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PRE-CONTRACTUAL LIABILITY IN ITALY BETWEEN TORT AND CONTRACT LAW. SOME COMPARATIVE REMARKS

RESPONSABILIDADE PRÉ-CONTRATUAL NA ITÁLIA ENTRE O REGIME CONTRATUAL E O EXTRA-CONTRATUAL. ALGUMAS NOTAS COMPARATIVAS

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Abstract: This paper examines the Italian rules on civil liability, focusing on pre-contractual liability. The author examines the Italian traditional legal approach, for which pre-contractual liability is extra-contractual and verifies its actuality in the light of European law and the new jurisprudential orientations of the Italian Corte di Cassazione.

Keywords: Comparative law. Pre-contractual liability. Tort law. Regulation Rome II.

Resumo: O artigo examina as regras italianas sobre responsabilidade civil, com foco na responsabilidade pré-contratual. O autor examina a abordagem tradicional italiana sobre o tema, para a qual a responsabilidade pré-contratual é extracontratual, e verifica sua atualidade à luz do direito europeu e da nova orientação jurisprudencial da Corte de Cassação italiana.

Palavras-chave: Direito comparado. Responsabilidade pré-contratual. Responsabilidade civil. Regulação Roma II.

Summary: Section I: Italian tort law – **1** Introduction – **2** The *elemento soggettivo* – **3** Causation – **4** Unjustified injury – Section II: Pre-contractual liability – **1** Introduction – **2** The traditional paradigm and case law – **3** Case law and pre-contractual liability: from tort to contract? – **4** Pre-contractual liability and comparative law, with particular references to Rome II regulation – **5** Closing remarks

Section I: Italian tort law

1 Introduction

The aim of this paper is to make a short introduction to Italian tort law and to analyse the nature of pre-contractual liability. In Italy it is a matter of discussion

if liability arising from breach of pre-contractual duties has its origin in contract rather than in tort law. Some recent decisions of the Italian *Corte di Cassazione* and articles have reopened the discussion.

Before examining pre-contractual liability it seems appropriate to correctly explain what tort law is and how it is regulated by the Italian legal system.

Even if the Hammurabi Code (ca. 2285 - 2242 b.C.) already had a tort law regime,¹ the modern liability for damages has its origin in Roman law² and in the *Lex Aquilia de damno* (III century b. C.) introduced the so called *damnum iniuria datum*.³

In Roman law, four categories of *delicta* were punished with pecuniary fines: *furtum*, *rapina* (which defended property), *iniuria* (in case of injury of moral or physical integrity) and last but not least, *damnum iniuria datum* that included a series of wrongs, which required a *culpa* or a negligence, rather than *dolo*.

According to Gaius (Gaius, *Institutiones* III, 88) obligation «*summa divisio in duas species diducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto*». The *Digesta* shared Gaius' opinion (in particular Gaius 2, *aureorum*) and there we can find: «*Obligaciones aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris*» (D. 44.7.1).

This principle is still in force in the Italian legal system. According to Art. 1173 c.c. «Obligations arise from contract (*contratto*), tort (*fatto illecito*), or any other act or fact (*ogni altro atto o fatto*) which is capable of producing obligation under the law».⁴

Tort law is regulated at the end of the IV book of the civil code (Art. 2043 c.c. ff.). A general provision is set out according to which: «any fraudulent, malicious, or negligent fact that causes an unjustified damage to another person, obliges the person who has committed the act to pay damages». It is, more or less, a translation of art. 1382 *Code Napoléon* («Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer»).

¹ See rule n. 55 of Hammurabi Code (BONFANTE Pietro (ed.). *Le leggi di Hammurabi, Re di Babilonia*. Milan: Società editrice libraria, 1903, p. 12) that could be translated as follow: "Anyone may open his culvert to water his crop, but if he acts without care, and the water floods his neighbor's field, then he must pay his neighbor for his loss".

² More historical observations in ALPA, Guido (ed.). *La responsabilità civile. Parte generale*, Turin: 2010, p. 25 ff. and, with particular remarks to Roman law, CURSI, Maria Floriana, *Dal danno aquiliano al danno extracontrattuale: le radici romanistiche*, in Aa. Vv., *Itinerari giuridici. Per il quarantennale della Facoltà di Giurisprudenza dell'Abruzzo*. Milano: Giuffrè, 2007, p. 215 ff.

³ See VALDITARA Giuseppe. *Damnum iniuria datum*. Turin: 1996, *passim*. It is not a case that, even today, when in Italy we talk about non-contractual liability we also use the term "responsabilità aquiliana". This term has a clear origin in the *lex aquilia*.

⁴ The English translation of the Italian *codice civile* in this article follows (with some alteration BELTRAMO, Mario; LONGO, Giovanni E.; MERRYMAN, John Henry. *The Italian civil code*. New York: Oceana, 2003).

This definition of tort is deeply influenced by Pothier's *Traité des obligations*. In his work, Pothier describes tort as an «act by which, through fraud or malice, a person occasions damage or injury to another».⁵

The wording of art. 2043 c.c. offers us three elements, that are essential to engage liability: a fault (*fatto doloso o colposo*), an unjustified damage (*danno ingiusto*) and a causal relation (*nesso causale*) between damage and fault.

The Italian *codice civile* provides also specific rules regulating liability of parents, guardians, teachers (art. 2048 c.c.),⁶ employers (art. 2049 c.c.),⁷ owners of animals (art. 2052 c.c.)⁸ or buildings (art. 2053 c.c.).⁹

As we have just said, art. 2043 c.c., according to Stolfi's renowned opinion,¹⁰ foresees at least three elements to engage liability: fault, unjustified damage and a causal link between the two. Now let's proceed to analyse each element and then move on to discuss about the problem of pre-contractual liability in Italy as a form of tort liability or as a contractual one.

2 The *elemento soggettivo*

Italian lawyers describe *dolo* and *colpa* as the mental element of the tort (*elemento soggettivo dell'illecito*). The discipline of the *elemento soggettivo* arises from artt. 2043, 2044, 2045 and 2046 and from the Italian penal code (artt. 42 and 43 c.p.).

⁵ POTHIER, Robert Joseph. *Traité des obligation*, in *Oeuvres complètes de Pothier*. Paris: 1835, p. 427, we can see this definition of tort, already in DOMAT, Jean. *Les lois civiles dans leur ordre naturel*, livre II. Paris: 1767, p. 179 ss.

⁶ Article 2048. Liability of parents, guardians, teachers, and masters of apprentices. The father and mother, or the guardian, are liable for the damage occasioned by the unlawful act of their minor not yet emancipated children, or of persons subject to their guardianship who reside with them. The same applies to a parent by affiliation. Teachers and others who teach an art, trade, or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices while they are under their supervision. The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act.

⁷ Article 2049. Liability of masters or employers. Masters and employers are liable for the damage caused by an unlawful act of their domestic staff and employees in the exercise of the functions to which they are assigned.

⁸ Article 2052. Damage caused by animals. The owner of an animal, or the person who adopted it, for the period of such use, is liable for damage caused by the animal, regardless of whether the animal was in the person's custody or strayed or escaped, unless the person can prove that the damage was the result of a fortuitous event.

⁹ Article 2053. Collapse of buildings. The owner of a building or other construction is liable for the damage caused by its collapse, unless the owner can prove that such damages are not the result of lack of maintenance or construction defects.

¹⁰ See for references ALPA, Guido. *La responsabilità civile*. cit., p. 114.

As general principle liability requires capacity to act. For this reason art. 2046 c.c. states that a person who was incapable of understanding or intending (*incapace di intendere e di volere*) at the time of committing the act causing injury shall not be liable for its consequences, unless the state of incapacity was caused by such person's own fault.

This does not mean that the injured person has no right to compensation. According to art. 2047 (1) c.c., if an injury is caused by a person incapable of understanding or intending, compensation is due from those who were in charge of such person's custody, unless it can be proved that the act could not have been prevented. In this case, if the person charged with the custody is unable to pay compensation for the damage, the court, considering the economic conditions of the parties, can order the person who caused the damage to pay equitable compensation (art. 2047 (2) c.c.).

According to art. 2043 c.c., a person capable to act, who acts with *dolo* or *colpa*, is liable if he or she, with his or her conduct, injures someone. The law disposes: «any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages».

Even if Italian law does distinguish between intentional (*dolosi*) and unintentional (*colposi*) torts, the disjunction "or" demonstrates that *dolo* or *colpa* are equivalent for the purposes of tort law. The *codice civile* does not give a definition of *dolo* and *colpa*, we can find it in art. 43 of the penal code. According to it, an injury is intentional (*danno doloso*) «when the harmful or dangerous event which is the result of the act or omission... is foreseen and desired by the individual as a consequence of his or her own act of omission». In relation to tort law, the *dolo* has not so much importance in case law and it is maybe for this reason that it has also a marginal position in Italian legal literature,¹¹ more problematic and interesting is instead the *colpa*.

We have a *danno colposo (unintentional)* «when the event, even though foreseen, is not desired by the individual and occurs through an act of carelessness, imprudence or lack of skill, or failure to observe laws, regulations, orders or instructions» (art. 43 c.p.). The *colpa* consists in the violation of standard of conduct ordinarily measured by what would do the so called "*bonus pater familias*".

In certain cases, even if the defendant acted with *dolo* or *colpa*, he or she is not liable for the damage caused.

It arises in cases of self-defence (*legittima difesa*, art. 2044 c.c.), state of necessity (*stato di necessità*, art. 2045 c.c.), fulfilment of a duty (*adempimento di un dovere*), approval of the right holder (*consenso dell'avente diritto*) and participation

¹¹ ALPA, Guido. *La responsabilità civile*. cit., p. 250.

in dangerous legal activities like, for instance, extreme sports. In all these cases, liability is excluded because the damage cannot be considered unjust.

It is a universal accepted principle, that persons under certain circumstances may protect themselves from harm, even when such behaviour would normally constitute a crime. For this reason, in case of *legittima difesa*, the person whose act is not responsible for the damages he/she causes and the plaintiff has no right to compensation.

Liability is excluded only if the force used to prevent the harm is reasonable, if there is an aggression to a person or to his/her property and if the defendant has reason to believe there is a real danger. The force used in self-defence, in fact, may be sufficient to prevent or to block any danger, but cannot be excessive. That means that self-defence cannot include killing to defend property, unless personal danger is also involved. Of course self-defence cannot be used once there is no more threat of danger.

Quite similar to the *legittima difesa* is the *stato di necessità* described in art. 2045 c.c. as: «the need to save oneself or others from imminent danger of serious personal injury». Indeed the danger can neither be voluntarily caused by the defendant nor otherwise avoidable.

In this case, the injured person is entitled only to an indemnisation (*indennizzo*) in an equitable amount established by the court.

Even the damage caused during the fulfilment of a duty must not be compensated. We can imagine a policeperson who captures a criminal. There is no doubt that the criminal is damaged by the privation of personal liberty, but in this case the damage is justified by the need to punish the individual.

On the contrary, in case of *consenso dell'avente diritto*, the injured person agrees in advance on the possibility to be damaged. Of course the agreement of the injured person can only concern disposable rights (*diritti disponibili*) and the defendant must have capacity to act.

2.1 Strict liability

Certain provisions of the *codice civile* create a strict liability (*responsabilità oggettiva*) through the action of a presumption of liability. In these cases, liability is imposed regardless of fault and the *onere della prova* (burden of proof) is shifted from the damaged to the person who acted.

Even if the *responsabilità oggettiva* is criticized, because it does not respect the need of an *elemento soggettivo*, in the modern society there are increasing cases of strict liability and the breadth of its application is expanding due to the rise in the types of injury covered.

In the civil code we can find some examples.

According to art. 2050 c.c. whoever causes injury to another, during the performance of a dangerous activity (by its nature or by reason of the instrumentalities employed) shall be responsible for damage, unless this person can prove to have taken all precautions and suitable measures to avoid such injury occurring.

Such provision has its origin in the duty to balance the general interest of the community that could be damaged by dangerous activities (like, in particular, industrial activities) and the need of business.

Some authors describe the provision as a peculiarity of the Italian civil code of 1942,¹² but also under the civil code of 1865 one could find such kind of provision in art. 1153 (1). So I think it is preferable the opinion that art. 2050 c.c. specifies only the general old rule contained in this article.¹³

Guido Calabresi has proposed to use strict liability to put liability on the most appropriate actors (the cheapest cost avoiders). Pardolesi and Tassone resume his thesis as follows: «Assuming that the objective function of the tort system is the minimization of the sum of the injury and injury avoidance costs associated with accidents (primary costs), risk-spreading costs (secondary costs), and administrative costs (tertiary costs), he suggested that the adoption of strict liability, targeted to specified activities, would achieve the goal of cost minimization. The core of an extremely richer message was that the cheapest cost avoider test would abate the administrative costs of courts. Moreover, the manufacturers' ability to spread the costs of strict liability through the prices charged for their products would effectively insure product users against the risks of injury. This masterpiece of normative analysis has deployed an ever increasing influence on thinking about tort law, not only in the US but also in Europe».¹⁴ In their paper Pardolesi and Tassone demonstrate how Calabresi's opinion influenced Italian case-law.¹⁵

Art. 2051 c.c. sets out liability for damages caused by things in custody. It is the so called *responsabilità da cose in custodia*. The rule creates a specific duty on the custodian (*custode*). This person must control the thing and also avoid or prevent that it causes damage to other persons. It is quite important to underline, that *custode*, under Italian law, it is not only the owner of the thing, but also every person who has physical control over it.

¹² G. GENTILE. *Responsabilità per l'esercizio di attività pericolose*. in *Resp. civ. e prev.*, 1950, p. 97 ss.

¹³ FRANZONI, Massimo. *Fatti illeciti: le responsabilità oggettive*, in F. D. Busnelli. *Il codice civile. Commentari*. Milan: Giuffrè, 2009, p. 164 ff.

¹⁴ PARDOLESI, Roberto; TASSONE, Bruno. *Guido Calabresi on torts: italian courts and the cheapest cost avoider*, in *Erasmus Law Review* [Vol. 1 Issue 4, 2008], p. 7.

¹⁵ R. PARDOLESI; B. TASSONE. *Guido Calabresi on torts*. cit., p. 15 ff.

Article 2051 excludes any need to prove fault or negligence: the custodian is liable for any damage the thing in custody causes, unless the injury originates from a “fortuitous event” (*evento fortuito*). As *evento fortuito* it has to be considered any autonomous event, with unpredictable and unavoidable character, which causes the damage.¹⁶

Quite similar is the *ratio legis* of art. 2052 (*Danno cagionato da animali*) and 2053 (*Rovina di edificio*). These rules, like art. 2051, foresee a strict liability following the relation between a person and a thing, which causes damages.

The owner of an animal (or the person who adoperates the animal and for the period of such use), is therefore liable for damage caused by the animal, regardless of whether the animal was in the owner’s custody or strayed or escaped, unless the person can prove that the damage was the result of a fortuitous event (art. 2052 c.c.).¹⁷ Art. 2053 c.c. foresees the liability in case of collapse of buildings. In this case, the owner of the building is liable for the damage caused by its collapse, unless it may be proved that the latter is not the result of lack of maintenance or construction defects.¹⁸

3 Causation

The *nesso di causalità* between *fatto* and *evento* is a prerequisite to liability. Only if there is a nexus between the conduct of the tortfeasor and the injury, the damaged may receive compensation.

Of course, is not always easy to establish if there is a nexus between an injury and a conduct. Sometimes damage is caused by more conducts; in this case, the problem is to determine which cause can be considered adequate. We can imagine the case of an employee, who usually goes to work by train. One day this person takes the car, because there is a strike, and on the way to work has an accident. He or she is taken away in an ambulance but, on the way to the hospital, the ambulance has an accident and the unlucky person passes away.

Which conduct has caused the death? According to the material causation (*nesso materiale*) all the conditions that are a *condicio sine qua non* of the event

¹⁶ FRANZONI, Massimo. *L’illecito* (II ed.), in M. FRANZONI (ed.). *Trattato della responsabilità civile*. Milan: Giuffrè, 2010, p. 600 ff.

¹⁷ See FRANZONI, Massimo. *Fatti illeciti: le responsabilità oggettive*. cit., p. 343 ff. For some references to case law see C. BILE, *Danno cagionato da animali*, in C. RUPERTO. *La giurisprudenza sul codice civile. Coordinata con la dottrina. Libro IV*, (artt. 2028-2059). Milan: 2012, p. 491 ff.

¹⁸ FRANZONI, Massim., *Fatti illeciti: le responsabilità oggettive*, cit., p. 391 ff. For some references to case law see BILE, Corrado. *Rovina di edificio*. in C. RUPERTO. *La giurisprudenza sul codice civile*, cit., p. 510 ff.

are relevant.¹⁹ But in our example, every condition is a *condicio sine qua non*. If there had been no strike, the person would not have taken the car, if the car had not been taken the accident would not have occurred, if an accident hadn't occurred, an ambulance would not have been required and so on. Of course it is easy to exclude the strike and the decision to take the car, as causes of the damage. It becomes more difficult as soon as we have to choose between the first and second accident.

The solution of the problem is given by art. 41. 2 penal code: «Supervening causes shall exclude a causal relationship when they were adequate to cause the event». So, in our example, to establish the cause of death, we have to determine if the person could die after the first accident, or if the injuries caused by the first accident were too light to cause death.

Case law normally speaks about *causalità adeguata*,²⁰ it means a conduct that, in an *ex ante* evaluation, is adequate to determining an event.

Of course, if the act causing damage can be attributed to more than one person, all are liable *in solido*, and the person who has to pay compensation for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom. In case of doubt, the degree of fault attributable to each is presumed to be equal (art. 2055 c.c.). This rule is read as a form of protection for the victim, because it allows the plaintiff to sue the richest tortfeasor.

Article 1227.1 c.c. establishes rules regarding contributory negligence of the damaged party. The rule is taken into consideration for contracts, however according to art. 2056, it can also be applied to tort law. The article reads: «If the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it». The general duty of good faith (art. 1175 c.c.) also requires the damaged party to cooperate to reduce the damage. According to art. 1227.2, no compensation is due for damages that the creditor could have avoided by using ordinary diligence.

So, if the damage could have been avoided or limited with the cooperation of the damaged party, no compensation is obtainable, or if a compensation is due, its amount can be reduced.

Claims for loss of chance are often determined on questions of causation. According to Italian doctrine and jurisprudence, loss of chance constitutes an

¹⁹ TORRENTE, Andrea; SCHLESINGER, Piero. *Manuale di diritto privato*. Milan: Giuffrè, XXI ed., 2013, p. 881.

²⁰ C. Cass. SU, 11. 1. 2008, n. 576, 579, 582, 583 and 584 in *De Jure* database.

“unjustified injury” for purposes of art. 2043.²¹ Loss of chance has been defined as the loss of possibility to pursue a good or an interest that - with its fulfilment – it would have brought about a change or improvement to the quality of life.²² Of course in this case the problem is the uncertainty. Often, to ascertain whether compensation is due or not, the court must first determine the probabilities that the chance would have materialized or not and it is not a simple question.

Many cases of loss of chance involve situations arising from public concourses, or medical malpractice claims.²³ The problem in these cases is, in general, to determine whether the person who was not admitted to the concourse would have had a true chance of winning it, or whether the patient would have had a real possibility to survive or to improve his or her situation, if had undergone a good operation.

4 Unjustified injury

Among legal systems we can distinguish between a typical and atypical approach in tort law. Systems with a typical approach are characterized by a series of offences that the law considers unlawful, as it happens for instance in Germany, where the BGB (§§ 823 ff.) makes a list of rights and interests protected by law.

On the contrary an atypical approach assumes an abstract rule, providing a general regulation of tort law. This is, for instance, the solution followed by the *Code Napoléon*, where article 1382 disposes «Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer». Of course, even where tort is atypical, not every loss caused through fault establishes liability, it would only be such a loss which can be considered unlawful according to the general provisions of the legal system.

The Italian civil code adopted a mixed solution. In art. 2043 c.c. we find a general rule similar to the French art. 1382 and in art. 2047 ff. some provisions regulating some typical tort.

Not every kind of damage can be considered a tort according to art. 2043 c.c. and as we have already said, only an unjustified injury (*danno ingiusto*) can be compensated.

The concept of *ingiustizia* can be seen as the core of Italian tort law. For this reason, defining the concept is one of the most difficult tasks. Sometimes

²¹ FRANZONI, Massimo. *Il danno risarcibile*. in M. FRANZONI (ed.). *Trattato della responsabilità civile*. Milan: Giuffrè, II ed., 2010, p. 80 ff.

²² FRANZONI, Massimo. *Il danno risarcibile*. cit., p. 80.

²³ See CHINDEMI, Domenico. *Il danno da perdita di chance*. Milan: Giuffrè, II ed., 2010, p. 66 ff. and 156 ff.

the concept is also expressed with the term *antigiuridicità*. *Antigiuridicità* means that a conduct is in contrast with the law (*ius*), for this reason, it produces a compensatory obligation on the subject who acts.

We should underline that the *ingiustizia* is strictly connected with the problem of typicality of tort. Normally we can read in books, that, according to Italian law, tort is atypical. There is a general clause, and any intentional or negligent fact that causes an unjustified injury obliges the person who has committed it to pay damages. If we meditate on the article, it is easy to observe that if the legislator says that only an “unjustified injury” is indemnifiable, it means that only an injury to an interest protected by the law can be considered as a tort.

Of course, not every interest can be legally protected. For this reason the court, before to sentence, must determine that a protected interest of the plaintiff was injured.

If we have a look at the case law we can immediately appreciate how difficult it is to determine which interests are legally protected.

In Italy, once, only the so called “*diritti soggettivi assoluti*” (absolute subjective rights) were considered “protected interests”.²⁴ Social changes and economic development have brought developments in the courts’ interpretation of which rights should be protected and consequently the range of hypothesis of unjustified injuries started slowly but is incessantly on the increase.²⁵

After the *Superga*²⁶ and *Meron*²⁷ rulings, the Italian Supreme Court started to consider relative rights (*diritti di credito*) as protected interests; therefore,

²⁴ See CURSI, Maria Floriana. in P. RESCIGNO (ed.). *Modelli teorici e metodologici nella storia del diritto privato*, vol. 2. Naples: Jovene, 2006, p. 23 ff.

²⁵ GALGANO, Francesco. *Le mobili frontiere del danno ingiusto*. in *Contratto e impresa*, 1985, p. 10 ff.

²⁶ Cass. 4. 7. 1953 n. 2085, in *Foro it.*, 1953, I, 1087 ff. «it is true that art. 2043 c.c. does not distinguish between absolute and relative rights, the injustice of the injury - which determines its compensation - most often appears in connection with the injury of an absolute right. However, it cannot be excluded that an unjustified injury can also follow an injury caused to a relative right... The restrictive interpretation of art. 1223 c.c., applicable also in cases of compensation, derives from the express wording of art. 2056 c.c., this rule poses an insurmountable limit to the indefinite sequence of injuries that could be, on the contrary, considered actionable. [The article] recognizes a compensation only for injuries that are a direct and immediate consequence of the illicit act. Such an immediate connection on the illicit act, regarding the injuries of the Torino s.p.a. does not exist; therefore liability has properly been excluded». A compensation for relative rights was already recognised by Cass. 19.7.1935, n. 2840, in *Ann. dir. comp. e st. legisl.*, 1935, XIII. 1, p. 49 ff. and Cass. 17.7.1940, n. 2411, in *Foro it. Rep.*, 1940, *Responsabilità civile.*, n. 305 and 306, in literature BUSNELLI, Francesco D. *La lesione del credito da parte di terzi*. Milan: Giuffrè, 1964, p. 3 ff.

²⁷ Cass. 26.1.1971, n. 174, in *Foro it.*, 1971, I, 342 ff.: «If on the one side the creditor will lose the performance supplied to him by the deceased debtor, on other side, the creditor is freed from his obligation to perform a counter-performance... “Anyone who, with an intentional or negligent act, causes the death of a debtor of a third person is obligated to compensate the damage suffered by the creditor, whenever the death causes the definitive and irreparable extinction of the credit”» and Cass. 24. 6. 1972, n. 2135, in *Giur. it.*, 1973, I. 1, 1123 ff. (so-called *Pasta Puddu* decision).

judges began to compensate the creditor in case of loss of his debtor, when the performance of the debtor was not replaceable.

Few years later, the *Cassazione* went over the question if the debtor was replaceable or not and started to recognise a compensation right to the employer for the payments this person made to the worker, without benefiting from his or her job performance due to the injury.²⁸

In 1988 Italian judges started to consider as interest to protect also the right to patrimonial integrity (*diritto all'integrità patrimoniale*). In the *De Chirico* case, the Court ruled that the harm suffered by the buyer of a false De Chirico's paint, caused by a negligent authenticity declaration, was an injury to the right to patrimonial integrity of the buyer. For the *Cassazione* the right to determine the contents of transactions concerning the assets was compromised. The Court had no doubt that such an infringement can be considered as an unjustified injury under the meaning of art. 2043 c.c.²⁹

Case law demonstrates how the idea of *danno ingiusto* is a mobile border of tort law. Injuries that were not indemnifiable fifty years ago, can now be compensated. The reason of this overruling lies in the changes that came around within the legal system's set of values. This change was made possible thanks to comparative law, to the work of literature and to the increase of judge's awareness. It is important to clarify that in the future the limit of *danno ingiusto* could become bigger or smaller, depending on how the Italian legal system develops.

Between discussed issues of *danno ingiusto* there is also pre-contractual liability. I will discuss this matter in the following section of the article.

Section II: Pre-contractual liability

1 Introduction

Precontractual liability arises out of a harmful conduct that occurs during the drawing up of a contract, even if its effects can be felt subsequently to its termination.

In Italy, pre-contractual liability finds its regulation in articles 1337 and 1338 c.c. The text of the law is not really determining to say if pre-contractual liability belongs to contract or tort law. So the wording of art. 1337: «the parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves

²⁸ Cass.12.11.1988 n. 6132, in *Giust. civ.*,1988, I, 2818 ff.

²⁹ Cass. 4.5.1982, n. 2765, in *Giust. civ.*, 1982, I, p. 1745 ff., see also MAGGIOLLO, Marcello. *Il risarcimento della pura perdita patrimoniale*. Milan: Giuffrè, 2003, passim.

according to good faith» according to art. 1338 «A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter in relying, without fault, on the validity of the contract».

It was, and for some aspects it is, quite an open question in Italian law whether pre-contractual liability has its origin in tort or in contractual law. The most part of literature and also the prevalent jurisprudence, consider pre-contractual liability as a tortious liability.³⁰ Some authors describe it as a kind of contractual liability³¹ and, last but not least, there are also those who speak of a *tertium genus* of liability (atypical or hybrid).³²

To qualify pre-contractual liability as contractual or tortious liability is not only a matter of discussion between academicians. From a practical point of view, if the liability is contractual, the limitation period is the normal ten years limit (art. 2946 civil code). If the liability arises from tort law, article 2947 will apply and the right to compensation will have a shorter five years limitation period, starting from the day in which the fact occurred.

Usually *culpa in contraendo* is considered subject to two conditions: the contract must not be terminated³³ and compensation is limited to the so called «negative interest» (in other words costs and earnings lost during negotiations). Pre-contractual liability is therefore restricted to the case of a party, who withdraws from negotiations without a valid reason, or to the case of a party, aware of the existence of grounds of invalidity, who does not communicate it to the other contractor.

Normally it is also said that if a valid *contratto* is concluded, any unfair behaviour during negotiations is considered deleted and no claim on pre-contractual liability is attainable. In an old decision, the *Cassazione*, confirming its traditional approach, ruled that there was no liability on pre-contract, after the conclusion of the contract, even when a seller did not inform the buyer that the land sold did not have planning permission.³⁴

³⁰ See for instance SACCO, Rodolfo; DE NOVA, Giorgio. *Il contratto*, II. Turin: UTET, 1999, p. 254 ff.; C. Cass. 30.8.1995, n. 9157, in *DVD Juris Data*. Also the European Court of Justice has qualified pre-contractual liability as a tortious liability (See for instance ECJ 7.9.2002, C - 334/00 in *Dir. comm. scambi int.*, 2004, p. 267 ff., with remarks of ONDEI, Alberto. *la responsabilità precontrattuale nella giurisprudenza della Corte di giustizia alla luce della convenzione di Bruxelles*).

³¹ MENGONI, Luigi. *Sulla natura della responsabilità precontrattuale*, in *Riv. dir. comm.*, 1956, II, p. 362 ff.

³² For the atypical nature see SACCO, Rodolfo. *Culpa in contrahendo e culpa aquiliana*. in *Riv. dir. comm.*, 1951, II, p. 82, and for the hybrid one LUMINOSO, Angelo. *La lesione dell'interesse contrattuale negativo (e dell'interesse positivo) nella responsabilità civile*. in *Contr. imp.*, 1988, p. 782 ff., p.

³³ C. Cass. 25.7.2006, n. 16937, in *Corr. giur.*, 2007, p. 539; Cass., 30 12 1997, n. 13131, in *Giur. it.*, 1998, p. 1644; RUBINO, Domenico. *La compravendita*, II ed. in *Tratt. dir. civ. comm. Cicu e Messineo*. Milan: Giuffrè, 1962, p. 361, nt. 22.

³⁴ Cass., 2.11.1961, n. 2537, in *Foro pad.*, 1962, I, p. 1029.

Furthermore, if we consider only the wording of art. 1337 c.c., it could be even dubious that a duty to indemnify is foreseen by the law. The article does not provide a right to compensation. It only foresees a duty to contract in good faith. Literature and case law agree that the violation of art. 1337 and 1338 imposes the compensation of the *interesse negativo* (i.e. costs and earnings lost during negotiations) but not of the *interesse positivo* (i.e. the gain that the party would have been obtained with the performance of the contract). Of course also the conditions provided by article 2043 have to be fulfilled.

Compensation has to be paid only in case of fault, unjustified injury (violation of good faith or art. 1338) and causation between the two.

The traditional approach has recognised certain cases in which damages arising from pre-contractual liability are *danni ingiusti*. The most common are cases of concluding an invalid contract when the other party was aware of or must have known of grounds of invalidity (of course in certain cases the principle *ignorantia iuris non excusat* can eliminate liability)³⁵ and the unjustified breach of negotiation. But it is also undisputed that pre-contractual liability arises also in case of impossibility to conclude the contract caused by fault or unfairness of one of the parties, as well as in the case of unfairness during negotiations³⁶ or breach of duties to cooperate between the parties.³⁷ These cases are extended by case law. In this domain, we can appreciate the influence of jurisprudence on the evolution of the law.

2 The traditional paradigm and case law

According to the traditional teaching that Italian students still learn in their law books,³⁸ no contract must be concluded, compensation is limited to the so called «negative interest» and pre-contractual liability falls under the umbrella of tort law. According to the Italian Supreme Court, pre-contractual liability for violation of Article 1337 of the Italian civil code is a non-contractual liability, which is linked to the violation of the rule of conduct established to protect a fair process of formation of the agreement.

³⁵ See GALLO, Paolo. *Trattato del contratto*, vol. 1. Turin: Giappichelli, 2010, p. 262 ff.

³⁶ A list of unfair acts during the negotiation can be found in R. SACCO; G. DE NOVA. *Il contratto*. cit., vol. II, p. 244 ff.

³⁷ GALLO, Paolo. *Trattato del contratto*. cit., p. 274.

³⁸ See for instance TORRENTE, Andrea; P. SCHLESINGER, Piero. *Manuale*. cit, p. 501 ff.

Part of the Italian legal scholars³⁹ deny the non-contractual nature of this kind of responsibility and states that the *culpa in contrahendo* has a contractual nature. The opposing contractual thesis is based on the assumption that, with the beginning of the negotiations, a true and proper obligatory relationship arises between the parties. According to the supporters of the theory that leads back to the pre-contractual responsibility in the area of contractual liability, there is a “social contact” (*contatto sociale*) between the contracting parties, which leads to the legal obligation to behave in accordance with good faith under art. 1337 of the Italian Civil Code.

Now, I would like to analyse if the traditional teaching is still compliant with the reality, or if case law, over the last years, has altered something in the field of pre-contractual liability. A further question arises from this one. If something has changed, have these changes influenced the nature of pre-contractual liability, or is it still a sector of tort law?

Let’s see some examples where the traditional teaching seems to have been surpassed.

2.1 Delay in concluding contract

According to *Cassazione* 16 October 1998, n. 10249⁴⁰ damages caused by a delay in signing a contract are compensable. The *Cassazione* in this decision overruled its jurisprudence saying that the conclusion of the contract does not make the delay irrelevant, if the behaviour of the other party was contrary to good faith. In this case pre-contractual liability can be applied even if a valid contract is concluded.

In this decision the Supreme Court has clearly overruled the teaching according to which no liability on pre-contract is possible in the case of a concluded contract. The decision does not necessarily means that the source of the damages is a breach of contract or obligation rather than an unlawful act.

³⁹ CUFFARO, Vincenzo. *Responsabilità precontrattual*. in *Enc. dir.*, XXXIX. Milan: Giuffrè, 1988, pp. 1265-1274; MENGONI, Luigi. *Sulla natura della responsabilità precontrattuale*. in *Riv. Dir. Comm.*, 1956; TURCO, Claudio. *Interesse negativo e responsabilità precontrattuale*. Milan: Giuffrè, 1990; D’AMICO, Giovanni. *La responsabilità precontrattuale*. in *Trattato del contratto*, diretto da V. Roppo. Milan: Giuffrè, 2006; G. MERUZZI, Giovanni. *La responsabilità per rottura di trattative*. in *Trattato della responsabilità contrattuale*, dir. by Visintini Giovanna, vol. I. Padova: Cedam 2009.

⁴⁰ C. Cass. 16.10.1998, n. 10249, in *Giust. civ.*, 1999, I, p. 89

2.2 Lack or misleading information

The *Sezioni Unite* of the *Cassazione* in two decisions of 2008 stated that the infringement of information duties by a private banker was grounds for liability when the money saver was damaged through this lack of information.⁴¹

According to Italian law, the customer has no remedies for breach of information duties by the bank.⁴² Case law normally used to make the financial contract invalid for breach of mandatory rules (art. 1418) or void for fraud or error, or to recognise damages under pre or contractual liability.⁴³

According to the *Sezioni Unite* a violation of a mandatory rule prescribing a good faith behaviour, like in this case, cannot make the contract void (*nullo*), because this kind of invalidity must be expressly foreseen by the law.⁴⁴

So the only way to protect the customer in case of violation of the so called “know your customer rules” is pre-contractual liability, if the duty to inform was left out before the conclusion of the contract or during its negotiation, and contractual liability if the duty was violated during the carrying out.

In 2010 this opinion was confirmed by another decision according to which, if an investor buys shares of a company and pays them a higher price than their market value due to misleading information contained in the brochure, this person has right to be compensated if the company that printed the brochure acted with fault.⁴⁵ In this case the damage is the difference between the price payed and the shares’ market value and the liability of the company is set out in article 1337 c.c.

2.3 Disadvantageous contract

Sometimes the information given by one party may lead the other to the conclusion of a less advantageous contract compared to the contract that the party had in mind.

⁴¹ Cass. Sez. un., 19.12.2007 n. 26725 and n. 26724 in *Contratti*, 2008, p. 221 ff. On information duties and pre-contractual liability see CASTRONOVO, Carlo; MAZZAMUTO, Salvatore. *Manuale di diritto privato europeo*, vol. II. Milan: 2007, p. 341.

⁴² On information duties and contract law see GALLO, Paolo. *Introduzione al diritto comparato*, vol. III. *Analisi economica del diritto*. Torino: 2018, p. 64 ff.

⁴³ Trib. Mantova, 12.12.2004, in *I Contratti*, 2005, p. 585 ff.; Trib. Foggia, 30 June 2006, in *I Contratti*, 2007, p. 423 ff., about these aspects see also BATTELLI, Ettore. *L’inadempimento contrattuale dell’intermediario finanziario*, comment to Trib. Milano, 25 luglio 2005. in *I Contratti*. 2006, p. 465 ff. and SANGIOVANNI, Valerio. *La violazione delle regole di condotta dell’intermediario finanziario tra responsabilità precontrattuale ed extracontrattuale*. in the same review, 2006, p. 1133 ff.

⁴⁴ See also C. Cass. 29.9.2005 n. 19024, in *DVD Juris Data*. Some remarks on this decision of *Sezioni Unite* in GENTILI, Aurelio. *Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite*. in *I Contratti*. 2008, p. 393 ff.

⁴⁵ Cass., 11.6.2010, n. 14056, in *DVD Juris Data*.

Let's conceptualize this example: during negotiations for the purchase of a car, the seller said to the buyer that the sale would be subject to a tax benefit, without being aware of the fact that the government a few months earlier had deleted it.

The customer in consideration of its need and of the fiscal benefit buys the car and as soon as he or she realises to not be entitled to the tax benefit, makes a claim against the seller to be compensated for damages since misleading information had been given and in force of such information the contract became disadvantageous.

The seller, according to the traditional doctrine, should be confident that the claim would be rejected as unfounded. There was no pre-contractual liability in this case, because the parties entered into a valid contract. But here again the Supreme Court overruled its opinion. According to the *Cassazione* in this case pre-contractual liability could not be excluded.⁴⁶ It is true that a valid contract was concluded, but as a consequence of the misleading information, the contract became «disadvantageous». In the opinion of the *Cassazione*, the decrease of interest in the contract, due to the breach of good faith has to be compensated and the compensation corresponds to the disadvantage suffered by the party.⁴⁷

If we should write a rule arising from these decisions it would be not the traditional one, but the following: pre-contractual liability imposes to act fairly and to fulfil disclosure duties to the other party. When these duties are not fulfilled, there is pre-contractual liability even if the contract is concluded.

These decisions of the Supreme Court are welcomed by a part of the Italian literature as they were announcing something more: not only a new paradigm of the pre-contractual liability but also a change in its nature from tort to contract.⁴⁸ Now the question is: is this opinion true, or do new rules arising from case law not affect the nature of liability?

3 Case law and pre-contractual liability: from tort to contract?

We have seen some cases in which the Courts have extended the field of contract liability. The old paradigm according to which pre-contractual liability is possible only if a contract is not concluded has been overruled. But in my opinion this does not mean that pre-contractual liability has changed its nature.

⁴⁶ C. Cass. 8.10.2008, n. 24795, in *Foro it.*, 2009, col. 440, with remarks of SCODITTI, Enrico. *Responsabilità precontrattuale e conclusione di contratto valido: l'area degli obblighi di informazione*.

⁴⁷ ROPPO, Vincenzo. *Il contratto*. Milan: Giuffrè, 2001, p. 184.

⁴⁸ See for instance FRANZONI, Massimo. *La responsabilità precontrattuale è, dunque... contrattuale*. in *Contratto e Impresa*, 2013, p. 283 ff.

Franzoni, in one article, supports the opinion that, according to the new orientation of the Italian Supreme Court,⁴⁹ pre-contractual liability must be qualified as contractual, because it arises from a breach of duty: the duty to negotiate in good faith. In his opinion this breach cannot be considered a tort, but it must be seen as a noncompliance of an obligation (*inadempimento di un'obbligazione*). In Italian legal system the liability can be only tortious or contractual, so, according to Franzoni's opinion, the only possibility is to consider this kind of liability as contractual.⁵⁰

The argument that pre-contractual liability is based on contractual liability does not point a further question: should the breach of the duty to act in good faith necessarily be regarded as a breach of an obligation or not, rather, as conduct contrary to the law and therefore unlawful? In this second hypothesis, it is clear that acting in violation of the canon of good faith translates into unlawful conduct pursuant to Article 2043 of the Italian civil code.

In my opinion, if there are no doubts that rules on pre-contractual liability have been deeply changed by case law, we cannot say that also its nature has changed. I think the proof can be found in the civil code itself. Even before the new orientation of the *Cassazione*, artt. 1439 c.c. disposed: «Fraud is cause for the annulment of the contract when the deception employed by one of the contract parties was such that, without it, the other contracting party would not have entered into the contract. When the deception was employed by a third person, the contract is voidable if it was known to the party who derived benefit from it». According to art. 1440, in case of incidental fraud: «if the deception was not such as to compel consent, the contract is valid, even though without the deception it would have included different terms; however, the contracting party in bad faith is liable for damages».

In my opinion these two dispositions are very meaningful in order to demonstrate the real nature of pre-contractual liability. In particular art. 1440. In case of incidental fraud, in fact, there is no doubt that we have a violation of pre-contractual good faith duties. The literature has also no doubt that the article foresees a hypothesis of pre-contractual liability⁵¹ and it is undisputed that the liability, in this case, arises from a tort.⁵²

⁴⁹ C. Cass. 20/12/2011, n. 27648, in *Europa e dir. priv.*, 2012, p. 1227, with remarks of CASTRONOVO Carlo and C. Cass. 21/11/2011, n. 24438, in *Resp. civ. e prev.*, 2012, p. 948, with remarks of SCOGNAMIGLIO (according to this decision the liability arises from the contact between the parties). *Contra* C. Cass. 20/03/2012, n. 4382, in *Resp. civ. e prev.*, 2012, p. 1161 and C. Cass. 26/02/2013, n. 4802, in *Guida al diritto* 2013,(16), p. 50.

⁵⁰ FRANZONI, Massimo. *La responsabilità precontrattuale è, dunque...*, in particular. p. 290 ss.

⁵¹ See GALLO, Paolo. *Trattato del contratto* cit., p. 279; Id. *Introduzione al diritto comparato*, vol. II, *Istituti giuridici*. III ed. Turin: 2018, p. 29 f. and CIAN, Giorgio; TRABUCCHI, Alberto. *Commentario breve al codice civile*. Padua, XI ed., 2014, p. 1440.

⁵² See CIAN, Giorgio; TRABUCCHI, Alberto. *Codice civile* cit., p. 1440.

This means that already the civil code has a case in which, even if a contract is concluded, pre-contractual liability arises. The jurisprudence has only extended the liability from fraud (*dolo*) to negligence (*colpa*). According to case law, the party who gives false informations, because he or she acts with carelessness is to be responsible as if were the party who acted with fraud. In both cases, the contract is concluded and in both cases, the victim has right to compensation. The only difference is the *elemento soggettivo*, but we know that, according to art. 2043, responsibility in case of tort arises from fraud, as well as from negligence or malice. So the jurisprudence seems to confirm, not to abandon the traditional opinion of pre-contractual liability as a tort.

The new orientation of jurisprudence does not influence the nature of pre-contractual liability; on the contrary, it seems to be a confirmation of its origin in art. 2043 c.c. If art. 2043 disposes that any fraudulent, malicious, or negligent fact that causes an unjustified damage, obliges the person who has committed it to pay damages and if to give misleading information causes an unjustified damage, then there is no reason to make a difference between fraud and negligence: in both cases a pre-contractual liability arises and therefore a duty to compensate.

This is also the demonstration that case law has not really overruled the tradition; on the contrary, with its new orientation it has only “closed the circle” coming back to the original pre-contractual liability foreseen in the civil code.

I think it is really important to underline one more aspect that could confirm the necessity to consider pre-contractual liability like a tortious liability. The content of pre-contractual liability is something different to the content of the contractual one. *Culpa in contrahendo* does not encompass the breach of a contractual obligation, it only encompasses non contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract.⁵³ So it could be really confusing to bring this kind of liability under the contractual umbrella.

Contractual liability is something else and something different, it protects the interests of the contractors. On the contrary, pre-contractual liability safeguards (like tort law) a general duty, the duty to act in good faith.

⁵³ CHAHINE, Najib Hage. *Culpa in Contrahendo in European Private International Law: Another Look at Article 12 of the Rome II Regulation*, in *Northwestern Journal of International Law & Business*, vol. 32, 3, 2012, p. 473 ff.

4 Pre-contractual liability and comparative law, with particular references to Rome II regulation

The idea that pre-contractual liability arises from tort law is also widespread in other jurisdictions (like the French one) and not only in Italy.⁵⁴ The first dogmatic analysis of the idea arises from the work of Rudolf von Jhering arising from the contact and the reliance between the parties.⁵⁵ Jhering considered, in particular, the case where one party, while being aware of one or more causes of invalidity, leads the other party to rely on the conclusion of a valid contract. At the base of the innovative theory proposed by Jhering there is, among other things, an interesting analysis on some parts of the Justinian Digest, related to the alienation of a *locus sacer*, *religiosus* or *publicus*, without the seller having informed the buyer that the good is *extra commercium*.

According to Jhering, pre-contractual liability is based on the violation of the duty to act in good faith in the German legal system, however, unlike in Italy, pre-contractual liability is considered to be contractual.

The reasons which lead German law to consider pre-contractual liability as a form of contractual liability are not, however, based in any way on theoretical or conceptual questions.

The choice to bring *culpa in contrahendo* under the contractual liability regime is based on practical reasons, which are basically intended to ensure adequate protection for the injured party. In the German legal system, the rules governing tort liability are extremely limited, since they are subject to numerous restrictions, first and foremost typicality.

On the basis of these premises, in the German legal system, therefore, the rules on contractual liability certainly provide more extensive protection to the

⁵⁴ Some comparative remarks in FARNSWORTH, E. Allan. *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*. 87 *Colum. L. Rev.* 217, 221 (1987); SCHWARTZ, Alan; SCOTT, Robert E.; *Precontractual Liability and Preliminary Agreements*. 120 *Harv. L. Rev.* 661 (2007); NEDZEL, Nadia E. *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*. 12 *Tul. Eur. and Civ. L.F.* 97 (1997); SALEILLES, Raymond. *De la responsabilité précontractuelle*. in *Rev. trim. dr. civ.*, 1907, p. 697; HONDIUS, Ewoud (ed.). *Precontractual liability: reports to the XIIIth congress, international acad. of comp. law, Montreal, Canada 18–24 august, 1990*, Deventer. Boston: Kluwer Law & Taxation, 1990.

⁵⁵ See VON JHERING, Rudolf. *Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, in *Jahrbüchern für die Dogmatik des heutigen römischen und deutschen Privatrechts*, tomo 4, 1861, p. 1 ff. The theory of Jhering was then reworked by the Neapolitan magistrate Gabriele Fagella, who in an article, entitled *Dei periodi precontrattuali e della loro vera ed esatta costruzione scientifica*, published in 1906 in *Studi giuridici in onore di C. Fadda*, III, Napoli, structured the dealings in 3 different phases. The first phase is prior to the formulation of the offer; the second is contemporary; the third is subsequent. The absolute innovation of the theory elaborated by Fagella lies, essentially, in the prediction of the configurability of a form of responsibility for one of the parties not only after the official formulation of the offer, but also in the previous phase.

injured party than the rules on tort law. The reasons for this greater protection are essentially two. Firstly, the limitation period is shorter for tort law. Secondly, under German law, the rules on liability for tort, because of their specific nature, cannot guarantee any remedy for purely economic damages. The choice made in Germany is, therefore, clearly a choice of opportunity rather than a choice dictated by a precise legal ideology.

Finally, the German legal system, with regard to the choice of the criterion to be followed for the determination of the damage to be compensated, was fully in line with the choice made by most European legal systems.

The amount of compensation is based, in fact, on the so-called negative interest: the compensation, provided for the liability for *culpa in contrahendo*, must reflect only the expenses incurred by the injured party during the negotiations and, possibly, the loss of some important opportunities for profit through the conclusion of contracts with third parties, and not also the profits that would have derived from the conclusion of the contract subject of the negotiations failed.

In France the *Code civil*, until the 2016 reform, did not provide any specific rules on *culpa in contrahendo*, but the parties were basically free to terminate the contractual negotiations before the conclusion of the contract. Whether a kind of responsibility had arisen during the negotiations, also before the conclusion of the contract (*dans les situations précontractuelles*) it would be a case of *responsabilité délictuelle*. But the same would happen in case of *faute paracontractuelle* and *faute postcontractuelle*.⁵⁶

In France, pre-contractual liability was considered as a particular form of non-contractual liability and the distinction between negative and positive interest is unknown. The criterion to be used for the quantification of the amount of compensation is that the liable party is obliged to compensate the losses suffered by the injured party.

The French doctrine has developed the so-called theory of *perte d'une chance*, according to which the amount of compensation should also take into account the loss of the possibility, for the injured party, to obtain advantages from the contract not concluded. This kind of theory seems not to disdain the hypothesis of guaranteeing a certain protection also to the positive interest of the injured party.

Article 1112 fr. c.c., introduced in 2016 with the reform of contract law, fills the original gap in the text by providing that: «L'initiative, le déroulement et la rupture des négociations précontractuelles sont libres. Ils doivent impérativement satisfaire aux exigences de la bonne foi. En cas de faute commise dans les

⁵⁶ MALINVAUD, Philippe. *Droit des obligations*, VIII ed. Paris, Litec, 2003, p. 380.

négociations, la réparation du préjudice qui en résulte ne peut avoir pour objet de compenser la perte des avantages attendus du contrat non conclu».

The rule does not refer to the nature of liability in the event of a breach of the obligation to behave in good faith, but scholars do not doubt that it should be framed within the scope of non-contractual liability, in accordance with the traditional orientation of the French jurisprudence.⁵⁷ Liability arises in the presence of negligent conduct during negotiations («En cas de faute commise dans les négociations») and it is extremely probable that the principles developed so far in the case law will continue to be applied.⁵⁸

The *common law* has not an equivalent of the *culpa in contraendo*: under English law, either party may legitimately withdraw from negotiations at any time and for any reason. It must be said, however, that despite this general rule, which fully reflects the dogma of the autonomy of private parties to negotiate, sometimes the party affected by the sudden interruption of negotiations can find some form of protection in order to compensate economic losses suffered.

However, this protection is in no way based on the violation of a general duty of good faith, since it is not recognised, but is based on some of the main categories of tort law, first and foremost misrepresentation (innocent or fraudulent).⁵⁹

In this regard, however, it is appropriate to add that the typical character of the various categories that make up English Tort Law certainly precludes the possibility of guaranteeing, always and in any event, protection to the injured party, who has reasonably relied on the conclusion of the contract, the subject of the negotiations suddenly interrupted. This is precisely the reason that has led, in the United States legal system, to the formulation of the well-known theory of promissory estoppel, a theory that seems to fully acknowledge the essence of the general principle of good faith, as conceived in European civil law systems.

According to the promissory estoppel theory, in fact, one party, which suddenly withdraws from the negotiations, is obliged to compensate the “negative” economic losses sustained by the other party, if, through some of its declarations or, in general, through its particular conduct, it has induced the other party to reasonably rely on the conclusion of the contract. As can be seen, therefore, the innovative side of promissory estoppel theory lies precisely in the fact that the party’s liability,

⁵⁷ See CHENEDE, François. *Le nouveau droit des obligations et des contrats: Consolidations, innovations, perspectives*. Dalloz : 2016, p. 32 ff ; and JUEN, Emmanuelle. *La remise en cause de la distinction entre la responsabilité contractuelle et la responsabilité délictuelle*. LGDJ, 2016, p. 285 ff.

⁵⁸ See CALZOLAIO ERMANNIO. *La responsabilità precontrattuale dopo la riforma del code civil francese. Profili comparatistici*. in *Riv. trim. dir. proc. civ.*, 2017, p. 1301 ff., in particular p. 1306.

⁵⁹ See AHERN, John; BINCHY, William. *The Rome II Regulation on the law applicable to non-contractual obligations*. Leiden: Boston, 2009, p. 254.

which abruptly interrupted the negotiations, is not based on a specific category of Tort Law, but is based on the violation of the general principles of good faith and trust.

This theory has, however, only become established in the USA and has not yet been accepted in the English legal system. The most relevant objection, which is directed against the theory, denounces a total lack of consideration, in relation to the obligation, on the part of each of the parties, to behave fairly and honestly during the negotiations, which implies, in a reasonable manner, the impossibility of withdrawing from the negotiations suddenly and without just cause. In the English legal system, the doctrine of consideration requires that each party can validly bind itself to a given obligation or prohibition only if this commitment corresponds to a mutual sacrifice made by the other party. This is, substantially, the reason that justifies the radical position of the English, according to which, precisely, the only cases in which the withdrawal from the negotiations is to be sanctioned concern the stipulation of an option pact for consideration.

In the common law systems, in which the theory of promissory estoppel has been affirmed (USA and Australia), it has been argued, that the doctrine of consideration is in no way contradicted or questioned. The doctrine of promissory estoppel does not in any way make the transaction that is the subject of the negotiations actionable, which, moreover, has not even been concluded, but, simply, allows to avoid that a party may unjustly suffer an economic loss.

According to those who support the promissory estoppel theory, the general principle of consideration would be contradicted only if the injured party could obtain positive interest protection, but not at all if it were granted, as in reality happens, only custody damages.

Finally, a very particular case, in which the English legal system goes so far as to grant, exceptionally, strong protection to the party who reasonably relied on the conclusion of a contract, which is not formally concluded because of a sudden interruption of negotiations, is represented by the institution of property estoppel.

The estoppel property institution is an exception to the general principle that in English law a contract concluded without the necessary formal requirements is valid, but not enforceable (i.e. it cannot be relied upon in the event of breach of contract). If the parties reach an oral agreement for the transfer of ownership and if the party, who in the light of this agreement should obtain ownership, relies on the oral agreement and begins to incur substantial and irreversible expenses, then, if the owner refuses to formalise the verbal agreement and implement it, the injured party may, exceptionally, appeal to the courts and obtain, on the basis of the estoppel property institution itself, a judgment in which the court orders implementation of the verbal agreement, even though it has never been formalised.

In a certain way we can say that comparative law seems to confirm that the *culpa in contraendo* is a part of tort law. Maybe the most eminent confirmation can be found in Regulation Rome II.⁶⁰ This Regulation defines the conflict-of-law rules applicable to non-contractual obligations in civil and commercial matters. In other cases, the regulation takes into account also the *culpa in contrahendo* or non-contractual obligations arising out of dealings before the conclusion of a contract.

During the drafting of the Regulation it was discussed if the *culpa in contrahendo* should be considered as contractual or tortious. In whereas 30 we read that *culpa in contrahendo* for the purposes of the Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. Whereas 30 defines also what the concept should include. In particular it should cover the violation of the duty of disclosure and the breakdown of contractual negotiations.

If we consider the text of the Regulation, we can immediately appreciate that article 12 (*culpa in contrahendo*) covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract, but regardless of whether the contract was actually concluded or not. Art. 12 covers, for instance, the liability for an innocent misrepresentation made during contractual negotiations.⁶¹

Even if Regulation Rome II regards only conflict of laws and its function is to determine which law should apply to the *culpa in contrahendo*, and even if it is unquestionable that this kind of liability is «at the heart of... the relationship between the Rome II Regulation and the Rome I Regime concerning the law applicable to contractual obligations»⁶² we can state that qualifying such a liability as tortious, the Regulation gives some indication and confirms a European tortious approach to this matter. Even more it confirms that the burden between *culpa in contrahendo* and contractual liability is not the conclusion of a contract as the Italian traditional literature provided for, but the violation of a non contractual obligation presenting a direct link with the dealings prior to the conclusion of the contract.

5 Closing remarks

Determining the nature of pre-contractual liability has considerable practical consequences with regard to the burden of proof, the quantum of liability (i.e. the determination of the damage), the significance of the fault, the formal notice and the limitation period.

⁶⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁶¹ DICKINSON, Andrew. *The Rome II Regulation*. Oxford: OUP, 2008, p. 526.

⁶² So DICKINSON, Andrew. *The Rome II Regulation*. cit., p. 528.

Even though the *Cassazione*⁶³ affirms in some decision that pre-contractual liability has a contractual origin, sometimes called *responsabilità da contatto*, according to the German theory of *culpa in contrahendo*, comparative law and international private law confirm that pre-contractual liability is generally seen as a branch of tort law.

We have already said that the reason that excludes this kind of liability from contractual law is that *culpa in contrahendo* safeguards the general duty to act in good faith and therefore there is not the typical *inter partes* relation of a contract. We have also seen that tort law has evolving borders in Italy and case law has constantly enlarged its field.

Over the last decades, a new paradigm has arisen in European contractual law: the protection of the weak contractual party, in particular consumer protection.

Such protection has also been recently confirmed, imposing a duty to inform⁶⁴ and a duty to act in good faith, before the conclusion of the contract. We may consider, for instance, the duty of information foreseen in the consumer credit directive,⁶⁵ the same duty is also envisaged in financial contracts⁶⁶ and, last but not least, we can contemplate unfair commercial practices.⁶⁷ All these provisions are in a certain way connected to *culpa in contrahendo* and with the duty to act in good faith. The bloom of these rules gives way to the broadening of borders for pre-contractual liability, but it does not mean a revolution of its legal ground.

Sometimes the legislator foresees that the violation of a pre-contractual duty can produce a contractual liability when the contract has been concluded. We can look, for instance, at the article 2.2 lett. d) of the Directive 99/44. The directive foresees lack of conformity if the consumer buys goods that do not «show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling». In this case, if a contract is concluded, the consumer

⁶³ See for instance C. Cass. 20/12/2011, n. 27648, cit. and C. Cass. 21/11/2011, n. 24438, cit. for expressing the theory of the *responsabilità da contatto sociale*.

⁶⁴ See DI DONNA, Luca. *Obblighi informativi precontrattuali: La tutela del consumatore*. Milan: Giuffrè, 2008, passim.

⁶⁵ See Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008, whereas 18, 19, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 43, Artt. 4 and ff.

⁶⁶ See DURANTE, Filippo. *Intermediari finanziari e tutela dei risparmiatori*. Milan: Giuffrè, 2009, p. 333.

⁶⁷ Directive 2005/29/EC of the European Parliament and of the Council, of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market, see MAGRI, Geo. *Gli effetti della pubblicità ingannevole sul contratto concluso dal consumatore. Alcune riflessioni alla luce dell'attuazione della direttiva 05/29 CE nel nostro ordinamento*. in *Riv. dir. civ.*, 2011, p. 269 ff., spec. 279 ff.

will be protected with contractual remedies, even if liability arises from a pre-contractual activity like advertising.⁶⁸

In my opinion in the Italian legal system, we have seen over the last decades a change of the traditional paradigm of pre-contractual liability operated by case law. Now *culpa in contrahendo* can be found, for instance, also in the case of a concluded contract. In conjunction with the new trend of case law, the Italian and the European legislator started to foresee more and more cases in which a form of pre-contractual liability can arise.

This does not mean that *culpa in contrahendo* has become a contractual liability; it only means that the border between tort and contractual liability are getting closer and closer, with the purpose to protect good faith during negotiation and conclusion of the contract, in particular in case of consumer contracts. It follows that when the source of the damage is a breach of an obligation, which is expressly foreseen by law (e.g. breach of information duties), there will be contractual liability, but in all cases in which the damage has its origins in a general breach of good faith, only extracontractual liability can be taken into consideration.

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⁶⁸ MAGRI, Geo. *Gli effetti della pubblicità*. cit., p. 281 f.