised'.

[185] The duty of disclosure has been the subject of a wide doctrinal debate in the last few years. See, in Italy, G. Grisi, n 66 above; A.M. Musy, *Il dovere di informazione. Saggio di diritto comparato* (Trento: Università degli Studi di Trento, 1999); S. Grundmann, 'L'autonomia privata nel mercato interno: le regole d'informazione come strumento' *Europa e diritto privato*, 257 (2001); G. Vettori, 'Le asimmetrie informative tra regole di validità e regole di responsabilità' *Rivista di diritto privato*, 241 (2009); P. Gallo, 'Asimmetrie informative e doveri di informazione' *Rivista di diritto civile*, I, 641 (2007), C. Camardi, 'Contratti di consumo e contratti tra imprese. Riflessioni sull'asimmetria contrattuale nei rapporti di scambio e nei rapporti "reticolari" ' *Rivista critica del diritto privato*, 549 (2005); R. Senigaglia, *Accesso alle informazioni e trasparenza. Profili della* conoscenza *nel diritto dei contratti* (Padova: CEDAM, 2007), 1-68; in Germany, see R. Schwarze, *Vorvertragliche Verständigungspflichten* (Tübingen: Mohr Siebeck, 2001); S. Breidenbach, *Die Voraussetzungen von Informationspflichten beim Vertragsschluß* (München: Beck, 1989); H. Fleischer, *Informationsasymmetrie im Vertragsrecht. Eine rechtsvergleichende und interdisziplinäre Abhandlung zu Reichweite und Grenzen vertragsschlußbezogener Aufklärungspflichten* (München: Beck, 2001); in European law, see C. Castronovo, 'Information Duties and Precontractual Good Faith' *European Review of Private Law*, 560 (2009); D. Kästle-Lamparter, '2:401: Duty to Disclose Information', in R. Zimmermann and N. Jansen eds,

1) A duty of disclosure[186] arises when a party is visibly closer to a source of information and, for this reason, is in a visibly asymmetrical position with respect to it.[187] In this case, the party may be obliged already to disclose this information during the negotiations, in two different cases: (i) if the party is aware of this information of which the counterparty does not seem to be aware, and if this information does not concern subjective opinions, including those relating to economic equilibrium,[188] does not involve expensive research foreseeable in their importance to both parties,[189] or does not concern data on which there is a right or even an obligation of confidentiality[190] (as in cases of typical mistake). In this case, lack of information or erroneous information can never be intentional, but

Commentaries on European Contract Laws n 36 above, 411, 415-419; from a comparative perspective, see also R. Sefton-Green ed, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005); with regard to law and economics, see A.T. Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' 7 *Journal of Legal Studies*, 1 (1978).

[186] With regard to disclosure duties and the situations in which they arise, see the criteria in Art 4:107(2) PECL, ie the cost of the information, the distance of one party and the proximity of the other to the source of the information, the relevance of the information. These criteria, to tell the truth, are set for fraud (and, therefore, for intentional non-disclosure); conversely, for error negligently caused by failure of the duty of disclosure, Art 4:103(1)(a)(ii) should apply, according to which the contract can be avoided in the case of misrepresentation or non-disclosure contrary to good faith, provided that the further conditions of point (b) are met and that the exclusions of point (2) are not met. In any case, in order to understand when the non-disclosure is contrary to good faith, criteria similar to those of Art 4:107(2) must be used.

[187] This is the case not only if (i) one of the parties is in a particular contractual position with respect to the source of the information, but also if (ii) it is simply aware of the information (of course, provided that the information is not easily accessible and obvious).

[188] Within the subjective opinions, assessments related to the convenience of the contract should be included (in particular, judgments of the price, high and low, on the existence of similar and better products, and also all subjective judgments of a good or a service that may derive from third parties for whom the good or the service is addressed). See R. Schwarze, n 30 above, 378-379.

[189] This occurs first of all in the case of studies which entail costs and which both parties, in view of their position, could have foreseen as necessary and normal and could therefore carry out. This information relates to aspects which the contract leaves, by its very nature, uncertain and of which each party bears the risk. On this point, see R. Singer, n 91 above, 526 and 581. This exception to the general rule of information (information that has entailed costs) can include all information that has been acquired by virtue of the position of a party and that has an economic value closely linked to the same position, so that, if obliged to disclose the information, the party would lose its role in the market. For example, a person who buys a painting considered a worthless copy by a non-professional seller and who is very familiar with works of art must disclose that the picture is authentic, because his knowledge may be used for various purposes, including economic ones, other than the conclusion of contracts relating to falsely attributed works of art; on the other hand, a person who sells a good that is about to be superseded by a new product is not obliged to disclose this information, because, if it did so, it would risk leaving its stocks unsold and losing its role in the market. On this point, see R. Schwarze, n 30 above, 379-380.

[190] For example, if a person buys a ring for his girlfriend, the other party has no duty to inform him that she has fled to another country with a new partner, when this party knows this information thanks to his friendship with the (now) previous girlfriend. See R. Schwarze, n 30 above, 377.

must always be negligent (otherwise there would be a fraud);[191] or (ii) if, even though the party is not aware of this information, it is obliged to find (and share) it, because the information does not concern subjective opinions, does not involve expensive and foreseeable research, or does not concern confidential data (again, as in cases of typical mistake), and the party, due to its contractual position, is (visibly) close to the source of information and it would be absolutely disproportionate to require the other party to inform itself.[192] Where it is not obliged to find the information, there may be a mutual mistake.

The induced mistake (caused by a lack of information) may concern the contractual terms or the motives.

An induced mistake as to the terms occurs when a party, due to its standing, is obliged to explain the content of the terms. This is the case whenever a person is in a position that makes it technically more competent and can imagine that the other party does not understand the meaning of certain terms or supposes to conclude a contract under a different regulatory regime. Such a situation does not normally arise in a contract between equal parties. Lack of information, however, may not give rise to a defect in consent if the question is already resolved by interpretation or supplementation of the contract (ie if the concluded contract corresponds to that which the protected party relied upon).

An induced mistake as to motive, which is much more frequent, concerns a normal or abnormal motive which a person declares as essential in a serious, appreciable and recognised way.

If a contract is concluded, the breach of this duty to provide information may give rise to a warranty or may give rise to a defect in consent depending on whether or not there is a discrepancy between the planned contract and the concluded contract. Where there is no contractual warranty, reliance will be breached unless, of course, the party to be informed knew the relevant facts anyway. In this case the error is caused, and not spontaneous, precisely because the duty of disclosure exists before the error. Otherwise, we would speak of a duty to correct the spontaneous mistake.

For example, this occurs when a person buys a property considering it quiet

[191] Art 1112-1 French Civil Code deals (only) with pre-contractual situations in which a party has information that the other party does not have, and states that this information be disclosed whenever the other party's ignorance is legitimate or results from a legitimate expectation on the part of the other party. This criterion, like the one that excludes disclosure duties in relation to information that does not have a '*importance déterminante*' or that relates to the '*valeur*', is similar to that proposed in the text (although there are some differences in detail). See G. Chantepie and M. Latina, *Le nouveau droit des obligations. Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz, 2nd ed, 2018), paras 180-190; F. Terré et al, *Droit civil. Les obligations* (Paris: Dalloz, 2nd ed, 2019), 367-375.

[192] These are exceptional cases, in which one party, due to its distance from the source of the information, cannot acquire it or can acquire it only with a considerable effort, while the other party, due to its position, contractually relevant, is (visibly) close to it, so much so that it would be absolutely normal for it to know the information. In most cases, the legislator dictates an express rule in such cases, but sometimes this is not so. See D. Kästle-Lamparter, n 185 above, 418-419.

because of the context of open country in which it is located, and the seller: (i) is aware that the property is noisy for some exceptional reason, but negligently believes that the buyer is already aware of it and does not inform him or her, or simply forgets to let him or her know it through the agent who conducts the negotiations; or (ii) is not aware that the property is noisy for exceptional reasons, and does not inform the buyer.

2) An obligation to provide (correct and proper) information also emerges where a party voluntarily provides information.[193]

A simple declaration can put one party in an asymmetrical position and can lead the other party to trust this party,[194] other than in cases in which: (i) the declaration is a statement concerning a subjective opinion also inherent to the economic equilibrium of the contract, unless the party seriously[195] exempts the mistaken party from carrying out certain checks, for example, on the normal amount of the price; (ii) the declaration is a statement concerning an element that does not have causal relevance (already) recognised with respect to the conclusion of the contract; or (iii) the declaration is a simple exaltation of a product (mere puffery), which does not give rise to reliance because it is unreal, exaggerated, vague, not serious, or joking.[196] In the event that causal relevance is recognised later than the declaration, or the exaltation of the good or service in practice (even though not in the abstract) has a deceptive significance and later than the declaration this is recognised or is otherwise recognisable by the party, the mistake of the other party may be relevant as a recognisable or recognised mistake.

The false and deceptive statement gives rise to a distorted reliance and, alternatively, to a warranty or to a defect in consent (unless the matter can be resolved by interpretation or supplementation of the contract). If the declaration is negligent, it will be an atypical induced mistake; if it is intentional, it will be a fraud. Otherwise, the error may result in a mutual mistake, under conditions which will be discussed below.[197]

[193] See R. Schwarze, n 30 above, 375-376. The same applies if the party takes on the task of informing itself in order to inform the other party (ibid 382-383).

[194] In such a case, asymmetry therefore results from the declaration itself. It can also happen that the information is initially correct, but becomes erroneous later. In this case, the informing party is obliged to correct it if it, with diligence, could have known the correct information. See R. Schwarze, n 30 above, 383.

[195] For example, the seller can exempt the buyer from a market investigation by seriously reassuring him about the value of the good, or by providing him with an expert opinion, or informing him of other proposals that have been received. See also, on this point, V. Roppo, n 54 above, 762-763.

[196] In the PECL system, see Art 4:103(1)(a)(i), together with point (b) and paragraph (2), about which we have already spoken, and which here must be adapted to the particular ground for avoidability.

[197] According to S. Lohsse, see n 112 above, 664, under the PECL, avoidability would be allowed in any case of misrepresentation, even if not negligent. This interpretation is not persuasive; in this case avoidability is allowed if the requirement of point 4:103(1)(a)(iii) (mutual mistake), with its own grounds of exclusion, is met. However, such a hermeneutical choice suffers from

An example may be that of the party who acquires a painting and, although not having a particular position with respect to the seller and to the good, declares that he knows the painting well and negligently, rather than fraudulently, adds that he is certain that it is a copy, seriously exempting the other party, who is selling inherited goods and is not acting as an expert, from any control.

dd) Fraud

Fraud always requires a caused error, be it as to the terms or as to the motives. The error must be causally relevant, either normally under the circumstances, or by virtue of subjective idiosyncrasies of the party, declared in a serious and appreciable way and recognised by the other party.

In the case of fraud, the lack of information or the misrepresentation is intentional (an oblique intent – '*dolo eventuale*' – would not be enough; a direct intent – '*dolo diretto*' – is necessary).[198] In this sense, the expression 'artifices' contained in Art 1439 of the Italian Civil Code can be revisited, without moving too far from its first meaning.[199]

A fraud can occur either by omitting due information, or by providing incorrect information, where there is an intentional breach of a duty to provide information or intentional misrepresentation.[200]

Intentional non-disclosure is not relevant if there was no obligation to provide information, already known to the party, by virtue of its object and content. With regard to this duty we can recall what has already been said, above.

Intentional misrepresentation is not relevant if it has no deceptive effect, ie if: (i) it concerns a subjective opinion, including all that concerns the economic balance of the contract; (ii) it has no normal or subjective causal relevance from the mistaken party's perspective, on the basis of elements known to the person making the statement; or (iii) it is mere puffery.[201] Deceptive capacity must be verified in practice from the point of view of the deceiver, ie by assessing whether the deceptive capacity, even if apparently absent, actually existed and the deceiver

the difficulties of interpreting a text which is not based on a certain degree of cohesion in the society for which it is intended, nor on a set of shared legal doctrines, nor on a political choice.

[198] For there to be a '*dolo eventuale*' it is necessary that a person fails to inform or provides incorrect information knowing that it is creating an error or at least knowingly accepting this risk, or provides information that it knows not to be, or doubts to be, correct. In this case, no fraud can be assumed.

[199] Therefore, a *dolo colposo* has no place in the Italian legal system.

[200] See in Germany C. Armbrüster, '§ 123 BGB. Anfechtbarkeit wegen Täuschung oder Drohung', in *Münchener Kommentar* (München: Beck, 8th ed, 2018), paras 14-17; in France F. Terré et al, n 191 above, 336-338; for the PECL regulation of fraud, which can be found in Art 4:107, see S. Lohsse, 'Art 4:107: Fraud', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 689, 693-694.

[201] The unsuccessful joke gives rise to a caused error or malice depending on whether the deceiver notices it before the conclusion of the contract (as long as the joke could not succeed according to a normal evaluation; if, on the other hand, the joke could succeed, it falls within the *dolus bonus* and at most there may be a recognisable or recognised error).

was aware of this.

The fraud may be decisive or incidental. There is a peculiarity here: since it is a case of fraud, the distinction in question can depend on subjective elements of the deceived party, even if they were not made known to the deceiver, as long as they appear to be serious and appreciable. In fact, the existence of direct intent shifts certain risks, even if unforeseeable, to the party in the wrong (see also Art 1225 Civil Code).

ee) Mutual Mistake

The *mutual mistake* is not a typical mistake.[202] It is not regulated by the Civil Code, since Art 1431 on the requirement of recognisability (which places a prerequisite that has nothing to do, precisely, with mutual mistake) does not apply.

Mutual mistake never relates to the contractual terms.[203] In such a case, the mutual mistake would result in a *false demonstratio* and, therefore, into a problem of interpretation. Moreover, if a term cannot be applied due to an extrinsic reason not known to the parties (for example: a price revision clause refers to a statistical index no longer recorded), the contract requires an *ex fide bona* supplementation, possibly through a duty of the parties to renegotiate; in this case, there is no mutual mistake.

A mutual mistake, rather, is related to the motives, and occurs when both parties made the same error, without the lack of information or the misrepresentation being against good faith in respect of one of the parties and without one of the parties (the one who complains of the error) being closer to the source of the information and thus being obliged to inform itself, or having to bear the correspondent risk.[204] A mutual mistake can occur either when the reality is unknown to an ideal contractor under the specific circumstances, or when the reality is readily apparent, but both parties nevertheless make the same error.[205]

A mutual mistake is relevant if it concerns material or immaterial qualities, intended in the broadest sense, which are normally relevant for one party in those circumstances, or correspond to seriously and appreciably declared and recognisable or recognised subjective idiosyncrasies in respect of whose satisfiability the other party has expressly or implicitly shared the risk, or which

[202] See, from a particular perspective, V. Pietrobon, n 32 above, 491.

[203] See R. Sacco and G. De Nova, n 76 above, 522.

[204] It is worth reading the German literature on the *beiderseitiger Motivirrtum*, whose regulation can be found in § 313 II (*subjektive Geschäftsgrundlage*): see, among others, M. Schollmeyer, *Selbstverantwortung und Geschäftsgrundlage* (Tübingen: Mohr Siebeck, 2014), 32-39, and T. Finkenauer, '§ 313 BGB. Störung der Geschäftsgrundlage', in *Münchener Kommentar* (München: Beck, 8th ed, 2019), paras 273-275. On mutual mistake see also Art 4:103(1)(a)(iii) PECL and S. Lohsse, n 112 above, 668-670.

[205] In this last case, it could be argued that the application of the typical mistake's regulation is preferable. This opinion, however, contrasts with the systematic harmony of these remedies.

are evidently not satisfiable.[206] Furthermore, these motives should not concern subjective assessments (including economic equilibrium), nor information that could foreseeably be discovered through an investigation or that correspond to duties of confidentiality. Finally, the erroneous motive must be an actual assumption on which the parties concluded the contract (without resulting in the 'purpose of the contract').[207]

There is a mutual mistake, for example, when an ideal contractor, such as the seller or buyer in a sale (that does not take place in a shop, or in a flea market, but between individuals), does not know – as no one at that time knows – that the painting the subject of the sale is not a copy, but a true masterpiece, and the real (and certain) author is discovered only a few months later.[208]

b) Remedies

Each defect in consent corresponds to specific remedies, which we shall deal with in turn.

aa) Mere Avoidance

Avoidance is the only remedy available in cases of typical (unrecognised) mistake. Simple recognisability does not give rise, in fact, to misconduct on the part of the party who does not correct the error. Under Italian law, avoidance requires the filing of a judicial demand[209] and is always conceived of as full avoidance.[210]

[206] These requirements are very important in mutual mistake and must be assessed with extreme care.

[207] As for spontaneous mistake, here too it would not be sufficient that an error as to whether an assumption will fail or be fulfilled (except in the unusual case in which the very probability of the assumption, calculated with a certain accuracy and on the basis of certain actual facts, has itself become an assumption); conversely, the same circumstance could be the subject of an information duty. On the other hand, an error as to the assumption that it is also the determining common ground falls within the regime of the '*presupposizione*', resulting in the nullity of the onerous contract (Arts 1325, 1345 and 1418, para 1, Civil Code) or avoidability where the contract is a donation (Art 787 Civil Code). See E. Navarretta, *La causa e le prestazioni isolate* (Milano: Giuffrè, 2000), 298-301.

[208] This case cannot be confused with the one concerning the (always uncertain) attribution of the authorship of a work, where it can happen that a critical opinion is denied by a new critical study, the results of which may in turn be denied in the future. Here, the new attributions must be considered as new events that have occurred, which do not affect the sale. See R. Sacco and G. De Nova, n 76 above, 510-512.

[209] See, on the other hand, Art 4:112 PECL.

[210] There is no statutory provision concerning partial avoidance, nor can a partial avoidance be recognised by means of interpretation. In fact, a system that involves the differentiation between decisive and incidental mistake probably does not require a partial avoidance (which, through a legislative reform, could indeed replace the abovementioned differentiation). On the other hand, see Art 4:116, which is provided for in a system where fundamentality is also posited as

If the error is discovered during negotiations, it allows the other party to walk away from the negotiations without consequence. If, however, the other party allows negotiations to continue on a contract analogous to the one on which the mistaken party thought it was negotiating, the latter cannot break off the negotiations on the basis of the mistake.

bb) Avoidance and Compensation

In any case of a decisive error corresponding to misconduct (typical or atypical recognised mistake, induced mistake, fraud), the remedy of avoidance is available together with the remedy of compensation.[211]

Avoidance is not intended here as restitution in kind (therefore it can be activated even in the absence of damages). In turn, compensation cannot replace avoidance; on the contrary, we shall soon see that it is subject to a form of prejudiciality.

In the simplest case, the mistaken or defrauded party can avoid the contract and claim compensation for damages equal to everything lost in the negotiations, within the limits of its positive interest (as already mentioned), and equal to what it has lost as a result of relying on having concluded a contract other than the supposed one (again, according to what has already been mentioned).

If such errors are discovered during the negotiations, they allow the parties to break off the negotiations and to charge part or all of the cost to the party that acted against good faith (depending on when the error occurs, ie when the error should have been corrected for the first time, or when the correct information should have been provided, or when the false information should not have been provided).

Breaking off negotiations is permitted even if the other party allows negotiations to continue on a contract analogous to the one on which the mistaken party thought it was negotiating, since the misconduct results in the mistaken or defrauded party losing confidence. In this case the mistaken or defrauded party cannot claim compensation for damages. However, breaking off and compensation for damages are permitted in the case of fraud, for the same reasons for which rectification is not provided for in the case of fraud, as we shall see below.

cc) Prejudiciality and Rectification

a requirement to avoid the contract. The reason probably lies in the difference between 'fundamentality' and 'decisiveness' of the error.

[211] As we have seen, atypical recognised and induced mistakes always require misconduct, so it is inevitable that they also involve compensation. Only in rare cases do induced mistakes not give rise to compensation, because the duty imposed by good faith has been infringed in a way that is not imputable: for example, if a third party has threatened one party to deceive the other (see n 135 and n 140 above). In this case, only avoidability will be granted and the claim for compensation will be directed against the third party.

1) It is worth asking whether, even in the presence of avoidability and where there is misconduct, the protected party can confirm the contract (according to Art 1444 Civil Code) or can simply omit to avoid the contract and also demand compensation for loss resulting from the missed opportunity to cancel the contract.[212] Likewise, it is worth asking whether, after the expiry of the limitation period for avoidance, the protected party can claim the same compensation.

The issue that comes to light is that of prejudiciality between remedies: ie whether there is a need to claim avoidance (and compensation) instead of (mere) compensation, where both remedies are granted.

In the abstract, if the contract is not avoided, compensation should be assessed on the difference between the value of the concluded contract and the market value, even beyond the limits of the positive interest if the supposed contract and the contract that was in fact concluded were compatible and, on the other hand, within these limits, if the contracts were not compatible and therefore were in fact overlapping. Compatibility exists when the defect in consent is incidental or, even if it is decisive, if the supposed contract would have been substantially different from the concluded contract, but at the same time would have better satisfied the interest of the mistaken or defrauded party. This is for example where the price to be paid was significantly lower in the supposed contract.

In any case, the wasted costs should be compensated, in addition to the loss resulting from the reliance on having concluded a contract other than that which was supposed (including unforeseeable loss, if the misconduct amounts to fraud).[213] Finally, other lost opportunities should be compensated, always within the limits of the positive interest. If the positive interest is lower than the market value and there is compatibility between the assumed and the concluded contract, the missed opportunities would not be compensated.

Returning to the issue of prejudiciality, there are various indications in the Italian legal system that suggest the general existence of prejudiciality: in particular, Art 1227, para 2, of the Italian Civil Code, according to which compensation is not due for damages that the creditor could have avoided by using ordinary diligence, and Art 31, para 3, of the Code of Administrative Procedure, which provides that the administrative judge shall exclude compensation for damages that could have been avoided by using ordinary diligence, including by using the appropriate means of protection provided for. Moreover, without prejudiciality, there is a risk of encouraging opportunistic conduct and of imposing

[212] Likewise, a party can demand compensation without claiming avoidance. This processual strategy does not involve confirmation of contract, but can be treated as a case of confirmation and claim for compensation.

[213] Coincidence between misconduct and fraud is needed; it would be not enough if misconduct had an element of intentionality in itself (as in recognised mistake), because the behaviour of the party that is not mistaken would still not be sufficiently serious (on the basis of the assessments made by the legal system).

a disproportionate remedy on the party that acted against good faith.[214]

Only in the case of fraud can a different solution be accepted, for the fact that *fraus omnia corrumpit* and that the intentional misconduct leads to compensation for losses that were also unforeseeable (Art 1225 Civil Code). The most serious misconduct exposes the party who acted against good faith to a more severe remedy in favour of the other party.

Consequently, where prejudiciality exists, the claim for mere compensation allows compensation only for expenses incurred during the negotiation and missed opportunities (within the limits of positive interest) or the difference between missed opportunities and the market value of the contract (within the limits of positive interest), depending on the compatibility or otherwise of the contract concluded and other missed opportunities, as well as for damages arising from having relied upon a contract other than the one supposedly concluded. No other loss can be compensated; these give rise only to a claim for avoidance, if still available.

2) Rectification (ie adaptation) is the power of one party to adjust and modify the contract, offering to perform the contract as it was supposed by the protected party (Art 1432 Civil Code).[215] Rectification causes the protected party to lose its rights to all other remedies, because it fully satisfies the interest of the person who participated in the negotiation and concluded the contract.

For this reason, rectification is only available before the party is prejudiced in its interest, ie before it is too late.[216] This does not mean that, if damages result from the assumption that the contract is different from what was concluded, rectification is not available. On the contrary, rectification is no longer available if the contract was concluded for a subjective reason which has been exhausted, because, having discovered the error, the party has redirected itself (and can prove it).[217] For example, this is the case if the party buys the good that it was

[214] Art 4:117(2) PECL states that 'If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost its right under the provisions of Arts 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The same measure of damages shall apply when the party was misled by incorrect information in the sense of Art 4:106' (paragraph (1) states that 'A party who avoids a contract under this Chapter may recover from the other party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage'). This provision, as is easy to imagine, 'has caused difficulties in interpretation': see S. Lohsse, 'Art 4:117: Damages', in R. Zimmermann and N. Jansen eds, *Commentaries* n 36 above, 730, 732.

[215] See E. Quadri, *La rettifica del contratto* (Milano: Giuffrè, 1973), 16-110; in the PECL, see Art 4:105(1) and (2), on the 'adaptation of contracts'.

[216] See Art 4:105(1) PECL, according to which, 'The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance'.

[217] In a similar sense, Italian scholars and judges read Art 1432 Civil Code: see R. di Raimo, 'Art. 1432', in E. Gabrielli ed, *Commentario del codice civile* (Torino: UTET, 2011), 130, 133, and G.

supposed to buy elsewhere.

Rectification is a legal power (in a technical sense). The rationale of rectification is that of full satisfaction of the interest and of the *exceptio doli generalis*.

For this reason, rectification is not available in cases in which the defect in consent is so serious that one party loses all confidence in the other party, even if the other party is willing to perform the contract as supposed by the protected party and intends to modify the contract concluded to that extent. These are the cases in which the error amounts to fraud (and, in fact, the Civil Code provides for rectification only with regard to typical mistake, and not to fraud).[218] Obviously, in the same circumstances, an agreement between the parties with content similar to rectification is allowed.

On the other hand, rectification is at least available in cases of typical mistake (to which Art 1432 Civil Code expressly refers) and atypical decisive (and not mutual) mistake. The fact that Article 1432 of the Italian Civil Code states that the party must offer to perform the contract 'in a manner consistent with the content and terms of the contract supposed by the other party' does not allow us to conclude that a mistake which gives rise to avoidability of the contract can also be incidental,[219] since even a decisive mistake, as we have seen, can refer to the content and terms of the contract.

dd) Compensation of the Differential Interest

Where the defect in consent is only incidental, and not decisive, the contract cannot be avoided. The only remedy available is compensation.[220]

Compensation in this case must take into account, in its quantum, the fact that a contract has been concluded, even if it does not fully correspond to the supposed

Marini, 'Il contratto annullabile', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), IV, 1, 309, 424.

[218] It may, however, be assumed that, in cases where fraud is not incidental due to a subjective reason of the defrauded party, not known to the other party, a rectification is exceptionally available, in view of the lesser seriousness of this kind of fraud. Furthermore, the same solution can be applied in cases where fraud is decisive because the contract concluded would have satisfied the interest of the errant party in a qualitatively different way than the supposed contract, but the whole difference resulted in favour of the defrauded party (for example: if the price to be paid was significantly lower in the supposed contract).

[219] In this sense, see M. Allara, *La teoria generale del contratto* (Torino: Giappichelli, 2nd ed, 1955), 188-189. Of course, every remark on this topic assumes a different sense, depending on how 'incidentality' and 'decisiveness' are understood.

[220] Something similar is provided for in the PECL, although this regulation distinguishes between fundamental and non-fundamental mistakes, and not between decisive and incidental errors (see n 159 above). The relevant provision can be found in Art 4:106, which, however, is surely incomplete from an Italian point of view (it refers only to 'information given', and not to failure of disclosure, probably to get closer to common law legal systems, and it does not provide for sufficient grounds for exclusion) and is not totally clear in assessing the quantum of damages. On this point see S. Lohsse, 'Art 4:106: Incorrect Information', in R. Zimmermann and N. Jansen eds, *Commentaries on European Contract Laws* n 36 above, 685, 686-688.

one. For this reason, the party that suffered loss must be put in the position in which it would have been if the supposed contract had been concluded[221] (by calculating the difference between this and the concluded contract).[222]

In the event that the error relates to the price or other terms, this does not pose a problem (it should only be added that the value of the terms will have to be considered not in itself, but by verifying the pecuniary losses to which their insertion actually gave rise). In the event of an error as to motive, compensation must be equal to the value that the subject matter of the mistake proportionally had in the economy of the contract within the limits of the market value of this element, and not directly to its market value (the two values coincide only when the contract is concluded at market values). Where there is fraud, it is possible to imagine that the deceiving party ought to be treated more seriously: compensation will be at least equal to the market value of the subject matter of the mistake, even when the contract is concluded, as a whole, on terms worse than market terms, and may exceed this market value if the contract is concluded on terms better for the deceiver than market terms.

The differential interest that is compensated, as can be seen, is similar to the positive interest, rather than the negative interest, precisely because the contract remains valid. In the case of fraud, the identity is total; in the cases of mistake, the methods of quantification distinguish differential interest from full positive interest.

Even in the case of an incidental defect in consent, rectification is available, and even if there is a fraud, since in this case the contract would be unavoidable in any case. In addition, a claim for compensation pursuant to Art 2058 of the Italian Civil Code is also granted (for example, by modifying the clauses of the contract through a judicial decision). This does not actually shift the discretionary line between decisive defects and incidental defects, which must be traced on the basis of the fact that simple pecuniary compensation satisfies the injured party.

If discovered before the conclusion of the contract, incidental defects allow for breaking off negotiations and the charging of costs to the other party, unless

[221] It is not convincing to assess the difference between the contract value and the market values (it could be zero or negative). It is also not convincing to calculate the amount of compensation determining 'what the negotiation would have led to in the in the absence of misconduct': the other party could in fact prove that it would not have concluded the contract. The 'presumptive' logic must be replaced by a 'differential' logic: the part of the value attributable to the misconduct must be compensated (which coincides with the other two methods of evaluation only in an ideal market, characterised by perfect competition).

[222] In addition, compensation must also be paid for damages resulting from the erroneous assumption of having concluded a contract other than the one assumed. Such damages are usually unforeseeable and, therefore, non-refundable; in the case of fraud, where they are refundable, they normally make the defect decisive and allow avoidance of the contract. Consequently, compensation can normally be envisaged if losses resulting from erroneous reliance are situated at a later stage after the conclusion of a contract, vitiated by non-decisive fraud.

the latter 'rectifies' the negotiation. In the case of fraud, even facing this 'rectification', the defrauded party may leave the negotiation, but will have no right to compensation for the loss.

ee) Renegotiation

In the event of a mutual mistake, the parties will be obliged to renegotiate the terms of the contract in accordance with good faith.

This remedy can be traced back to the one provided for in § 313 II BGB[223] and to the doctrinal debate on good faith renegotiation,[224] which it is not possible to discuss here. If one of the parties refuses to renegotiate according to good faith, the judge will be able to force this renegotiation through the *astreintes*, ie fines for failure to comply with a judicial order.

Renegotiation has a limit, because it cannot be ordered when disproportionate or oversized; in this case, each of the parties may terminate the contract by means of a specific judicial request, modelled on that provided for by Art 1467 of the Italian Civil Code. Renegotiation also concerns contracts that are not long-term ones and that have already been performed, with the ten-year limitation period since the error was discovered being the only limiting factor (or, perhaps, since the conclusion or the full performance of the contract).[225]

IV. Conclusion

The previous analytical construction of informational defects in consent shows that, by reversing the traditional point of view, a new system can be created, based on the interests at stake, but also sufficiently faithful to the statutory texts and to the technical and political choices of the current legal system.

Moreover, the fundamental lines of this analytical construction reproduce those of the recent European soft law instruments.

The PECL, for example, regulates mistake and fraud from the point of view of a distribution of pre-contractual risks.[226] Their system of informational defects

[223] In Germany, see T. Finkenauer, n 204 above, paras 85-109. See also Art 4:105 PECL, according to which 'Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred'.

[224] See, in Italy and among others, F. Macario, *Adeguamento e rinegoziazione dei contratti a lungo termine* (Napoli, Jovene, 1996), 309-440; F.P. Patti, 'Obbligo di rinegoziare, tutela in forma specifica e penale giudiziale' *Contratti*, 571 (2012).

[225] About termination of *Anpassungsanspruch* (adjustment claim) in Germany see T. Finkenauer, n 204 above, para 109.

[226] See N. Jansen and R. Zimmermann, 'Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules' 31 *Oxford Journal of Legal Studies*, 625, 647-650 (2011); N. Jansen, 'Irrtumsanfechtung im Vorschlag für ein Gemeinsames Europäisches Kaufrecht', in H. Schulte-Nölke et al eds, *Der Entwurf für ein optionales europäisches Kaufrecht* (München: Sellier, 2012), 169, 172-177.

in consent is thus based on pre-contractual good faith and on the balancing of the parties' risks.[227] The difference between this and the proposed Italian system is that the PECL, in regulating the vices, in fact also delineates the boundaries of pre-contractual liability. On the other hand, in the revised Italian system, it is on the distribution of pre-contractual risks that both the identification of the defects in consent and the boundaries of the pre-contractual liability are based.[228]

Moreover, in the detailed regulation – on which it is not possible to dwell extensively here – many points in common can be found, even if there are obvious differences. Of course, the revised Italian system must deal with a certain tradition and with certain statutory texts; on the other hand, certain concepts and rules of soft law instruments do not appear to be completely convincing or, in any case, not entirely congruent with respect to the cultural (social) horizon in which the Italian interpreter operates.

In conclusion, it seems that, even in the absence of reform of the Civil Code, Italian scholars and judges are now in a position to update the system of informational defects in consent.

Of course, it may be argued that such a revision is too imposing and broad, such that it would produce considerable uncertainty if it were carried out in a hermeneutic way, moreover because it would require much time and effort to crystallize into shared solutions.[229] As a consequence, it may be considered preferable to wait for a legislative intervention.

Nevertheless, even if this more cautious, legislative approach were adopted, the legislature too would do well to proceed along the lines that have been proposed. Whether by way of case law or statutory law, the proposed regime we have outlined here makes a strong candidate for any new update or reform in the field of informational defects in consent.

[227] See Arts 4:103-4:107, 4:106 and 4:117 PECL. These provide that, even in the absence of avoidability, compensation may be sought under certain conditions. Moreover, the regulation of mistake and fraud is perfectly consistent with a pre-contractual balancing of risks based on good faith and focused on the conduct of the party that is not mistaken, so that we can argue that this regulation encompasses that of the pre-contractual information duties, leaving out only cases of non-essential error for which it would not be appropriate to have a restitutory remedy (ie avoidance).

[228] The PECL system follows the 'first choice' and not the 'second choice', which were identified in para II.4.d.bb.

[229] Another critical point could be seen in the regime of *bona fide* purchasers that buy goods gratuitously, although it could be argued that they do not deserve protection through a property rule.