Remedy for Fraud in *Cir vs. Fininvest*: Damages or Specific Performance?

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Abstract

The Supreme Court's judgment ruling in favour of Cir's independent action for damages against Fininvest brings to an end proceedings that originated from a judicial decision setting aside the Mondadori arbitration award, a decision that Fininvest had obtained by bribing one of the judges and that had led Cir to reach an out-of-court settlement of the dispute. As far as the Supreme Court is concerned, that settlement is valid and the harm suffered by Cir is to be considered as damage arising from a criminal offence. However, different reasoning could have been employed focusing on the remedies which are related to the stipulation. Where a contract has been entered into as a result of fraud by one party to the detriment of another, the rule that the remedy of avoidance is infungible must be departed from if annulment is futile or impossible. The unpalatable alternative is that of leaving the deceived party without any protection at all.

I. Introduction

There are several tricky questions arising from the *Cir* v *Fininvest* judgment. Undoubtedly that relating to the quantification of the compensable harm is certainly one of the most challenging.[1]

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[1] Among the earliest comments, see C. Scognamiglio, 'Effettività della tutela e rimedio risarcitorio per equivalente: la Cassazione sul caso Fininvest c. Cir' *Responsabilità civile e previdenza*, I, 42-52 (2014); F. Piraino, 'Intorno alla responsabilità precontrattuale, al dolo incidente e a una recente sentenza giusta ma erroneamente motivata' *Europa e diritto privato*, IV, 1118-1177 (2013); and the contributions offered by G. Costantino, A. Palmieri and R. Pardolesi, 'In tema di corruzione di un componente del collegio giudicante e responsabilità' *Foro italiano*, I, 3121 (2013). See also A. Di Majo, 'La via di fuga nel torto aquiliano' *Europa e diritto privato*, 1098-1118 (2013); S. Pagliantini, 'Il danno (da reato) ed il concetto di differenza patrimoniale nel caso CIR-Fininvest: una prima lettura di Cass. 21255/2013' *Contratti*, II, 113- 124 (2014).

At first glance it would seem trouble-free: the amount of compensation awarded should be set so as to match actual damage and loss of profits exactly. In fact, the injured party should not be awarded 'less' – and the infringing party should not likewise be ordered to pay 'more' – than what is necessary to restore the *status quo ante*. Otherwise we would end up with a hybrid situation, with damages that do not compensate or conversely that punish and an injured party respectively defrauded or enriched.

Because of a series of complicating factors, however, it is very difficult to ascertain whether Cir obtained a measure of damages lower or higher than that which it was entitled to: ie if the compensation awarded was adequate or disproportionate.

As will be shown, according to the Supreme Court the harm suffered by Cir is a typical example of damage arising from a criminal offence.[2] By way of exception to what Art 1223 of the Italian Civil Code provides in relation to compensation for lost profits in the context of contractual liability, in this case it is the law itself that requires the court to assess the compensation for lost profits in tort on an equitable basis (Art 2056, para 2, Civil Code), ie having regard to what the court considers fair and just in the particular circumstances of the case.

However, compensation assessed on an equitable basis does not mean that damages for the compensable harm should be assessed without reference to any objective standards. It is true that the adoption of a rough standard for compensation may betray the primary goal of satisfying the victim, yet such an approach has the advantage of heightening the predictability of a damages award. Otherwise, as Atiyah observes,[3] compensation for the loss of profits in tort would turn into a lottery.

Now, in the very singular case decided by the Supreme Court, the compensable harm was held to be the difference between the amount

[2] See G. D'Amico, 'Responsabilità precontrattuale anche in caso di contratto valido? (L'isola che non c'è)' *Giustizia civile*, I, 214, n 46 (2014), earlier again, C. Scognamiglio, 'Ancora sul caso CIR-Fininvest: violazione dolosa della regola di buona fede nelle trattative, giudizio di ingiustizia e alternatività delle tutele di diritto civile' *Responsabilità civile e previdenza*, III, 704-716 (2012). See also S. Pagliantini, n 1 above, 116.

[3] See P. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997), 8.

of the 'fraudulent' out-of-court settlement and the figure initially offered by Fininvest in 1990. Therefore, it could be argued that damages were assessed having regard mainly to the 'reason' why the economic loss suffered by Cir was judged to be significant harm 'caused' by Fininvest.

While nobody can profit from their own misdeeds Fininvest engaged in conduct that was not simply wrongful but actually criminal. Therefore, it is only right that the amount of compensation should fluctuate between reparation and punishment, leaving room for the coexistence of reparation and deterrence thereby excluding those outside options that Fininvest could have raised in an out-of-court settlement, since at the time the Mondadori share price had fallen because of the lawsuit.

Not any less persuasive is the view that the figure for compensation awarded to Cir was considered as the equivalent to the amount of the 'overall harm' that the latter's assets suffered, in the sense of what was required to fully restore the company's competitive capacity to do business. Once Cir signed the vitiated settlement, it lost the chance to invest 'that capital' in other commercial operations.

If that were so, the compensatory function would not be affected by any punitive connotation. The principle, confirmed by the judgment, in accordance with which punitive damages have no place in the Italian legal system,[4] would therefore remain intact.

II. Cir's harm as damage arising from a criminal offence

In the first place, the right to sign an out-of-court settlement *ex fide bona* sounds better than the right not to witness a subsequent setting aside of a favourable arbitral award.[5] However, both are hypostases.

[4] The ostracism of punitive damages by the Italian courts can clearly be perceived in Corte di Cassazione 19 January 2007 no 1183, *Foro italiano*, I, 1461-1467 (2007), with comment by G. Ponzanelli, "Danni punitivi: no, grazie' and Corte di Cassazione 8 February 2012 no 1781, *Danno e responsabilità*, VI, 609-613 (2012) with remarks again by the same G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio'.

[5] That is the opinion of the Supreme Court, amending the Court of Appeal of Milan's judgment.

All of the Supreme Court's reasoning can be summarised by saying that the specific right of compensation granted to Cir must fall within the provision of Art 185 of the Italian Criminal Code (CP) by virtue of the rule that any behaviour constituting a crime obligates the perpetrator to compensate the injured party for the harm suffered: more specifically, the higher profit that Cir would have gained by signing the out-of-court settlement in the absence of an unfair judgment *ex corrupto*.

While it is true that the harm suffered by Cir was pure economic loss, a loss of profits engendered by an offence, it is also true that, in a system where there is no equivalent to the rule enshrined in § 826 BGB, it would be too bold to 'directly' link damages to the perpetrator's fraudulent conduct, ie without referring to Art 185 Criminal Code.

Nonetheless the *reine Vermögenschaden* claimed by Cir ought to be compensated since Art 185 Criminal Code is a 'primary rule' not subordinated to Art 2043 Civil Code so that the former can make up for the absence of the 'unjust harm' criterion contained in the latter. More specifically, Art 185 Criminal Code treats the criminal unlawfulness of behaviour as a criterion for determining the ensuing harm, as if it were a distinct requirement for being awarded compensation: because it is this 'qualified unlawfulness' that replaces the unjustness of the harm that is a *conditio sine qua non* for attaining compensation in tort. There was the precedent – albeit forgotten – of Supreme Court judgment no 1540/1995:[6] for harm caused by crime, the unjustness is *in re ipsa*, say the judges, and thus does not need to be connected to the violation of a right based on delict. It therefore becomes a matter of legal taste, and consequently not much really changes if one speaks of in terms of the unjustness of the harm that flows from the criminal conduct. Both interpretations, however, counteract a heuristic reference to the logic of *Verkerspflichten* or § 823, para 2, BGB.[7]

Sic stantibus rebus, the Court's syllogism is not wrong. It should simply be rearranged underlining that pure economic loss (the settlement signed in worse conditions due to the corruption of the

[6] See Corte di Cassazione 11 February 1995 no 1540, *Foro amministrativo*, IX, 1822 (1995).

[7] But see A. Di Majo, n 1 above, 1110.

judge who issued the judgment) is compensable if there is a rule – specifically Art 185 Criminal Code – which entitles the injured party to a 'merely objective remedy'.[8]

The above mentioned statement is not however *novitas*: the autonomy of compensation in tort, when arising from an offence pursuant to This norm, had been recognised as far back as the first critique on *reine Vermögenschaden*.[9] The overwhelming attention paid by the French scholars to the issue[10] is likewise not to be neglected. In France the latest trend is to *grignoter* fraud/vitiation of consent in favour of tort law whereby courts do not grant the *deceptus*, ie the deceived party, the right to demand subsequent avoidance of the contract pursuant to Art 1116 Civil Code but grant him damages in accordance with Art 1382 Civil Code.

The more authoritative literature criticises this *absorption du dol dans le giron de la responsabilité civile*. Nonetheless, it is a widespread opinion that the above-mentioned choice is the consequence of the dual nature of fraud, projected on the field of remedies. Thinking in terms of the classification of conflicts, we have here an intersection between preventive (contract) and subsequent (liability) conflict.[11]

Nihil novi, then, even if we need to make a second remark in order to avoid misunderstandings.

If the harm arises from a crime, thanks to the direct application of Art 185 Criminal Code, it is possible to treat the Court's entire

[8] See C. Scognamiglio, 'Ingiustizia e quantificazione del danno da sentenza frutto di corruzione di uno dei componenti del collegio' *Responsabilità civile e previdenza*, III, 611-620 (2010).

[9] See A. Di Majo, 'Il problema del danno al patrimonio', *Rivista critica del diritto privato*, II, 297-334 (1984).

[10] See the round table on '*L'absorption du dol par la responsabilité civile: pour ou contre?*', *Revue des Contrats*, III, 1155-1218 (2013). Amongst others see also A.-S. Barthez, 'Contre l'autonomisation de la responsabilité civile délictuelle en matière de dol ibid, 1155-1161 (2013); J. Ghestin, 'Contre l'absorption du dol par la responsabilité civile' ibid, 1162-1178 (2013); G. Lardeux, 'L'absorption du dol par la responsabilité civile' ibid, 1179-1188 (2013); P. Rémy, 'L'absorption du dol par la responsabilité civile: pour ou contre? ibid, 1195-1200 (2013); E. Savaux, 'Résister à l'absorption du dol par la responsabilité' ibid, 1201-1218 (2013).

[11] See especially P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 456.

extended comment in support of its opinion about the liability for a legally binding but unfavourable contract as merely *obiter dictum*.

Some scholars have already emphasised[12] that according to the Supreme Court the compensation awarded to Cir does not fall within Art 1337 or 1338 Civil Code. In other words, the fact that compensation lies outside the field of contract is not due to the widespread but still debated view that *culpa in contrahendo* falls within the domain of tort law. The harm stems from outside contract because it originates from an unjust judgment that serves as a harmful event.

Thus, if not pre-contractual, the inquiry as to the foundation of the liability, ie the controversial principle supported by the Supreme Court according to which the *culpa in contrahendo* principle can coexist with a binding contract, is rather worthless if not counterproductive.

The point about good faith operating as basis for compensation against unfair conduct during negotiations in reality serves as an argument *a fortiori* because if one can claim compensation when a party conceals essential information, it would be unreasonable to suppose that there is non-compensable harm in tort when compared to conduct contrary to good faith the case exhibits a '*quid pluris* … and a *quid alii*'.[13]

The atypical nature of the tort discussed by the Court should be taken seriously: accepting it in a 'weak sense' may mislead one, forgetting that the unfair pre-contractual conduct has been adjudged to be relevant only because it coincides with the subornation of the judge who then went on to issue a judgment unfavourable to CIR. The elegant notation, according to which the reasoning of the Court is a 'message in a bottle' for the next *rationes decidendi*,[14] strengthens and does not deny the sensation of a digression transcending the texture of a case revolving around a criminal offence.

[12] See G. D'Amico, n 2 above, 213.
[13] See the judgment *de quo*.
[14] See C. Scognamiglio, n 1 above, 42-52.

III. Compensation in a voidable contract as a non-fungible remedy: case law

Moreover it is correct to say, as many scholars have already emphasised,[15] that Cir would have adopted different trial strategies, the most orthodox of which would have entailed in the following order:

a) requesting that the judgment be set aside because of the judge's fraud (Art 395, subparas 1 and 6, of the Italian Civil Procedure Code);

b) challenging the out-of-court settlement pursuant to Art 1972, para 2, Civil Code for the purpose of annulling it considering that, at the time of the events, Cir was most certainly unaware of the grounds of nullity;

c) seeking restitution under Art 2033 Civil Code and compensatory damages pursuant to Art 1338 Civil Code.

However, it would have been possible also to claim (and here the Court's contrary opinion is not totally persuasive) annulment of the out-of-court settlement because vitiated by fraud: a defect in respect of which the rules governing out-of-court settlements do not contemplate an *ad hoc* challenge.

It's true that it was not a case of fraud by a third party – here the judge's fraud – under Art 1439, para 2, Civil Code. Nevertheless, there was some scope for applying Art 1439, para 1, Civil Code on the basis that Fininvest's wilful misconduct, through bribery, had obtained a decision – overturning the arbitration award – with the deliberate aim of conditioning in a more advantageous sense the subsequent out-of-court settlement. It is no coincidence that in the reasoning the out-of-court settlement in question is labelled as a 'corrupt carve up'. So a 'machination' on Fininvest's part that had stacked the deck, was plausible, and, so to speak, was *in re ipsa*.

The problem – and here the Court's reasoning is unshakable –

[15] Read, *inter alios*, M. Barcellona, 'Chance e causalità: preclusione di una virtualità positiva e privazione di un risultato utile' *Europa e diritto privato*, IV, 945-990 (2011); G. Iudica, 'Efficacia della transazione e responsabilità extracontrattuale per indebolimento di posizione negoziale' *Responsabilità civile e previdenza*, IX, 1807-1826 (2011) and previously C. Castronovo, 'Vaga culpa in contrahendo: invalidità, responsabilità e la ricerca della chance perduta' *Europa e diritto privato*, I, 1-48 (2010).

was the fact that a ruling setting aside the corrupt judgment would have proved completely 'useless' to Cir. Firstly, the 1991 shares no longer existed and, secondly, the annulment of the out-of-court settlement would certainly have had the effect of restoring the *status quo ante* but the one subsequent to the corrupt judgment and not the Pratis arbitration favourable to Cir that the judgment in question had set aside. That judgment was – as one can well imagine – *res judicata,* with the result of raising the *vexata quaestio* of the revocability of a judgment vitiated by a judge's fraud but nonetheless the product of a collegial decision. Hence, these two factors together disclosed a manifest lack of interest – by Cir – to seek annulment of the out-of-court settlement.

Now, with argumentation resembling the reasoning of the French Courts,[16] according to the Supreme Court it is admissible to discard the action for annulment and focus on the claim for damages in connection with the pre-contractual misconduct. The precedent is Supreme Court judgment no 20260/2006:[17] a borrower omitted to mention her husband's bankruptcy at the time of entering into a loan agreement on the basis that it would have been relevant only in the case of more favourable conditions. This, however, is a rather questionable precedent because a party who waives a defence of

[16] Among the leading cases see Cour de Cassation-Chambre civile I 4 March 1975 no 73-14940, *Revue trimestrielle de droit civil*, 537 (1975). *Amplius* J. Ghestin ed, *Traité de droit civil. La formation du contrat. T. 1 – Le contrat. Le consentement* (Paris: LGDJ, 4th ed, 2013), notes 1294, 1301, 1321, 1437, 1438, 1441, 1457 and 1460 and C. Guelfucci-Thibierge, *Nullité, restitutions et responsabilité* (Paris: LGDJ, 1994), notes 405, 778-781.

[17] See Corte di Cassazione 19 September 2006 no 20260, *Responsabilità civile e previdenza*, X, 2113-2121 (2007), a case on fraudulent omission *causam dans*. But see the earlier contrary Corte di Cassazione 25 July 2006 no 16937, *Giustizia civile*, I, 2717 (2006), that denied damages on grounds of pre-contractual fraud under Art 2043 Civil Code to an intending purchaser to a preliminary contract that can be annulled for having been entered into with a person lacking capacity. The only – dated – precedents for Corte di Cassazione 19 September 2006 no 20260 are Corte di Cassazione 9 February 1980 no 921, *Giustizia civile Massimario*, II, (1980), possibly (but it is very uncertain) Corte di Cassazione 11 July 1968 no 2445, *Giustizia civile Repertorio*, v. Obbligazioni e contratti, n 539 (1968) but not Corte di Cassazione 29 March 1952 no 862, where the Court reasons about wrongdoing under Art 2043 Civil Code but related to a third party in a case where annulment of a contract was not an issue.

specific performance in favour of mere damages behaves in a manner that operates as a form of affirmation of the agreement. And 'affirmation', curing the defect, erases the relevance of the previous treachery from a damages standpoint. There is, in particular, an 'affirmation for valuable consideration', implicit in the claim for damages, that urges '– *par omission – le maintien* [of the contract]':[18] but there is no trace of this hybrid figure in the Italian legal system. Either the fraud is *incidens* and the contract on modified terms is of interest or the fraud is *causam dans* and the contract may end up being useful or not to the deceived party but 'as a whole'. An overlapping of the two circumstances would be … a *hirco-cervus*. The law does not protect an interest of the deceived party that changes *ratione temporis*: an 'amphibological' interest, so to speak.

However in this case – as noted – the situation was very different: the performance of the 'voidable contract' had irreparably compromised the feasibility of restitution. An annulment of the out-of-court settlement, considering the legal and material impossibility of operating a *reductio in pristinum*, made no sense at all for Cir. As a consequence damages, due to the impossibility of repairing the harm done through specific performance, was 'the only remedy' able to assure legal protection against the harm suffered.

Avoidance, depriving of efficacy an agreement wheedled through fraud, is undoubtedly the most adequate technique to prevent or to compensate harm: yet *conditio sine qua non* is that the judgment of annulment succeeds in removing 'the loss'. And, just like in the case *de quo*, it can well happen that removing an obligation is not sufficient because it may prove to be 'useless'. Therefore, the 'uncertainty of restitution justifies granting solely the claim for damages'.

The amount of compensation will naturally be higher or lower depending on how inflexible or elastic the court evaluates the possibility of achieving *restitutio in integrum*. Damages will be highest when the court's evaluation is informed by absolute criteria, lowest if that evaluation is conducted on a relative basis. This latter option seems to be preferable, with reference to possible restitution whenever restoration would give rise to a situation not 'substantially'

[18] See A.S. Barthez, n 10 above, 1160.

different from the original one. Any performance of the contract, in reality, generally changes the order of things.

This example recalls a situation, rather common in the French experience,[19] where the buyer of real estate, deceived by the seller, has important works of renovation done by someone else. In this case avoidance of the contract clearly results more detrimental than compensation aimed at correcting the exchange.

The case of a personal computer sold as new, although second hand, is not so different, where the buyer has got someone else to install some sophisticated and costly applications on it that are not transferable to another model. In this case also there is performance, which alters the situation and consequently avoidance is far less suitable than damages. Likewise if the deceived party is a company that has planned, with reference to the acquired portfolio, a strategy of investment that can in no way be stopped, for example, because the rigged securities belong to a 'holding'. As in the cited examples, one can reasonably talk of compensation as a non-fungible surrogate of avoidance, considering the possibility in all the three cases analysed of remedying the harm solely through damages.

In this case, however, there is no tort liability that transcends its area and competes with the (typical) remedy of avoidance although this could well occur if the running of time forces one to renounce opting for annulment[20] in that the action of avoidance is statute barred. Here too there is an action for avoidance, which no longer pursuable, would leave the harm where it is. Furthermore, due to a sort of necessary conversion, where the *inertia* of the deceived party is not labelled as contrary to good faith,[21] avoidance would revolve

[19] For an acute and incisive report read J. Ghestin, n 10 above, 1177.

[20] An old issue. See, for eligibility, A. Montel, *Azione di danni per dolo e prescrizione dell'azione di annullamento del negozio* (Milano: F. Vallardi, 1933), 558, in reply to A. Motta, *L'azione extracontrattuale di danni per dolo e la prescrizione dell'azione di annullamento del negozio* (Padova: Cedam, 1932) and in *Foro Lombardo*, I, 759 (1932), which, conversely, discerned in 5-year *inertia* an incontrovertible case for affirmation.

[21] As part of that *Verwinkung* which may be relevant here as a form of early termination of action: although still, famously, it exhibits the prevalent idea that maintains that this concept is not conceptualised in the Italian system 'because in opposition to the rules governing the statute of limitations'. See R. Tommasini and E. La Rosa, *Dell'azione di annullamento. Artt. 1441 – 1446*, in F.D. Busnelli ed, *Il*

around damages still reliant on an *incidenter* finding of fraud vitiating the contract.

It is worth stressing that what is involved is an action for damages being brought when the action for avoidance is precluded because of contingent legal reasons. Damages in respect of an action for avoidance that 'cannot be' and 'must not be'. Fraud as a vitiating factor of will cannot be sanctioned on the basis of the '*seul terrain de [la] responsabilité [civile]*'.[22] Not even as lesser consequence of invalidation. Nor using the argument that the exigency of protection of the victim demands the '*plus grande latitude possible dans l'élection du mode de reparation*'.[23]

A choice between remedies depending on the actual circumstances entangles and mars the certainty of contractual relations. This equally applies to the common law experience, where the right to avoid the contract, as far back as *Clarke* v *Dickson (1858) E. B. and E. 148*, can actually be extinguished when *restitutio in integrum* is impossible. And, significantly, a possibility of restitution understood in a relative way, is the dominant view, ie not exactly the *status quo ante* but a similar situation.

In cases different from the preceding ones, some doubts can be nurtured regarding a possible annulment but with a high economic cost. The deceived party, for example, has agreed with a third party to maintain, for a certain period, a stake in the company bought for an inflated price. If the deceived party seeks avoidance, he will have to answer for non-performance that is more onerous compared to restitution of the *status quo ante*. Therefore, a choice between two remedies is lacking here in reality, which leads one to reason in terms of an economic loss, if the intention is to transfer it to the *deceptor*, ie the deceiving party, remediable only through damages. Otherwise, since avoidance of the contract is uneconomic, the deceived party will

Codice Civile. Commentario fondato da Piero Schlesinger (Milano: Giuffré, 2009), 63.

[22] But in this sense see J. Ghestin, n 10 above, 1163. In spite of 'les multiples facettes de sa souplesse pour la victime du dol', see also J. Mestre, 'Observation' *Revue trimestrielle de droit civil*, 354 (1995).

[23] In this sense O. Deshayes, 'Le dommage reparable en case de dol dans la formation du contrat' *Revue des contrats*, I, 97 (2013).

not be encouraged to file a lawsuit and would remain without protection.

It is worth noting that, in common law, if avoidance is predicated on fraudulent misrepresentation, the court's assessment of the possibility for restitution is conducted less stringently in order to protect the deceived party. The leading 1939 case of *Spence* v *Crawford* is emblematic here.

Conclusively, it seems that everything should revolve around a 'replacement' claim for damages which occurs when avoidance is precluded so as to bridge a gap in the protection (Art 24 Italian Constitution).

IV. Avoidance *v.* equivalent protection as fungible actions: the French suggestions. Compensation in any event?

If this is the state of things, there should be grounds to support the view that a voidable contract creates liability 'if cancelled by the courts' or, as in the present hypothesis, when it is not possible to proceed with *restitutio in integrum*, ie for 'inadequacy' of avoidance as a remedy. Compensation, in the former case, completes the remedy of avoidance in the manner referred to in Art 1338 Civil Code whereas, in the latter case, it may actually balance out the paradox of loss where avoidance would leave the victim's economic situation 'untouched'. Therefore it is a 'substitute'.

At this point, however, a question arises: *quid iuris* if, in this case, restitution had been possible? Could Cir have sought damages for a voidable out-of-court settlement[24] on the premise that fraud constitutes a crime? Compensation seen in this sense would become a kind of *supplementum iusti pretii*.

Notwithstanding an opinion to the contrary from more than one author,[25] it does not seem that such a claim would have been well-grounded.

[24] In an affirmative way but in general because 'the claim for compensation is autonomous and does require the prior annulment of the contract' R. Tommasini and E. La Rosa, n 21 above, 48.

[25] See C.M. Bianca, *Diritto civile 3. Il contratto* (Milano: Giuffré, 2000), 2, 174 and 664, and M. Lobuono, *Articolo 1439*, in E. Navarretta and A. Orestano eds, *Dei*

The assumption that the law of tort can function as an autonomous solution, corrective of contractual equilibrium, is not persuasive. Firstly, because the rules governing vitiation of consent are not limited to just violation of the principle of good faith, requiring in the meantime both a *quid pluris* and a *quid alii*. Secondly, because tort liability, seriously understood, is a *Jedermann Haftung*, ie the exact opposite of an obligatory relationship between parties. The image of compensation, separate from and not flowing from the remedy of avoidance, not only gives rise to 'the scenario' of a law of tort that invades the space that the law of contract has left 'free': a *responsabilité civile seule*, in the sense of 'lone' as an alternative and not cumulative to avoidance, diminishes the distinction between contractual and tort liability.

Therefore, when an action to avoid a contract is brought, it is inconceivable that there can be compensation under Art 2043 Civil Code, seeking to transform *responsabilité civile* – in accordance with the French notion[26] – into a sort of 'Northwest Passage' that sidesteps the remedy of avoidance as a solution 'against' contract: or, so to speak, a solution which, to counter residual injustice, 'completes' the system. The remedy of avoidance, if there is no irreversible change in the shareholding as by contrast occurred in the present case, is and remains 'exclusive'. It does not have an equivalent in damages. Maintaining, according to an authoritative opinion mirroring the French model,[27] that 'the structure of vitiation of consent' is similar to 'a tort'[28] without doubt eliminates harm but

contratti in generale. Commentario del Codice Civile diretto da E. Gabrielli, IV (Torino: UTET, 2011) 191.

[26] See Y. Lequette, *Responsabilité civile versus vices du consentement*, in Collectif Paris II ed, *Mélanges en l'honneur Marie – Stephane Payet* (Paris: Dalloz, 2011), 363-382. An isolated voice is M. Caffin-Moi, 'Dol dans la formation du contrat: la question delicate du prejudice reparable' *Recueil Dalloz*, 2772 (2012), in particular notes 9 and 10.

[27] The reference is to the well-known idea of R. Sacco, 'Il contratto', in R. Sacco and G. De Nova eds, *Trattato di diritto civile* (Torino: UTET, 2004), I, 620-750. In the same vein, *ex multis*, G. Marini, 'Il contratto annullabile', in V. Roppo ed, *Trattato del contratto* (Milano: Giuffrè, 2006), IV, in A. Gentili ed, *I Rimedi – 1*, 396-638 and G. Afferni, *Il quantum del danno nella responsabilità precontrattuale* (Torino: Giappichelli, 2008), 187-285.

[28] In this sense, see R. Sacco, ibid, 623: and, *ex multis*, V. Roppo, 'Il contratto', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2011), 758,

at the same time has the effect of obstructing the delicate mechanism of vitiation of consent regulated in a well-balanced manner by the combined provisions of Arts 1441 and 1444 Civil Code. Consequently, unless a case of *dolus incidens* pursuant to Art 1440 Civil Code occurs, the deceived party cannot seek in lieu of avoidance, when this would be 'efficient because working well', a pecuniary remedy in the form of the restitution of the overprice that the deceived party had been tricked into paying. '*Invoquer le dol pour conclure seulement à une reductio de prix*'[29] is not permitted: it is forbidden because, if annulment restores the deceived party to the situation that he was in before the vitiated contract, the sanction is not 'dual'; the remedy in law is just one. Whoever, in the French vein, considers only a *réfaction du contrat* claim, fails to consider that the deceived party complains of harm produced by a (validated) contract which in the meantime he demands be carried out. The logic of Art 1382 *code civil* is not transferable *sic et simpliciter* into the Italian legal system.

Naturally, it is true that the interest in disputing the contract is to be assessed at the moment of the discovery of the deception and not at the time of concluding the contract. For example, if A, because of deception on the part of B, acquires a company that is on the verge of bankruptcy and then because of unexpected turn of events the company recovers it is obvious that A will have no further interest in bringing an action for avoidance. But, that which is no less evident is that, in the example given just now, A will no longer be able to complain that it suffered harm. The unexpected circumstances have in fact cleared that loss which the deception had caused. The pre-contractual unfairness is not relevant if the deceived person does not prove that it has suffered harm.

770, who speaks about alternative remedies chosen by the damaged party. The *deceptus* can 'renounce annulment of the contract even if suitable to be annulled and demand only compensation'.

[29] See A.S. Barthez, n 10 above, 1158 and Cour de Cassation-Chambre civile III 6 June 2012 no 11-15973, *Revue des contrats*, 1180 (2012), Obs T. Genicon. See also Cour de Cassation-Chambre commerciale 23 November 1993 no 92-10284, *Revue trimestrielle de droit civil*, 354 (1995), Obs J. Mestre; Cour de Cassation-Chambre civile I 4 October 1988, *Bulletin civil*, I, 265; Cour de Cassation-Chambre civile I 14 November 1979, *Revue trimestrielle de droit civil*, 763 (1980), Obs Chabas and Cour de Cassation-Chambre commerciale 14 March 1972, *Recueil Dalloz*, 653 (1972), with a note by J. Ghestin.

The same holds true for the purchase of a signed painting by a noted artist that is later revealed as being a forgery if however the reputation of the real artist, ie the forger, has grown to the point of making the purchase worthwhile. 'Here there is no economic loss' apart from saying that the harm suffered by A consists of the lack of purchase of another painting that he could have negotiated with a different gallery owner. But then the argument changes: the deceived party, in this case, will not demand compensation for the disadvantageous condition but quite the contrary for 'the better chance that he missed out on'. His claim for compensation will thus have as its object the negative interest referred to in Art 1338 Civil Code. The choice between the possible solutions, once it is admitted, is indeed to be taken seriously: it cannot be unreasonably limited to the alternative between avoidance of contract and compensation that remedies the inconvenience or prejudicial conditions.[30] The discovery of the fraud, as indicated elsewhere, does not supply any indication as to 'which' hypothetical contract the party would have stipulated in the absence of deception: if the (no longer) vitiated one on better conditions or a different one with a third party.[31] On the level of probability, the two hypotheses 'are equal'.

A claim for mere compensation does not minimally permit '*prèjuger du choix q'aurait fait l'acquéreur 'au moment de la vente*'[32] if there had not been fraud. Holding that the choice not to seek avoidance of the contract influences and restricts the 'amount' of compensable harm, in the sense of uniquely limiting it to that corresponding to '*à la perte d'une chance d'avoir pu contracter à des conditions plus avantageuses*',[33] is a *petitio principii*. If the remedy

[30] But in this sense see, in the controversial judicial French experience, the recent Cour de Cassation-Chambre commerciale 10 July 2012, that is reported in various periodicals. See, *inter alia*, O. Deshayes, n 23 above, 91-97.

[31] See J. Ghestin, n 10 above, 1178. *Contra* Y. Lequette, n 26 above, 376-382.

[32] See J. Ghestin, n 10 above, 1178, who rightly notes one must not confuse '*le choix de conclure ou non un contrat, avec un choix postérieur, purement procédural, entre une action en annulation ou en dommages-intérets*'.

[33] See the discussed Cour de Cassation-Chambre commerciale 10 July 2012, *Recueil Dalloz*, 2772 (2012); *Revue trimestrielle de droit civil*, 725 (2012), Obs Fages, and 732, Obs Jourdain; *La Gazette du Paais*, no 285, 17 (2012), Obs Houtcieff and *Juris-Classeur périodique*, *édition Générale*, 1151 (2012) with a note by J. Ghestin and Obs of Serinet. But previously Cour de Cassation-Chambre civile I 25 March 2010, *Revue trimestrielle de droit civil*, 322 (2010), Obs Fages.

of compensation is autonomous, there is no contradiction in seeking performance of the voidable contract 'as is' and damages for another contract which by reason of the first contract could not be entered into. Obviously, cumulative damages for both cases is forbidden.

Naturally, the deceived party would need to furnish proof of the lost chance: the deceiving party certainly cannot be made to answer for a commercial risk that the deceived party has knowingly decided to run. But if the deceived party manages to adduce proof that the negotiation for property *x* were aborted because a less lucrative *y* was acquired, the autonomy of the remedy in damages does not nullify the harm consisting of the lost chance assuming that it was real and existed at the time that the voidable contract was stipulated. Therefore, it is loss that is a '*consequence directe de la tromperie*'.[34] The *quantum* will be equal to the difference between the negative interest and the profit which the deceived party draws from the vitiated but existing contract.[35]

V. Compensation as a *double peine*

There remains the case of the deceived party who confirms the adverse contract for non-economic reasons, for example, because the acquired property once belonged to his family: here, in fact, there are grounds which could lead one to claim compensation of the difference.[36] There is nevertheless an obstacle. Whoever confirms lends fresh consent to the deal and in doing so makes an implied cost-benefit trade-off that cannot subsequently and contradictorily be complained of. The law affords legal protection consisting of not 'confirming that contract. *Tertium non datur*.'

[34] See J. Ghestin, n 10 above, 1178 ('*un tel préjudice n'a rien d'indirect, ni d'hypothétique*').

[35] So not a *quantum* that sums the profit from the contract to the whole negative interest.

[36] The example is suggested by G. D'Amico, 'La responsabilità precontrattuale', in V. Roppo ed, *Trattato del contratto,* n 27 above, 1033, note 72. The circumstance comes back to the Principles of European Contract Law (Arts 4: 114 and 4: 117, § 2) because if a party has the right to avoid a contract but does not exercise its right to do so or has lost its right for affirmation, it may recover damages limited to the loss caused to it by the fraud.

Not only.

On closer examination, the deceived party – according to Art 1439 Civil Code – already has a *facultas eligendi*: he may choose, as has been stated, to seek annulment or to confirm the contract. Permitting compensation *extra ordinem*, the solutions become 'three'. In any event judicial correction is not limited to simply eliminating the defect with a view to achieving a '*reequilibrage èconomique du contrat purgè*'.[37] There is a second effect: the deceiving party remains party to a revised contract which originally he would never have agreed on at the 'new conditions'. Therefore this correction is in reality a 'sanction' which rewards the deceived party by placing him in a better situation to that which he would have been in if the fraud had not occurred. The judicial correction – it is plain – binds *ex post* the deceiving party, making him 'party' to a contract which in general he 'would not have chosen' to conclude. And if this is indeed the case, one must doubt that the historical intention of the Italian legislation was to inflict such punishment on a party already facing an action for avoidance while at the same time have him pay damages. Such compensation, when annulment may be possible, is in fact closely related to an action for reduction of the price: but a *quanti minoris*, as explained elsewhere,[38] is extraneous to the whole subject of vitiation of consent.

Stressing that a tripartition of solutions assures the empiric advantage of '*diversifier les sanctions du dol*',[39] depicting less rigid models of protection or ones that are '*plus pragmatiques*' than those in the civil code[40] is not convincing: for the simple reason that, if this is not a question of *dolus incidens*, for the deceiving party the risk is the annulment of contract not of a '*double peine*',[41] which would be the case if compensation were to coexist with the performance of the contract. The result of compensation being autonomous would be Art 1440 Civil Code that cannibalises Art 1439 Civil Code or that

[37] See A.S. Barthez, n 10 above, 1158.

[38] For a wide demonstration see T. Genicon, Obs Cour de Cassation-Chambre civile III 6 June 2012, *Revue des contrats*, 1180 (2012).

[39] See A.S. Barthez, n 10 above, 1161.

[40] If they are not interpreted in an evolutive way.

[41] According to the interpretation, by contrast, supported by A.S. Barthez, n 10 above.

competes with it. And this would not seem permissible, not even in the case in which the deception takes the form of criminal conduct. Notwithstanding all attempts to interpret it differently, Art 1440 Civil Code was established and remains an 'exceptional norm':[42] a *dolus causam dans*, unless the law provides otherwise, is a ground for avoidance and not for a discretionary award of damages. That which Art 1440 Civil Code codifies is still a *fictio iuris*. At the same time, the potestative nature of confirmation of contract implies that the deceiving party must accept: but as regards 'how it was' and not what it 'becomes' judicially.

Ergo, the replacement of avoidance with damages unless an express provision of law or a restitutory failure, is not up to the discretion of the courts.

VI. Combination of remedies and express statutory provisions: scholarly misconceptions

So, there are no remedies in tort law against[43] the vitiation of consent or, to be more precise, that go beyond it. It would be wrong to think, as some do,[44] of a scheme in which avoiding the contract addresses the lack of consent while damages address the illegal conduct of the deceiving party. A deceived party who chooses an *ad nutum* remedy in place of another is in reality speculating: and this potestative assessment finds no support at all under Art 1441 Civil Code *et seq*. In addition, differentiating the reasons that may induce the deceived party to prefer damages instead of avoidance, so as to distinguish between appreciable and undeserving reasons, would imply that the framework of remedies be calibrated on a too uncertain and case-by-case oscillating perspective.

We could give an example of a deceived party who has bought

[42] See L. Mengoni, ' "Metus causam dans" e "metus incidens" ' *Rivista del diritto commerciale*, I, 27-30 (1952), and then G. D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (Napoli: Edizioni Scientifiche Italiane, 1996), 114-353.

[43] In such a sense, on the contrary, Y. Lequette, n 26 above, 377, as the title itself suggests.

[44] See, for example, R. Tommasini and E. La Rosa, n 21 above, 47-260.

goods for 200, goods that would be worth 210 if they actually had the promised qualities but whose real value is 150. If, under Art 1440 Civil Code, we consider that the compensable amount is the difference between the estimated and real value, the sum to be paid is 60. It means that it's more economic for the deceived party to apply this norm because under Art 1439 Civil Code the deceived party would receive just a refund.

In this way, an independent action for damages is more convenient only if the action for avoidance is subject to more stringent terms. However, this would not appear to be possible because if a contract is voidable under Art 1442, para 2, and Art 2947 Civil Code, in the same way, it is not possible that an action for damages bars one for avoidance. From a different prospective, following Supreme Court judgment no 27648/2011,[45] fraud, as unfairness *in contrahendo*, gives rise to a contractual action under Art 1337 Civil Code. But, is it possible that, if the action for avoidance is barred, a deceived party could invoke an iniquity within ten years?

From outside the realm of contract, on the other hand, arguing that Art 30 para 1, of the Italian Administrative Procedure Code (CPA) embodies a rule that states that a claim for damages is separate from demolition is a partial and non conclusive assertion. This for the simple reason that, while para 1 frees, para 3 grants the administrative court the power to determine whether the failure to challenge has affected the amount of damage. So, the action could be unfounded whenever the court prudentially considers that the failure to seek annulment has affected the occurrence or aggravation of the harm. So, in detail:

Firstly: it is not an issue regarding a full autonomy.

Secondly: the claim for damages is usually understood as contrary to good faith if there is evidence that a timely application for avoidance would have excluded or reduced the damage.[46]

[45] See, for all, C. Castronovo, 'La Cassazione supera se stessa e rivede la responsabilità precontrattuale' *Europa e diritto privato*, 1227-1246 (2012) and C. Scognamiglio, 'Tutela dell'affidamento, violazione dell'obbligo di buona fede e natura della responsabilità precontrattuale' *Responsabilità civile e previdenza*, 1949-1959 (2012).

[46] There is a lot of *dicta* to this effect in various decisions. See Tribunale Amministrativo Regionale del Lazio 2 October 2013 no 8533, *Foro amministrativo TAR*, 3059 (2013). For example, Tribunale Amministrativo Regionale della Sicilia 11

Thirdly: in the rare cases which are not hindered by Art 30, para 3, the dual track of protection is set out by law.

Fourthly: significantly, the Supreme Court preliminary decision recalls Art 121 CPA for the ineffectiveness of the contract in cases of serious violations (ll. A – d). The ineffectiveness postulates an administrative court annulling the assignment: if it were so, then a prior annulment of the administrative act implies an Art 121 notwithstanding the Art 30, para 1. The autonomy of claims for damages, in the possible alternative of a specific performance, indeed should result in the right to entry of the business plaintiff in the contract spuriously assigned, without a preliminary action against the assignment. But compensation in the specific performance against the contract is not provided *per tabulas*. So, especially after the *en banc* decision of the Supreme Administrative Court ('Consiglio di Stato'),[47] that parallelism is out of date. Or, rather, it can be misleading.

Finally, considering the other issues that should lend support to the notion that compensation is separate, it is possible to consider the following:

a) Those who invoke the provisions of Art 2377, para 4, Civil Code regarding the legitimacy of shareholders to seek damages caused by a shareholders' decision not complying with law or bylaws seem to ignore the fact that the shareholders have no standing to bring an action seeking to annul the decision because they do not hold a set minimum of voting shares. Therefore, there is no cumulation of remedies. And the notion of damages as an alternative to returning to the original position is reproduced in Art 2504-*quater* Civil Code which provides that it is not possible to challenge a merger after it is

April 2013 no 1021 ibid, 1399 (2013); Tribunale Amministrativo Regionale della Puglia 6 February 2013 no 159 ibid, 648 (2013); Tribunale Amministrativo Regionale del Lazio 11 January 2013 no 247 ibid, 109 (2013) and Tribunale Amministrativo Regionale della Puglia 16 July 2012 no 1450 ibid, 2509 (2012). See S. Pagliantini, 'Tutela per equivalente di un contratto annullabile e principio di effettività: appunti per uno studio' *Le nuove leggi civili commentate*, II, 645-670 (2014).

[47] See Consiglio di Stato 23 March 2011 no 3, *Foro amministrativo Consiglio di Stato*, 826 (2011). Subsequently, but cited here only by way of example, Consiglio di Stato 31 October 2012 no 5556, *Foro amministrativo Consiglio di Stato*, 2655 (2012); Consiglio di Stato IV 30 July 2012 no 4309 ibid, 7-8, 1901 (2012) and Consiglio di Stato 2 November 2011 no 5837, available at www.dejure.it.

registered in the Company Register. This rule is then reproduced in Arts 2500-*bis* (on transformation of companies), 2504-*novies* (on demergers), 2379-*ter*, para 3 (on resolutions regarding the increase and reduction of a company's capital and bond issues) and 2434-*bis* (on resolutions approving financial statements) Civil Code.[48]

b) Those who cite damages in the case of a wrongful termination of an employment contract overlook the fact that caselaw allows claims for compensation when it is not possible to overturn the dismissal.[49] Compensation is a substitutive remedy whenever an action for reinstatement under Art 18 of the Workers' Statute is precluded. In fact, damages are assessed on the basis of the usual criteria and do not correspond to unpaid wages. Therefore, there is no 'competition' between remedies.

c) Finally, those who emphasise some principles arising from soft law ignore that Art 8.102 Principles of European Contract Law as well as Art 3.102 Draft Common Frame of Reference provide for a limited cumulation of remedies. Cumulation is in fact provided for only when it involves the *exceptio inadimpleti contractus* and the cancellation of contract, or cancellation and damages. Similar rules are provided for also by Art 29 Common European Sales Law, which states that damages do not preclude the claim for avoiding the contract grounded on fraud. However, it is not clear whether this remedy of damages is an alternative or, as it seems more likely, complementary to the remedy of avoidance. Therefore, the picture is far from clear.

In conclusion, duress as well as mistake do not have that dual nature that is typical of fraud. Therefore it is not correct to consider a claim for damages as a priority in the cases of Art 1429, subparas 1 and 3, Civil Code.[50] The *choix*, as understood by French legal scholars, goes beyond the scope of the spontaneous mistake, while

[48] See Arts 2388, 2409-*quater*, 2416 and 2447-*octies* Civil Code, also considering the reference therein contained to Art 2377, para 3, Civil Code.

[49] See Corte di Cassazione 10 January 2007 no 245, *Repertorio del Foro italiano*, v. Lavoro (rapporto), 1359 (2007), and Corte di Cassazione 10 March 2010 no 5804, ibid (2010). *Contra*, for forfeiture that produces comprehensive foreclosure, Corte di Cassazione 3 March 2010 no 5107, *Giustizia civile Massimario*, 3, 316 (2010) and, earlier, Corte di Cassazione 4 May 2009 no 10235, *Giustizia civile Massimario*, 5, 713 (2009).

[50] M. Barcellona, *Responsabilità extracontrattuale e vizi della volontà contrattuale,* 16-48, available at www.judicium.it.

fraud has a particular physiognomy. At the same time, if a person has a claim, his freedom does not end deciding whether to act or not but also includes the choice of which remedy to seek.[51]

But cumulation of remedies must be stated by an express provision of law, as is the case with Art 1453 or Art 2377, para 8, Civil Code. The latter rule is concerned with damages despite the fact that the unlawful shareholders' decision being challenged has been replaced, before trial, by another one complying with law and bylaws. The *choix* or 'discrepancy'[52] between no judgment decreeing avoidance and a claim for damages should be expressly provided for by law. And in the field of vitiation of consent, this autonomy does not seem to have been contemplated. When the deception used by one of the parties in such that, without it, the other party would not have concluded the contract, avoidance is certainly to be considered as the overriding remedy unless restitution is impossible.

Under Art 1441 Civil Code *et seq* there is no other balance struck between specific performance and damages. If restitution is possible, avoidance of the contract shapes the claim of the deceived party by allowing damages in the form provided for in Art 1338 Civil Code.

Summing up, the schedule of protection appears to be as follows: subsidiarity of compensation if annulment is not futile. So 'subsidiarity' with the variable compensation as a surrogate infungible against a loss otherwise unavoidable. A compensation allowed to make good a virtuality of protection. Significantly so regarding the legitimacy of the shareholders to seek damages when under Art 2377 Civil Code, they may bring an action for annulment. It highlights the best doctrine and the Courts do not think otherwise.[53]

[51] Corte di Cassazione 23 December 2008 no 30254, *Foro italiano*, I, 2721 (2009), with comment by I. Pagni, 'La responsabilità della pubblica amministrazione e l'assetto dei rapporti tra tutela specifica e tutela risarcitoria dopo l'intervento delle sezioni unite della Cassazione'; I. Pagni, *Tutela specifica e per equivalente. Situazioni soggettive e rimedi nelle dinamiche dell'impresa, del mercato, del rapporto di lavoro e dell'attività amministrativa* (Milano: Giuffré, 2004), *passim*.

[52] See I. Pagni, 'La responsabilità della pubblica amministrazione' n 51 above, 2724.

[53] See F. D'Alessandro, 'Il conflitto di interessi nei rapporti tra socio e società' *Giurisprudenza commerciale*, I, 11-13 (2007) and above all F. Guerrera, *La*

VII. The quantum of damages: ideas in progress

It's time to go back to the decision.

Naturally, if the logic of damages as a replacement for a futile remedy of avoidance had prevailed over the notion of an atypical tort, then Art 1440 Civil Code would have had to be applied. In that case, considering that the contract would not be removed, the *quantum* would be equal to the different economic terms that would have been freely negotiated without fraud. In fact, the compensation that 'corrects' is equivalent to compensation that 'makes good' harm that cannot be eliminated by restitution *in integrum*. When fraud causes a higher price, then compensation is designed to restore the balance between the respective contractual obligations that the fraud had upset.

According to the Supreme Court the scheme is different: the out-of-court settlement between Cir and Fininvest is valid and the harm suffered by Cir is to be considered as a consequence of the crime. There was an unlawful judgement due to the corruption (*ex corrupto*), thus weakening Cir's bargaining power and meaning that the latter is entitled to an amount corresponding to the assumed loss of profit. According to the Supreme Court, like in the previous Court of Appeal of Milan decision, if the corrupt judgment had not occurred, the disadvantageous settlement would not have been entered into but rather another agreement with a different balance would most likely have been reached.

Thus, the setting aside of the arbitration award is to be considered as the cause of Cir's weakened contractual power as the settlement offered by Fininvest in 1990 demonstrates. That proposal, which was much more advantageous for Cir, was made when the decision of the Court of Appeal of Rome had not yet been issued and was considered by the Supreme Court as being tantamount to a lost chance for Cir. As a consequence, the Supreme Court viewed the settlement proposed by Fininvest in 1990 as evidence of the loss suffered and a way to calculate the damages payable in respect thereof.[54]

responsabilità "deliberativa" nelle società di capitali (Torino: Giappichelli, 2004), 239-473. See also the fundamental Tribunale di Catania 10 August 2007, *Rivista del diritto commerciale*, II, 17 (2009).

[54] See A. Nicita, 'Scenario controfattuale e valutazione economica del danno: il caso CIR/Fininvest' *Danno e responsabilità*, 1100-1103 (2011).

So, this aspect constitutes the bulk of the problem, as it is highly controversial to determine the amount that should actually be considered as stemming from Cir's weaker bargaining power: who is to say that from among all the possible settlements, the one freely negotiated by Cir would have exactly reproduced the terms of the above mentioned settlement proposed in 1990. In this respect, it is possible to envisage various scenarios.

The first scenario could be the following. If the verdict of the Court of Appeal had been favourable to Cir, Fininvest would have certainly challenged the decision before the Supreme Court. In such a case, it is unlikely that a settlement identical to the one proposed in 1990 would have been entered into. In fact, Fininvest's appeal before the Supreme Court, due to the duration of the proceedings, would have increased the uncertainty that had already reduced the market value of the Mondadori shares. Accordingly, the above mentioned appeal could be considered as an *atout* far from being trivial. It is possible that Fininvest could well have entered into a settlement for a lower figure than the one budgeted in 1990.

And yet even that is not sure because the terms of the issue could be viewed from reverse perspective. In this regard one could imagine a second scenario where a lawful judgment would have strengthened the expectations of Cir and weakened the bargaining power of Fininvest. The Supreme Court appeal filed by Fininvest would have served exclusively to prevent the terms demanded by Cir being more disadvantageous than the ones offered in 1990. With this in mind, it is possible to argue that the appeal before the Supreme Court would have served solely to avoid a worse outcome than in 1990.

Therefore, the Supreme Court probably considered the settlement proposed by Fininvest in 1990 as the best balance between the different variables, each of which actually presented problems in terms of proof. Besides, when assessing profits in financial stocks, the loss lies not in the 'the *habere* but the *agere,* not ownership but activity'.[55] In other words, the loss is to be considered as uncertain, since the wealth that is lost is, as an intangible, uncertain itself.

[55] See M. Costantino, 'Danno ingiusto agli enti pubblici territoriali', in M. Costantino ed, *Rischi temuti, danni attesi, tutela privata*, (Milano: Giuffré, 2002), 219.

Therefore, if the kind of wealth changes, it follows that the techniques to calculate the loss will likewise change.

The debate, however, is still only in its infancy.

Annotation

One hundred eighty-five pages of reasoning are many, perhaps too many. Notoriously however, according to Wittgenstein, 'the individual case turns out to be unimportant, but the possibility of each individual case discloses something about the essence of the world'.[56] And so, at least one quality this decision has: rediscovery of the criterion that governs the competing remedies of specific performance and a claim for damages when a contract is voidable. Or valid but unpleasant because incorrect.[57] Avoidance for fraud can be addressed in terms of *atout* for an equitable modification of the contract:[58] but only if the threat is not virtual, in which case a 'different rule' is required.

[56] So L. Wittgenstein, *Tractatus logico – philosophicus* (London: Routledge, 1961), 62.

[57] See P. Femia, n 11 above, 460-755.

[58] See R. Pardolesi, 'Tutela specifica e tutela per equivalente nella prospettiva dell'analisi economica del diritto' *Quadrimestre*, 75 (1988).