

SUMMARY OF DOCTORATE THESIS

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In the most recent developments concerning *Consumer protection*, where this thesis lies especially relating to contract remedies used by consumer groups in cases of pre-negotiation obligations violated in contracts stipulated by the former with professionals (or entrepreneurs).

Due to the absence of any clear ruling within the Italian legal system which may resolve this *quaestio*, both doctrine and law have made recourse to pre-contract liability, involving compensation for damages, or to invalidity.

This issue, though highlighted by the well-known conclusions drawn by the Italian Supreme Court of Cassation in 2007, must be reconsidered today because of the recent change to the Consumer Code as per decree of. n. 21/2014, in recognition of the EU Directive 2011/83/UE "*Consumer Rights*".

The purpose of this work consisted not only in rethinking (and consequently examine) contract remedies which had been used by the legal bodies for a long time, but also by analysing the legislative requirements as provided by the European Lawmaker, and even to try and understand how much this had influenced the standards set by the Italian order.

As such, Dir. 2011/83/EU has passed on the issue to internal lawmakers to solve the problems decreeing that in the event of inadequate national coverage of the regulations then it would be the responsibility of the single member States to introduce fines and sanctions relating to *Business to Consumer* contracts (as long as they are effective and dissuasive), to determine the kind of remedies to use and the public or private nature of these.

After taking such matters into consideration, it is clear that currently the European States are still not prepared (as such also the Italian one) sufficiently to permit any general conclusions in relation to the liability nature and likewise the effects on the non-performance of a contract's information obligations, especially in the pre-contract phase.

This has caused speculation concerning future requests which require a solid knowledge of relative traditional debate and the development of the arguments presented by both sides, and as a matter of fact the void in the discipline of supranational reforms, in addition to the silence of the Italian Legislators within decree n. 21/2014, demands the intervention (and continued as such) of other interpreters.

Because of this, the thesis previously mentioned will have to be considered, as considered by doctrine and law, though under a different prospective.

It has been deemed better not to refer to one particular opinion only, even though this is authoritative and influential, by accepting it in an uncritical way, so as to find a solution to a problem, by evaluating the interests of the consumers each and every single time.

Therefore, if the consumer were interested in keeping the contract, it would be necessary to re-address it, which would sanction the upholding of the juristic act and the remedy would involve compensation for damages from pre-contract liability, as per the third model of liability (contract valid but unsuitable).

Instead, in the event the consumer had stipulated a contract aware of the asymmetric information, then there would be no interest in keeping to the juristic act, as the remedy related to the precontract liability would not be satisfactory.

It can be deduced that the methodological approach needs to be focused on the actual case, be analysed in all its particularities and in the interests of all those concerned, hereby evaluating which tool is adequate in defence of the consumer.

A similar perspective would be necessary even for the use of the general clause of good faith, especially when utilised in the negotiation phase.

Although the latter position does not appear to be dominant today, and given the necessity to delay the general theory due to the legal void for remedies concerning the violation of information obligations, and notwithstanding the 2014 reform, nothing can be excluded within this everchanging panorama, hence the 'new' function of good faith in the general clause might be considered as a parameter of validity of a contract.

The renewed debate on compensation or invalidity due to violation of pre-contract information obligation (supported by the Supreme Court of Cassation, after accepting an authoritative doctrinal opinion), and as such the ongoing issue of the decadence of the non-interference directive between validity regulations and behaviour ones, has made it necessary to constantly update the laws on consumer rights, which as previously mentioned altered various articles of the Consumers Code, above all, articles 48 and 49.

In reference to the above, it has been questioned whether the lawmaker, during the reform of the Consumers Code, had considered or not the prevailing abovementioned solution relating to pre-contract liability and the right to compensation for damages.

Moreover, it can be contested how the changes have not caused any general *restyling* of consumer protection, despite the original intentions of the *Consumer Rights* Directive. As underlined before, there was the issue of classifying pre-contract information obligations, with the effect of being able to offer a definitive solution to the difference between validity regulations and behavioural ones, and in any case the most satisfactory remedy possible.

If the *ratio legis* was to follow the conclusions of the Supreme Court made some years before, then this would have been clearly expressed. As this was not the case, then the issue has to be deemed still open (and in continuous evolution).

By actually maintaining the distinction between validity regulations and behavioural ones, it is inasmuch true that the current speculation on this issue seem to strengthen such orientation, or even to put it permanently in crisis, allowing an eventual influence on within the legislating body.

If the issues are still open on the speculation concerning the applicability of virtual invalidity protection types and on the likely new role of good faith (even in the exercise of such remedies for the invalidation of the asymmetrical contract) acceptable or otherwise, it is clear that a decisive legal shift is required in order to clarify the point, leading to effective protection.

For instance, this shift could consist with actual information providing correct and adequate education of the subjects involved (who would be "*behaviourally informed*"), thanks to the contribution of behavioural law

economics and, at the same time, with the application of penalties *ex lege* against the economically stronger subject who may not have respected the legally prescribed information obligations.