CAUSA CONCRETA AND VOLUNTARINESS: AN OLD DOCTRINE REDISCOVERED

Hao Jiang* and James Gordley**

When a contractual performance was useless to one of the parties at the time of contracting or becomes so, his purpose in contracting is defeated. It may be unfair to the other party to allow him to withdraw. But if it is not unfair, can he do so? Leonard Lessius (1554-1623) believed that he could because the contract no longer served the causa or purpose for which he contracted. We will examine the doctrine of causa concreta *in Italian law and see why, properly interpreted, it could do the same.*

* Assistant Professor of Comparative Private Law, Bocconi University; Senior Corresponding Fellow, Yale Law School Center for the Study of Private Law.

** W.R. Irby Chair in Law, Tulane Law School and Distinguished Professor in Legal History, Bocconi University.

I. INTRODUCTION

Causa is perhaps the most contested doctrine in Italian contract law. It is always there but nobody could say for sure why it needs to be. As one commentator put it:

> 'La causa o la si ama, collocandola al centro della disciplina del contratto o del negozio; o la si odia, provando a scartarla come un elemento superfluo o inutile; nulla, in fondo, è cambiato rispetto all'esperienza storica e, specificamente, a quella precodicistica, momenti durante i quali il dibattito sulla causa non era troppo dissimile da quello odierno. Nessuno dice esattamente cosa sia, ma tutti sanno che c'è, e che deve esserci.'[1]

The proponents of the doctrine since Emilio Betti recognize causa as an indispensable element of a contract or *negozio giuridico* due to its social economic function (*funzione economico-sociale del negozio*),[2] which corresponds to its abstract *causa* or *causa astratta*. It means that a contract is only valid when the interests it pursues are worthy of legal protection (*interessi meritevoli di tutela*). As a result, the law only protects certain types of contracts such as sales, leases, and gifts. The protection of other transactions must be decided on a case-by-case basis.[3] Over time, the rigid nature of Betti's formula has come under criticism. It has been said that it rejects the enforceability of atypical contracts and it ignores the concrete purpose for which a contract is made.[4]

The anti-causalists claim that causa as a doctrine is both false and useless.[5] They claim, according to Cesare Massimo Bianca, that the doctrine of *causa* was put in the Codice Civile in deference to political ideology which has since changed,[6] Causa has no place in the free market system. The use of causa infringes the freedom of contract.[7] As long as the contract is not illegal or contrary to public policy, it is valid. If that is all the doctrine of causa means it is useless.[8]

Bianca argued that the idea that only the interests worthy of protection should be protected has an important role to play in the democratic system established by the constitution. In addition to illegality, there are interests that are against

---

[1] F. Bartolini, 'La causa del contratto dal Codice civile del 1942 ai giorni nostri', in G. Albers et al eds, *Causa contractus* (Tübingen: Mohr Siebrek Ek, 2022), 249.

[2] E. Betti, *Teoria Generali del Negozio Giuridico* (Torino: UTET,1943), 116.

[3] G. Albers, 'History of a Notion', in G. Albers et al eds, n 1 above, 31.

[4] A.M. Garofalo, *Itinerari della causa dal Code Civil del 1804 e Codice Civile del 1942*, in G. Albers et al eds, n 1 above, 242

[5] G. Albers, 'History of a Notion' n 3 above, 29, 'False, because elements of a contract, being part of that same contract and thus part of the effect, could not be at the same time its cause. Useless, because the instances in which an obligation was considered to be void because of its *cause* or lack of *cause* could be explained by other requirements'.

[6] C.M. Bianca, 'Causa concreta del contratto e diritto effettivo' *Rivista di Diritto civile*, 252 (2014).

[7] ibid 252.

[8] ibid 252.

public policy or moral norms. They are not worthy of the protection of contract law. Therefore, they should be invalid because of the absence of causa. An example are contracts made for the purpose of tax evasion are not valid for the want of *causa*.[9]

In recent years have seen the rise of the doctrine of *causa concreta* in Italy. Unlike the traditional doctrine of causa, it is concerned with whether the specific purpose of the parties can be fulfilled.[10]

Bianca defended the new doctrine despite the anti-causalist trend. It enables the courts to examine the practical reason (*ragione practica*) of the parties in entering the transactions by looking at what parties aimed to achieve.[11] Without *causa concreta*, a contract cannot be binding.[12] Such a causa is not subjective but rather objective. According to Giovanni Battista Ferri, causa is an objective expression of the subjective aim that the authors of the contract intended to pursue (*una espressione oggettivata delle finalita soggettive che gli autori del negozio intendono perseguire*).[13] Francesca Bartolini describe *causa concreta* as a protection of the 'functioning capacity' of a contract.[14] Moreover, according to Bianca, *causa concreta* is also an aid to contract interpretation since it examines the purposes that the interested parties wanted the contract to achieve.[15]

It appears that Italian courts have been using the doctrine to serve the function of a common law doctrine, frustration of purpose. When the contractual performance is no longer useful (*infruibilità della prestazione*) to the creditor (the party receiving the performance), the doctrine of *causa concreta* allows the party to be excused from performing the contract. However, such an application of causa has been attacked on several grounds.

Vicenzo Roppo argued that the unsuitability of performance (*infruibilità della prestazione*) should not allow a party to escape the contract when the unsuitability is subjective, for example, when he arrives late or gets sick.[16] He should only be excused when the impediment is objective.[17] Consequentially, both Roppo and Bianca claimed that objective impossibility (*impossibilità oggettiva*) should be required for relief.[18] Their opinions are influential. As we will see, this conclusion is supported by the practice of the courts. They have invoked the doctrine of impossibility whenever they give relief regardless of whether the performance

[9] ibid 253.

[10] G. Albers et al eds, n 1 above, preface.

[11] C.M. Bianca, n 6 above, 258.

[12] ibid 258, in which C.M. Bianca reasoned that 'L'applicazione del principio della causa concreta è senz'altro legittima perché la connessione che lega un contratto all'altro può essere rilevata solo con riferimento alla causa concreta che le operazioni sono complessivamente dirette a realizzare.'

[13] V. Ferri, 'La Causa', in A. Orestano ed, *Lezioni sul contratto* (Torino: Giappichelli, 2009), 33.

[14] F. Bartolini, n 1 above, 256.

[15] C.M. Bianca, n 6 above, 268.

[16] V. Roppo, 'Causa concreta: una storia di successo? Dialogo (non reticente, né compiacente) con la giurisprudenza di legittimità e di merito' *Rivista di Diritto civile*, 968 (2013).

[17] ibid 968.

[18] C.M. Bianca, n 6 above, 263

was in fact impossible.

In this article, we will show that the doctrine which is now called *causa astratta* once meant, in contracts of exchange, that the terms of the contract must be economically fair. The doctrine which is now called *causa concreta* meant that the parties subscribe to the terms of a contract voluntarily. A contract of exchange was an act of voluntary commutative justice, both voluntary and fair. We will see how these doctrines complement each other. The doctrine of *causa concreta*, preserves voluntariness of a contract and provides relief when the contract was useless or becomes useless, provided that doing so would not be unfair to the other party. That is as it should be, whether one uses the term 'causa' or not.

II. THE RISE AND FALL OF *CAUSA*

1. The Two Doctrines of Causa

There were once two doctrines of *causa* in civil law. According to the more famous one, there are two *causae* or reasons for the parties to contract and for the law to respect their decision to do so. Each party might which to receive an equivalent in return for his own performance, in which case the contract was made *causa onerosa*. Or one party might wish to confer a benefit on the other, in which case the contract was made *causa gratuita*. Robert Pothier (1699-1792) explained that in some contracts, the *cause* for which one party contracts 'is that which the other party gives him or obligates himself to give him.' In others, the *cause* is 'the liberality which one party wishes to exercise towards the other.'[19] This doctrine passed into Art 1108 of the French Civil Code which provided that one of the 'conditions [that] are essential for the validity of an agreement (is) a licit *cause* of the obligation.' Nineteenth century jurists found it confusing. They rejected the idea that the value of one performance could be equivalent in value to another. The value of the performances that the parties exchanged was subjective. Having rejected the idea of equivalence in exchange, the doctrine seemed them to be a tautology: either a party received something in exchange for what he gave, or he did not. After two centuries of criticism, the doctrine was abolished in France in 2016. Elsewhere, we have argued that it was a mistake to reject that doctrine.[20] Whether one uses the term *causa* or not, without the idea of equality in exchange, one cannot explain the relief the law gives when an exchange is unfair.

The Italian doctrine of causa concreta resurrects a different doctrine of cause, and one that is less well-known. According to this doctrine, *causa* means the reason that a party wished to have the performance that the other party was to make.

---

[19] R.J. Pothier, *Traité des obligations* (Paris: Chez Rouzeau - Montaut, 1761), para 41.

[20] J. Gordley and Hao Jiang, 'The Lost Doctrines of Causa and the Incoherence of Contemporary Contract Law' 98 *Tulane Law Review*, 1023(2024).

He wished to buy the other party's horse because he believed his own would die. He wished to sell the other party his law book because he believed that a superseding edition was about to appear. Medieval jurists used the term '*causa*' in this sense to explain remedies for fraud. A party could have a contract set aside if fraud concerned the causa for which he contracted; otherwise, he could only recover damages. Later jurists extended the term to explain why a party should be given relief when, because of a mistake or changed circumstances, a performance was no longer suitable for the *causa* or purpose for which he contracted. The suitability of the performance for that causa was an implied condition of the contract. This doctrine was also rejected by most jurists in the 19th century. They subscribed to a will theory of contract. Contract was the will of the parties. The parties willed only what they consciously intended. Therefore, there could be no implied conditions. This second doctrine of causa, like the first, was forgotten until, in the 20th century, it was rediscovered in Italy and given the name '*causa concreta*.' This article will discuss how this doctrine was originally formulated, how it was forgotten, how it was rediscovered, and why such a doctrine is necessary to explain modern law.

2. *The Formulation of the Doctrine*

Both doctrines of causa were formulated in the Middle Ages, the less well known doctrine was used to explain the remedies for fraud that they found in the texts of Justinian's *Corpus iuris civilis*. They concluded that several texts were best explained by distinguishing fraud as to a fact that gave the contract its *causa* from other sorts of fraud. According to the anonymous *Collectio Senensis*, written in the 12th century:

> When fraud gives a contract of good faith its *causa*,[21] the contract is invalid ipso iure, and no action arises on it. Nevertheless, if the property has been delivered, then title to it passes, and no action is given against a person who buys or otherwise acquires the property from the one who employed the fraud. But an action for fraud (*de dolo*) is given against the person who committed the fraud and, if he possesses the property it can be reclaimed by the *condictio indebiti*. When the contract is affected by fraud that does not give the contract its *causa* but affects it in some other way, then . . . (i)f the fraud is committed intentionally, it is purged away by an action on the contract no matter how small the amount of money.[22]

The author of this passage thought that this distinction best explained the

[21] Some Roman contracts were contracts of good faith: for example, sale, lease and partnership. Others were contracts of strict law.

[22] Id at § 28 (citations omitted). Collectio Senensis § 28, in 2 *Scripta Antiavissimorum Anecdota Glossatorum* 141, 152 (Augustus Gaudentius & Johanne Baptista Palmerio eds, Bononiae, Ex aedibus Angeli Gandolphi 1892).

Roman texts he cited even though none of them used the word *causa*.[23] If one party told a lie which induced the other party to contract, the contract should not be binding. If the other party would have contracted anyway but at a more favorable price, the remedy should be for damages.

In the early 17th century, Leonard Lessius asked what effect a mistake in *causa* should have when the mistake was not induced by fraud. He concluded that, at least in conscience, the contract should not be binding because a party who made an error in *causa* had consented but on the 'tacit condition' that he was not mistaken.[24]

He distinguished sharply between mistake in the substance of the performance (*error is substantia*) and a mistake in the *causa* for which a party contracted. A party who made an error in substance had not truly consented. A party who made an error in *causa* had consented but on the 'tacit condition' that he was not mistaken.[25]

The medieval jurists had agreed that a contract was void an error in substance. They cited a Roman text which said that there was no consent when a party was mistaken as to the 'substance' (*substantia*) or 'essence' (*ousia*) of the object contracted for. An example was when *aes* was sold *pro auro*: copper was sold for gold. It is not clear what these terms meant to Ulpian or, for that matter, to his medieval interpreters. Lessius, however, belonged to a group of jurists known to historians as the late scholastics who set themselves the task of synthesizing Roman law with the moral philosophy of their intellectual heroes, Aristotle and Thomas Aquinas. For Aristotle, things that differ in substance or essence differ in kind. The late scholastics concluded that a mistake in substance or essence vitiated consent because the mistaken parties did not know what they were contracting for. According to Lessius,

> '(W)hen the other contracting party is in error as to the substance of the thing then the contract is void by the law of nature. That is the common opinion of the doctors. The reason is that the substance of consent is absent for the party did not consent to this thing but to another which he judged to underlie its accidents. For example, the seller judged the gem to be glass and sold it as such. … It is the same if the seller sells glass as a gem because the buyer does not consent to buy the glass but the gem which he judges to be of

[23] D. 4.3.7(A person who, deceived by his slave, sells that slave to a buyer who frees him, has an action for fraud against the slave but no action against the buyer who was not party to the fraud.); C. 4.3.37 (A seller's praise of his goods is not a promise or assertion about them. If he intentionally deceives the buyer, however, the buyer has an action for fraud though he does not have an action on the seller's words or promise.); C. 4.44.5 (If you sell an estate because of the fraud of the other party, the contract will be rescinded because fraud is contrary to the good faith these contracts require.); C. 4.44.10 (A seller who was defrauded has an action against the buyer but not against one who received title from the buyer.); D. 4.3.9 (If anyone states that an inheritance is of trifling value and so buys it from the heir, there is no action for fraud since the action on the sale suffices.); D. 19.6.6; (There is an action on the purchase against the seller even if he was unaware that the farm he sold was smaller than he specified.).

[24] L. Lessius, *De iustitia et iure* (Bruxelles: Antverpiae, 1628), lib. 2, cap. 3, dub. 5.

[25] ibid lib. 2, cap. 3, dub. 5.

that species'.[26]

In contrast, when a mistake 'concerns

> 'not the substance or its matter, but a *causa* of contracting which is extrinsic and accessory to the thing . . . consent is not taken away but is, in its way, sufficient for the nature of the contract.'[27]

Nevertheless,

> 'whenever an invincible error gives the contract its *causa* and the positions of the parties have not changed, the person who is deceived and would not have contracted had he known the truth is not bound in conscience to perform the contract.'

'(A)s long as the positions of the parties have not changed,' a party who mistaken could refuse to perform without injuring the other party.

> '(A) party has not perpetrated an injury (by breaking the promise) since the tacit intention of the contracting parties is not to be obligated to fulfill the contract if they discover themselves to be deceived. This is confirmed by a custom which is received almost everywhere. In the usage of all nations this same tacit condition is understood in promises to stand by a contract and not to revoke it.'[28]

It would be otherwise, Lessius implies, if the other party had changed his position and would be worse off than before he contracted if the other party withdrew. 'If, however, damage has been done to the other party then one ought to compensate him.'[29]

Lessius used this doctrine to explain another situation in which, according to the medieval canon lawyers, a promise is not binding: when there has been a change in circumstances. They had been explaining a passage from St. Augustine which Gratian had incorporated into his *Decretum*, a collection of texts which became the basis of much of Canon law:

> He who does not have a divided heart is not said to be a liar. For example, if a sword is entrusted to someone who promises to give it back when the person who entrusted it to him asks for it if he ask for the return of the sword when he is insane, clearly, it is not to be returned lest he kill himself or others until his sanity returns. Here the one to whom the sword was entrusted does not have a divided heart because when he promised he

[26] ibid lib. 2, cap. 3, dub. 5.
[27] ibid
[28] ibid
[29] ibid

did not consider returning it to a madman.

Medieval jurists explained their texts by writing glosses or notes to certain words. Johannes Teutonicus wrote this gloss to the word 'insane': 'Therefore, this condition is always understood: if matters remain in the same state.'[30] Although the rule was not based on an interpretation of the Roman texts, it passed into civil law.[31]

For Lessius, the reason for giving relief was the same as when a party was mistaken as to the *causa* for which he contracted.

> (I)f something occurs after contracting, he is not held to perform when the state of things has notably changed. Therefore, he also ought not to be held if something that was concealed from him in the beginning later becomes apparent. For the case of a new event arising is the same as that of a past event coming to light so that it begins to be known.[32]

3. The Oversimplification of the Doctrine

Hugo Grotius, the founder of the northern natural law school, borrowed many of his ideas from Lessius. He borrowed Lessius' conclusion that a party who made an error in *causa* might not be bound to perform although he used the term presumption (*praesumptio*) rather than *causa*.

> (T)he most obvious and natural way of discovering the truth is by referring to laws, which derive their force and efficacy form the general consent of mankind; so that if a law rests upon the presumption of any fact, which in reality has no existence, such a law is not binding. For when no evidence of the fact can be produced, the entire foundation, on which that law rests must fail. But we must have recourse to the subject, to the words and circumstances of a law, to determine when it is founded on such a presumption. The same rule applies to the interpretation of promises. For where they are made up on the supposition of a fact, which in the end proves not to be true, they lose the force of obligations. Because the promiser made them upon certain conditions only, the fulfillment of which becomes impossible.[33]

Nevertheless, he oversimplified the doctrine. Lessius had distinguished between a mistake in *causa* and a mistake in substance. A mistake in substance vitiated consent. A party who was mistaken as to the *causa* had consented but subject to a tacit condition. Grotius dismissed the 'distinction (which) is commonly made

---

[30] Glossa ordinaria to Decretum Gratiani C. 22 q. 2 c. 14.
[31] See Baldus de Ubaldis, Commentaria Corpus iuris civilis to D. 12.4.8.
[32] L. Lessius, n 24 above, lib. 2, cap. 3, dub. 5.
[33] H. Grotius, *De iure belli ac pacis libri tres* (Amsterdam: Joannem Bleau, 1670), II.xii.9.1.

between an error as to the substance of a thing, and an error not about the substance': it had 'perplexed' 'the discussion of pacts made in error.'[34]

Moreover, according to Lessius, a person who was mistaken as to the *causa* for which he contracted was not liable if he could withdraw from the contract without 'injury' to the other party because 'the position of the parties' had not changed. 'If, however, damage has been done to the other party then one ought to compensate him.'[35] Grotius imposed no such limitation. Yet even Grotius might have rejected the consequences of that position. A party is mistaken in the *causa* for which he contracts if, for example, he buys a horse in the mistaken belief that his own will die or sells a law book in the mistaken belief that it will be superseded by a new edition. It may be that he should be able to escape from the contract if the other party's position had not changed. But should he be able to escape when he leaves the other party worse off than if they had never contracted?

4. The Rejection of the Doctrine

a) France

Grotius had a great influence on the French jurist Robert Pother who, in turn, had a great influence of the drafters of the French Civil Code. Nevertheless, Pothier did not accept Grotius' solution to the problem of mistake. He accepted the traditional solution that an error in substance vitiated consent. He understood in much the same way as Lessius and the late scholastics. There cannot be consent when the parties made an error in 'substance' rather than in 'some accidental quality of the thing.'[36] Pothier did not discuss the doctrine of changed circumstances, possibly because that doctrine, as we have seen, was not Roman. It was developed by the Canon lawyers, and although some civilians adopted it, it was never grounded in the Roman texts.

The drafters borrowed from Pothier. According to art. 1110 of the French Civil Code: 'Error is only a ground for voiding the contract when it falls on the substance of the thing which is the object of the contract.' There is no reason to think that the drafters understood this provision any differently than Pothier.

It confused 19th century jurists. The Aristotelian meaning of 'substance' was all but forgotten. Some accepted the traditional idea that things differ in substance when they differ in kind.[37] Their contemporary Fubini called this the 'objective' solution. He objected that kind or species had no precise meaning. Moreover, the parties might have attached importance characteristics that do not determine the

---

[34] H. Grotius, *De iure belli* n 33 above.

[35] L. Lessius, n 24 above, lib. 2, cap. 3, dub. 5.

[36] R.J. Pothier, n 19 above, 17-19.

[37] A.M. Demante and E. Colmet de Santerre, *Cours analytique de Code Civil* (Paris: Plon, 2nd ed, 1883), para 16 *bis*; C. Demolombe, *Cours de Code Napoléon* (Paris: Durand, 1854), para 89.

'species' of an object.[38]

François Laurent adopted what Fubini called a 'subjective' solution. Relief should be given whenever a party would not have contracted had he known the truth.[39] He had taken a step towards the doctrine of *causa* as Lessius had understood it. Yet, like Grotius, Laurent was describing when a contract lacked consent because of a mistake, not when the parties consented subject to an implied condition. Moreover, for Lessius, the mistake had to concern the *causa* or *reason* that a party wished to have the performance that the other party was to make. For Laurent, any mistake a party made would allow him to escape the contract provided he would not have contracted had he known the truth. Fubini objected that

> 'if a contracting party could always have the contract avoided by claiming that he decided to contract because of a quality which had importance for him alone, agreements will be subject to grave uncertainty.'[40]

Finally, Lessius said that relief should be given for a mistake in *causa* only when it could be done without unfairness to the other party. Laurent, like his contemporaries, had little use for the concept of fairness.

The doctrine of *cause* passed into Art 1108 of the French Civil Code. It provided that one of the 'conditions (that) are essential for the validity of an agreement (is) a licit *cause* of the obligation.'[41]

'An obligation without a *cause*, or on a *cause* that is false or on a *cause* that is illicit has no effect.' The drafters took this provision from Pothier who, as we have seen, had been using *cause* in a different sense: there were two *causae* or causes for which the parties might contract: to exercise liberality, and to receive a performance of equivalent value in return. The 19th century jurists found this doctrine confusing as well. They had no use for the idea that performances could be equivalent in value and consequently that there could be a just price. Without this idea, the doctrine seemed to be a tautology: either a party received something in return for his own performance or he did not. Courts gave relief when, supposedly, a contract lacked a *causa* because what was given in return was illusory or insignificant. As Laurent Aynès explained, it allowed judicial intervention when the return performance in a contract of exchange was nonexistent or indeterminate or when the purpose of the contract was illegal.[42] In 2016, the doctrine was abolished but not rule. A newly enacted Art 1169 invalidates 'an

---

[38] R. Fubini, 'Contribution a l'etude de la theorie de l'erreur sur la substance et sur les qualités substantielles' *Revue trimestrielle de droit civil*, 309-11 (1902).

[39] F. Laurent, *Principes de droit civil français* (Bruxelles: Bruylant-Christophe & Cie, 1878), para 487.

[40] R. Fubini, n 38 above, 321.

[41] See Art 1108 of French Code civil.

[42] L. Aynès, 'The Content of Contracts: Prestation, Objet, but No Longer la Cause?', in J. Cartwright and S. Whittaker eds, *The Code Napoléon Rewritten French Contract Law After the 2016 Reforms* (Oxford: Hart , 2017), 142.

onerous contract … when, at the moment of its formation, the counter-performance that is agreed upon for the benefit of the party who commits himself is illusory or derisory (*illusoire ou dérisoire*).

b) Germany

The German will theorists had little use for the ideas of substance and essence. They concluded that the reason for giving relief was not the mistake itself, but rather the failure of the will of a party to match his outward declaration of his will. Georg Friedrich Puchta said,

> 'A legal transaction (*Rechtsgeschäft*) presupposes a will directed to the act's object and purpose and a declaration (*Erklärung*) of the will. A failure of the two to accord excludes the existence of the juristic act'.[43]

The will was, so to speak, a party's decision to buy or sell an object. His reasons for wishing to do so were irrelevant.

Bernhard Windscheid gave examples:

> 'Someone wants to acquire the pen with which King Ludwig I of Bavaria signed his abdication (National Museum in Munich). Or the violin which Joachim played yesterday in concert. … He erroneously believes that the indicated facts are true of the … thing in front of him or perceived earlier and as such designated correctly. Or he wants to buy a watch made by C. Döring, a firm particularly recommended to him, and enters the store of C. Foring by misreading the firm name. … In such cases the declaration of will is not void and the erring party can only be helped in other ways'.[44]

This solution was widely accepted by German jurists, even though, as Windscheid noted, it could not easily explain why relief for mistake was given in the Roman case in which gold was sold for copper.[45]

That solution presupposed, as Friedrich Carl von Savigny said, that 'a sharp distinction' is to be drawn 'between the will itself and that which precedes it in the soul of the person who wills. The will is an independent event and it alone is of importance for the formation of legal relations'.[46] As Puchta explained, '[a]n action presupposes the direction of the will to its object. The existence of the will juridically is, as a rule, only what comes to light through the act. The process of its establishment and hence its motives are irrelevant from a legal standpoint'.[47] The purposes for which a party contracted were legally irrelevant.

---

[43] G.F. Puchta, *Pandekten* (Lepizig, 2nd ed, 1844), para 77.
[44] B. Windscheid, *Lehrbuch des Pandektenrechts* (Frankfurt, 7th ed, 1891), para 76a no 5.
[45] ibid para 76a.
[46] F.C. Von Savigny, *System des heutigen Römischen Rechts* (Berlin, 1840), 112-13.
[47] G.F. Puchta, n 43 above, para 77.

Nevertheless, Windscheid believed it necessary to consider the purposes of a party to explain another doctrine: relief for changed circumstances. In one respect, his explanation of the doctrine was like that of Lessius. Relief was given because the parties' declaration of will was subject to an implied, or, as he put it, an 'undeveloped condition' (*unentwickelte Bedingung*).[48] Most of the Pandektists thought that to speak of an implied condition contradicted the will theory. Windscheid warned his contemporaries that if they threw this doctrine out by the front door it would come back through the window.

It certainly did. Although the drafters of the German Civil Code rejected the doctrine, within twenty years, the German courts read it into § 242 of the Code which requires that a contract be performed in good faith. It would violate good faith to demand performance when there had been a *Wegfall der Geschäftsgrundlage*, a falling away of the basis of the transaction. The cases in which they gave relief, however, were not like those envisioned by Lessius in which one party's performance was no longer of any use to the other party. They were cases in which, because of changed circumstances, a performance had become more burdensome, and to enforce the contract was consequently unfair: the unexpected outbreak or conclusion of World War I caused a massive change in the price of a commodity;[49] in the hyperinflation of the 1920's the Reichsmark fell to a fraction of its former value.[50]

c) The Anglo-American Common Law

Sir Frederick Pollock adopted Savigny's solution to the problem of mistake. Nevertheless, he qualified it using an idea like that of Windscheid. Windscheid said that the consent of the parties could be subject to an 'undeveloped condition'. Pollock said that 'it may be founded on an assumption made by both parties as to some matter of fact essential to the agreement'.[51]

> 'The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts: which state of facts not existing, the agreement destroys itself'.[52]

The American jurist Samuel Williston adopted this solution. In his treatise on contract law, Willison said that a contract is voidable when the parties were mistaken as to a 'fundamental assumption'.[53] This solution passed in the First Restatement of Contract, for which Williston served as Reporter, and thence into

[48] B. Windscheid, n 44 above, para 97

[49] RG 21 Sept 1920, RGZ 100, 129; RG 29 Nov. 1921 RGZ 103, 177.

[50] RG 28 Nov. 1923, RGZ 107, 78.

[51] F. Pollock, *Principles of contract at law and in equity* (London: Robert Clark & Co eds, 4th ed, 1885), 373.

[52] ibid

[53] S. Williston, *A Treatise on the Law of Contract* (Egan MN: Walter H.E. Jaeger, 3rd ed, 1970), §1544.

the Second. According to the First Restatement, for relief to be given parties must be mistaken 'as to a fact assumed by them as the basis on which they entered into the transaction'.[54] According to the Second Restatement, the mistake must concern 'a basic assumption on which the contract was made'.[55]

Williston and the American Restatements had taken a step towards the doctrine of *causa* as Lessius had understood it. For Lessius, however, the mistake had to concern the *causa* or *reason* that a party wished to have the performance that the other party was to make. For Willison and the Restatements, what constituted a 'basic assumption' was not clear.

According to the Official Comments to the Second Restatement, the parties need not consciously have assumed anything: 'The parties may have had such a basic assumption, even though they were not conscious of alternatives'.[56] Moreover, an 'assumption' may be critical to the decision to contract and still not be 'basic'. '(M)arket conditions and the financial situation of the parties are ordinarily not such assumptions'.[57] So we arrive at the curious rule that the parties must have made an assumption, whether they consciously assumed anything or not, and that the assumption must be basic, whether or not it is of great importance to the parties. One gets the impression that the drafters were not sure what the rule should be but could not think of a better one.

III. THE REDISCOVERY OF THE DOCTRINE

1. Causa concreta *in Italy*

The drafters of the Italian Civil Code adopted the rule of the French Civil Code that a contract is not valid if it lacks a *causa*. As we have seen, the drafters of the French Code borrowed this provision from Pothier who had been referring to *causa* or *cause* in a different sense: the *cause* of a contract is either the exercise of liberality or the receipt of a performance of equivalent value in return. The Italian jurists, like the French, had abandoned the idea that the performances in a contract of exchange ought to be of equivalent value, and so they, too, found the doctrine confusing. Italian courts, like the French, gave relief when the performance given in exchange was insignificant or illusory. For example, an Italian court annulled an interest swap contract that places the risk of interest variation solely on the customers for the absence of *causa concreta*.[58] The court held that there

[54] Restatement (First) of Contracts para 502 (Am L. Inst. 1932).

[55] Restatement (Second) of Contracts para 152(1) (Am. L. Inst. 1981).

[56] Restatement (Second) of Contracts para 152, comm. b (Am. L. Inst. 1981). Section 152 deals with mistake, but, according to the Second Restatement, the term 'basic assumption' has the same meaning in the rules governing that doctrine as in those governing changed circumstances.

[57] ibid

[58] Tribunale di Prato 13 January 2017, available at www.dejure.it.

was no real interest that the contract is intended to achieve. The practical purpose of the contract was to neutralize the risk of interest rate variation, which was deprived by such a contract.

The French courts never used this provision of their Code to give relief for changed circumstances. Relief for changed circumstances (*imprévision*) was not given in France until the reform of 2016.

In contrast, on occasion, Italian courts have used the analogous provision of their Code to give relief when the purpose of a party is frustrated by a change of circumstances. They have said that the contract then lacks a *causa*. In so doing, like Lessius, they have used the term *causa* to refer to the reason that a party wished to have performance that the other party was to make.

Customers were excused from paying for an 'all inclusive' touristic package to Cuba when it became dangerous to travel there due to an epidemic, hemorrhagic plague.[59] The *Corte di Cassazione* held that although it was still possible to perform the contract, the contract has lost its *causa concreta*. It could not serve its purpose which is enjoyment (*scopo di piacere*). In another case, an open-air concert in Verona was suspended due to severe weather conditions.[60] The court gave relief because of the absence of a *causa concreta*.

In those cases, the change of circumstances would have frustrated the purpose of anyone who had signed up for the trip to Cuba or the open-air concert. In other cases, the *Corte di cassazione* gave relief when the change frustrated the purpose of a particular customer. A husband was excused from paying for a trip that he intended to take with his wife when she died the day before their vacation.[61] In another case, a tourist was held to have the right to withdraw from a contract when sudden illness prevents him from enjoying the tourist package.[62] The court held that the *causa concreta*, the practical purpose (*scopo pratico*), cannot be fulfilled and that it was a case of force majeure. The tour agency argued that it was unfair or imbalanced to shift all the responsibilities to the tour operator. The court held that Art 1463 of Codice Civile intended only to protect the party receiving the performance when it becomes impossible to use the performance so there was no shift of responsibilities here.

In all of these cases, the court not only spoke of *causa concreta* but of impossibility. Nevertheless, it would be a misuse of the doctrine of impossibility to characterize these performances as impossible. The courts said that it was impossible to fulfil the '*finalità turistica*' or '*scopo di piacere*'. It was possible to perform the contract but the performance is not useful to the party who is to receive it. Consequently, the *causa concreta* of Italian law is like the *causa* of Lessius. It is the reason that a party wished to have the performance that the

[59] Corte di Cassazione 24 July 2007 no 16315, *Foro italiano*, I, 214 (2009).
[60] Corte di Cassazione 29 March 2019 no 8766, *Massimario Giustizia civile* (2019).
[61] Corte di Cassazione 20 December 2007 no 26958, *Massimario Giustizia civile* (2008).
[62] Corte di Cassazione 10 July 2018 no 18047, *Guida al diritto*, 32, 35 (2018).

other party was to give or make.

This idea is narrower and more precise than the 'foundation' or *Grundlage* of a contract in German law or, in American law, the 'basic assumption' on which a contract is made. Every party enters into a contract in order to be better off than he would be otherwise. Every party who is disappointed would not have contracted had he known the truth about how things were at the time he contracted and how they would be in the future. That, as Fubini observed, was the difficulty with Laurent's 'subjective solution' to the problem of mistake. Laurent said the relief should be given whenever a party would not have contracted had he known the truth.[63] If that were so, not much would be left of the binding force of contract. The German jurists who speak of *Geschäftsgrundlage* and the Americans who speak of a 'basic assumption' surely do not mean that a party is not bound whenever he would not have contracted had he known the truth. More is required. That is why the German jurists say the 'foundation' of the contract must be affected and the Americans that an assumption must be 'basic'. But the meaning to these terms is not clear. They cannot mean merely that a party was wrong about something that was very important to him. The *cause concreta* is important to him in a specific way: the performance for which a party contracted is not useful to him.

Some of these cases were heavily criticized by scholars such as Roppo and Bianca because they had a different doctrine in mind. For Bianca and Roppo, *causa concreta* is an objective doctrine, and only objective impossibility can excuse the performance. Bianca described the Cuba touristic package case and the case where the wife died the day before the trip case as false applications of *causa concreta*.[64] It is possible that courts have invoked the impossibility doctrine, when the performance was still possible, just to meet the criteria set by Bianca and Roppo for the application of the doctrine of *causa concreta*.

Lessius has a different theory. For him, however, even if the performance for which a party contracted was useless to him, could only withdraw from the contact when to do so would not 'injure' the other party. 'If … damage has been done to the other party then one ought to compensate him'.[65]

It appears that in their use of *causa concreta,* Italian courts are caught between the doctrine of Lessius and that of Bianca and Roppo. They delivered the results envisaged by Lessius while on its face conforming to the doctrine formulated by Bianca and Roppo.

In the cases that we have described, the Italian courts did not consider whether the defendants could withdraw from their contracts without injuring the plaintiffs. In the next section we will see why they did not need to do so. In the cases in which they gave relief, the plaintiffs were not injured.

---

[63] F. Laurent, n 39 above, para 487.
[64] C.M. Bianca, n 6 above, 262.
[65] L. Lessius, *De iustitia et iure caeterisque virtutibus cardinalibus*, lib. 2, cap. 3, dub. 5.

2. Causa Concreta *and Injury to the Other Party*

It may seem strange to say that a party should be able to withdraw from a contract if he finds that the performance for which he contracted is useless to him. Nevertheless, that idea is not surprising if one considers why parties enter into a contract of exchange. Each party does so in order to receive something of greater value to him than what he gives in return. If he receives a performance of no use to him, then the exchange has not served this purpose.

If Lessius' insight is correct, such a party should be allowed to withdraw unless the other party will be worse off than if the contract had never been made. In Lessius' example, the other party changed his position. Since 'damage has been done to the other party then one ought to compensate him'.[66] Suppose A rents an apartment from B so he can live near an aging grandparent. B promises to repaint the apartment in a color that will appeals to A but is unlikely to appeal to anyone else. If the grandparent dies before A moves in, A has no use for the apartment. If B has repainted the apartment, and it now must be repainted before he can rent it to anyone else, then he is worse off than he was before the contract was made. A should compensate him by amount it costs to repaint.

A might harm B by withdrawing from the contract even if B did not change his position by repainting the apartment. When parties contract at a fixed price, each one gives up the opportunity to find a better bargain if he waits and, in return, is guaranteed that he will not have to accept a worse. If A agreed to pay €1000 a month in rent, he gives up the chance to find equally desirable premises more cheaply but is guaranteed he will have to pay no more than €1000. B gives up the chance to rent the premises for more but is guaranteed he will not have to rent them for less. If A withdraws, B loses that guarantee. He may have to rent them for €800. Whenever the parties contract at a fixed price, each is protecting himself against the risk of receiving a less advantageous price. A party who withdraws harms the other party by depriving him to that guarantee. That is so even if he withdraws because the performance he was to receive has become useless to him.

The plaintiffs were not trying to recover because they were deprived of such a guarantee in the cases described earlier in which an 'all inclusive' tour to Cuba was cancelled because of a plague or an open-air conference in Verona was cancelled because of weather. The plaintiffs could not resell passage to Cuba or tickets to the open-air opera to someone else at a lower price. Letting the defendant escape will not put them in an economically less advantageous position.

The cases in which the defendant cancelled a trip because his wife had passed away and the defendant's illness prevents him from going on the trip are more complex. The court might be wrong in giving relief because doing so might be economically unfair to the tourist agency. It may be that because they cancelled on short notice, the plaintiffs lost their chance to sell to someone else. They should

[66] L. Lessius, *De iustitia* n 65 above.

be compensated because their position changed from what it would have been if they had not contracted with the defendants. Or it may be that they were able to resell to someone else but only at a lower price. They should be compensated for the same reason as the landlord who is forced to rent at a lower price. But it could be that they are in as good a position as they would been if they had never contracted with the plaintiffs. If the plaintiffs had not contracted, they would have made one less sale. They are not like a cruise line who would have sold the plaintiff's cabin to someone else but now must sail with one cabin empty. They are like a cruise line who had more cabins than it could sell, and sails with one more cabin empty than if the plaintiff had not fallen ill. The cruise line is no worse off than if the defendant had never contracted. If Lessius' insight is correct, the defendant should be able to withdraw.

A contemporary jurist might object that the plaintiff was harmed. Under the contract, it was entitled to the profit that it will not make if the defendant withdraws. Therefore, it is entitled to a remedy that will put it in as good a position as if the contract had been performed. That argument, however, begs the question. The question is whether the plaintiff is entitled to enforce the contract even though the trip became useless to the defendant because he became ill or his wife died. If not, the defendant did not violate any of right of the plaintiff.

IV. CONCLUSION

We do not think that doctrines such as *causa onerosa* or *causa concreta* are indispensable in contract law but the functions they serve ought to remain: they work to preserve voluntariness and commutative justice in contract law.[67] The use of *causa concreta* in Italy, despite the academic criticism, takes account of the contractual purpose of the parties and so ensures that a contract is voluntary. Nevertheless, it is crucial to demarcate the scope of this doctrine. Specifically, according to Lessius, when a contractual performance was useless to one of the parties at the time of contracting or becomes so, he should be able to escape the contract only when to do so is not unfair to the other party.

[67] See *generally* J. Gordley and H. Jiang, 'Contract as Voluntary Commutative Justice' *Michigan State Law Review*, 725 (2020).