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# MISTAKE AS A DEFECT OF CONSENT: STRENGTHS AND WEAKNESSES OF THE ITALIAN RULES COMPARED WITH THE U.S. APPROACH

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*This essay undertakes a comparative inquiry into the rules on unilateral mistake in U.S. and Italian contract law, using the methodological lens of law and economics in order both to examine the effects of the various rules on the conduct of legal actors and to assess the two legal systems in terms of economic efficiency. The discussion begins with a comparison between the rigid taxonomy of Article 1429 of the Italian Civil Code and the flexible standard of the basic assumption drawn from U.S. law, showing that this divergence is reflected in the degree of predictability of judicial decisions and in the duties of diligence imposed on the parties. It then shows how the Italian remedial architecture, through the combined operation of the restrictive filter of the determinative mistake and the rectification mechanism of Article 1432 of the Civil Code, is better able to preserve efficient exchanges than the U.S. system. The rule of recognizability applicable to mistake, adopted by both legal systems, is then examined and interpreted in light of the doctrine of the last clear chance. Regarding the duty to inform the counterparty, the operational fragility of the safe harbor provided by U.S. law in favor of the informed buyer is identified. Finally, the essay proposes an economic justification for the Italian rule that establishes voidability for a recognized mistake without providing zones of immunity for the informed party. This rule is interpreted as a possible response to the no-trade problem, since the buyer's silence becomes, as a rule, a credible signal of the absence of undisclosed private information, with the result that the rational attitude of suspicion that often blocks bilateral negotiations is mitigated.*

**Keywords**: unilateral mistake; recognizability of mistake (Article 1431 Italian Civil Code) - rectification of contract (Article 1432 Italian Civil Code) - *last clear chance* doctrine; *cheapest cost avoider* doctrine - *no-trade* theorem (Milgrom–Stokey) - *unraveling result* (Grossman–Milgrom); buyer's duty of disclosure.

## I. INTRODUCTION

Mistake represents one of the most problematic defects of consent in contract law. Indeed, when one party concludes a contract on the basis of an incorrect representation of reality, the law must choose between two alternative solutions, both supported by interests deserving of protection but potentially in tension: maintaining the contract, so as to protect the reliance of the non-mistaken party, or allowing its avoidance, so as to preserve the integrity of the consent of the party who has fallen into mistake. The way in which this choice is made is reflected primarily in the treatment the legal system gives to four distinct problems, each of which entails a different balance among the stability of exchanges, the protection of negotiating autonomy, the allocation of risks, and the management of informational asymmetries.

The first problem is the selection of legally relevant mistake. As a general matter, not every mistake authorizes avoidance, and a criterion is needed to set the threshold of relevance. The choice of that criterion - through typified categories or through flexible standards - is an institutional-design choice whose effects on the predictability of decisions and on litigation costs are evident. The second problem concerns the fate of efficient exchanges affected by mistake. A legal system that allows the avoidance of contracts achieving a socially desirable transfer of resources incurs a cost in allocative efficiency. Tools that avoid the destruction of value may therefore become necessary. The third problem concerns the allocation of the risk of mistake between the parties. Even when the mistake is qualified as legally relevant, it remains to be determined whether the consequences are to be borne by the party who has erred or by the counterparty. The fourth problem, finally, concerns the precontractual duty to inform. When one party knows that the other is mistaken about a relevant fact, the law must choose whether to impose the correction of the mistake or tolerate reticence. Such a choice has a direct impact on the incentives for the production and sharing of information.

This Article undertakes a comparison between the Italian and the U.S. legal systems, examining the responses they provide to the problems just identified. The analysis uses the tools of law and economics, both to identify how the conduct of legal actors is modified by the different rules and to assess the various regulatory approaches in terms of economic efficiency. The objective is not to determine which system offers the most efficient solution to the problem of contractual mistake. Its aim is more limited: to show that some rules of Italian civil law, often considered foreign to the economic logic of contract law, can also be understood in light of efficiency considerations.

The Article advances four principal theses. First, it seeks to show that allocative efficiency and the determinative character of the mistake are logically independent. Indeed, the requirement that the mistake be determinative of consent reduces, but does not eliminate, the risk of avoiding efficient contracts - that is, those contracts in which the good passes from a person who values it less to one who values it more. This explains the importance of Article 1432 of the Italian Civil Code.

Second, in order to justify the legislative choice to ground recognizability on an objective standard, a reference to the doctrine of *last clear chance*, developed in the Anglo-American world in the area of tort law, is proposed. It is argued that the party called upon to recognize the mistake is the one who, in the causal sequence already underway, is the last in a position to prevent its translation into a contractual bond; on that party, therefore, a duty of diligence is imposed, regardless of the negligence with which the mistake originally arose.

Third, the operational fragility of the *safe harbor* granted to the buyer under U.S. law is demonstrated. In principle, that law allows the buyer who possesses positive information about the value of the good to remain silent without incurring negative consequences. However, this protection of silence tends to dissolve as soon as the seller poses a direct question about the existence of unshared information. In that case, the buyer is forced to choose among a false answer, sanctioned as *misrepresentation*; a truthful answer, which discloses the information and eliminates the acquired advantage; and silence, which in any event conveys information to a rational counterparty. It follows that the right to remain silent, as outlined by U.S. law, far from being a stable protection, is vulnerable to a simple inquiry by the counterparty.

Fourth, a possible interpretation of the Italian rules on recognizable mistake is proposed in terms of economic efficiency. In particular, it is suggested that the rule laid down by Article 1431 of the Italian Civil Code can be read as an institutional response to the *no-trade* problem generated by private information in bilateral transactions. As Milgrom and Stokey's theorem shows, when one of the contracting parties holds relevant private information, the other can rationally infer - from the counterparty's very willingness to enter into the exchange - that such an exchange is unfavorable to it, with the result that it does not take place. On this view, the Italian rules, which make the contract voidable in every case of a recognized determinative mistake, without affording any *safe harbor*, may be understood as a regulatory framework designed to reduce that risk and to enable exchanges that might otherwise not occur.

## II. Relevant Mistake: Taxonomy And Standards

In both legal systems examined, not every mistake allows avoidance of the contract; however, how legally relevant mistakes are selected differs significantly. While U.S. law adopts a standards-based approach, Italian law rests on a taxonomic approach[1].

### II.1 The U.S. rules: *basic assumption* and *material effect*

In U.S. law, unilateral mistake is governed by § 153 of the Restatement (Second) of Contracts[2], which provides that the contract is voidable when one party's mistake concerns a fundamental presupposition of the exchange ("*basic assumption on which the contract was made*"), produces a material effect on the balance of performances ("*material effect on the agreed exchange*"), and a further alternative condition is met: performance would be *unconscionable* (severely unfair); or the counterparty knew or had reason to know of the mistake ("*knew or had reason to know*"); or the counterparty caused the mistake.

[1]This reflects the contrast between rules and standards along the lines elaborated by L. Kaplow, *Rules Versus Standards: An Economic Analysis*, in Duke Law Journal, 42, 557 ff. (1992).

[2]In what follows, the categories and formulations of the Restatement (Second) of Contracts are used as an authoritative synthesis of the subject, while bearing in mind that it is not a formally binding source and that the existing law may vary among individual U.S. jurisdictions. The analysis does not purport to reconstruct such variations exhaustively.

The Restatement does not define *basic assumption*, but the Comments make it clear that this refers to a presupposition so fundamental that it was taken for granted by the parties at the time of contracting, without need for express negotiation. The traditional example offered (which actually concerns a case of mutual rather than unilateral mistake) is *Sherwood v. Walker*[3], in which both parties believed that a cow was barren and structured the transaction on that assumption; when it emerged that the animal was pregnant and that its value was ten times higher, the court allowed avoidance, treating fertility as a *basic assumption* of the exchange.

The *material effect* requirement operates as an objective filter. The mistake must significantly affect the balance of performances. Hence, mistakes concerning a *basic assumption* but with a negligible impact on the relationship between the performances do not justify avoidance. Section 154 adds another requirement, which introduces the further filter of assumption of risk, under which a party bears the risk of the mistake when the party has assumed the risk by contract; when it was aware of its own ignorance and nonetheless decided to proceed (*conscious ignorance*)[4]; or when the risk is allocated to it by the court through an assessment of reasonableness in the circumstances[5]. In all of these cases, the contract is not voidable.

The U.S. system thus operates, in its overall design, through open standards such as *basic assumption*, *material effect*, *unconscionability*, and *reasonableness*, which are not exhaustively defined. From this follows broad judicial discretion, useful in tailoring the rule to the variety of cases but associated with reduced predictability *ex ante*. It should be noted, however, that this judicial discretion is partly mitigated by the principle of binding precedent typical of the U.S. system.

### II.2 *The Italian rules: essentiality and causation*

Italian law addresses the relevance of mistake through a different structure: Article 1429 of the Italian Civil Code lists the categories of essential mistake and contains no open-textured concept comparable to *basic assumption*. According to a substantial portion of legal scholarship, mistake is relevant only if it falls within one of the four categories provided[6];

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[3]*Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887).

[4]On conscious ignorance as the foundation for assumption of risk, *see* E.A. Farnsworth, *Farnsworth on Contracts*, § 9.3, 578 ff. (3d ed. 2004); J.M. Perillo, *Calamari and Perillo on Contracts*, § 9.26, 363 ff. (5th ed. 2003). In the case law, *see Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885). In that case, a seller transferred a small stone to a jeweler for one dollar; the jeweler, although possessing superior expertise, had not identified the nature of the stone with certainty. The stone turned out to be a rough diamond worth approximately seven hundred dollars. The Wisconsin Supreme Court denied avoidance of the contract, emphasizing that the plaintiff had been in possession of the stone for a long time and had carried out some investigations to determine its precise nature, ultimately deciding to sell it without further inquiry. It is worth noting that when Italian courts deny the essential character of a mistake on the ground that the party had accepted a degree of uncertainty as to the quality or value of the good - as occurs in sales of used goods or in transactions involving works of art of uncertain attribution - they implicitly perform the same risk-allocation operation. In both systems, the fact that the party had, even tacitly, assumed the risk of mistake forecloses the rescissory remedy.

[5]On this point, *see* E.A. Farnsworth, *Contracts*, § 9.3, 628 ff. (3d ed. 1999).

[6]On the exhaustive character of the categories of essential mistake under Article 1429 of the Italian Civil Code and on the internal distinction between the various categories, *see* R. Sacco, in R. Sacco and G. De Nova, *Il contratto*, in Trattato di diritto civile directed by R. Sacco, vol. I, 384 (1993). For the exhaustive

outside the list, it remains legally irrelevant, even when it is psychologically significant for the party who made it. The structure of Article 1429 of the Civil Code operates on two levels. At the first level, by which it defines the scope, it establishes that the mistake must fall within one of the listed categories. At the second level, within that scope, it distinguishes between mistakes that require no further inquiry (no. 1)[7] and mistakes that require proof of subjective causation (nos. 2, 3, 4).
The qualification of the list in Article 1429 of the Civil Code as exhaustive nonetheless requires discussion of a different position taken by the Court of Cassation, which has on some occasions held that the enumeration in Article 1429 of the Civil Code is merely illustrative[8]. It should be noted, however, that in recent decades the Supreme Court has not had occasion to address the question of the exhaustiveness of the list as an autonomous issue. Recent decisions confine themselves to subsuming concrete fact patterns under categories already codified, reasoning systematically *within* the boundaries of Article 1429 of the Civil Code, without ever invoking an opening of the list.

It has also been pointed out that, in the decisions in which the generalizing capacity of the rule has been proclaimed, the courts have actually avoided contracts vitiated by a mistake regarding the very nature of the transaction or by a mistake regarding quantity[9].

This Article adopts the interpretation that the list provided by Article 1429 of the Civil Code is exhaustive. The reason is that, for purposes of voidability of the contract, the Italian legal system requires the mere recognizability of the mistake and not actual knowledge thereof. If the list were merely illustrative, the duty of diligence of the counterparty would become unduly burdensome, since that party would have to verify the absence of mistake even with respect to all circumstances not contemplated in the list of Article 1429 of the Civil Code[10]. Such an effect would compromise the security of

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character also P. Trimarchi, *Istituzioni di diritto privato*, 184 (24th ed. 2023). Taking the view that the enumeration in Article 1429 of the Civil Code is merely illustrative, *see* C. Rossello, *L'errore nel contratto. Artt. 1427-1433*, in Il Codice civile. Commentario founded by P. Schlesinger and directed by F.D. Busnelli, 73 ff. (2019); C.M. Bianca, *Diritto civile, III, Il contratto*, 604 (3d ed. 2019); M. Bessone, *Nuovi saggi di diritto civile*, 25 ff. (1980).

[7] Holding that, in order to qualify a mistake as essential under Article 1429, no. 1, of the Civil Code, no further requirements are needed: A. Trabucchi, *Errore (diritto civile)*, in Noviss. dig. it., vol. VI, 668 (1960); F. Galgano, *Il negozio giuridico*, in Trattato di diritto civile e commerciale formerly directed by A. Cicu and F. Messineo, continued by L. Mengoni, 27 (1st ed. 1988); R. Sacco, in R. Sacco and G. De Nova, *Il contratto*, cit., 388. Holding, on the contrary, that "concrete essentiality" is also required, *see*, among others, G. Mirabelli, *Dei contratti in generale*, in Commentario del Codice civile, book IV, vol. II, 540 (1958); F. Santoro-Passarelli, *Dottrine generali del diritto civile*, 162 (9th ed. reprint 2012); V. Pietrobon, *L'errore nella dottrina del negozio giuridico* 340 (1963).

[8] *See* Cass., 17 January 1953, no. 124, according to which "the requirement of essentiality of the mistake must be determined by objective criteria, listed in Article 1429 in a non-exhaustive manner and capable of being identified in further factual situations sharing the same features." A comprehensive review of the conflicting scholarly positions can be found in N. Distaso, *I contratti in generale*, in Giurisprudenza sistematica civile e commerciale, edited by W. Bigiavi, 140 ff. (1980). Holding that the first hypothesis under Article 1429, no. 2, of the Civil Code (regarding the identity of the object) does not require any further demonstration: F. Galgano, *Il negozio giuridico*, cit., 275; R. Sacco, in R. Sacco and G. De Nova, *Il contratto*, cit., 388.

[9] Thus R. Sacco and G. De Nova, *Il contratto*, cit., 388.

[10] On this point, see P. Trimarchi, *Istituzioni di diritto privato*, cit., 189.

transactions and, in some cases, would altogether deter the parties from entering into contracts.

A systematic argument reinforces this functional consideration. Article 1428 of the Civil Code makes voidability depend on the concurrence of two requirements - the essentiality of the mistake and its recognizability - entrusting to the subsequent Article 1429 of the Civil Code the task of defining when the mistake must be considered essential. Between the two provisions there is therefore a relationship of definitional cross-reference: Article 1428 of the Civil Code uses a predicate whose content is entirely determined by Article 1429 of the Civil Code. If a merely illustrative character were attributed to the latter provision, the predicate would become substantially indeterminate, and the rules on mistake would end up resting on a notion of essentiality lacking textual anchorage.

A second argument concerns the textual formulation of Article 1429 of the Civil Code. The provision opens by stating that the mistake is essential and follows with the enunciation of the four categories through a closed numbering, without resorting to the adverbs ("in particular," "among other things," "especially") that Italian legislative technique reserves for illustrative enumerations. Comparison with provisions of the Civil Code that employ genuinely open-textured formulas—such as, for example, Article 2598 of the Civil Code on unfair competition, where the listing of two typical hypotheses is preceded by the clause "anyone who performs acts of unfair competition…" and followed by the closing clause of no. 3—shows that the legislator of 1942, when intending to leave the judge supplementary leeway, employed drafting techniques different from the one adopted in Article 1429 of the Civil Code.

Lastly, it must be emphasized that the Italian rules on mistake, structured around a closed typological scope (Article 1429 of the Civil Code), a restrictive causal filter (determinative mistake), and an objective imputation criterion (recognizability under Article 1431 of the Civil Code), serve a predictability function that would be significantly undermined by the generalization of the first component. Opening the list would mean converting the typological rule into a flexible standard and, with it, transferring to the judge a measure of evaluative discretion that the legislator appears to have intended to withhold from him. The interpretive choice supported here therefore rests not only on the text and on systematic coherence, but also on the observation that opening the list would produce, on the level of the overall functioning of the institution, outcomes incompatible with the very logic underlying the rules on mistake in the Civil Code.

II.3 *Observations on the comparison between the two systems*

The comparison between the criteria for selecting legally relevant mistake in the two systems shows that the difference between the U.S. model and the Italian model reflects different ways of resolving the trade-off between predictability of judicial decisions and completeness of the situations contemplated by the rule. The *basic assumption* standard, adopted by U.S. law, entrusts to the court the task of determining, on a case-by-case basis, whether the mistake bears upon a fundamental presupposition of the exchange. This approach gains adaptability at the expense of predictability, since the parties, prior to adjudication, often cannot determine with certainty whether their mistake will be qualified

as relevant. The taxonomy of Article 1429 of the Civil Code circumscribes the scope of relevance through predetermined categories and, in doing so, allows the parties to estimate with greater reliability the outcome of any future dispute, but at the cost of a reduced ability to capture atypical mistakes nonetheless deserving of protection[11]. Thus, a comparison between the two solutions in terms of economic efficiency is difficult. The open standard reduces the costs deriving from the rigidity of categories but increases litigation costs; the taxonomy reduces litigation costs but creates the risk of excluding mistakes which, although significant, do not fall within the codified categories.
A further divergence between the two systems emerges regarding the duty of diligence that each system imposes on the parties in the precontractual phase. As will be seen *infra* (Section IV), both Italian and U.S. law base voidability on the mere recognizability of the mistake and not on its actual knowledge. This convergence on the imputation criterion amplifies the divergence in the consequences arising from the selection of relevant mistakes, since the breadth of the scope within which a mistake can lead to voidability has a direct impact on the intensity of the diligence each party must exercise. In the U.S. system, where any *basic assumption* can ground voidability, the party seeking to preserve the stability of the contract is required to verify the absence of mistakes regarding a potentially unbounded set of presuppositions of the exchange. The flexibility of the standard thus translates into a particularly burdensome duty of diligence, since the counterparty of the mistaken party cannot determine *ex ante*, with sufficient precision, which aspects may be legally relevant. Conversely, the taxonomy of Article 1429 of the Civil Code, by circumscribing the categories of legally relevant mistake, allows the parties to focus their diligent attention on a determinate number of hypotheses, thereby containing the overall verification burden.

Alongside these divergences, however, it is appropriate to note a point of convergence that the comparison reveals. Both legal systems exclude avoidance when the party had knowingly accepted uncertainty about the good or the deal, although through distinct technical mechanisms. U.S. law does so through the doctrine of *conscious ignorance* (§ 154(b) of the Restatement): the party who was aware of its own ignorance on a relevant point and nonetheless decided to contract assumes the risk of mistake and cannot invoke avoidance. Italian law reaches the same result through a different route. The Court of Cassation's case law denies the essentiality of the mistake when it appears that the party had - at least tacitly - accepted an *alea* relating to the quality or value of the good, as occurs in sales of used goods or in transactions involving works of art of uncertain attribution[12]. In both systems, therefore, the conscious choice to operate within an area of uncertainty bars the rescissory remedy: one who accepts the risk cannot complain of mistake.

## III. Determinative Mistake, Incidental Mistake, and Efficient Exchanges

[11] For the general analysis of the trade-off between rules and standards, *see* L. Kaplow, *Rules Versus Standards: An Economic Analysis*, cit., *passim*.
[12] Cass., 21 May 2018, n. 12453.

The examination of the two models for selecting relevant mistake reveals a further line of comparison, which concerns the different attitudes of the two legal systems toward the mistake affecting efficient exchanges. More precisely, the question is whether, and to what extent, each system is able to preserve those contracts which, despite the mistake, achieve the transfer of a good from a lower-valuing party to a higher-valuing party. The problem unfolds along two related dimensions: on the one hand, the definition of the filter through which the mistake gains access to the rescissory remedy; on the other hand, the corrective mechanisms designed for the cases in which the filter is not enough to save the efficient exchange.

The first dimension calls for a distinction between mistake that is determinative of consent - in the sense that, absent the mistake, the party would not have concluded the contract - and mistake that is merely incidental, which alters the terms of the exchange without removing the will to contract[13]. Consider two scenarios. A buyer purchases for the price of 4 a good that he values at 8; he later discovers that he was mistaken about a quality and, given the correct information, revises his valuation, attributing to the good a value of 6. In this case the buyer still pays less than what he values the good at and would have purchased even had he known the truth. Now modify the example by assuming that, after the discovery, the buyer values the good at 3. In this second case the mistake is determinative of consent in the sense that the buyer would not have purchased at 4. The difference between the two scenarios is not exhausted by a merely quantitative datum, since a different intensity of economic impact may translate into opposite legal consequences.

In Italian law, the formulations used in the Civil Code support a restrictive interpretation[14], under which a mistake is relevant only when, but for the mistake, the party would not have entered into the contract. It must be noted that the Court of Cassation has consistently embraced this interpretation[15]. The restrictive rule operates as a first level of safeguard for efficient contracts. Indeed, if voidability presupposes that, but for the mistake, the party would not have contracted, all cases in which the party would have entered into the contract anyway, albeit on different terms, fall outside the scope of the rescissory remedy. In the example in which the buyer, having discovered the mistake, revalues the good from 8 to 6 and would in any event have purchased at the price of 4, the restrictive rule excludes avoidance and the efficient exchange survives.

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[13]P. Trimarchi, *Istituzioni di diritto privato*, cit., 173 ff. In American law, on the distinction between mistake that destroys consent and mistake that alters its terms, *see* E.A. Farnsworth, *Farnsworth on Contracts*, cit., § 9.3, 563 ff.

[14]The judgment of essentiality has given rise to a scholarly debate concerning whether it is purely subjective-causal in nature or whether it contains an objective element. According to the prevailing view, embraced by the case law of the Court of Cassation, a mistake is essential when, but for the mistake, the party would not have entered into the contract. This is a counterfactual judgment centered on the actual will of the contracting party. A minority position proposes instead a reading that, alongside the subjective element, introduces an objective dimension: the mistake would be essential only where a reasonable contracting party, in the same situation, would not have concluded the contract. In this direction, *see* G. Mirabelli, *Dei contratti in generale*, cit., 539 ff.

[15]Cass., 20 April 2015, no. 8031.

Even this rule, however, is unable to save all efficient contracts from voidability. There are cases in which the mistake is determinative of consent but the transfer of the good carried out through that contract is efficient.

The situation can be illustrated with an example. The seller values the good at 2 while the buyer values it at 8. The price set for the sale is 4. Once the mistake is discovered, the buyer modifies his valuation and assigns the good a value of 3. In these circumstances, the mistake is determinative of consent, in the sense that the buyer would not have entered into the contract had he not fallen into mistake (the price paid (4) exceeds the corrected valuation of the good (3)). However, the exchange is efficient, since the good passes from a person who values it at 2 to one who attributes to it a value of 3.

In a hypothesis of this kind, providing for voidability entails the removal of the contract even though there is a socially desirable transfer of resources. Consequently, the Italian rules cannot exclude the voidability of all contracts that achieve efficient exchanges.

Section 153 of the Restatement (Second) of Contracts does not employ the formula of determinative consent but uses the two filters of *basic assumption* and *material effect on the agreed exchange*. It is above all the second filter that bears on the issue, because it operates as a test centered on the economic balance of the exchange. In the example in which the buyer pays 4 and revalues the good from 8 to 6 - a 25% reduction - a U.S. court might find a *material effect on the agreed exchange* even where the buyer would have purchased anyway[16].

To this aspect a further one must be added, which aggravates the risk of dismantling efficient exchanges in the U.S. system. As will be illustrated in Section IV, § 153(a) of the Restatement allows avoidance for *unconscionability* independently of the recognizability of the mistake and, therefore, independently of any consideration regarding the conduct of the counterparty. Since the criterion of *unconscionability* looks to the harshness of performance for the mistaken party and not to the allocative efficiency of the exchange, it can lead to the avoidance of contracts that, although onerous for the mistaken party, transfer the good to the person who values it more. The U.S. system is therefore exposed, on this front, to a risk of dismantling efficient exchanges that Italian law does not face, since the Italian system does not provide for hypotheses of avoidance for mistake grounded in the inequity of performance in the absence of recognizability[17].

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[16]In the case law, a significant illustration is offered by *Elsinore Union Elementary School District v. Kastorff*, 54 Cal.2d 380, 353 P.2d 713 (1960). *See also Donovan v. RRL Corp.*, 26 Cal.4th 261, 27 P.3d 702 (2001), in which the same court, expressly applying § 153(a), held that a significant mistake as to price constitutes a mistake regarding a *basic assumption* and ordinarily produces a *material effect* adverse to the mistaken party, regardless of whether that party would have contracted on different terms.

[17]*Cf.* Cass., 25 July 2011, no. 16240, in Dir. giur., 2011: "A mistake is a ground for avoidance of the contract when it is essential and recognizable by the other contracting party. The inquiry to be carried out is therefore twofold: the first, with respect to the contracting party who claims to have fallen into mistake, is aimed at establishing whether that party was induced to contract on the basis of a distorted representation of reality; the second, concerning the other contracting party, is aimed at ascertaining whether that party, with the use of ordinary diligence, could have realized the other's mistake."

It should also be observed that, with respect to all hypotheses in which an efficient exchange is supported by a contract that is in fact voidable, both the U.S. and Italian legal systems contemplate corrective mechanisms.

U.S. law provides a corrective in § 158 of the Restatement (Second) of Contracts, which allows the court to shape the remedy in such a way as to avoid unjustified results stemming from avoidance. The provision does not, admittedly, express a rule directed at saving the efficient exchange. Rather, it grants the court an equitable power to adjust the remedy, primarily in light of the reliance of the counterparty. As a result, the maintenance of the contract may be achieved even where the mistake is relevant, but only on a discretionary basis and without allocative efficiency constituting the express criterion of the decision.

Italian law offers a more structured corrective. Article 1432 of the Civil Code grants the non-mistaken party the option of preventing avoidance by offering to perform the contract in a manner consistent with the content under which the mistaken party intended to contract[18]. In the example proposed, the seller could offer a price reduction from 4 to a level equal to or below 3, thus foreclosing the mistaken party's attempt to seek avoidance. The mechanism operates unilaterally: an adequate offer by the non-mistaken party automatically forecloses the rescissory remedy, without the mistaken party being able to oppose it as such. Article 1432 of the Civil Code thus transforms the problem of mistake from an issue of validity into an issue of adjustment of the contractual content, allowing the exchange to be preserved whenever it is possible to realign it with the counterfactual preferences of the mistaken party. It must, however, be noted that this corrective, while removing the decision from judicial discretion, introduces a different point of friction, consisting in the assessment of the adequacy of the offer itself. Such an assessment requires a determination of what the counterfactual intentions of the mistaken party were - that is, the conditions under which he would have entered into the contract in the absence of the mistake. The mistaken party, although unable to refuse an objectively adequate offer, may challenge its adequacy before the court, contending that his counterfactual intentions were different from, and more favorable than, those reconstructed by the counterparty.

The comparison between the two legal systems thus seems to show, on the whole, a greater capacity of Italian law to preserve efficient exchanges, operating on two cumulative

[18]On a doctrinal level, the solution of Article 1432 of the Italian Civil Code falls within the broader tendency of the legal system toward the preservation of the contract whenever the interest of the mistaken party can be satisfied without sacrificing the underlying transaction. On rectification under Article 1432 of the Civil Code as a tool to preserve a contract vitiated by mistake, *see* E. Quadri, *La rettifica del contratto*, *passim* (1973). It should be noted that positive law does not set a rigid deadline within which the offer must be made: the prevailing scholarly view holds that it may be made up to the formulation of final submissions in the trial court (*see* E. Quadri, *La rettifica del contratto*, cit., 89 ff.). This regime generates an incentive for the non-mistaken party to wait for the proceedings to develop before formulating the offer, so as to avoid unnecessary concessions. As a result, in practice, the contract may remain in a state of uncertainty throughout the duration of the first-instance proceedings, with attendant procedural costs for both parties. From the standpoint of allocative efficiency, this aspect is immaterial. The exercise of the right, even if delayed, still produces the preclusive effect, and the efficient exchange is preserved. What is greater, compared with a system in which the offer were subject to a short time limit, is the cost of the path taken to reach that result.

levels: the restrictive rule of the determinative character of the mistake and the mechanism of Article 1432 of the Civil Code. One might object that, in the U.S. system as well, the non-mistaken party can spontaneously propose a modification of the contract in order to avoid avoidance, thereby producing a similar result in fact. The difference, however, is not merely terminological. Article 1432 of the Civil Code grants the non-mistaken party a *potestative* right whose exercise forecloses avoidance. In the U.S. system, by contrast, the offer of modification does not produce this effect. Indeed, the mistaken party can ignore it and continue to seek avoidance, and the court will, in any event, decide on the basis of its own discretion[19].

## IV. The Recognizability of Mistake

Once the mistake's legal relevance has been established, voidability of the contract does not automatically follow from it. There remains, indeed, the question of identifying the party that should bear its consequences. In the two legal systems considered, this issue is addressed through the requirement of recognizability of the mistake[20], which operates as a criterion for the allocation of risk and, at the same time, as a limit on the rescissory remedy.

U.S. law, through § 153 of the Restatement (Second) of Contracts, requires that the counterparty "*knew or had reason to know*" of the mistake[21]. Italian law, through Article 1431 of the Civil Code, requires that the mistake be recognizable, qualifying as such the mistake that, in light of the content and circumstances of the contract or of the qualities of the contracting parties, a person of ordinary diligence could have detected[22]. The convergence

[19]The behavioral law and economics literature has highlighted how a series of systematic heuristics and biases—including the self-serving bias, by which each party tends to perceive as reasonable claims that are in fact one-sided; the endowment effect, which leads parties to overvalue what they own or seek to retain; and reactive devaluation, which leads parties to undervalue a proposal merely because it comes from the counterparty—operate as endogenous frictions in the negotiation process, hindering the conclusion of agreements that would nonetheless be efficient. *See* C. Jolls, C.R. Sunstein, and R. Thaler, *A Behavioral Approach to Law and Economics*, in Stanford Law Review, 50, 1471 ff., esp. 1497 ff. (1998). It follows that, even if one were to recognize the non-mistaken party's ability to make a modifying offer, the absence of an automatic preclusion mechanism analogous to that of Article 1432 of the Italian Civil Code leaves the rescue of the efficient exchange exposed to all the risks of failure inherent in bilateral bargaining.

[20]On Article 1431 of the Italian Civil Code and on the requirement of recognizability as a limit on the protection of the mistaken party, *see* C.M. Bianca, *Diritto civile, III, Il contratto*, cit., 606; V. Roppo, *Il contratto*, 701 (3d ed. 2025). On the "reason to know" standard in American law, *see* E.A. Farnsworth, *Farnsworth on Contracts*, cit., § 9.4, 592; J.M. Perillo, *Calamari and Perillo on Contracts*, cit., § 9.26, 369 ff. In the case law, *see Geremia v. Boyarsky*, 107 Conn. 387, 140 A. 749 (1928).

[21]However, A.L. Corbin, *Corbin on Contracts. A Comprehensive Treatise on the Rules of Contract Law*, § 608, 675 (1960), notes that there are many decisions that do not conform to this principle.

[22] On Article 1431 of the Italian Civil Code and on the standard of normality used to determine recognizability, *see* C.M. Bianca, *Diritto civile, III, Il contratto*, cit., 606. In the case law, Cass., 28 November 2019, no. 31078, that reaffirmed that recognizability consists in the ability to detect the mistake on the part of a person of average diligence and, significantly, that treated actual concrete knowledge of the mistake as equivalent *quoad effectum* to abstract recognizability, on the assumption that the rationale of Article 1431 of the Civil Code is to protect only non-culpable reliance. More generally, for an analysis of certain cases in which the issue of recognizability of the mistake has been addressed, *cf.* C. Rossello, *L'errore nel contratto. Artt. 1427-1433*, cit., 235 ff. Stating that the indicators of recognizability may also be relevant: P. Barcellona, *Errore (Diritto privato)*, in Enc. dir., vol. XV, 279 (1966).

toward the objective standard expresses a non-mandatory choice, since both systems could have adopted a subjective standard, based on the actual knowledge of the mistake. The non-adoption of such an alternative seems interpretable through the lens of economic analysis, which allows recognizability to be read as a tool for the efficient allocation of informational burdens.

It should be noted, however, that U.S. law also recognizes situations in which the contract is voidable for unilateral mistake regardless of the recognizability of the mistake. These situations warrant discussion before proceeding to the economic analysis of the objective standard of recognizability, since they affect the overall assessment of the U.S. system.

The first situation is that of *unconscionability*, provided for by subsection (a) of § 153 of the Restatement (Second) of Contracts. It permits the avoidance of a contract for unilateral mistake even when the counterparty did not know and had no reason to know of the mistake, provided that performance of the contract would be severely unfair. This is a category heterogeneous from that of recognizability: while the latter operates as a criterion for the allocation of risk between the parties - identifying the party that could have avoided the mistake at the lowest cost - *unconscionability* looks exclusively to the effect of performance on the wealth of the mistaken party, operating as a form of equitable control over the harshness of the contractual obligation. The typical case is that of a contractor who has submitted a bid affected by a significant calculation error. Even when the counterparty had no reason to recognize the mistake, performance of a contract that would impose confiscatory losses on the offeror may be deemed *unconscionable*, with the result that the contract is voidable[23].

The second situation concerns the residual equitable power—already encountered—conferred on the court by § 154(c) of the Restatement. This provision provides that the risk of mistake may be allocated to a party when this is "reasonable in the circumstances." It is a closing clause with an open-ended content that confers on the court a wide margin of appreciation. Although this clause more frequently operates as a limit on avoidance - allowing the court to place the risk on the mistaken party when this appears reasonable - it can also, according to the Comments to § 153 and judicial practice, ground the granting of the rescissory remedy when none of the typified conditions is met but the totality of the circumstances suggests that it would be unfair to place the risk on the mistaken party.

Thus, the U.S. system, although having recognizability as a general rule, is open to case-by-case solutions that disregard such a requirement whenever the application of the general rule appears to the court to be incompatible with the equity of the case at hand.

### IV.1 *The economic justification: the cheapest cost avoider*

The economic logic of the recognizability standard is traditionally identified through the concept of the *cheapest cost avoider*, developed by Calabresi[24] regarding tort law and applied

[23] A judicial illustration in this direction is offered by the previously cited decision in *Elsinore Union Elementary School District v. Kastorff*, in which the court allowed avoidance of the construction contract notwithstanding the absence of any knowability of the mistake on the part of the contracting authority, giving weight to the confiscatory disproportion that performance would have caused for the contractor.

[24] G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*, esp. ch. 7 (1970).

to the law of contractual mistake by Kronman[25]. The idea is that the risk of mistake should fall on the party who can avoid it at the lowest cost. On this view, it is said that the legal system seeks to place the burden of prevention where prevention is least costly and therefore most efficient. In the context of unilateral mistake, this often falls on the counterparty of the mistaken party, especially when that counterparty possesses technical skills, professional experience, or contextual information that allows it to perceive the anomaly with modest effort, while for the declarant the elimination *ex ante* of every possible mistake would require widespread and far more onerous verifications. Read in this light, U.S. common law and Article 1431 of the Italian Civil Code would select the actor who, in relation to the content of the contract, the circumstances, and the qualities of the contracting parties, is in a position to identify the mistake at the lowest cost.
This explanation, however, while capturing a real aspect of the problem, does not fully account for the two positive-law regulations examined here. It would logically lead to the conclusion that, when the mistake is attributable to the negligence of the declarant - that is, when the cost of prevention was lower for him - the risk should remain on the latter and the contract should be valid. But this conclusion does not correspond to the framework adopted either by Italian or by U.S. law: in both systems, the mistake can be relevant even when caused by the inattention of the mistaken party, provided it was recognizable by the counterparty[26]. The *cheapest cost avoider* criterion thus appears to be contradicted in the cases in which the mistaken party was negligent but the mistake was nonetheless recognizable. Accordingly, the criterion proves insufficient to exhaust the rationale of the rule.

A more satisfactory explanation emerges if one looks to the doctrine of *last clear chance*, developed in Anglo-American tort law to mitigate the rigidity of the rule of *contributory negligence*. In tort law, the traditional common-law principle excluded any compensation for a victim who had contributed by his own conduct to the production of the harm. The doctrine of *last clear chance* introduced a significant exception, providing that even when the victim had culpably created the situation of danger, liability fell on the tortfeasor if, in the causal sequence already underway, the tortfeasor had the last concrete opportunity to avoid the harm and had failed to use it. Thus, the initial negligence of the victim did not erase the liability of the tortfeasor.

The formation of a contract under mistake can be read as a similar causal sequence. At a first stage, a party falls into mistake - possibly due to its own negligence. The mistake, however, does not, by itself, produce any legally relevant consequence. Indeed, it produces consequences only if and when it translates into a contractual bond. Between the moment when the mistake arises and the moment when the contract is concluded, there is a window of time in which the counterparty - who recognizes or could have recognized the

[25] A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, in Journal of Legal Studies, 7, 1 ff., esp. 4 ff. (1978).
[26] In the U.S. context, some courts have nevertheless held that if the negligence of the mistaken party exceeds a certain threshold, the contract cannot be avoided. On this point *see* E.A. Farnsworth, *Contracts*, cit., § 9.4, 634.

mistake - has the last concrete opportunity to prevent its legal effects, simply by bringing it to the attention of the mistaken party. If that window is not used and the contract is concluded, the counterparty finds itself in the position of one who has not used the *last clear chance* to avoid the harm.

The logic of *last clear chance* thus seems to explain what the *cheapest cost avoider* criterion fails to explain. When the mistaken party has been negligent, the *cheapest cost avoider* criterion requires verifying which of the two parties had the lower cost of prevention: if the answer is the mistaken party, the risk should remain on him. The doctrine of *last clear chance*, on the contrary, disregards the comparison of the original prevention costs entirely and looks exclusively to the sequential structure of the situation at the time of contract formation. It asks not who could have prevented the mistake at the lowest cost, but who was in a position to prevent its legal consequences last. This criterion is invariant with respect to the fault of the mistaken party, since the initial negligence of the party who errs does not change the position in the causal sequence of the one who has the last opportunity to correct the mistake[27].

It must, however, be emphasized that the transposition of the *last clear chance* doctrine presupposes that, in the final phase of the negotiation, the counterparty finds itself in a qualitatively distinct position with respect to the mistaken party, as the last actor able to prevent the mistake from translating into a contractual bond. But this presupposition does not always hold, since the mistaken party also often retains, until the end, the possibility of checking, verifying, and choosing not to contract. It cannot, therefore, be excluded that the reference to *last clear chance* has a primarily heuristic value, offering a tool capable of illuminating the structure of recognizability rather than identifying with certainty the rationale of the rule as enacted.

### IV.2 *The discarded alternative: the standard of actual knowledge*

It seems useful at this point to consider the alternative discarded by the two legal systems, under which avoidance would be allowed only in cases in which the counterparty actually knew of the mistake, while the mere possibility of recognizing it would not be sufficient. Under such a regime, the parties would have an incentive not to gather information.

[27]The non-excusability of the mistake, although it does not preclude avoidance of the contract under Article 1431 of the Italian Civil Code, is relevant on the level of precontractual liability. The mistaken party who has breached the minimum duties of diligence during negotiations may be liable under Article 1337 of the Civil Code for damages suffered by the counterparty who, without fault, relied on the validity and future performance of the contract. On this view, the assessment of the conduct of the two parties is comparative in nature: *see* V. Pietrobon, *L'errore nella dottrina del negozio giuridico*, cit., 160 ff., who observes that the requirement of recognizability is laid down to protect the non-culpable reliance of the counterparty, so that, when the mistake is inexcusable, the negligence of the mistaken party may give rise—in addition to the rescissory remedy—to a duty to compensate the party who relied on the stability of the contract. It should however be noted that the case law of the Court of Cassation tends to deny compensation under Article 1338 of the Civil Code whenever the injured party could have detected the cause of invalidity through ordinary diligence (Cass., 8 July 2010, no. 16149). This trend, however, does not preclude protection grounded on Article 1337 of the Civil Code, which does not contain the "without fault" clause typical of Article 1338 of the Civil Code and which, in its scope as a general clause, allows liability to be calibrated in light of the comparison between the negligence of the mistaken party and the reliance of the counterparty.

Knowing that the contract would be voidable solely on the basis of actual knowledge, each contracting party could benefit from keeping its own knowledge in a zone of uncertainty, avoiding analyses, verifications, and checks, so as to be able to claim that it did not know. Strategic ignorance reverses the logic of the *cheapest cost avoider*. Instead of incentivizing the party that can prevent the mistake at the lowest cost to take precautions, the subjective standard incentivizes that party not to take them. The risk thus remains on the mistaken party, who is often the party with the higher cost of prevention. Such a regime would be characterized by a strong inefficiency.
A further argument, in terms of economic efficiency, in favor of the objective standard concerns procedural costs. Proof of actual knowledge entails a particularly burdensome evidentiary burden, since it requires findings concerning the subjective mental state of the counterparty and the reconstruction of the knowledge possessed at the time of contract conclusion. These are findings that demand costly evidentiary tools. The standard of recognizability reduces procedural costs. The court must determine what a reasonable person, with the same qualifications and in the same circumstances, could have recognized. The assessment is grounded on observable facts, such as the professional training of the defendant, the nature of the good, the circumstances of the negotiation, and the content of the contract; it does not concern the actual knowledge of the non-mistaken party.

## V. The Buyer's Duty of Disclosure

It has been highlighted that, in both legal systems, the risk of mistake is allocated to the counterparty when the latter could have recognized it. The next step is to consider whether there are situations in which a party is granted the right to withhold information even though that party is aware that the other has fallen into mistake. The case of the buyer aware of the seller's mistake will be considered. On this point, the two systems take *prima facie* sharply divergent positions.

### V.1 The U.S. *safe harbor*

The Restatement (Second) of Contracts § 161, Comment (d), formulates the rule under which the buyer is not, as a rule, required to disclose circumstances that make the good more valuable than the seller believes. Illustration 10 offers the example of a buyer who learns, on the basis of investigations and surveys carried out by a public authority, that a tract of land contains valuable mineral deposits. In such a case, he may purchase without communicating that information to the seller. The so-called *safe harbor* protects the buyer's silence with respect to positive information - that is, information that increases the value of the good. This right to exploit one's own information, however, is not unlimited, since it does not cover false statements; consequently, among other things, the buyer cannot declare that he has no private information. Indeed, § 164 of the Restatement (Second) of

Contracts sanctions *misrepresentation*, understood as a false representation of a fact capable of inducing the counterparty to conclude the contract[28]. Furthermore, the *safe harbor* does not protect silence when fiduciary relationships exist or when, under the circumstances, non-disclosure proves incompatible with reasonable standards of commercial fair dealing[29]. In any case, in transactions between parties without prior relationships and in the absence of fiduciary ties, the buyer who remains silent about positive information remains protected[30].

V.2 *The Italian rule: recognizability without exceptions*

Italian law does not provide a *safe harbor* allowing the informed party to withhold information in typified hypotheses. Indeed, the codified rules on mistake do not construct an area of immunity based on the nature of the information (positive or negative) or on the subjective position of the parties; the framework revolves exclusively around the two requirements of essentiality of the mistake and its recognizability by the other contracting party. Where the seller is mistaken and the buyer is aware of that fact, once it is established that the seller's mistake was essential, the voidability of the contract follows in all cases. One of the principal consequences is that voidability is not foreclosed when the buyer's information is the result of a deliberate and costly investment specifically aimed at identifying unknown qualities of the good.

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[28]The definition of *misrepresentation* contained in the Restatement (Second) of Contracts, § 159, is "an assertion that is not in accord with the facts."

[29]The clause concerning good faith and reasonable standards of fair dealing actually operates as a definite avenue for the erosion of the safe harbor. Section 161(b) of the Restatement (Second) of Contracts equates silence with the assertion of a non-existent fact in all cases in which disclosure would correct a counterparty's mistake regarding a basic assumption of the contract and the non-disclosure amounts to a violation of good faith and reasonable standards of fair dealing. This is an elastic mechanism, independent of the misrepresentation referred to in § 164, that allows courts to remove from the safe harbor situations in which silence about the other party's mistake appears, under the circumstances, contrary to fair dealing, even in the absence of a direct question by the counterparty. It follows that the operational fragility of the safe harbor discussed below (*infra*, Section V.3) actually unfolds along two concurrent dimensions: the external pressure produced by the direct question, which triggers the risk of misrepresentation, and the internal pressure produced by the good faith standard of subsection (b), which operates regardless of any prompting by the counterparty. For a proposal to give greater scope to this clause in order to expand the duties of disclosure in American law, *see* M.A. Eisenberg, *Disclosure in Contract Law*, in California Law Review, 91, 1645 ff., esp. 1680 ff. (2003).

[30]*See Neill v. Shamburg*, 27 A. 992 (Pa. 1893). In that case, the buyer had borne substantial research costs to ascertain the presence of oil deposits in the subsoil of a tract of land offered for sale, and concluded the purchase contract without disclosing to the seller the information so acquired. The court denied the existence of a duty to disclose, observing that the buyer's conduct reflected nothing other than the legitimate intention to derive an advantage from his informational investment. The case is used by A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, cit., 19 ff., as a paradigmatic example of the right not to disclose deliberately acquired information. Since the information was produced through targeted and costly research, its compelled sharing would have eroded the expected returns from the investment, discouraging the future production of socially useful information. *See also Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817); *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885). More recently, in *Chiarella v. United States*, 445 U.S. 222 (1980), the Supreme Court reversed the conviction for securities fraud of a printer who had purchased shares of target companies after ascertaining their identity by reading documents relating to tender offers. The Court held that the mere possession of non-public information does not, in itself, give rise to a duty to disclose owed to the sellers of the securities. A duty to disclose arises only where there is a fiduciary or trust-and-confidence relationship with the counterparty to the transaction. Since Chiarella had no fiduciary relationship with the sellers, his silence could not be deemed fraudulent under Rule 10b-5. The Court thus reaffirmed the principle that "silence, absent a duty to disclose, is not fraudulent."

Alongside this dimension, there also operates a distinct form of control, entrusted to objective good faith in the negotiation phase. It can ground precontractual liability under Articles 1337 and 1338 of the Italian Civil Code[31]. Consequently, a buyer who knows of a fact significantly affecting the seller's decision and who chooses to remain silent in order to exploit the seller's ignorance may be exposed to liability for damages for breach of the duties of fair dealing[32].

A further institution that may strengthen the sanction for the failure to share information is fraud by omission, which, however, appears to require more than mere silence and presupposes—according to the traditional approach—the presence of circumstances capable of qualifying the omission as deceptive conduct, also given the manner of the negotiation[33].

V.3 The *safe harbor* and its limits: *misrepresentation* and direct question

As discussed above, the U.S. *safe harbor* protects the buyer's silence but not untruthful statements. The dividing line is between reticence, as the omission of what one knows, on the one hand, and the assertion of falsehood, on the other. The former is protected; the latter is sanctioned[34].

[31]To this effect, *see* M. Allara, *La teoria generale del contratto*, 190 (1955); A. Fedele, *Dell'annullabilità del contratto*, in Commentario del diritto civile directed by M. D'Amelio and E. Finzi, Libro delle obbligazioni, vol. I, 65 (1948); M. Franzoni, *Dell'annullabilità del contratto. Artt. 1425-1426*, in Il Codice civile. Commentario, founded and formerly directed by P. Schlesinger and continued by F.D. Busnelli, 30 (2d ed. 2005). On precontractual liability for breach of good faith under Article 1337 of the Civil Code in connection with informational reticence, *see* C. Rossello, *L'errore nel contratto. Artt. 1427-1433*, cit., 47 ff.

[32]*Cf.* P. Gallo, *Errore sul valore, giustizia contrattuale e trasferimenti ingiustificati di ricchezza alla luce dell'analisi economica del diritto*, in Quadrim., 1992, 656 ff., esp. 676 ff. On the so-called "incomplete defects" of the contract, *see* M. Mantovani, *«Vizi incompleti» del contratto e rimedio risarcitorio*, *passim* (1995). *See* Cass., 26 April 2012, n. 6526 and Cass., 23 March 2016, n. 5762.

[33]On fraud by omission and on the requirement that silence be inserted into a communicative context capable of misleading the counterparty, *see* Cass., 11 October 1994, no. 8295. In more recent case law, the principle has been reaffirmed and clarified by Cass., 11 April 2022, no. 11605, according to which mere silence and reticence, by not altering the representation of reality but merely failing to counter the perception that the other contracting party has formed, do not, in themselves, constitute a ground for invalidating the contract (in that case, silence by the seller as to building-permit irregularities in a real-estate sale). In the scholarly literature, *see* P. Gallo, *Asimmetrie informative e doveri di informazione*, in Riv. dir. civ., 2007, § 11, according to whom there is reticence relevant both for purposes of avoidance of the contract for fraud by omission (Article 1439 of the Civil Code) and for purposes of compensation for damages (Article 1338 of the Civil Code) whenever a contracting party, while aware of the other's mistake, has deliberately remained silent.

[34]In the well-known case of *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817), Organ purchased tobacco in New Orleans shortly before news became public of the peace between the United States and Great Britain - information that would have rapidly increased the price of the goods. The seller, unaware of the news, asked him whether there were any circumstances relevant to the value of the tobacco. Organ did not disclose the information he possessed, and the contract was concluded. The sources of the case, however, do not make it clear whether he simply remained silent or whether he expressly answered that he did not know anything. This factual ambiguity has persisted in the reconstruction of the precedent. The contract was held valid.

If the theoretical justification of the *safe harbor* has been extensively investigated, less examined is the question of its operational fragility. The privilege of remaining silent presupposes, indeed, that the information remain confined within the silence of the informed party, but that presupposition is shaken when the counterparty formulates a specific request for clarification. At that point, silence (which takes the form of a refusal to answer) can itself become a signal capable of conveying precise information to the counterparty. Consequently, the *safe harbor*, although theoretically recognized, may turn out in practice to be far narrower than its dogmatic construction would suggest.

Consider the case of a seller who, before concluding the contract, expressly asks the buyer whether he possesses any particular information about the good. In this hypothesis, the informed buyer faces a choice composed of three options. The first option is to lie, denying that he possesses particular information - a choice that exposes him to the voidability of the contract for *misrepresentation*. The second option is to disclose the information, foregoing the informational advantage. The third option is to refuse to answer. Such conduct, although it does not, by itself, amount to *misrepresentation*, nonetheless operates as a strongly significant informational signal, since the buyer has an interest in communicating negative information, because it lowers the price, and an interest in not disclosing positive information, because its disclosure would raise the price. Consequently, the refusal to answer conveys information, since a rational seller infers that the hidden information is positive information. This is an application of the logic of the *unraveling result*[35].

Therefore, when faced with a direct question, the buyer hardly has available an answer that allows him to fully preserve his informational advantage. In such a context, the *safe harbor* granted to the buyer by the legal system is considerably reduced in operational efficacy[36].

Finally, commentators have observed that the U.S. rule granting the *safe harbor* to the buyer operates as a default rule, which the parties may derogate from by agreement[37]. Through contractual derogation, therefore, the buyer loses the right to withhold information.

The difference between the Italian and the U.S. legal systems therefore lies chiefly in the fact that the Italian system, through the rule of recognizability of mistake, also protects the seller who does not act to formulate the useful question (for example, because he does

[35]This phenomenon consists in the fact that those who benefit from sharing information disclose it, while those who remain silent reveal themselves by subtraction, since silence can be rationally interpreted as a signal of the very information one wishes to conceal. The mechanism of the unraveling result was identified independently by S.J. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, in Journal of Law and Economics, 24, 461 ff., esp. 461–464 (1981), and by P.R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, in Bell Journal of Economics, 12, 380 ff., esp. 382–385 (1981). From the broader perspective of signaling theory, *see also* M. Spence, *Job Market Signaling*, in Quarterly Journal of Economics, 87, 355 ff. (1973).

[36]If a legal system genuinely intended to guarantee the buyer a safe harbor capable of allowing him to exploit the information acquired, it would have to authorize him to lie—that is, to deny that he holds private information.

[37]G. Dari-Mattiacci, S. Onderstal, F. Parisi, and R. Singh, *The Value of Silence: Optimal Disclosure Default Rules in Contract Law*, in American Law and Economics Review, 27:1, 1 ff., esp. 5 (2025).

not have the necessary expertise to formulate it or because the transaction costs are too high)[38], a protection that is not, instead, ensured by U.S. law.

V.4 *The safe harbor in light of the economic analysis of law: Kronman's idea and its developments*

Kronman's 1978 article, *Mistake, Disclosure, Information, and the Law of Contracts*[39], constitutes the classic economic justification for the *safe harbor*. Kronman's central idea is that information acquired through a targeted and costly investment - such as geological surveys, technical appraisals, or market research - deserves protection functionally analogous to that of a property right[40]. If the legal system systematically imposed disclosure at the time of exchange, a significant share of the returns on the investment would be transferred to the counterparty; anticipating this effect, individuals would not invest in the production of information.
Kronman contrasts this category with information acquired casually[41]. When knowledge arises without a specific investment, the imposition of disclosure does not affect investment choices, because the information was not produced for the purpose of appropriating a gain in the exchange. Hence the selective rule, according to which the buyer's right to remain silent is to be ensured in cases in which the information is the fruit of a specific investment, while a duty of disclosure must be imposed when the information emerges without targeted investment.

It is important to specify that, in Kronman's reasoning, information that can be gathered through a specific and costly activity is information whose acquisition is always desirable from the standpoint of economic efficiency.

This clarification situates Kronman's analysis within the analytical strand devoted to the study of incentives to search for information, to which Jack Hirshleifer initially and most notably contributed[42]. Hirshleifer distinguished between the social and private value of information and emphasized that the two values may diverge. He underscored that expenditures on the search for information do not always promote economic efficiency (that is, do not always increase social wealth). More precisely, information is socially useful when it allows for more efficient real choices, such as production, investment, use, or allocation choices; it is socially unproductive when it does not modify real decisions and merely produces redistributions of surplus in the exchange. In this latter case, the search for information is socially harmful, because it absorbs resources without generating an increase in social wealth. It therefore appears that the provision of a *safe harbor* is not justified.

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38 In American law, for a reflection on the protection of unsophisticated sellers under conditions of informational asymmetry, *see* M.A. Eisenberg, *Disclosure in Contract Law*, cit., 1680 ff., proposing an expansion of disclosure duties.
39 A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, cit., 13.
40 A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, cit., 14.
41 A.T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, cit., 13 ff.
42 J. Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, in American Economic Review, 61, 561 ff. (1971); *see also* G.J. Stigler, *The Economics of Information*, in The Journal of Political Economy, 69:3, 213 ff. (1961).

One may therefore hypothesize the case of an individual who manages to learn, a week before the public, that a highway will be built that will produce a sharp increase in real-estate prices in a certain area. In such a case, the knowledge acquired does not allow social wealth to be increased but only to be redistributed[43].

Shavell[44] formalized the intuition in a model of acquisition and disclosure of information prior to exchange. In his framework, a duty of disclosure imposed on the seller is, in general, desirable; and when it does not seem so because the information is socially useful, such a duty does not undermine the incentive to acquire it, since socially desirable information is positive information, and the seller has his own interest in communicating it, since it translates into an increase in price[45].

Regarding the buyer, Shavell does not propose a uniform rule. When the information that can be acquired by the buyer is socially unproductive, a rule imposing disclosure is preferable, because it eliminates the incentive to incur search costs without social return. In that case, therefore, no *safe harbor* would be justified. When, on the contrary, the information is socially useful—in the sense that it allows actions or decisions that increase overall wealth - a generalized duty of disclosure may prove counterproductive, because it reduces the buyer's ability to appropriate the returns on the information and may compress the incentive to acquire it. In these cases the *safe harbor* therefore appears desirable.

The analysis of situations involving informational asymmetry between seller and buyer was further developed by Dari-Mattiacci, Onderstal, and Parisi[46], who have elaborated a model symmetrical to Akerlof's classic "*market for lemons*"[47]. They have analyzed the case in which it is the buyer, rather than the seller, who holds private information about the quality of the good. The model assumes that the buyer is not required to disclose his information—a setup corresponding, on the regulatory level, to the non-disclosure regime characteristic of the U.S. *safe harbor* - and analyzes its allocative consequences. In this scenario, called the "*market for gems*," there arises a problem of reverse adverse selection, under which the seller, not knowing the true value of the good, tends to set the price on the basis of expected value. The informed buyer, however, will agree to purchase only if the good has a value higher than the price requested. Anticipating this conduct, the seller is led to progressively

[43]R. Cooter, U. Mattei, P.G. Monateri, R. Pardolesi, and T. Ulen, *Il mercato delle regole. Analisi economica del diritto civile*, vol. II, 109 ff. (2006), present a hypothesis of information that performs only a distributive function and therefore does not increase wealth. The facts addressed in *Chiarella v. United States*, 445 U.S. 222 (1980), discussed *supra* at note 30, can be assimilated to a hypothesis in which the information merely produces a redistribution of wealth; in that case, moreover, the U.S. court upheld the validity of the contract.
[44]S. Shavell, *Acquisition and Disclosure of Information Prior to Sale*, in RAND Journal of Economics, 25, 20 ff. (1994).
[45]Within Italian scholarship, distinguishing depending on whether the omitted information (on the part of the better-informed contracting party) concerns hidden qualities (or, if one prefers, positive or surplus qualities) of the other party's performance (permitted), or rather aims to conceal defects and flaws (negative or deficiency qualities) of one's own performance - not permitted insofar as it amounts to fraud by omission - is V. Roppo, *L'informazione precontrattuale: spunti di diritto italiano, e prospettive di diritto europeo*, in Riv. dir. priv., 2004, 755 ff.
[46]G. Dari-Mattiacci, S. Onderstal, and F. Parisi, *Asymmetric Solutions to Asymmetric Information Problems*, in International Review of Law and Economics, 66, art. 105981 (2021).
[47]G.A. Akerlof, *The Market for «Lemons»: Quality Uncertainty and the Market Mechanism*, in The Quarterly Journal of Economics, 84:3, 488 ff. (1970).

raise the price, with the result that only goods of high quality (the "gems") are exchanged, while those of lower quality remain excluded from the market. There is thus a "race to the top" in prices and quality, mirroring the race to the bottom typical of the *market for lemons*. The deadweight loss resulting from the failure to conclude exchanges concerning lower-quality goods represents, therefore, the allocative cost of the non-disclosure regime when the informational asymmetry lies on the buyer's side. Where a phenomenon with these features arises, the *safe harbor* may indeed find its economic justification in its capacity to stimulate the production of information, but at the cost of foregoing certain exchanges.

## VI. THE NO-TRADE PROBLEM

The literature examined in the preceding section has led us to analyze the rules of disclosure mainly within a market structure in which a seller sets a price and buyers decide whether to accept. However, when a single seller bargains with a single buyer for a specific good, the transaction takes on a markedly bilateral structure. In this case, the seller faces a determinate counterparty and must decide whether to sell to that particular party.
In such a situation - still assuming that the buyer may have private information - it is possible that further obstacles arise to the conclusion of contracts. Indeed, a particular mechanism may operate, traceable to the problem at the basis of the so-called "no-trade theorem." This theorem, elaborated by Milgrom and Stokey[48] and originally proved for financial markets, establishes that, among rational agents with common prior beliefs, the emergence of private information held by one of the parties does not generate exchanges, since the very act of proposing the exchange signals that the proponent holds information that makes the operation advantageous for him and disadvantageous for the counterparty.

The reference to the no-trade theorem does not mean to suggest that the theoretical conditions of the result can be identified in many other situations of reality. Such a reference is made to highlight the mechanism underlying the theorem - that is, the economic intuition represented by the idea that, in a bilateral transaction, an offer to purchase coming from a potentially better-informed actor may be interpreted by the counterparty as a signal of informational advantage, triggering an attitude of suspicion that hinders the exchange even when it is mutually beneficial. The friction in exchange generated by private information in bilateral negotiations is not a theoretical anomaly confined to the Milgrom and Stokey result; rather, it is a structural feature of bilateral bargaining, systematically documented by the economic literature on bargaining with asymmetric information. The models that fall within this literature show that, even when there are positive gains from exchange, the equilibrium typically entails delays in reaching

[48]P.R. Milgrom and N.L. Stokey, *Information, Trade and Common Knowledge*, in Journal of Economic Theory, 26, 17 ff., esp. 19–23 (1982).

agreement, refusals of objectively advantageous offers, and, in a non-trivial share of cases, the definitive breakdown of negotiations[49].

The point is, in short, that when information is private, the offer itself generally tends to become indicative of superior information, and this can lead the counterparty to revise its beliefs to the point of declining to enter into the contract[50].

Consider this example. An agronomist has spent years studying soil science and knows that a certain plot of land, used for pasture, is suited - thanks to the chemical composition of the soil - to a highly profitable cultivation. The market value in its current use is 400. Under optimal cultivation techniques, the land would be worth 1,000, but the owner is unaware of this circumstance. The agronomist offers 450. The owner is rational and knows that buyers sometimes have superior information. An offer from an expert is consistent with two hypotheses: either the buyer attaches a particular subjective value to the property, or he knows information unknown to the owner that makes the value of the good higher than 450. If the owner attributes a non-negligible probability to the second hypothesis, he may refuse the offer, reasoning that to accept would mean transferring a good at a price below its true value.

The transaction concerning the pasture-land has the feature of being potentially mutually beneficial: there are real gains from trade, because the agronomist can devote the good to a more productive use. The owner's rational attitude of suspicion, however, operates as a friction to the exchange. The owner is unable to distinguish between the component of the offer that reflects an idiosyncratic preference and the component that reflects an informational advantage. In the face of such uncertainty, he may demand a very high price or break off negotiations. The result is a deadweight loss: the mutually beneficial exchange does not take place.

The frictions described are at their most severe in exchanges involving unique or highly specific goods, such as land with particular productive vocations, real estate with redevelopment potential, businesses with non-immediately perceivable value, or works of art whose value can be ascertained mainly by experts. The idea underlying the no-trade theorem describes a concrete problem capable of preventing the realization of mutually beneficial exchanges.

VI.1 *The Italian rule as a solution to the no-trade problem*

Consider the same transaction in light of Italian law. The agronomist knows that, if he purchases the land without disclosing the information and the owner subsequently acquires an accurate representation of reality, the contract may be voided pursuant to

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[49]For a systematic survey of bargaining models with private information and their outcomes in terms of allocative inefficiency, *see* J. Kennan and R. Wilson, *Bargaining with Private Information*, in Journal of Economic Literature, 31, 45 ff. (1993).

[50]This intuition is also corroborated by experimental economics studies. W. Samuelson and M.H. Bazerman, *The Winner's Curse in Bilateral Negotiations*, in V. Smith (ed.), Research in Experimental Economics, vol. 3, *passim* (1985), have shown that, in bilateral negotiations characterized by informational asymmetry, parties systematically tend not to reach agreement even when objective gains from trade are present, because the counterparty's offer functions as an informational signal that leads them to revise upward their estimate of the value of the good and to harden their position on price.

Article 1431 of the Italian Civil Code. In addition, precontractual liability may arise under Articles 1337 and 1338 of the Civil Code. Under the Italian rule, therefore, a rational buyer who possesses relevant information does not have a strong incentive to conceal it, because silence exposes him to the risk of negative consequences. He may then decide to share it, and at that point negotiation may take place between two informed parties.
Consequently, the rule that attaches negative consequences to silence in cases of a recognized mistake produces the effect of altering the informational meaning of silence itself. Indeed, if the buyer remains silent and proceeds to purchase, it is highly likely that he does not possess private information, since he would have preferred to disclose such information, had he had it, in order to avoid the avoidance of the contract and precontractual liability. Therefore, silence indicates, in the normal course of events, that the buyer does not possess private information.

Even assuming that the buyer withholds the information, the mere availability of the remedy of avoidance for recognizable mistake on the seller's side nonetheless modifies the *ex ante* framework of the negotiation. It does not eliminate the informational asymmetry, but it reduces its expected cost for the seller, who knows that he is not necessarily bound by a contract concluded on the basis of a false representation of reality. By this route as well, the Italian rules mitigate the disincentive to contract that informational asymmetry tends to generate.

The Italian rules on recognizable mistake, which do not afford any *safe harbor* to the informed buyer who fails to disclose his information, thus appear capable of mitigating the no-trade problem described above. On this view, this framework can be interpreted not only as a rule for the protection of contractual will, but also as a possible institutional mechanism designed to facilitate exchange when private information is present. And in this an economic rationality of this framework can be discerned[51].

VI.2 *The limit of ex post observability*
The reconstruction proposed presupposes that the rule of voidability for recognizable mistake (and, possibly, the protection of damages for breach of precontractual good faith) operates as a credible deterrent against the informed buyer who intends to exploit the informational asymmetry. For such a deterrent to be effective, however, it is necessary that the seller be able to discover that the buyer has withheld relevant information. It is on this point that a structural limit seems to emerge.
In most sales, the conclusion of the contract entails the transfer of possession to the buyer. From that moment on, it is the buyer who materially holds the good, decides on its use, and reaps its fruits. The seller, deprived of possession, often loses the ability to observe the use the buyer makes of the good and, consequently, the ability to infer from such use

[51] A further aspect concerns the defensive investments that a non-disclosure regime tends to generate on the seller's side. To protect himself, the seller may be induced to bear high costs in order to produce information. This is a doubly inefficient cost, because it reproduces information already available to the buyer and does so through the party who bears the higher cost of producing it. A regime that imposes disclosure reduces such waste by requiring that information be shared.

the existence of information that had been withheld. The problem has already been grasped, generally, by some authors[52], and it has been noted that, while the uninformed buyer experiences the quality of the good after the purchase and can therefore activate any available remedies (such as warranty), the uninformed seller, having lost possession, has difficulty discovering the actual quality of the good transferred.

The deterrent effectiveness of the rule sanctioning the failure to share information therefore depends on the probability that the breach will be discovered. If that probability is low—because the transfer of possession creates an informational opacity in favor of the buyer - the rational buyer can discount this circumstance and conclude that the actual risk of avoidance and damages liability is contained. He may therefore decide to remain silent, relying on the opacity afforded by the transfer of possession. As a result, the protection offered to the seller by the combination of voidability and precontractual liability is the more effective the more the use the buyer intends to make of the good is observable from outside.

VI.3 *The production of information under the Italian rule*

It might be argued that the Italian rule, by reducing the share of surplus appropriable by the buyer, discourages the acquisition of information. Indeed, if the buyer anticipates having to share what he discovers, he has no incentive to search for information. The objection is significant but is not entirely conclusive for reasons connected to the nature of the "information" good.

In many bilateral transactions, the information possessed by the buyer is not specific to the operation and is not even the product of a professional training aimed at conducting exchanges. It derives from skills acquired for reasons independent of operating in the market. The agronomist generally does not study soil science to make purchases; he studies it to build a profession. Similarly, the geologist does not learn stratigraphy to perform market operations; he acquires it for many other purposes. The rule that imposes disclosure does not, therefore, bear on the incentive to build core expertise, which is rewarded by the professional market regardless of the possibility of exploiting it in market operations. The consequence is that the benefit, in terms of the facilitation of transactions, that a duty of disclosure would produce can plausibly outweigh the cost arising from the failure to produce information.

Still, in situations in which information is genuinely specific to the transaction and the buyer bears a targeted cost to discover it, or in which a certain core expertise is built exclusively to perform market operations, the loss of incentive is real. In such cases, the Italian rule imposes a net cost on the level of the production of information, and the enabling effect on exchange may not be sufficient to justify that cost in every circumstance. This is the remaining core of Kronman's objection, which the analysis proposed here has sought to scale down in its scope of application but does not purport to eliminate.

[52] G. Dari-Mattiacci, S. Onderstal, and F. Parisi, *Asymmetric Solutions to Asymmetric Information Problems*, cit., 14.

## VII. Conclusions

The comparative analysis developed in the preceding pages allows the economic-legal profile of the two systems examined to be sketched with some clarity, revealing not only the technical solutions adopted, but also the different regulatory philosophy that inspires them.
A first fundamental level of divergence emerges already from the structure of the criteria for selecting relevant mistake. U.S. law - by entrusting to the court the verification of *basic assumption* and *material effect* and reserving for the *unconscionability* remedy an operation independent of recognizability - strongly pursues the justice of the individual case. The open standard makes it possible to tailor the rule to the variety and complexity of real-world situations, avoiding the exclusion of situations deserving of protection on the sole ground that they do not fit predetermined categories. The price of this flexibility, however, is high: the multiplicity of evaluative standards, the residual clause of *reasonableness* under § 154(c), and the safety valve of *unconscionability* make it difficult for the parties to predict *ex ante* the outcome of a dispute. U.S. law is therefore a system that trusts the judge more than the rule.

Italian law follows the opposite path. The taxonomy of Article 1429 of the Italian Civil Code circumscribes the categories of essential mistake within a determinate catalogue; the restrictive rule of determinative mistake excludes from the area of relevance the cases in which the party would have entered into the contract anyway. The result is greater predictability of decisions: the parties, already at the negotiation stage, can estimate with reasonable reliability whether or not a mistake will be legally relevant. The cost of this predictability, however, is also real: there are atypical hypotheses, significant on the economic and psychological level for the party suffering them, that remain outside the scope of the rescissory remedy—not because they are less deserving, but because they do not conform to the codified categories. Italian law is therefore a system that trusts the rule more than the judge.

A further level of divergence between the two systems concerns the treatment of contracts that are seriously inequitable for the mistaken party. U.S. law provides, through subsection (a) of § 153 of the Restatement, that the contract is voidable for unilateral mistake when its performance would be *unconscionable*, regardless of the recognizability of the mistake and therefore irrespective of any consideration concerning the conduct of the counterparty. Italian law does not have an analogous rule within its rules on mistake. Voidability always presupposes recognizability, and the mere harshness of performance for the mistaken party does not, in itself, constitute an autonomous prerequisite of the rescissory remedy.

A third decisive level of divergence concerns the treatment of the buyer's duty to inform. U.S. law grants the informed buyer a *safe harbor*, under which, in principle, silence about positive information gives rise neither to avoidance nor to liability. This choice is justified, from the perspective of Kronman and Shavell, by the need to incentivize the production of socially useful information, ensuring to those who bear the costs of research the possibility of appropriating the corresponding returns. The U.S. system seeks to ensure that information is produced and accepts, to that end, that the uninformed seller remain exposed to the asymmetry. The U.S. system, therefore, incentivizes the production of information but is unable to solve the no-trade problem that informational asymmetry can generate in bilateral transactions involving specific goods.

Italian law does not provide any *safe harbor*. The buyer who knows of the seller's mistake and remains silent exposes himself to the avoidance of the contract under Article 1431 of the Civil Code and, potentially, to precontractual liability for breach of Articles 1337 and 1338 of the Civil Code. This solution discourages the production of information, at least where the information is genuinely specific to the operation and the buyer has borne a targeted cost to acquire it. However, the Italian rule produces a significant compensating effect in facilitating exchanges. Indeed, since the rational buyer has an incentive to share the information in order to avoid sanctions, silence becomes a credible signal of the absence of informational asymmetry. The seller, knowing this, is less inclined to believe that the buyer's offer is grounded on a hidden informational advantage, and consequently the friction in exchange generated by rational suspicion is mitigated. Italian law, therefore, favors the solution of the no-trade problem, but at the price of disincentivizing the production of information in cases in which it would be genuinely specific and socially useful.

The two legal systems express, in the end, different responses to the same problems, within a set of trade-offs in which neither solution strictly dominates the other. U.S. law privileges flexibility in the selection of relevant mistake and the protection of the buyer's informational investment: it gains in adaptability and in incentives for the production of information, but pays the cost of reduced predictability of decisions and a risk of friction in bilateral transactions involving specific goods. Italian law privileges certainty in the delimitation of grounds for avoidance and the absence of zones of immunity for the informed buyer: it gains in predictability and in the capacity to mitigate the no-trade problem, but pays the cost of leaving certain deserving situations unprotected and of reducing, in certain contexts, the incentives to search for socially useful information.

This interpretive framework may have a relevant implication for projects to reform the Italian Civil Code and for the European harmonization of contract law. To the extent that such projects intend to borrow the logic of the U.S.-style *safe harbor*, it must be asked whether they entail a cost insufficiently considered thus far, represented by the loss of exchanges that the non-disclosure regime can cause, especially in transactions involving specific goods, in which perceived informational asymmetry can operate as an autonomous obstacle to the conclusion of mutually beneficial agreements.